Case 30 – Dread disease claim

Dread disease claim under group risk policy declined as claim for the same condition was paid by previous underwriter

Background

A. The complainant is covered under her employer's group risk policy for dread disease.

B. The policy was previously underwritten by another insurer.

C. During 2013 the complainant was diagnosed with localised breast cancer and a claim was paid by the "previous insurer✸".

D. She underwent a mastectomy on 16 September 2014 followed by radiation therapy and hormonal blockade without evidence of metastases.

E. From 1 May 2015 the group risk policy is being underwritten by Alexander Forbes.

F. On 22 October 2015 the complainant was diagnosed with liver metastases and stage IV breast cancer.

G. She submitted a claim to Alexander Forbes, but the claim was declined. It is not in dispute that the condition would qualify under the Cancer dread disease benefit.

H. The insurer first relied on the pre-existing exclusion clause which reads as follows:

> *"No Dread Disease Benefit shall be payable under this policy during the first twelve months of a Life Assured's Commencement Date if, in the opinion of the insurer, the Dread Disease claim is directly or indirectly attributable to any injury or illness in respect of which the Life Assured sought medical advice, or about which he know or could reasonably be expected to have known, during the six month period preceding the commencement of his becoming a Life Assured. These pre-existing conditions shall be waived by the insurer in instances where a Life Assured is actively in the service of an Employer and has previously satisfied these provisions under a policy issued by any insurer who was insuring a similar benefit immediately before the Commencement Date. These pre-existing conditions may also be waived in other situations if this is agreed to by the insurer in writing. "*

✸ We have replaced the name of the insurer with the words "previous insurer" in order to maintain confidentiality.

I. We requested Alexander Forbes to provide the medical evidence on which they relied to invoke the pre-existing exclusion clause. No such evidence had been provided.

J. The insurer had also relied on the following arguments to decline the claim:

> "Upon receiving all the required documentation the Complainant's dread disease claim was assessed in great detail and independent and external industry experts were consulted to arrive at a decision. After much internal and external deliberation, we came to the conclusion that the claim was not valid. The reasons for our decision were as follows:
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> - The medical evidence presented to us in respect of the claim indicated that the cause for the claim is directly related to a condition for which a claim has been submitted to the "previous insurer" and for which the full benefit had been paid by the "previous insurer";
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> - A core principle of contract law is the possibility of performance. An insurance contract is based on the supposition that the risk has not yet materialised, therefore there can be no binding contract of insurance if the risk has already materialised at the time the contract was concluded;
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> - Group risk insurance contracts are generally accepted on the same terms and conditions by the new insurer as the "previous insurer". The reason for this is not to disadvantage the policyholder and members as a result of changing insurers. Had the benefit remained insured by the "previous insurer", her current claim would not be honoured since it was honoured previously. In agreeing to take over her benefit on the same terms and conditions as per previous cover effectively means that we would need to keep our decision consistent with the "previous insurer";
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> - Shortly after commencing insurance with us, we sent out a letter accepting her previous cover level from the previous insure however at the time, we were not aware of her prior claim for the same dread disease with the "previous insurer", and we were not aware that her previous accepted cover letter from the "previous insurer" did not make provision for the dread disease claim that was paid. Our decision was based on an accepted cover level and decision made by the "previous insurer" prior to her claim being paid by the "previous insurer", and therefore is not valid."

K. We made a provisional determination stating the following:

> "This matter was discussed at an adjudicator meeting.

1. It seems clear, that based on the information on file, the pre-existing exclusion clause cannot be invoked by Alexander Forbes. There is no evidence that there had been medical advice sought during the six months preceding the commencement date of cover with Alexander Forbes. Nor is there evidence that the complainant knew or should have known of an illness which falls within the exclusion clause. Based on the evidence on file she was under the impression that she was in remission.

2. Of course, if the pre-existing clause had a longer pre-existing period e.g. 24 months, your defence could have been that the complainant's claim should fail because the present claim is indirectly attributable to an illness in respect of which she had sought medical advice in the 24 months prior to inception of the policy. However that is not the case here.

