IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2015-485-1032
[2018] NZHC 2939

BETWEEN	PETER JAMES TAYLOR Plaintiff
AND	ASTERON LIFE LIMITED Defendant

Counsel: Andrew Beck for plaintiffs
Christine Meechan QC for defendant

Judgment: 13 November 2018

JUDGMENT OF ASSOCIATE JUDGE JOHNSTON
[On the papers]

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[1] From August 1994 Asteron Life Ltd insured Mr Taylor against total disability, defined in the policy as being " … unable to work in your usual occupation for more than ten hours per week". The benefits payable were monthly payments of a specified amount.

[2] Some years later Mr Taylor became unwell. He made a claim pursuant to the policy. Asteron Life Ltd accepted the claim. From January 2010 it paid the monthly benefits.

[3] In September 2014 Asteron Life Ltd ceased paying the monthly benefits on the basis that it had sought but not received information from Mr Taylor as to his condition. This meant – it said – that Mr Taylor was in breach of the terms of the policy.

[4] In December 2015 Mr Taylor commenced this proceeding seeking a declaration that Asteron Life Ltd was not entitled to cease paying benefits. There has been much interlocutory skirmishing. Especially concerning discovery. This is the latest round.

[5] Recently, Asteron Life Ltd has become aware that the insurance broking business of which Mr Taylor was a shareholder and director, P J Taylor & Associates Ltd, has been sold. By notice of application filed on 24 September 2018 the defendant seeks discovery of:

> The agreement for the sale and purchase and/or transfer of Mr Taylor's broking business and any other documents which set out the terms of the sale.

[6] Mr Taylor's notice of opposition filed on 4 October 2018 denies the defendant's entitlement to this category of documentation on relevance grounds.

[7] Asteron Life Ltd's argument is that in order for Mr Taylor to be entitled to cover, his medical condition must be the cause of his incapacity. It says that, upon the sale of the business, Mr Taylor may have been required to agree to a restraint of trade prohibiting him from competing with the purchaser, at least within a geographical area and for a period of time. The argument is that if that is correct then a significant cause of Mr Taylor's incapacity is the contractual commitment he has made.

[8] In developing this argument the defendant relies heavily on this Court's decision in *Blanshard v National Mutual Life Association of Australasia Ltd.*[1]

[9] In that case the parties had entered into insurance arrangements on materially similar terms. Harrison J summarised the facts that are relevant for present purposes as follows:

> [2] In mid 1995 Mr Blanshard was diagnosed as suffering from Meniere's disease, a disorder of the inner ear. It's most prominent symptoms are vertigo – a spinning sensation which affects balance functions – hearing loss, and tinnitus or roaring in the ear. In early 1996 Mr Blanshard signed the first of many progress claim forms for a financial benefit under the policy. He declared that he was totally disabled from working in his normal occupation

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[1] *Blanshard v National Mutual Life Association of Australasia Ltd* HC Auckland CIV-2001-404-1961, 22 September 2003.

> by virtue of 'vertigo attacks, deafness and loud noise'. AXA accepted his claim.
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> [3] Mr Blanshard did not disclose to AXA, then or later, that two weeks earlier he had sold all his shares in BSW [the company through which he operated his business] and resigned from its employment and that, as part of his termination package, he had agreed not to work again in the advertising industry for at least 9, if not 21 months.

[10] Against that background, Harrison J considered whether the contractual arrangements which the plaintiff there had entered into precluded him from relying on his medical condition as the primary reason for his disability, and concluded as follows on this issue:

> [42] The starting point from considering this question is found in the contractual definitions of "sickness" and "total disability". On analysis they mirror each other. The policy defined "sickness" as the sole or predominant cause ('independently of all other causes') of total disability; "total disability" means that Mr Blanshard is unable to perform his normal duties solely by reason of that sickness. In this way both definitions mutually reinforce the same concept of sickness as the dominant cause of the insured's inability to work.
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> [43] There is no contextual warrant for reading down or limiting the insured's inability to work to physical incapacity or incapability. The meaning of 'unable' is synonymous with 'incapable' or 'incapacitated'. What is important for these purposes is that the New Shorter Oxford English Dictionary definitions of all three words emphasise a lack of ability or power, without restriction or qualification to a physical dimension.
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> [44] Here, even if he had been of good health and full physical capacity, Mr Blanshard did not have had the requisite legal power or freedom to work as an executive creative director. The restraint prevented him. In contractual terms it was the real or dominant cause of his inability to perform his normal duties. Its existence relegated his ill health to causative inconsequence. By analogy, Mr Blanshard would not have been able to claim a benefit under the policy if on either 30 January 1996 or 12 April 1996 fundamental changes in the advertising industry made all creative executive directors redundant, regardless of their states of health. His restraint had the same effect.

