

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CIV-2012-404-7645
[2014] NZHC 1573**

BETWEEN DAVID JOSEPH PERCY

Plaintiff

AND SOVEREIGN ASSURANCE COMPANY
LIMITED

Defendant

Hearing: 25-28 February 2014 and 3,4,5 and 6 March 2014

Counsel: G P Blanchard and C M Hanafin for Plaintiff
C M Meechan QC and A Borchardt for Defendant

Judgment: 7 July 2014

JUDGMENT OF KATZ J

*This judgment was delivered by me on 7 July 2014 at 12:00 pm
Pursuant to Rule 11.5 High Court Rules*

Registrar/Deputy Registrar

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Introduction

[1] Mr David Percy was a member of two group insurance schemes provided by Sovereign Assurance Company Limited (“Sovereign”). The relevant policies provided coverage in the event that Mr Percy suffered from an accident or sickness that prevented him from working in his “specified occupation” as a self-employed financial adviser for the AMP Group.

[2] Mr Percy became ill with depression in mid-2009. In October 2009 Sovereign accepted a claim under his Income Protection Plan for a total disability benefit and commenced paying him the maximum benefit of \$10,000 per month. On 29 June 2010, however, Sovereign concluded that Mr Percy’s health situation had improved and that he was no longer totally disabled by depression. In addition, Sovereign had concluded, in March 2010, that Mr Percy was not totally and permanently disabled as a result of depression. It therefore declined his claim for a lump sum payment under his Life Plan.

[3] Mr Percy alleges that Sovereign made various errors when making these decisions. In the alternative, he says that if he was no longer totally disabled by depression as at 29 June 2010, he was partially disabled at that date. He was therefore entitled to a partial disability benefit pursuant to the Income Protection Plan.

The scope of the Court’s inquiry into Sovereign’s decision making

[4] Where a benefit entitlement turns on the formation of a particular opinion by an insurer, the Court must first decide whether the insurer has formed a valid opinion. The key principles are that:¹

- (a) The insurer must consider and determine the correct question, with reference to the terms of the policy.

¹ These principles are primarily drawn from *Edwards v The Hunter Valley Co-op Dairy Co Ltd* (1992) 7 ANZ Insurance Cases 61-113 (NSWSC) and, to a lesser extent, from *Butcher v Port* [1985] 3 NZLR 491 (CA) and *van der Noll v Sovereign Assurance Co Ltd* [2013] NZHC 3051.

- (b) Where the insurer seeks an opinion from an expert, the expert must have all of the information that is relevant to the expert's opinion. Further, the expert must also be asked the right questions.
- (c) The insurer must act in good faith and fairly having due regard for the interests of the claimant.
- (d) Where, as in this case, the insurer is required to be "satisfied" of a state of affairs governing entitlement of the insured to a benefit, the insurer must act reasonably in considering and determining the matter.

[5] In *Edwards v The Hunter Valley Co-op Dairy Co Ltd* McLelland J said:²

To say that an insurer must act reasonably in forming or declining to form an opinion is not to say that a Court can substitute its own view for that of the insurer. As North J pointed out in [*Doyle v City of Glasgow Life Insurance Co*] "reasonable persons may reasonably take different views". Unless the view taken by the insurer can be shown to have been unreasonable on the material then before the insurer, the decision of the insurer cannot be successfully attacked on this ground.

[6] That statement has been cited with approval in this Court in *Cigna Life Insurance New Zealand Ltd v Rowles*,³ *Keith v AMP Life Ltd*⁴ and *van der Noll v Sovereign Assurance Co Ltd*.

[7] Accordingly the nature of this Court's inquiry is a limited one. Provided that Sovereign has asked the right question(s), acted in good faith, taken account of relevant information available to it, and reached a decision that is reasonably open to it, the Court cannot intervene. That is the case even if the Court may itself have reached another conclusion. It is only if the insurer has failed to form a valid opinion, taking the principles I have outlined into account, that the Court will be entitled to determine the matter itself, based on all of the evidence available at trial.⁵

² Above n 1, at 77, 536.

³ *Cigna Life Insurance New Zealand Ltd v Rowles* HC Wellington AP 131/96, 2 May 1997 at 10.

⁴ *Keith v AMP Life Ltd* HC Christchurch CP40/98, 20 May 1998 at 5.

⁵ *Edwards v The Hunter Valley Co-op Dairy Co Ltd*, above n 1 at 77,537; *Butcher v Port* at 497, 500, and 505.

Mr Percy's claims

[8] The specific deficiencies or errors alleged by Mr Percy are as follows.

Issue relevant to all claims

[9] Mr Percy submits that Sovereign and its advisers incorrectly assessed the difficulty and complexity of his specified occupation and that this necessarily impacted on any medical assessments that he was fit to return to work.

Total disability claim under the Income Protection Plan

[10] Mr Percy's claims against Sovereign in relation to his total disability claim under the Income Protection Plan are that:⁶

Original decision of 29 June 2010

- (a) Sovereign failed to ask the right question, namely whether Mr Percy was suffering a total disability as at 29 June 2010;
- (b) Sovereign failed to act fairly or reasonably by not having any regard to Mr Percy's symptoms of depression as at 29 June 2010 and failing to investigate the same;
- (c) Sovereign failed to act fairly and/or reasonably by not investigating the concerns Mr Percy had regarding Ms Leeson and Mr Schnabel's assessment of his level of function;
- (d) Sovereign failed to act in good faith, fairly and/or reasonably by making a predetermined decision on 29 June 2010;

Decision by Claims Review Committee on 11 February 2011

- (e) Same as (a) and (b) above;

⁶ As articulated in Mr Percy's closing submissions.

- (f) Sovereign failed to act fairly and/or reasonably by not investigating whether and to what extent it was possible for Mr Percy to work in his specified occupation on a reduced basis.

Partial disability claim under the Income Protection Plan

[11] Mr Percy claims, in the alternative, that if he was not suffering a total disability as at 29 June 2010, then Sovereign was required to pay the partial disability benefit to him, unless a medical assessment indicated to Sovereign that he was not partially disabled.⁷

Total and permanent disability claim under the Life Plan

[12] Mr Percy repeats several of the allegations regarding Sovereign's handling of his total disability claim in support of his claim for total and permanent disability under the Life Plan. In addition, he alleges that Sovereign failed to act fairly and/or reasonably by failing to give him an opportunity to comment on or obtain his own medical evidence in response to Sovereign's medical reports before closing his claim under the Life Plan.

[13] I will first outline the relevant factual background, before turning to consider Mr Percy's various heads of claim in further detail. In summarising the factual background I will focus primarily on the information contained in various contemporaneous reports and other documents, as these comprise the information that was before Sovereign at the time of its decisions. Mr Percy provided some further evidence at trial, which was not before Sovereign at the time of its decisions. Such information will generally only be relevant, however, if it becomes necessary for me to undertake my own assessment of Mr Percy's entitlement to benefits under the relevant policies.

The facts

[14] At the time he was diagnosed with depression, Mr Percy was a self-employed financial adviser for AMP ("AMP Adviser"). His "one man" company, Hillross

⁷ Amended statement of claim at [79].

Financial Group Limited contracted to Rothbury Risk and Investment Services Limited (“Rothbury”) which in turn had an Agency Agreement with AMP.

[15] As an AMP adviser, Mr Percy specialised in giving investment and insurance advice and selling associated AMP products to both personal and corporate clients. He also provided ongoing client servicing and dealt with many of the administrative and regulatory requirements of running an owner-operated business (albeit some of these were handled by Rothbury).

Mr Percy's first episode of depression - 2006

[16] Mr Percy suffered from his first depressive episode in 2006. Sovereign accepted his claim for a total disability benefit under the Income Protection Plan and made payments of \$10,000 per month from September 2006. Mr Percy successfully made a graduated return to full-time work over a period of several months in early 2007.

[17] During his 2006/2007 episode of depression, Sovereign referred Mr Percy to Mr Ralf Schnabel, a clinical psychologist, for assessment and treatment. Mr Schnabel recommended a psychological short term intervention and had six clinical treatment sessions with Mr Percy. The focus of those sessions was on teaching Mr Percy cognitive behavioural techniques and exercises to address his depressive symptoms. Mr Percy also received treatment, including anti-depressant medication, from his GP, Dr Hay. He was also referred by Sovereign to Dr Fraser, a psychiatrist, for assessment.

Recurrence of Mr Percy's depression – June 2009

[18] On 2 June 2009 Mr Percy visited Dr Hay, reporting a return of his depressive symptoms. Mr Percy also told Dr Hay that he wanted to change his career, but was fearful of doing so and saw it partly as failure. He did not feel, however, that he could maintain his drive to stay at the top of his profession as before. Dr Hay assessed a recurrence of Mr Percy's depression and suggested he resume taking antidepressants and meet with Mr Schnabel again.

[19] Mr Percy met with Mr Schnabel on 16 June 2009. Mr Schnabel identified three “coping challenges”, namely work, personal issues and financial pressures caused by major home renovation plans. Mr Percy expressed a sense of disenchantment with the daily pressures of work and advised Mr Schnabel that he was considering selling his business and either retiring early or finding a stress-free job. This in turn gave rise to financial concerns and increased stress. Mr Schnabel advised Mr Percy to resume taking anti-depressants and also to resume the cognitive and other strategies he had previously been taught for addressing his symptoms. Mr Schnabel’s assessment was that “this appears to be a stress issue, rather than a relapse of depression”.