3. Your argument has been that the risk had already materialised when the contract was concluded. That argument is flawed for the following reasons:

4. The Alexander Forbes policy is a contract which was concluded on 1 May 2015. It was not a continuation/transfer of insurance business and therefore was not the insurance business which the "previous insurer" had underwritten. The policy is clear as to that. This is a new policy issued to the employer. You state that group risk insurance contracts are generally accepted on the same terms and conditions by the new insurer as the "previous insurer". However you also state, "We have no access to other insurance policies." The two statements appear contradictory. In any event, your policy does not incorporate the "previous insurer's" terms and conditions.

5. Under the "previous insurer's" policy there was a provision which read:

   *"**Maximum Critical Condition Benefit***

   The Critical Condition Benefit payable to a Member in terms of this Policy shall be restricted so that the total dread disease capital sum benefits in aggregate do not exceed the Maximum Critical Condition Benefit as specified in the Schedule, or such greater amount as may be agreed to by the "previous insurer" in its discretion in writing, from time to time."

6. If the complainant had received the total dread disease capital sum benefits equalling the Maximum Critical Condition Benefit she would not have qualified for a further benefit under the "previous insurer" policy because of this exclusion. There is also an exclusion clause 12.12 which would apply and exclude her second claim. (If there were no such clauses she would have been able to claim

again for the new cancer claim under the “previous insurer’s” policy.) As she is now covered under a new policy underwritten by you those provisions in the “previous insurer’s” policy do not apply. Nor is there any other provision in the Alexander Forbes policy which excludes her from claiming. If you had wanted to exclude claims such as these you had the opportunity to provide for such an exclusion in your policy.

7. The current claim is not the same claim as that for which the complainant had claimed under the “previous insurer’s” policy. At the time when Alexander Forbes concluded the insurance contract there was uncertainty as to whether the complainant would have recurrence of cancer. Because of this uncertainty, the risk had not yet materialised. The complainant is not claiming for the cancer which was diagnosed in 2013.

8. This is a new claim for the cancer which was diagnosed on 22 October 2015. There is no legal or insurance principle which prevents an insured from claiming for a recurrence of a condition (in the absence of a specific provision). On the contrary, there are tiered insurance products which specifically provide within the same policy for multiple claims if a condition progresses. There is no insurance principle preventing payment of a claim such as this. As I pointed out, if you wanted to exclude a new separate claim for the same disease (such as cancer) as a previous claim under another insurer’s policy you should have incorporated an exclusion clause to that effect.

9. You stated in your letter of 30 August 2017 that it is a fundamental principle of risk insurance that a life assured cannot claim for the same disease and benefit. This is not accurate. There is nothing preventing a life assured from claiming under two different policies for the same disease and benefit. Obviously a life assured cannot be paid twice for the **same** claim under one policy. That is not the case here.

10. You also stated that there was a duty to disclose the previous claim and the complainant’s health status. You have not provided documentation reflecting that the complainant or the employer had such a duty and had non-disclosed information. Alexander Forbes appear to have relied on information provided by the “previous insurer” in assessing the risk and issuing the cover letter. There is no evidence on file which suggests that either the employer or the complainant appointed the “previous insurer” as their agent for purposes of disclosure of medical information to enable you to assess the risk. In the absence of evidence of a duty to disclose on the complainant and the employer and the absence of the appointment of the “previous insurer” as their agent for such purpose, your defence of non-disclosure cannot be upheld.

11. You also raised a defence of unjustified enrichment. The complainant is claiming in respect of a benefit under a policy in terms of which she is insured. It is not clear to me how this translates to unjustified enrichment. There has been no payment made in error as you stated. This defence is without any merit.

12. The adjudicator meeting was of the view that the claim should be assessed, and, that you cannot rely on the defences you have raised.

13. The ruling set out above is of a provisional nature. In accordance with our usual practice each party is given an opportunity until **26 January 2018** to place new information before us and to make new representations to us before we proceed further with the complaints handling process. Any response received from a party will be regarded as that party's only response, unless otherwise indicated.

    If we do not hear from any party by **26 January 2018** we will assume that neither party challenges the provisional ruling."