[11] For Asteron Life Ltd, Ms Meechan contends that the same principles may apply in this case, at least from the date of the sale of the business.

[12] It is not my task in this interlocutory application for further and better discovery to embark upon a close analysis of the competing arguments, much less to attempt to resolve them. However, it is necessary, in order adequately to address the

relevance or otherwise of the material sought, to give some preliminary consideration to the arguments.

[13] There appears to me to be room for doubt as to whether *Blanshard* was correctly decided insofar as this point is concerned. As already said, Harrison J's conclusion was that:

> [44] … even if he had been of good health and full physical capacity, … did not have … the requisite legal power or freedom to work as an executive creative director. The restraint prevented him. In contractual terms it was the real dominant cause of his inability to perform his normal duties. Its existence relegated his ill health to causative inconsequence.

[14] Another approach may have been to ask whether, but for the contractual arrangements, the plaintiff in that case would have been able to perform his duties. If the answer to that question were to be "no", then that might be said to relegate the contractual arrangements to causative inconsequence.

[15] In any event, it seems to have been critical to the outcome in *Blanshard* that the contractual arrangements including the restraint of trade, were entered into prior to the insurance claim being made. That is to be contrasted with the present case where the insurance claim was made during 2009 and the business in question was not sold until 2018, nine years later.

[16] Finally, whatever *Blanshard* may be authority for, if Mr Taylor's claim was legitimate in the first place, it is difficult to imagine that the law is so maladroit as to prevent someone in his position from selling their business years later because they could, by doing so, imperil their insurance entitlements.

[17] My view is that this defence would be a difficult one for Asteron Life Ltd. On that basis, it appears to me that the contractual documentation of which it seeks discovery is unlikely to be relevant.

[18] However, that does little more than bring me back full circle to the point made earlier that it is not for me to reach any concluded views about the merits of the arguments involved.

[19] Putting the merits to one side, there appear to me to be three additional points that need to be taken into account in dealing with this application:

(a) As Mr Beck submits, the case, as currently pleaded, focuses on whether Mr Taylor was entitled to cover at the time that he made his claim and whether Asteron Life Ltd was entitled to cease paying the monthly benefits in August 2014. There is no pleaded defence at this stage based on the sale of P J Taylor & Associates Ltd in or around June 2018. It is elementary that the scope of parties' discovery obligations are determined by the pleadings. As matters stand, in my view, Mr Taylor is entitled to say that any issues relating to the sale of P J Taylor & Associates Ltd are not before the Court. However, Asteron Life Ltd was not aware of the sale until recently. That explains why the matter is not pleaded. Obviously, it would be open to Asteron Life Ltd to put the matter in issue in an amended pleading. And, in order to determine whether there is any foundation at all for such a pleading, Asteron Life Ltd will need discovery of the documentation sought.

(b) Mr Beck also submits that the transaction involving the sale of P J Taylor & Associates Ltd did not involve Mr Taylor but that company and the purchaser, Arthur J Gallagher & Co. That is only partly correct. Mr Taylor was a shareholder (albeit of only one of ten thousand shares) and a director. I infer that he would have been the driving force behind the transaction from the perspective of P J Taylor & Associates Ltd and either have possession or control of the documentation sought or know of its whereabouts.

(c) More forcefully Mr Beck submits that the nature of the transaction is such that it may be sensitive from a commercial point of view and that both P J Taylor & Associates Ltd (if that company still exists) and Arthur J Gallagher & Co should be served with the application so that they can consider such issues and if necessary seek appropriate orders. In my view there is something in this point.

[20] Bearing in mind all of those considerations, I am prepared to make the order sought.

[21] However, I direct that:

(a) Asteron Life Ltd notify the parties to the agreement of this application and the orders I am making;

(b) in the first instance Mr Taylor, assuming that he has possession or control of the documentation in question, is to discover it on the basis that it will be viewed only by Asteron Life Ltd's solicitors and counsel, not copied and not provided to or discussed with any other party.

[22] Those orders should enable Asteron Life Ltd's advisers to determine whether there is any basis for persisting with this proposed new defence. If they conclude that there is, an application may be made by memorandum for further directions. At that point, I would expect to hear from the parties to the agreement as to whether they see a need for ongoing confidentiality orders.

Associate Judge Johnston

Solicitors:
Peter Sara, Dunedin for plaintiff
Vero, Auckland for defendant