[20] Mr Percy visited Mr Schnabel again on 24 June 2009. Mr Schnabel noted that Mr Percy felt he needed to get away from his work role “as this stresses him out”. Mr Percy wanted to “sell up” and review his life and priorities then. Mr Schnabel’s view, on the other hand, was that Mr Percy should endeavour to get back to work and full function before deciding about his vocational options. His assessment was that Mr Percy’s stress was not caused by his work role per se, but rather ineffective stress management, extreme self-imposed performance expectations and a failure to tackle difficult personal issues. He concluded that:

I don’t believe there is incapacity for work. In fact, leaving work could cause considerable destabilisation.

[21] By July 2009, after four sessions with Mr Schnabel, Mr Percy decided that he was ready to return to work. He planned to do this on Monday 13 July 2009, after he returned from a holiday in Fiji. However, on the night before he was due to return to work, Mr Percy became overwhelmed with anxiety and was unable to sleep. Accordingly, instead of returning to work the next day, Mr Percy went to see Dr Hay. He told Dr Hay that he was unable to cope with the stress of long hours of delivering good service to clients, but was anxious about not being able to reduce his work load and still function at the same level his clients expected. Dr Hay noted that Mr Percy seemed really worn out by the job and had lost his enthusiasm and drive. A break up with his business partners and the need to re-establish his own business had added to his stress.

[22] The following week (on 21 July 2009) Mr Percy submitted a claim to Sovereign for a total disability benefit under the Income Protection Plan.

Preparation of a functional job description

[23] Following receipt of Mr Percy's claim, Sovereign engaged an occupational therapist, Ms Leeson, to meet with Mr Percy in order to prepare a "functional job description" of his role as an AMP Adviser. The functional job description report was prepared by Ms Loveridge, who was assisting Ms Leeson, following a meeting with Mr Percy. The functional job description report and Mr Percy's comments regarding it are discussed in further detail at [60] to [69] below.

Dr Fraser's 13 September 2009 Report

[24] Sovereign also referred Mr Percy back to Dr Fraser, who had previously assessed him in 2006. In his report of 13 September 2009 he diagnosed Mr Percy with a "major depressive disorder, recurrent, non-melancholic, non-psychotic, moderately severe". Dr Fraser noted that Mr Percy felt so damaged by the return of his depression, and issues relating to the disintegration of his previous business partnership, that he could not envisage a return to work in the field of financial planning. In particular, Mr Percy told Dr Fraser that he could not just "make do" at work. He would have to excel, and he found the thought of trying to do so overwhelming. Dr Fraser's report concluded that:

Presently, Mr Percy sees himself as "badly damaged goods" and therefore recovery which includes a return to previous work is seen by him as completely out of the question. That will not change without considerable psychological work.

Mr Percy sells his business

[25] It appears that almost immediately after the commencement of his 2009 depressive episode, Mr Percy's mind had turned to selling his business. As a result, on 12 October 2009 Mr Percy met with another AMP Adviser, Stephen Morris, and verbally agreed to sell his business to him. With assistance from AMP, the sale and handover process took place between October and December 2009. The mechanics were largely handled by Stephen Morris and AMP.

[26] Also on 12 October 2009, after receiving reports from both Ms Loveridge and Dr Fraser, Sovereign accepted Mr Percy's claim for a total disability benefit. Sovereign was not aware at the time that Mr Percy had decided to sell his business. Sovereign only became aware of this on 7 December 2009, when Mr Percy told his Sovereign case manager, Mr Peter Browne, that although some of his symptoms had reduced, he had lost confidence in his ability to excel in his business. He did not wish to continue working as a financial adviser unless he could be at "the top of his game". Mr Browne's file note recorded that:

He has seen other good advisers "lose it" towards the end of their career and he believes their quality of work and effectiveness suffer. He does not want this which is why he wants to get out. He is actively working on the completion of the sale of his business which should be completed in 3 months. He does not know what else to do at this stage.

Sovereign reviews the position – January and February 2010

[27] In early 2010 Mr Browne decided that, as six months had elapsed since the commencement of Mr Percy's depressive episode, a review of the situation was appropriate. He initiated assessments from Ms Leeson, Mr Schnabel and Professor Robert Kydd (a Professor of Psychiatry at the School of Medicine, University of Auckland).

[28] Ms Leeson was asked to undertake a functional review, which involved interviewing Mr Percy as to what he was actually doing on a day-to-day basis, and assessing what degree of functionality he had achieved. Ms Leeson concluded, in essence, that Mr Percy was functioning at a level that suggested he had the functional capacity to begin the journey back to work.

[29] Mr Schnabel was asked to carry out a neuropsychological assessment. His report of 10 February 2010 was positive. Mr Percy had "excellent levels of cognitive functioning" and was "well capable" of high-level cognitive challenges. He was assessed as operating at a level well consistent with his estimated abilities prior to the onset of his depression. Mr Schnabel's report further noted that Mr Percy did not report significant symptoms of depression or anxiety disorder. His scores on a clinical depression scale were in the mild to minimum range. No vocational disability was documented.

[30] The third review was undertaken by Professor Kydd. He diagnosed Mr Percy's depression as being in remission. Professor Kydd noted, however, that Mr Percy had major concerns about returning to his previous role as a financial advisor and that this could trigger a recurrence of depression. He noted that Mr Percy's own view was that "he can't go back" because of potential detrimental effects on his health and wellbeing. Given Mr Percy's anxiety about returning to work, Professor Kydd considered whether or not his symptoms fulfilled the criteria for a specific anxiety disorder, but concluded that they did not. Professor Kydd concluded that:

In summary, Mr Percy's general level of functioning is such he could be considered for a graded return to work. However, I am concerned about the emotional effect of this on him and believe that any such plan should be associated with continuing psychological support, stress reduction exercises and careful planning and review. He views himself as especially vulnerable to the work environment and this will need to be carefully managed.

Sovereign declines Mr Percy's total and permanent disablement claim

[31] In light of these reports, on 9 March 2010 Sovereign declined Mr Percy's claim (made on 24 December 2009) for a lump sum total and permanent disability payment under the Life Plan. It concluded that it could not be said, at that time, that Mr Percy was permanently disabled.

Unsuccessful attempt to prepare a vocational re-integration plan for Mr Percy

[32] In April 2010 Mr Browne instructed Professor Desmond Gorman to assess Mr Percy and advise how to best effect a safe and sustainable return to work for him. Professor Gorman is a Professor of Medicine at the University of Auckland Medical School, with almost 30 years of specialist occupational medical practice experience, focussing on vocational rehabilitation.

[33] Professor Gorman reported that Mr Percy's cognitive function was commensurate with returning to work as a financial adviser and that "the barriers to David returning to work are emotional and affective as compared to cognitive". Professor Gorman noted that he did have some concerns in relation to Mr Percy's return to work, not because of medical reasons, but rather because of the "emotional and stress related perceptions of work" that Mr Percy had. Professor

Gorman recommended that Mr Schnabel and Ms Leeson be invited to prepare a return to work programme for Mr Percy, for review by himself and Professor Kydd.

[34] Ms Leeson and Mr Schnabel both then met with Mr Percy separately in an attempt to progress the preparation of the requested vocational reintegration plan. They were unable to prepare such a plan, however, as Mr Percy was not willing to contemplate a return to his former role.

[35] Ms Leeson's letter to Sovereign of 26 May 2010 outlined Mr Percy's daily routine and his performance in a range of life roles. Mr Percy had informed her that AMP wanted him to come back into the business in some capacity, such as a salaried adviser or a locum. Mr Percy was not open to exploring either of these options, however, as he did not want to be a "bit player". Ms Leeson noted that Mr Percy had made a clear decision not to return to the industry or his former role as a financial adviser and that he was not open to such a possibility. Mr Percy did indicate an interest in carpentry, and that he may buy another house and do it up after he had finished renovating his home. He had not, however, made any clear decisions about work options moving forwards. In the course of this discussion Mr Percy commented "Mr Sovereign, you are going to have to pay me until I am 65 years old".⁸

[36] Ms Leeson and Mr Schnabel prepared a joint report headed "Vocational Rehabilitation Plan", dated 25 May 2010. The document was not in fact a vocational rehabilitation plan, however, but rather a summary of their assessments of Mr Percy and the reasons why it was not possible to prepare such a plan. In particular, the report noted that Mr Percy had made a "bold career move" by leaving the corporate world behind and that he had made it clear that he was not willing to return to financial or insurance work "but will keep his options open for an occupation suitable to his current life stage and values". Ms Leeson and Mr Schnabel concluded that in the absence of any identifiable rehabilitation goals, no options for rehabilitation planning could be identified. Ms Leeson's and Mr Schnabel's assessment of Mr Percy's level of function and Mr Percy's criticisms of that are addressed further at [82] to [93] below.

⁸ This comment was not passed on to Sovereign at the time, although Mr Percy accepted at trial that he did make such a statement.

[37] The matter was then referred back to Professor Gorman for review. On 18 June 2010 he wrote to Sovereign confirming his view that Mr Percy's depression was in remission and that he had excellent neurocognitive function. He stated that:

While I understand David's decision not to return to his previous work, this is not a decision based on substantive medical factors.