L. Alexander Forbes responded as follows repeating previous arguments without substantiation:

"I refer to your email below, dated 28 December 2017. The insurer has carefully considered all points below and has no new information to add.

However, would like to reiterate the importance points of reliance below, as previous discussed:

- This claim relates to a group cover, not individual cover;
- The group cover was take over from the "previous insurer", on the same terms and conditions that existed at the "previous insurer";
- A member that was paid by the "previous insurer" for a certain dread disease, would not be able to claim for the same dread disease again; 1 claim per dread disease listed;
- The medical evidence presented to the us in respect of the claim indicates that the cause of claim is directly related to a condition for which a claim has been submitted to the "previous insurer", and for which the full benefit has been paid by the "previous insurer";
- Based on industry practice and applied principles of risk insurance , 1 dread disease (or event), has one valid claim;
- The claim for the exact event / dread disease in question, was already paid at the highest level of cover, and cannot be paid from

the same group cover again. Different insurer, same terms for the group as the original insurer;

- An insurance contract is based on the supposition that the risk has not yet materialised, therefore there can be no binding contract of insurance if the risk has already materialised at the time the contract was concluded;

- Group risk insurance contracts are generally accepted on the same terms and conditions by the new insurer as the "previous insurer", as mentioned.;

- The reason for this is, not to disadvantage the policyholder and members as a result of changing insurers, and keep them at the same level of cover they enjoyed under the "previous insurer", within this group cover;

- Had the benefit remained insured by the "previous insurer", the current claim will not be honoured since it was honoured previously;

- Since the entire group cover moved over to us, in agreeing to take over the benefit on the same terms and conditions as per previous cover, effectively means that we would need to keep our decision consistent with the "previous insurer";

- Shortly after commencing insurance with us, we sent out a letter accepting the claimant's previous cover level from the "previous insurer" however at the time, we were not aware of the claim with the "previous insurer" and we were not aware that the previous accepted cover letter from the "previous insurer" did not make provision for the claim that was paid.

Our decision was based on an accepted cover level and decision made by the "previous insurer" prior to the claim being paid by the "previous insurer" and prior to the group cover being taken over, therefore is not a valid claim as it would mean 2 payments from the same group cover for the same claim event/ type of dread disease.

We hope you find the above in order and look forward to the finalization of this matter."

M. In response we then wrote and stated the following:

"

- You make statements in your email for which you provide no substantiation. If you want us to take them into account, you have to substantiate your statements.

- I point out the following: we are aware that his is group cover, we never regarded it as individual cover.

- You state that the cover was taken out on the same terms and conditions with Alexander Forbes as the previous scheme, please provide proof that this is so particularly as you did not have the terms and conditions in your possession. Please see point 4 of the provisional determination. The problem you have with your argument is that you do not have the same clauses in your policy as the "previous insurer" policy, nor did you incorporate them into your policy.

- I have pointed out that the risk had not yet materialised at the time of the commencement of your policy. By repeating your incorrect statement, you do not give it more weight.

- General statements which are contradicted by policy terms and evidence also do not carry any weight."

N. In response the insurer stated the following:

"I refer to your email below dated 16 March 2018. Please see the response below from the Insurer,

- *Point 4 of the provisional determination and statement that the cover was taken out on the same terms and conditions with Alexander Forbes as the previous scheme, please provide proof that this is so particularly as you did not have the terms and conditions in your possession.* **See attached confirmation of accepted cover terms and condition as was provided by the Broker. At the time of the cover acceptance Alexander Forbes Life were not made aware of the previous claim. As you can observe the terms and conditions were taken out on the same cover that were made available to AF Life at time. We further attached accept that at the time of the initial Dread Disease application with the "previous insurer" the claim was paid 100%.**

- *I have pointed out that the risk had not yet materialised at the time of the commencement of your policy. By repeating your incorrect statement you do not give it more weight.* ***The member was paid a 100% benefit on the cancer definition. The claimant condition was in remission but this condition is of the same event. I refer to the attached oncology report where Metastasis of the liver (Stage 4 Breast Cancer).***