Professor Gorman confirmed that he did not see any medical barriers to Mr Percy returning to his pre-illness occupation.

Meeting between Sovereign and Mr Percy on Friday 25 June 2010

[38] On the basis of the reports received from Ms Leeson, Mr Schnabel and Professor Gorman, it appeared to Sovereign that Mr Percy no longer met the definition of total disability in the Income Protection Policy. Accordingly, on 22 June 2010, Sovereign forwarded Professor Gorman's report to Mr Percy and informed him that it would have an effect on his benefit entitlements. Sovereign requested a meeting to discuss this with him.

[39] Emails were then exchanged and the proposed meeting took place on Friday 25 June 2010. Sovereign was represented at that meeting by Mr Browne and Dr Simon Mayhew (Sovereign's medical adviser). Mr Percy became deeply distressed during the course of the meeting.

[40] Following the meeting, Sovereign moved forward with its decision making and, on Tuesday 29 June 2010, wrote to Mr Percy advising that it was closing his claim under the Income Protection Plan, as it was satisfied that the medical evidence before it did not justify further benefit payments. Mr Percy was informed that if he was not satisfied with Sovereign's decision, he must present his concerns in writing. They would then be forwarded to Sovereign's Claims Committee for review. The events of 22 to 29 June 2010 are discussed in further detail at [94] to [106] below.

Mr Percy's challenge to Sovereign's decisions

[41] Mr Percy's then solicitors, Stace Hammond, wrote to Sovereign on 26 October 2010, foreshadowing a challenge to Sovereign's decisions to discontinue

payment of the total disability benefit and to decline his total and permanent disability claim. Subsequently, on 17 December 2010, Stace Hammond provided Sovereign with reports from Dr Wyness (a psychiatrist) and Dr Kahan (an occupational physician) in support of Mr Percy's challenge to Sovereign's decisions. Those reports are discussed in further detail at [108] to [114] below.

[42] Sovereign forwarded the Wyness and Kahan reports on to Professors Gorman and Kydd for comment, together with a transcript of the meeting of 25 June 2010 and the medical notes of Dr Hay for the period 26 June 2010 to 7 November 2010. Having reviewed this new material, Professors Gorman and Kydd provided a joint report to Sovereign on 29 January 2011. They remained of the view that Mr Percy was not totally disabled by depression, but recommended that his return to work needed to be graduated and fully supported. They noted that anticipatory anxiety about a return to work is not uncommon and there were psychological interventions that could be applied and worked through to help in the reintegration process. Their report is discussed in further detail at [115] to [118] below.

[43] The joint Gorman and Kydd report was sent to Stace Hammond, who set out, in some detail, Mr Percy's comments on it in their letter of 9 February 2011. Those comments included that working at a lower level of intensity would probably mean business failure in Mr Percy's specified occupation, that Mr Percy had remained on anti-depressants for a full 12 months following his first incident of depression and that Sovereign had not had proper regard to Mr Percy's condition during the 25 June 2010 meeting and his suicidal ideation.

Claims Committee review

[44] Sovereign's Claims Committee reviewed the 9 March 2010 and 29 June 2010 decisions on 10 February 2011. It had Mr Percy's full claims file (including all relevant correspondence) before it. The Claims Committee upheld the original decisions that Mr Percy was neither totally disabled nor totally and permanently disabled.

[45] Mr Percy was notified of the Claims Committee's decisions by a letter to his solicitors dated 18 February 2011. That letter set out in some detail the information

that Sovereign had considered (including the various reports I have outlined above) and summarised Sovereign's reasons for its decisions. Sovereign's view was that the barriers that Mr Percy faced in returning to work as a financial adviser were self-imposed and not the result of any certified medical incapacity:

Mr Percy has determined that he does not want to return to the Financial Adviser industry. AMP had offered him 'less stressful' financial adviser roles but he does not want to be 'a bit player'. He has stated at various times, that he does not intend to return to his previous occupation. His expressed preference is to pursue a lifestyle-motivated career change to carpentry.

Mr Percy's 'lack of motivation' to return to the financial adviser industry has meant that it has not been possible for Sovereign and its experts to undertake an agreed treatment and return to work rehabilitation program...A further review of Mr Percy's GP's clinical records for the later part of 2010 do not indicate referrals or treatment consultations consistent with the extent of disability he is claiming.

[46] Sovereign acknowledged Mr Percy's "right to make the lifestyle choices he considers appropriate". It advised, however, that it was not willing to continue to pay him a benefit when it had been medically certified that there were no medical barriers to him returning to his specified occupation.

Mr Percy's current situation

[47] Mr Percy ceased using antidepressants in June 2010, under the supervision of Dr Hay. He continues to take prescribed sleeping pills to assist with achieving sleep.

[48] Mr Percy has not engaged in any paid employment since June 2009. He frankly acknowledges that he is capable of returning to work, albeit in a less stressful occupation. He has elected, however, not to pursue any alternative work, due to its potential impact on his entitlement to claim a total disability benefit under the Income Protection Plan. In particular, the effect of the policy wording is that if Mr Percy undertakes any paid work, even for a short period or for relatively little remuneration, he will cease to fall within the definition of totally disabled in the Income Protection Plan. In that event, Sovereign would be entitled to deduct from his benefit payments its assessment of what Mr Percy is capable of earning, in any occupation.

[49] Mr Percy's evidence was that he had no confidence that Sovereign would make this assessment fairly. He therefore wants to first establish, through these proceedings, that he is totally disabled in terms of the Income Protection Plan, and totally and permanently disabled in terms of the Life Plan. In the event that he succeeds in doing so, he will then seek to reach an agreement with Sovereign that will allow him to re-enter the workforce "without his benefit being unfairly affected".

What constitutes "total disability"?

[50] Before turning to consider whether Sovereign erred in concluding that Mr Percy was not totally disabled in terms of the Income Protection Plan, it is helpful to first consider what "total disability" means in this context. In the particular circumstances of Mr Percy's case, "total disability" means:

...the complete and continuous inability of the Member solely by reason of Accident or Sickness to earn remuneration from his or her Specified Occupation.⁹

It was common ground that depression fell within the definition of "sickness".

[51] The policy required that a Member's entitlement to a total disability benefit be determined "to the satisfaction" of Sovereign. In the event that a claim was accepted, the total disability benefit ceased to be payable if the Member returned to any work, part or full time with AMP or any other employer, or a medical assessment indicated, to the satisfaction of Sovereign, that the Member was no longer disabled.

[52] The key issue for Sovereign was accordingly whether it was satisfied that the medical assessments before it established that Mr Percy was no longer completely and continuously unable, solely by reason of his depression, to earn remuneration from his occupation as a financial adviser for AMP, as at 29 June 2010.

⁹ "Specified Occupation" is defined in the Income Protection Plan as "the occupation of the member immediately prior to any period of Total Disability". Under the Life Plan it is defined as "the occupation of the Member immediately prior to the Date of Disablement". It was common ground that there is no practical difference between these two definitions.

[53] Counsel for Mr Percy referred to a decision of the Supreme Court of Canada, *Paul Revere Life Insurance Co v Sucharov*,¹⁰ for further guidance as to the meaning of “total disability”. In that case the Supreme Court observed that:¹¹

To put the matter another way, an owner-manager is totally disabled from performing his work as such when he is unable to perform substantially all of the duties of that position.

[54] The issue before the Supreme Court of Canada was whether the Manitoba Court of Appeal had applied the wrong legal test to distinguish total disability from partial disability. The Court’s analysis of the meaning of “total disability” was somewhat sparse and I do not find it particularly helpful. I note that subsequent Canadian courts have failed to agree on the precise meaning of *Sucharov* and its “test” for total disability¹² and academic commentators have criticised its lack of clarity. Nor do I find the decision of *Till v National Mutual Life Association of Australasia Ltd* to be particularly helpful, given the different definition of total disability in the policy before the Court in that case.¹³

[55] I do, however, find the analysis of Woodhouse J in *van der Noll v Sovereign Assurance Co Ltd* to be of assistance. In that case Sovereign had to consider the definition of total disability that applied after an initial two year “own occupation” period had expired. The key elements of the relevant definition are almost identical to those in this case:

“Total Disability” means the complete and continuous inability of the Member solely by reason of Accident or Sickness to earn remuneration from their Specified Occupation for the first two years following expiration of the Waiting Period and thereafter from any occupation for which they are reasonably suited by education, training or experience;...

¹⁰ *Paul Revere Life Insurance Co v Sucharov* [1983] 2 SCR 541.

¹¹ At 546.

¹² See for example: *Kent v Unum Life Insurance Co of America* [1997] BCI No 801 (QL); *Poersch v Aetna* [2000] CarswellOnt 216 (Ont. S.C.J.); *Kulych v Great-West Life Assurance Co* [2000] YJ No 16 (YTSC); *Mathers v Sun Life Assurance Co of Canada* (1998) 5 CCLI (3d) 201.

¹³ *Till v National Mutual Life Association of Australasia Ltd* [2004] ACTCA 26, (2005) 13 ANZ Insurance Cases 61-640.

[56] Woodhouse J noted that the definition had three relevant elements (in circumstances where the initial two year period had elapsed):¹⁴

- (a) was Mr van der Noll completely and continuously unable to earn remuneration;
- (b) from any occupation to which he was reasonably suited by education, training or experience; and
- (c) solely by reason of his condition?

[57] The definition in this case differs only to the extent that reference must be had to Mr Percy's "specified occupation", rather than "any occupation to which he was reasonably suited by education, training or experience". Woodhouse J considered each element of the definition in turn. In relation to the meaning of the phrase "completely and continuously unable to earn remuneration" he observed that:¹⁵

In my opinion the expression "complete inability" is used in a straightforward way and means what it says – completely unable. There is nothing in the relevant context to suggest a different meaning. The context supports that meaning. It is consistent with the primary expression "total disability". It is consistent with one of the circumstances in which the total disability benefit ceases to be payable; when a member returns to "any work, part or full time" (and with any employer). It avoids conflict between provision for payment of a total disability benefit and provision for payment of a partial disability benefit. The plaintiff's argument would in fact mean, in many cases, that partial disability would also be total disability.

[58] I find Woodhouse J's analysis compelling and I agree with his conclusion. His Honour's approach accords with common sense and the general principles of contractual interpretation, including the principle that ordinary words should be given their ordinary meaning. On the particular facts of this case, however, it is arguable that relatively little turns on the precise definition of "total disability". That is because, on the basis of Professor Gorman's evidence (which Sovereign relied on) there were *no* medical barriers to Mr Percy returning to work.

¹⁴ At [7].

¹⁵ At [107].

[59] I now turn to consider the specific errors that Mr Percy alleges Sovereign made in reaching the conclusion that he was no longer totally disabled by depression as at 29 June 2010.

Did Sovereign and its advisers fail to understand the difficulty and complexity of Mr Percy’s specified occupation?

[60] In order to correctly determine if Mr Percy was completely and continuously unable, solely by reason of his depression, to earn remuneration from his specified occupation, Sovereign and its medical advisers had to understand what Mr Percy’s specified occupation actually involved. For this reason Sovereign engaged Ms Leeson to prepare a “functional job description” report. Ms Loveridge, an occupational therapist who was assisting Ms Leeson, met with Mr Percy at his home on 18 August 2009. She took detailed notes during the interview and, immediately afterwards, prepared a detailed (four pages) report.

[61] Mr Percy is referred to in the functional job description report as a “self employed financial adviser”. The key functions of his role are described as generating business with new and existing clients, servicing existing clients by providing advice about investment strategies and insurance, and keeping his professional development up to date. Key work tasks were noted as including general administration and business management (reflecting Mr Percy’s self-employed status) as well as client focussed activities and professional development. The duties undertaken in relation to different categories of clients were outlined in some depth. Under the heading “Work Hours” the report noted that:

David worked eight hours per day from 7.30/8.30 am until 5.30/5.45pm for five days per week. David advised that he had a 40/45 minute lunch break in the lunch room each day. David estimated that he worked approximately 10 hours per month during the weekends attending to his business management duties.

Further, under the heading “Work Demands”, the report stated, in part, that:

General Demands

David advised that his workload was manageable as he chose the volume of work to undertake. David identified a heavy workload between the end of April and the end of October due to generating six monthly reports for clients...

Cognitive Demands

...He described his work tasks as complex due to the analysis he was required to perform to provide optimal investment advice for clients....

...As the role was fully autonomous, David was constantly required to plan, initiate, prioritise and coordinate his work tasks to ensure they were performed in an efficient manner. The role required a high degree of executive function in order to establish and maintain effective working relationships with clients and business associates.

[62] A copy of the functional job description report was provided to Mr Percy. By email dated 16 September 2009 Mr Percy commented on three specific aspects of the report, as follows:

- (a) First, under the heading “Key work tasks” Ms Loveridge had identified that 50 per cent of Mr Percy’s time was spent on client meetings and reports. Mr Percy suggested that prospecting for and securing new clients and/or business, which he noted was “very challenging and therefore stressful” should have been noted as being included in the 50 per cent of time spent on client meetings.
- (b) Second, Mr Percy noted that he rarely works eight hours per day. On the days where he started at 7.30 am (the earliest start time in the range he provided to Ms Loveridge) and finished at 5.45 pm (the latest finish time in the range he provided) that would be closer to a nine and a half hour working day.
- (c) Third, in terms of “work demands”, Mr Percy’s recollection was that he had said to Ms Loveridge that “in my business (by which I meant profession) you are as busy as you want to be”, which Ms Loveridge had interpreted as being “manageable”. Mr Percy, however, said that to:

...achieve the recognition of a top performer in AMP’s distribution network over nearly two decades requires a very strong, focussed work ethic and a high capacity to work much harder than an average adviser. Therefore, in my case, “manageable” needs to be viewed in this context.

[63] Sovereign asked Ms Loveridge to respond to the matters raised by Mr Percy. She advised that “key work tasks” describe the general action undertaken to fulfil the duties described in the functional job description. References to work generation activities were included elsewhere in the report. In relation to the second issue, Ms Loveridge advised that she was happy for the reference to “eight hours per day” to be removed from the report (there was no suggestion that the range of start and finish times she had included in the report were inaccurate).

[64] In terms of the third issue, Ms Loveridge said that Mr Percy’s comment that “you are as busy as you want to be” was reflected on page three of the report, where she had noted that Mr Percy “chose the volume of work to undertake”. Ms Loveridge stated that she recognised that Mr Percy had “a very strong, focused work ethic and a high capacity to work much harder than an average adviser” (quoting the wording of his email) but noted that “this relates to his association to his worker role, rather than a Work Demand as would be understood in a clinical sense”.

[65] At trial, counsel for Mr Percy submitted that the three matters Mr Percy had raised were “significant inaccuracies” in the functional job description, which rendered it unreliable. Mr Percy contends that as a result of such inaccuracies Sovereign and its advisers underestimated the difficulty and complexity of his specified occupation as an AMP Adviser.

[66] I do not accept that submission. The functional job description was prepared by a competent and experienced occupational therapist. Of necessity, the content of the document had to be based largely on what Mr Percy told her. He had been copied in on Sovereign’s instruction letter to her and was therefore well aware of the matters that needed to be covered. Mr Percy was given a thorough and comprehensive opportunity to outline the demands of his role in detail, and appears to have done so, based on Ms Loveridge’s contemporaneous file note.¹⁶ Indeed Mr Percy himself later relied on the functional job description when he submitted his total and permanent disability claim on 24 December 2009.

¹⁶ At trial Mr Percy, and also Dr Kahan, referred to evidence from another AMP Adviser, Brendan White, as to what the role of an investment adviser for AMP entailed. That evidence was not, however, before Sovereign when it made the relevant decisions. Further, Mr White’s business differed significantly from Mr Percy’s, as it employed 16 financial advisors.

[67] None of Mr Percy's "criticisms" were major. His key criticism related to Ms Loveridge's interpretation of his comment that "you are as busy as you want to be" as meaning that his work load was "manageable". It was reasonable, however, for Ms Loveridge (and ultimately Sovereign) to take from Mr Percy's comment that he could control the volume and intensity of his work.

[68] The way in which an individual AMP Adviser chose to run their business was clearly, to some extent, a matter for him or her. It was apparent from the evidence before the Court that Mr Percy was a perfectionist who set very high standards for himself. He chose to, as he put it, "work much harder than an average adviser". Mr Percy had previously won awards as a top AMP Adviser and wanted to remain "at the top of his game". While that is commendable, Ms Loveridge was clearly correct in concluding that that is not a "work demand" in a clinical sense.

[69] I further note that the whole sequence of documents, including Mr Percy's comments on the functional job description report, were put on his claim file and provided to the clinicians asked to undertake medical assessments. They were accordingly aware of Mr Percy's comments regarding the functional job description report. I am satisfied that, on reviewing Mr Percy's file as a whole, the relevant clinicians would have had a clear understanding of the nature and requirements of his specified occupation, including its demands and stresses.

Did Sovereign fail to consider whether Mr Percy was suffering a total disability as at 29 June 2010, having regard to his symptoms of depression at that time?

Mr Percy's claim

[70] The issues raised by Mr Percy at [10](a) and [10](b) above are closely inter-related and I will therefore consider them together. In essence, Mr Percy alleges that when Sovereign decided to cease paying total disability benefits to him on 29 June 2010 it was acting on information that was out of date. In particular, Sovereign should have realised that its email to him of 22 June 2010, advising that his benefit entitlements were at risk, had triggered (or may have triggered) a third episode of depression.

Events during 22 to 29 June 2010

[71] As noted above, on 18 June 2010 Professor Gorman advised Sovereign that, in his opinion, Mr Percy's depression was in remission and that Mr Percy's decision not to return to his previous work was not based on substantive medical factors. Professor Gorman did not see any medical barriers to Mr Percy returning to his pre-illness occupation.

[72] On 22 June 2010 Sovereign forwarded Professor Gorman's report to Mr Percy and advised him that it would have an effect on his benefit entitlements. It requested a meeting to discuss this with him on 25 June 2010. Mr Percy responded by email the following day. He said that he was "very dismayed" by Professor Gorman's conclusions and that "I don't think you have any idea of the increase in stress you have caused". He said that he had slept very poorly the previous night. The next day Mr Percy sent a further email to Sovereign, advising that he had endured another sleepless night.