In addition to the previous email/ feedback from the insurer, they would like to add:

- At the time, team accepted cover on the basis of the previous cover accepted in the cover letter from Capital Alliance and we were not told about the

previous claim with Capital Alliance. These letters were sent to us in November 2015 after the claimant's recurrence of the condition'

- The email I sent yesterday it worth pointing out that in the email attachment, in December 2015, the broker queries our pre-existing condition exclusion but does not disclose that there was a cancer claim paid previously by Capital Alliance;

- Clearly the information sent to us was misleading, the broker sent us a letter confirming cover that was meant to be in place with Capital Alliance which was not actually in place. We then took over Capital Alliance's cover based on the letter sent to us. Effectively we accepted cover which was not in place because a claim was already paid.

This matter has been ongoing for some time and we believe the information submitted should be sufficient for the LT Ombud to make a call. Please let us know the outcome/ determination once made."

O. Alexander Forbes had provided a letter dated 9 December 2015 containing a table of benefits for which the complainant qualified. The amounts corresponded to the benefit amounts that she had qualified for under the previous policy. There was no reference anywhere on the letter suggesting that this was a continuation of the previous policy. It was clear from the letter that the complainant had passed an underwriting process to be accepted. There was no reference to an incorporation of the previous policy terms either.

Final determination

P. The matter was again discussed at an adjudicator meeting. The insurer had not provided any information or arguments which convinced the adjudicator meeting that the provisional determination should be set aside.

Q. The insurer has the onus of proving that the complainant does not have a claim on the basis that they have alleged i.e. that the risk had already materialised. No proof/evidence was presented that the complainant had cancer at the time the cover commenced at Alexander Forbes. That would be for Alexander Forbes to prove, and despite numerous opportunities granted, no such proof/evidence was presented.

R. The complainant's claim under the "previous insurer's" policy is not proof that the complainant was suffering from cancer at the time cover commenced under the Alexander Forbes policy. The complainant stated that she was cancer free at that time and there was no medical evidence on file that showed any different. If she had submitted a claim under any policy for a dread disease at that time it would have been declined on the basis that she did not comply with the definition because there was no evidence of cancer.

S. The other defence raised by the insurer is that in group insurance business an insured can only have one valid claim. No substantiation was given for this

broad based generalisation. It appears that in Alexander Forbes' view, if a new group scheme commenced with a new insurer, even if there is no reference to such an exclusion, a life insured cannot receive a benefit for a claim if the same dread disease re-occurs. No substantiation is provided for this statement. We are not aware that there is such a limitation. If an insurer wishes this type of limitation to apply it is free to include such a provision in the **policy**.

T. A further defence that Alexander Forbes kept raising is the fact that no disclosure of the previous cancer claim was made to them. Alexander Forbes has not provided any request for such medical disclosures to be made by either the complainant or the broker for the scheme. If there is reliance on non-disclosure, then there has to be a duty of disclosure. That has not been established at any stage.

U. No proof/evidence has been provided for the imposition of the pre-existing exclusion clause despite our previous requests for medical evidence in this regard and it appears that Alexander Forbes abandoned this defence.

V. There are circumstances where the underwriter of a group scheme changes and the new underwriter takes over the risk on the same terms and conditions. The policy in the present case militates against that construction. There is no suggestion that it is the same cover as under the "previous insurer". There is no reference in the Preamble or Definition section to a previous scheme.

W. The general provisions state under policy:

> "*5.1 Policy*
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> *This policy, read in conjunction with Schedule 1 constitutes the entire agreement between the Insurer and the Policyholder an any alteration thereto shall be in the form of an endorsement signed by an authorised official of the Insurer and the Policyholder."*

Given this provision it is not clear how Alexander Forbes can incorporate the provisions of previous policies issued to the Employer, into this agreement.

X. Alexander Forbes has not discharged the onus in proving that any of the defences they have raised, apply to the claim by the complainant. The claim is accordingly to be paid by Alexander Forbes together with interest. This is a final determination.

<u>Outcome</u>

Alexander Forbes paid the benefit to the complainant.