[73] On 25 June 2010 Mr Percy met with Mr Browne and Dr Simon Mayhew. Mr Percy said that he did not consider that Professor Gorman, Ms Leeson and Mr Schnabel appreciated the nature of his specified occupation. He referred to internet research he had undertaken on depression and expressed concern that if he went back to work he would relapse and be at risk of suicide. Mr Percy was extremely distressed and tearful during the meeting and expressed suicidal thoughts. Mr Percy's obvious distress was of concern to Dr Mayhew. In Mr Percy's presence, he contacted Mr Percy's GP, Dr Hay, leaving him a voice mail requesting he see Mr Percy later that day.

[74] The following Monday, 28 June 2010, Dr Mayhew made a follow up phone call to Dr Hay. Dr Hay informed him that he had had a long consultation with Mr Percy following his meeting at Sovereign. He stated that Mr Percy had been quite emotional at the start of the consultation, but had settled down. Dr Hay's contemporaneous notes described Mr Percy's reaction as an "extreme stress reaction". Dr Hay told Dr Mayhew that he had no concerns that Mr Percy would commit suicide and he did not think any further action or specialist referrals were

required. (Indeed, Dr Hay did not see Mr Percy again for another seven weeks or so.)

[75] Dr Mayhew's evidence was that his discussion with Dr Hay reassured him regarding Mr Percy's mental state. Sovereign accordingly moved forward with its decision making and, on 29 June 2010, wrote to Mr Percy advising that it was closing Mr Percy's claim under the Income Protection Plan, as it was satisfied that the medical evidence did not justify further benefit payments.

Discussion

[76] Mr Percy submits that Sovereign's email to him of 22 June 2010 triggered a third episode of depression and that Sovereign should have been alerted to the possibility of this by his emails of 23 and 24 June 2010 and his behaviour at the meeting on 25 June 2010.

[77] I do not accept that submission. Obviously, Mr Percy's emails of 23 and 24 June 2010, and (more particularly) his conduct at the meeting on 25 June 2010, indicated a high degree of stress and anxiety on his part. I note, however, that the reports of various clinicians would have indicated to Sovereign that it was not unusual for Mr Percy to become highly distressed and emotional in interview situations. Mr Percy's own expert psychiatrist, Dr Wyness referred to this (in a later report) as Mr Percy's tendency to "catastrophise" in situations where he becomes anxious. This tendency to catastrophise (view a situation as far worse than it objectively is) is apparent from the transcript of the 25 June 2010 interview. It appears to have been exacerbated by Mr Percy's heavy reliance on his own internet research as to his likely prognosis, rather than the views of the expert clinicians who had assessed him.

[78] Mr Percy is clearly a somewhat anxious person, who was in a particularly stressful situation, having learned that his benefit entitlements were at risk. That understandably caused him considerable distress, given that he had made a firm decision not to return to work as a financial adviser, whatever impact this might have

on his benefit entitlements.¹⁷ Accordingly, the financial implications of Mr Percy's benefit entitlements ceasing were very serious.

[79] Sovereign was obviously concerned enough about Mr Percy's behaviour at the 25 June 2010 meeting to arrange for him to see Dr Hay, and also to follow up with Dr Hay the following Monday. It was reasonable, however, for the conversation between Dr Mayhew and Dr Hay on 28 June 2010 to have provided considerable comfort to Sovereign. There was nothing in Dr Mayhew's discussion with Dr Hay that would have alerted Sovereign to the possibility that Mr Percy may have plunged into a third episode of depression. Rather, it appeared that he had had an "extreme stress reaction", from which he had fairly quickly recovered.

[80] I further note Professor Kydd's evidence that symptoms of depression must be persistent over at least a two week period "before you can make a diagnosis of depression rather than it just being a stress reaction, if you like, over a short period of time". The events Mr Percy relies on took place over a three day period (22 to 25 June 2010).

[81] Taking all of these matters into account, it is my view that Sovereign did not act unfairly or unreasonably by failing to investigate whether its email of 22 June 2010 had triggered a further episode of depression in Mr Percy.

Did Sovereign fail to act fairly and/or reasonably by not investigating Mr Percy's concerns regarding Ms Leeson and Mr Schnabel's assessment as to his level of function?

Mr Percy's claim

[82] Mr Percy's next ground of challenge is that Sovereign failed to act fairly and/or reasonably by not properly investigating his concerns that Ms Leeson's report of 26 May 2010, and Mr Schnabel and Ms Leeson's joint report of 25 May 2010, significantly overstated his level of function. Mr Percy submits that, as a result, Professor Gorman relied on incorrect information in his reports of 9 and 18 June

¹⁷ For example, in an email to Sovereign on 27 May 2010 he advised that his decision never to return to his former role as a financial adviser "was not predicated upon convincing Sovereign to continue to pay me any insurance benefits". He further stated that "even if Sovereign were to discontinue their payments to me, it would not compel me to attempt a return to my previous occupation".

2010, which concluded that Mr Percy was no longer depressed and was fit to commence a graduated return to work.

Ms Leeson and Mr Schnabel's assessments of Mr Percy's level of function

[83] As noted above, in January 2010 Ms Leeson was asked to undertake a functional review. Essentially, she was tasked with establishing what Mr Percy was doing on a day-to-day basis and what degree of “functionality” he had achieved. Ms Leeson concluded, in essence, that Mr Percy was functioning in a day to day way that suggested he had the capacity to begin the journey back to work. In particular, she noted his involvement in the sale of his business, dealing with issues relating to his mother-in-law’s estate and his involvement in home renovations (although she noted that a project manager had been employed in relation to these).

[84] Subsequently, in May 2010, Ms Leeson and Mr Schnabel were asked to prepare a vocational reintegration plan. Mr Schnabel, in his report dated 10 May 2010, observed that:

[Mr Percy] has remained engaged in multiple, emotionally challenging roles, initially in the marketing and successful sale of his business, followed by undertaking a major renovation of their family home which is now near completion. These engagements were complex and presented numerous emotional and operational/managerial challenges. [Mr Percy] has been handling these demands with confidence, clarity of decision making, and efficiency.

[85] Mr Schnabel also noted that:

David feels happy with life style choices he has made. He has moved on from the “rat race” corporate world with its rewards and pressures. He has managed not to fall into an emotional or functional “vacuum”, but to find and fully engage in multiple, partially challenging projects that match his personal intelligence and personal drive to achieve. David presents with sustained remission of depression.

[86] Ms Leeson also met with Mr Percy in May 2010 to establish his current level of function and his goals in relation to returning to work. Her subsequent letter to Sovereign of 26 May 2010 outlined Mr Percy’s daily routine and his performance in a range of life roles.

[87] Ms Leeson and Mr Schnabel prepared a joint report headed “Vocational Rehabilitation Plan”, dated 25 May 2010, at Sovereign’s request. The report was not, however, a vocational rehabilitation plan, but rather a summary of their respective assessments of Mr Percy and the reasons why it was not possible to prepare a vocational rehabilitation plan.

Discussion

[88] Mr Percy was provided with copies of both Ms Leeson’s and Mr Schnabel’s reports. On 27 May 2010 he emailed Mr Schnabel with comments on his 10 May 2010 report. He prefaced his email with the following opening comment:

Whilst in broad agreement with your review the ability to deal with the two major objectives for selling my business and then home renovations was handled very carefully and I think your review overstates somewhat my capacity to handle these matters.

[89] I accept Ms Meechan QC’s submission that this falls short of being a “red flag” that ought to have signalled to Sovereign that the Schnabel report was completely “off beam and unreliable”. Rather, Mr Percy’s comments were, as Mr Schnabel observed in his reply email, not in conflict with Mr Schnabel’s report, but rather an extension of what the report set out, viewed from Mr Percy’s perspective. Mr Percy did not take issue with that summary when he later forwarded the entire email exchange on to Mr Browne, for inclusion in his claim file. Indeed, aspects of Mr Percy’s email provide further support for some of Mr Schnabel’s conclusions, including that he had coped fairly well with the challenge of having sold his business. In this context I also note that, in a much later conversation with Dr Monigatti (September 2011) Mr Percy appears to have described the sale of his business in similar terms to his discussion with Mr Schnabel. He said that:

He decided it would be best for his health to sell the business, which he did with AMP’s help in December 2009. He found the sale surprisingly non stressful.

[90] In relation to his home renovations, Mr Percy noted in his email that he had hired a project manager to minimise the stress on him. However, this was already known to Sovereign as it had been referred to in Ms Leeson’s earlier report.

[91] Ms Leeson's and Mr Schnabel's assessment of Mr Percy's degree of functionality was based on information provided by Mr Percy himself. I accept Ms Leeson's evidence that, in his interview, Mr Percy presented as a man who was successfully engaging in a number of activities, involving varying degrees of challenge. I found Ms Leeson to be a reliable and credible witness. She had no need or incentive to present an unrealistic picture of Mr Percy's level of function. Her reports do not suggest that Mr Percy was necessarily performing at a functional level similar to that prior to his depression (indeed that could only be established if and when Mr Percy returned to work). However, it appeared from Ms Leeson's reports, reinforced by Mr Schnabel's assessment, that Mr Percy had a level of functional capacity that was consistent with a graduated return to work.

[92] The reality is that different people can, quite reasonably, take different views of the level of a person's functionality. A claimant's own view of their level of functionality may well differ from the conclusions reached by an independent expert. Mr Percy expressed broad agreement with Mr Schnabel's conclusions, although expressing the view that he had "somewhat" overstated his capacity in relation to a couple of matters. Further, Mr Percy's comments were included in the information sent to Sovereign's medical advisers. Sovereign also had the benefit of the further comments Mr Percy made regarding his level of functionality (and his belief that Mr Schnabel and Ms Leeson had over-stated this) at the 25 June 2010 meeting.

[93] In all of the circumstances, I am not satisfied that Sovereign failed to act fairly and/or reasonably by not further investigating the reliability of the information from Ms Leeson and Mr Schnabel that Professors Kydd and Gorman had relied upon.

Did Sovereign fail to act in good faith, fairly and/or reasonably by making a predetermined decision on 29 June 2010?

Mr Percy's claim

[94] On 22 June 2010 Sovereign received Professor Gorman's 18 June 2010 letter, in which he expressed the opinion that Mr Percy's depression was in remission and that his decision not to return to his previous work was not based on any substantive medical factors.

[95] Mr Browne immediately forwarded a copy of that letter, together with Professor Gorman's 9 June 2010 letter, to Mr Percy. His covering email concluded:

We would like you to consider the attached report from Professor Gorman. This medical opinion will have an effect on your benefit payments which I would like to discuss with you this Friday at 11.00 am Friday.

[96] As outlined above, that meeting took place on Friday 25 June 2010. Mr Browne represented Sovereign at that meeting. Mr Browne also arranged for Sovereign's medical adviser, Dr Simon Mayhew, to attend to answer any questions of a medical nature.

[97] Mr Percy raised various concerns at that meeting, including that Ms Leeson and Mr Schnabel had overstated his level of functional ability. He was advised that Sovereign would consider the various matters he had raised. .

[98] The following Tuesday, 29 June 2010, after Dr Mayhew had received reassurance from Dr Hay that Mr Percy had "settled down" following the meeting, Sovereign proceeded with its decision-making process. It concluded that Mr Percy was no longer totally disabled. Mr Percy alleges that, given the speed of this decision following the 25 June 2010 meeting, it must plainly have been "predetermined".

Discussion

[99] In the five months leading up to its 29 June 2010 decision, Sovereign had initiated a series of assessments from Ms Leeson (or Ms Loveridge), Mr Schnabel, Professor Kydd and Professor Gorman. Each of those reports was sent to Mr Percy for review and comment. Any comments he made were included in his claims file and provided to the relevant clinicians, as appropriate.

[100] I have carefully reviewed the various reports available to Sovereign at the time of its June 2010 decision. It was open to Sovereign, based on those reports, to conclude that Mr Percy's depression was in remission. Further, he had a high level of cognitive function and appeared to be coping reasonably well in his daily life. Professor Gorman's final report expressed the clear opinion that there was no medical reason why Mr Percy could not return to work. Any remaining impediments

were not medical, but rather related to Mr Percy's anticipatory anxiety (which fell short of a medical condition). Nevertheless, in light of Mr Percy's anticipatory anxiety, Professor Gorman recommended that his return to work be undertaken on a graduated basis.

[101] Mr Percy was unwilling to attempt a return to work. This was because, based largely on his own internet research, he believed that if he returned to work in his former role his depression would return and he would be at very high risk of suicide.¹⁸ As a result of his fears, Mr Percy sold his business and made a "decisive life-style choice" to leave the corporate world behind. He refused to engage with Ms Leeson and Mr Schnabel in their attempts to prepare a vocational reintegration plan.

[102] All of this information led Sovereign to the preliminary view that Mr Percy was no longer totally disabled. His benefit entitlements were therefore at risk. In my view Sovereign quite properly put Mr Percy on notice of this in its 22 June 2010 email. Sovereign nevertheless invited Mr Percy to attend a meeting to present any final comments or information before a final decision was made. Dr Mayhew's evidence was that in some cases clients do come to such meetings with new information which significantly changes things:

He could've come to that meeting with a new report from a new psychiatrist who said something completely different. People sometimes do that, they come in with a report which blows us away. Case managers come to us and say, "We've got this new report" I go down to a meeting with a client and what was not a terminal illness is now a terminal illness, something like that, so things change.

[103] Mr Percy did not, however, provide Sovereign with any medical reports of his own that challenged the conclusions of Sovereign's medical advisers. Rather, he focussed on his own internet research and repeated the criticisms or comments he had made earlier in the process (and which had been put before the relevant clinicians).

¹⁸ This appears to be an example of what Dr Wyness referred to as Mr Percy's tendency to "catastrophise" or, in other words, assume the worst possible outcome, however unlikely.

[104] In such circumstances it was open to Sovereign to conclude that Mr Percy had not raised any matters of such significance that a deferral of its decision was required. In the absence of any material new information, Sovereign was entitled to proceed to make a decision fairly soon after the meeting. Obviously, in the event that Mr Percy was subsequently able to produce further relevant information (which he did by way of the Wyness and Kahan reports) he would be entitled to submit this to the Claims Committee, in the context of seeking a review of Sovereign's decision.

[105] Mr Percy has not established that Sovereign's decision of 29 June 2010 was predetermined. Rather, it was the culmination of a fairly lengthy (five month) process, which Mr Percy was given the opportunity to be fully engaged in.

[106] As I have not been persuaded that any of Mr Percy's grounds of complaint regarding Sovereign's 29 June 2010 decision have been made out. I now turn to consider Mr Percy's challenges to the February 2011 decision of Sovereign's Claims Committee.

The Claims Committee's decision of February 2011

[107] The role of the Claims Committee was not to decide whether Mr Percy was depressed or suffering from an anxiety disorder as at February 2011, but rather whether the decision that had been made by Sovereign on 29 June 2010 was a reasonable one.¹⁹ To do this it needed to look at the information on which the original decision was made and also consider any new information that may be material to assessing Mr Percy's mental health *as at 29 June 2010* (including any particular the reports of Dr Wyness and Dr Kahan).

Dr Wyness' Report

[108] Dr Wyness' report of 10 October 2010 noted that for much of the time over the eight months preceding May 2010, Mr Percy had not experienced symptoms of depression or anxiety. However, at times when he faced work related stresses, such as when he was medically cleared to return to work in June 2010, Mr Percy

¹⁹ The Claims Committee also reviewed Sovereign's decision of 9 March 2010 that Mr Percy was not totally and permanently disabled in terms of the Life Plan. I address this issue further at [141] to [143] below.

experienced rapid recurrences of depression and anxiety symptoms. Dr Wyness noted that Mr Percy had conducted his own research on depression on the internet and that he appeared to have a “fairly rigid and concrete interpretation of the effects of his condition on his ability to function in his different roles”.

[109] Dr Wyness diagnosed Mr Percy, as at October 2010, as having a major depressive episode that was in partial remission and a generalised anxiety disorder. He also diagnosed obsessive compulsive and narcissistic personality traits. He noted that Mr Percy experiences “anticipatory anxiety” when he contemplates returning to his former work and that he placed very high expectations on himself.

Mr Percy does not see that it might be possible to moderate his expectations and still successfully build up a business.

[110] In terms of recommended future clinical management, Dr Wyness noted his agreement with Dr Fraser and Professor Kydd’s recommendations for treatment of depression and anxiety symptoms including interpersonal psychotherapy. In this context he stated that:

I believe that any return to work should be a graduated one and occur over four to twelve months depending on his progress. This should be monitored by treatment providers and particularly the psychologist involved in his treatment.

Mr Percy needs to have assistance to help him deal with anticipatory anxiety and to avoid catastrophising in situations where anxiety does start. He needs to monitor his own stress and learn ways of reducing this...

[111] Dr Wyness noted that a number of factors were against Mr Percy in attempting to return successfully to his former occupation, including the risk of recurrence of depression, his anticipatory anxiety, fear about his ability to cope and lowered self-confidence. He also noted Mr Percy’s feeling that:

...he is being expected to put his health and life at risk by attempting a third return to his previous occupation. He feels that he would again be assuming the risk from his insurance company and giving up a benefit to which he feels he is entitled.

[112] Dr Wyness concluded that for Mr Percy to undertake the clinical treatment that he and others had recommended he needed to be fully motivated to do so, which he was not at present. Dr Wyness’s report concluded that:

In my opinion, treatment aimed at returning Mr Percy to being able to maintain well and work would be for him to make some compromises regarding the amount of work he does, the intensity of that work and the standards that he sets for himself. His view is that trying to carry out his specified occupation with those altered parameters would not enable a business to be successful. *If this is the case*, I believe that the likelihood for him to return to his specified occupation is small. He is also currently not strongly motivated to undertake treatment aimed at such an outcome.

[Emphasis added]

Dr Kahan's Report

[113] The other report put before the Claims Committee on behalf of Mr Percy was that of Dr Kahan, an occupational physician. His report of 6 December 2010 largely summarised prior clinician's reports and added relatively little new analysis or opinion to the existing picture. Dr Kahan noted that his own view was that it would be in Mr Percy's best interests to return to the work force but:

As noted there are significant factors in his previous work tasks and nature of the work which have in part contributed to the development of his depression and that there are limited "reasonable adjustments" that can be made which would make it easier for him to return to work...

Hence returning back to his pre-illness role poses a significant risk of further depression and I do not feel that this is currently feasible given his condition...

[114] Dr Kahan did not elaborate on his view as to why there were limited "reasonable adjustments" that could be made to make it easier for Mr Percy to return to work. This statement appears to have been based largely on Mr Percy's own views that a graduated return to work, or working at a lower level of intensity in future, would result in business failure.

Review of Dr Wyness' and Dr Kahan's reports by Professors Kydd and Gorman

[115] The Claims Committee sought comment from Professors Kydd and Gorman on the Wyness and Kahan reports. Having reviewed this new material, they provided a joint report to Sovereign on 29 January 2011. They noted that Dr Wyness' report agreed in many respects with their own views and also those previously expressed by Dr Fraser:

Where we disagree is that Dr Wyness currently feels that Mr Percy fulfils the criteria for being totally and permanently disabled because of his symptoms

and his likely inability or unwillingness to engage in a therapeutic programme. In contrast, we are of the opinion that to make such a decision is premature.

[116] Further:

...the obsessive and compulsive and narcissistic personality traits referred to by Dr Wyness are exactly that – traits – and do not signify an abnormality sufficient to make a diagnosis of a personality disorder.

[117] Professors Gorman and Kydd noted that Mr Percy had shown the ability to return and function well in his work environment following earlier episodes of depression. His relapse, in their view, may have been due to there not being adequate ongoing input of both a psychiatric and psychological nature. They noted that Mr Percy appeared to have obtained some misinformation from the internet about the nature of depression and the effectiveness of treatments in preventing relapse and suggested that more formal education about these matters might make Mr Percy more optimistic about his prospects for sustained recovery.

[118] Ultimately Professors Gorman and Kydd did not alter their view that Mr Percy was ready to return to work on a graduated basis. The need for any return to work to be graduated was not, however, for medical reasons (namely depression) but rather due to Mr Percy's anticipatory anxiety. Professors Kydd and Gorman noted that such anticipatory anxiety about returning to work is not uncommon and there were psychological interventions that could be applied and worked through to help in the reintegration process. Professor Gorman's evidence was that in his 30 years of experience he had:

been involved in cases with individuals with far greater illness beliefs than Mr Percy's, who have been able to return to demanding complex roles as a result of engaging in multi disciplinary incremental return to work programmes.

Discussion

[119] Dr Wyness was in broad agreement with Sovereign's medical advisers on a number of key issues. I note that he reached a different opinion on the questions of remission and whether Mr Percy suffered from a generalised anxiety disorder. That does not, however, make the views of other clinicians on those issues "wrong" or unreliable.

[120] I had the benefit of seeing all of the relevant medical experts give evidence as to the opinions they had reached and the reasons for their conclusions. They all impressed me as highly competent and experienced professionals who had given careful thought to the preparation of their reports although, as I have noted, Dr Kahan's report was perhaps of somewhat less relevance to the key issues than those of the other clinicians. Reasonable experts can reasonably disagree, and there were clear areas of disagreement in this case. There were also significant areas of agreement.

[121] The Claims Committee's role was to carefully consider all of the information available to it (including the opinions of Dr Wyness and Dr Kahan) and form a view as to whether the original 29 June 2010 decision remained reasonable in light of that information. Having undertaken that exercise, they upheld Sovereign's original 29 June 2010 decision.

[122] It is not for this Court to substitute its own view for that of the Claims Committee, unless that Committee has acted unfairly, unreasonably, or otherwise in breach of its obligations to Mr Percy. Subject to the issue of whether it was unreasonable for Sovereign to expect Mr Percy to make a graduated return to work (which I discuss in the next section) it is my view that the Claims Committee's conclusion was one that was reasonably open to it. It was not made in breach of any relevant obligation owed to Mr Percy.

Did Sovereign err in not investigating whether it was feasible for Mr Percy to work on a reduced basis?

[123] Mr Percy submits that the Claims Committee acted unfairly or unreasonably by not investigating whether, and to what extent, it was feasible for him to return to work as an AMP Adviser on a reduced basis. In particular, Mr Percy submits that returning to work on a graduated basis, or working at a lower level of intensity than he had in the past, would have resulted in business failure.

[124] The first difficulty with this submission is that Sovereign's proposal that Mr Percy make a graduated return to work was not because his current *sickness* (as defined by the policy) required it. On the contrary, Professor Gorman had concluded that Mr Percy's depression was in remission and that there was no medical impediment to Mr Percy returning to work on a full-time basis. A graduated return to work was proposed because of Mr Percy's "anticipatory anxiety" about returning to work, or what Professor Kydd described as Mr Percy's "emotional and stress related perceptions of work". These "perceptions" did not, in the opinion of Professors Gorman and Kydd, amount to a medical impediment to returning to full-time work. Accordingly, even if returning to work on a graduated basis would have resulted in business failure, this would not necessarily have been causally linked to any *sickness*, in terms of the policy.

[125] Even assuming, however, that sickness (as opposed to personality or behavioural factors) necessitated a graduated return to work, Mr Percy has failed to establish that the information before Sovereign at the time was sufficient to reasonably trigger an investigation on its part as to whether a graduated return to work would have resulted in business failure.

[126] Mr Percy's evidence at trial was that AMP was unwilling to support him in 2009/2010 in the manner they had during his 2006/2007 episode of depression, when they had provided salaried in-house staff to look after his clients. As a result, Mr Percy had no option but to sell his business. I treat this evidence with some caution. Mr Percy did not call anyone from AMP to give evidence to confirm their position. There are numerous references throughout the contemporaneous documents, including in various clinician's assessments, to Mr Percy's decision to sell his business. None of those references suggest that Mr Percy ever indicated to anyone in 2009 or 2010 that a contributing factor to his decision to sell his business was a perceived lack of support from AMP.

[127] Further, if lack of AMP support was likely to be a significant impediment to Mr Percy making a graduated return to work, it was incumbent on him to squarely raise the issue with Sovereign. Sovereign may well have been able to reach an arrangement with AMP to provide the necessary support, or may have been able to

make other arrangements to support Mr Percy during the transitional period. It was not given the opportunity to do so.

[128] Mr Percy's related submission was that, in the long term, he may only have been able to return to work at a "reduced level of intensity" and that this would have resulted in business failure. Such a submission is highly speculative. Mr Percy had previously made a successful transition back to full-time work, following his earlier episode of depression. Unless and until he engaged with a vocational reintegration programme there was no basis for Sovereign to assume that he would not be able to successfully return to full-time work again.

[129] Ultimately, the focus must be on the reasonableness of Sovereign's conduct, assessed as at the time of its decisions. Mr Percy only raised potential business failure issues in a peripheral way, with no supporting evidence (for example there was one sentence regarding this issue in Stace Hammond's letter of 9 February 2011). Mr Percy failed to alert Sovereign to any specific concerns he may have had, for example regarding a lack of AMP support.

[130] The reality is that Mr Percy was not willing to attempt to return to his former role, on a graduated basis or otherwise. It is therefore not known whether a vocational re-integration plan would have been successful. In such circumstances Sovereign did not act unfairly or unreasonably by failing to investigate, on a hypothetical basis, what the financial implications for Mr Percy's business might be if he had ultimately only been able to work at a reduced level of intensity. That was an issue for another day, if and when those circumstances arose (in which event Mr Percy may well have had grounds for a partial disability claim).

[131] I note for completeness that, during the course of trial, Mr Blanchard submitted that Ms Meechan had failed in her cross-examination issues under s 92 of the Evidence Act 2006 by not putting to Dr Kahan a paragraph of Dr Kydd's brief of evidence in which he set out, hypothetically, how a graduated return to work could have been implemented. In particular, he said that a return to work programme may initially involve the person returning in a "lower performing position" requiring some, but not all, of the skill set required for his performance in the specified role.

Once stabilised in that position the person could then move to a position that is more demanding with eventual return to function in the specified role.

[132] I ruled that there had been no breach of cross-examination duties. The fact that Professors Kydd and Gorman believed that a graduated return to work was both possible and appropriate, but Dr Kahan and Dr Wyness had reservations as to whether it would be possible (based on what Mr Percy had told them) had been on the table since the various clinician's original reports were prepared in 2010. Indeed, as a result of an earlier trial having been aborted, Dr Kahan was aware of Professor Kydd's precise evidence on the issue, prior to his own brief of evidence in this trial being finalised. He therefore had ample opportunity to expand upon his own evidence as to why a graduated return, in any form, would not be feasible. Ultimately, however, nothing turned on the relevant paragraph in Professor Kydd's brief. It is irrelevant what precise form a graduated return to work might, hypothetically, have taken, for the reasons I have outlined more fully at [123] to [130] above. Further, it was outside of the knowledge or expertise of any of the clinicians whether a graduated return would potentially result in business failure.

Did Sovereign act unreasonably, unfairly or otherwise in breach of its obligations to Mr Percy in concluding that he was not entitled to a partial disability benefit?

Mr Percy's claim

[133] Mr Percy claims, in the alternative, that if he was not suffering a total disability then Sovereign was required to pay the partial disability benefit to him, unless a medical assessment indicated to Sovereign that he was not partially disabled.²⁰ Under the Income Protection Plan a member is entitled to a partial disability benefit if he or she is partially disabled. "Partially Disabled" refers to a member who:

Is totally disabled for an initial period of at least fourteen days and has not been able to return to their specified occupation on a full time basis during the remainder of the waiting period, if the waiting period exceeds thirty days; and solely as a result of the sickness or accident which directly caused the total disability, does not earn, or is incapable of earning in any occupation, more than 75% of their annualised Pre-Disability Income.

²⁰ Amended statement of claim at [79].

[134] Sovereign's letter to Mr Percy of 29 June 2010, advising of its decision to close his claim, stated that Sovereign was "satisfied that medical evidence does not justify further Total or Partial Disability Benefits". In particular, Sovereign relied on Professor Gorman's opinion that he "did not see any medical barriers to David returning to his pre-illness occupation".

[135] There is nothing in Sovereign's letter, or any other evidence before the Court, to suggest that Sovereign considered the issue of partial disability in any detail. Sovereign's position was that the reason for this was that, prior to the commencement of proceedings Mr Percy had never submitted a partial disability claim to it. At no stage did he inform Sovereign that he wished to be considered for a partial disability benefit. Nor did he provide any information which would have enabled Sovereign to assess the extent of any claimed partial disability. This is consistent with Mr Percy's unwavering position (including at trial) he was totally disabled. Indeed he has refrained from working, in any occupation, for the last five years in an attempt to establish that he meets the policy definition of total disability rather than partial disability.

[136] Sovereign's position was that it would have been prepared to consider payment of a partial disability benefit if, for example, Mr Percy had engaged in a return to work programme but had been unable to work on a fulltime basis. It was, however, unable to explore this option because the only position ever taken by Mr Percy was that he was totally disabled. He was not prepared to engage in a return to work programme and did not provide any evidence on which an assessment of partial disability could have been made.

Discussion

[137] In *van der Noll v Sovereign* Woodhouse J rejected a claim in the alternative for partial disability. His Honour noted in that case that the onus was on the insured to provide the evidence in support of the claim to a partial disability benefit and the insured never presented the necessary evidence.²¹ He considered but did not decide

²¹ At [154].

an argument by Sovereign that the claim for the partial disability benefit had been made too late.²²

[138] Similarly, in this case, Mr Percy never presented any evidence to Sovereign in support of a partial disability claim, because Mr Percy never made such a claim. As a result it would have been difficult, if not impossible, for Sovereign to assess the extent of any partial disability. There was no evidence as to what Mr Percy was capable of earning as a financial adviser, as Mr Percy submitted that he was totally incapable of working as a financial adviser. He was unwilling to engage in a return to work programme to test the issue. Nor did Mr Percy provide Sovereign with any evidence as to what he may be capable of earning in any other occupation.

[139] Further, it was open to Sovereign to conclude, based on Professor Gorman and Professor Kydd's reports, that Mr Percy was not partially disabled by depression as at 29 June 2010. Professor Gorman's view was that Mr Percy's depression was in remission and that there were no medical barriers to Mr Percy returning to his pre-illness occupation. On the basis of that view, Sovereign was entitled to conclude that Mr Percy was not suffering from any relevant "sickness" as at 29 June 2010. If so, he did not meet the requirements for either a total disability or partial disability benefit.

[140] This case bears some similarities to *van der Noll*, in which Woodhouse J also considered the circumstances in which it could be said that the insured's inability to work was due "solely by reason of accident or sickness". His Honour accepted an argument that it was reasonable for Sovereign to conclude that it was Mr van der Noll's illness belief, and not his medical condition, which was the effectual reason for Mr van der Noll's not earning remuneration.²³ Similarly, in *Rose v Paul Revere Life Insurance* the Court of Appeal of British Columbia observed that:²⁴

Where the insured recovers and "becomes healthy as a result of withdrawal", his or her employment benefits necessarily cease because the coverage does not extend to inability to work due to a condition not under medical treatment which renders the insured physically or psychologically allergic to his or her occupation. It extends only to inability to work due to sickness for

²² At [157].

²³ At [144].

²⁴ *Rose v Paul Revere Life Insurance* (1991) 4 CCLI (2d) 170 at [29].

which regular medical treatment is given, and continues so long only as sickness and treatment continue.

[141] The Court rejected a submission that the earlier case of *Paul Revere Life Insurance Co v Sucharov* stood for the proposition that an insured who has recovered from a sickness is entitled to continuing benefits because the former sickness may recur if he or she returns to the former employment.²⁵

[142] In the absence of any error on the part of Sovereign, this Court is not entitled to undertake its own assessment of partial disability. I note, however, that it would have been extremely difficult, if not impossible, to do so. Although Mr Percy called expert quantum evidence as to his likely level of income if he had worked, as an AMP Adviser, at 20 per cent, 40 per cent, 60 per cent or 80 levels of exertion, there is no evidence on which the Court could reasonably assess what particular level of exertion Mr Percy was capable of working at. In the absence of Mr Percy engaging in a return to work programme, any view as to what level of exertion he would have ultimately been capable of is necessarily speculative. The only concrete evidence before the Court that could be relied on by way of analogy is that, after his 2006 episode of depression, Mr Percy was able to successfully return to full-time work, over a period of several months.

Did Sovereign err in concluding that Mr Percy was not totally and permanently disabled in terms of the Life Plan?

[143] On 9 March 2010 Sovereign declined Mr Percy's claim (made on 24 December 2009) for a total and permanent disability benefit under the Life Plan. It concluded that it could not be said, at that time, that Mr Percy was totally and permanently disabled. The Claims Committee affirmed that decision in February 2011.

[144] The issues Mr Percy raises in relation to Sovereign's rejection of his claim under the Life Plan have, with the exception of one issue, been addressed above (and must fail for the same reasons). The one additional matter is an allegation that Sovereign failed to act fairly and/or reasonably by failing to give Mr Percy an

²⁵ At [30].

opportunity to comment on or obtain his own medical evidence in response to Sovereign's medical reports, before rejecting his claim.

[145] In my view there is no substance to this complaint as, even if Mr Percy did not feel he had sufficient opportunity to comment on Sovereign's medical reports prior to 9 March 2010, the matter then proceeded to a Claims Committee review almost a year later, in February 2011. There was ample time between March 2010 and February 2011 for Mr Percy to present his own medical evidence in support of his claim under the Life Plan and also to comment on Sovereign's medical reports. He took that opportunity and provided the Wyness and Kahan reports to the Claims Committee.

Summary and conclusion

[146] Mr Percy alleges that Sovereign erred in a number of respects when it decided that he was not totally or partially disabled (in terms of the Income Protection Plan) and that he was not totally and permanently disabled (in terms of the Life Plan).

[147] The nature of this Court's inquiry into Sovereign's decision-making is a limited one. Provided that Sovereign has asked the right question(s), acted in good faith, taken account of relevant information available to it, and reached a decision that is reasonably open to it, the Court cannot intervene. That is the case even if the Court may itself have reached another conclusion. It is only if the insurer has failed to form a valid opinion that a Court will be entitled to determine the matter itself, based on all of the evidence before it at trial.

[148] I have found that Sovereign did not err in any of the ways alleged by Mr Percy. In particular:

- (a) Sovereign and its advisers did not fail to properly understand the demands and pressures of Mr Percy's specified occupation as an AMP Adviser, due to inaccuracies in the functional job description. I am satisfied that, on reviewing Mr Percy's file as a whole, the relevant clinicians would have had a clear understanding of the nature and

requirements of Mr Percy's specified occupation, including its demands and stresses.

- (b) Sovereign was not acting on medical information that was out of date when it made its decision of 29 June 2010. Sovereign did not act unfairly or unreasonably by failing to investigate whether Mr Percy's emails of 23 and 24 June 2010 and his distressed behaviour at a meeting with Sovereign on 25 June 2010 evidenced a return of his depression.
- (c) Sovereign did not act unfairly or unreasonably by not further investigating Mr Percy's concerns that Ms Leeson's report of 26 May 2010, and Mr Schnabel and Ms Leeson's joint report of 25 May 2010, significantly overstated his level of function.
- (d) Sovereign's decision of 29 June 2010 was not predetermined.
- (e) The Claims Committee's role was to carefully consider all of the information available to it (including the new medical evidence provided by Mr Percy) and form a view as to whether Sovereign's original 29 June 2010 decision remained reasonable in light of that information. They concluded that it was. That decision was reasonably open to the Claims Committee. It did not act unfairly, unreasonably, or otherwise in breach of its obligations to Mr Percy in reaching that conclusion.
- (f) Sovereign did not act unfairly or unreasonably by failing to investigate what the financial implications for Mr Percy's business might be if Mr Percy was only able to work at a reduced level of intensity. Unless and until Mr Percy was willing to engage in a graduated return to work programme it was not possible to determine whether he could successfully transition back to full-time work or not.
- (g) It was reasonably open to Sovereign on the medical information before it to conclude that Mr Percy was not partially disabled as at

29 June 2010 (to the extent that it was required to consider the issue at all, given that no partial disability claim had been made).

- (h) Sovereign did not breach any relevant obligation to Mr Percy in concluding that he was not totally and permanently disabled in terms of the Life Plan.

Result

[149] Mr Percy has failed to establish that Sovereign has erred in any of the ways alleged and accordingly all of his causes of action must fail.

[150] My preliminary view is that, as the successful party, Sovereign is entitled to costs on a 2B scale basis. However, as I have not heard argument on the issue of costs, leave is reserved to file memoranda if agreement cannot be reached based between the parties. Any memorandum on behalf of Sovereign is to be filed by 25 July 2014. Any memorandum in response on behalf of Mr Percy is to be filed by 8 August 2014.

Katz J