CASES AND TRIBUNAL DECISIONS

Court Rules on Offset Provisions

Susan Buswell v TAL Life Limited [2018] NSWSC 1507 (10 October 2018)

Link to decision

Summary

Justice White of the NSWSC recently handed down a decision dealing with an 'offset' clause in a group salary continuance (**GSC**) policy. Bearing in mind both the prevalence of such clauses in group and retail IP policies and the commonality of the wording of such clauses, the decision has industry wide implications.

Background

The plaintiff received payments under the GSC policy and also made a claim against her employer seeking damages arising from the injuries sustained in the course of her employment. This damages claim was settled via a deed for $350,000 (the Damages Sum).

The group life insurer sought to reduce the monthly payment due under the GSC policy on account of the Damages Sum pursuant to an 'offset' clause under the policy. Because so much turned on the precise wording of the 'offset' clause, it is worthwhile noting the wording in full. The important words are highlighted:

1.9.1. The amount of any Benefit payable in respect of an Insured Person for a month will be reduced by any Other Disability Income which accrues to that person during that month.…

Other Disability Income means any income (other than Return To Employment Income) which an Insured Person may derive during a month for which the Benefit is payable and includes;

a) any benefit payable under other income protection insurance policies; and

b) any benefit under any workers compensation, statutory compensation, pension, social security or similar schemes or other similar State, Federal or Territory legislation; and

c) any benefit paid under state or federal legislation such as the Department of Veteran Affairs; and

d) any other income payments including Employer funded sick leave entitlements.

Any Other Disability Income which is in the form of a lump sum or is commuted for a lump sum, has a monthly equivalent of one sixtieth (1/60) of the lump sum over a period of sixty (60) months.

If it can be shown that a portion of the lump sum represents compensation for pain and suffering; or the loss of use of a part of the body, we will not take that portion into account as Other Disability Income."

The plaintiff challenged the group insurer's right to 'offset' the Damages Sum and matter proceeded to judgment before Justice White.

The Decision

The Court found that the Damages Sum was not 'Other Disability Income' as defined under the policy and that accordingly it could not be used to reduce monthly payments due under the policy (see paragraph 48). It did so for two critical reasons:

- The word 'income' in the opening line or 'the chapeau' of the '*Other Disability Income*' definition is to be '*given its ordinary meaning*' noting that '*the receipt of damages for personal injury, or a settlement sum in compromise of a claim for damages for personal injury, is capital and not income*'. In this regard the Court did '*not accept that paragraphs (a)-(d) have the effect of allowing the word "income" where it is used in the chapeau to the definition to be read as "benefit" or "monetary benefit", whether capital or income*' (see paragraphs 22 and 23).
- Notwithstanding the above, the Court accepted that the Damages Sum could still be '*Other Disability Income*' if it fell within one of the sub paragraphs of the definition. Here the insurer argued that it fell under sub paragraph (b), being payments '*under any workers compensation*' legislation. Despite cogent and forceful arguments to support this position, the Court rejected this argument on the basis that the underlying entitlement to damages (which formed the basis of the Damages Sum) whilst heavily modified by NSW WC Act, arose 'under' the common law and not 'under' the WC legislation (see paragraph 48).

Implications

This is obviously a single judge decision on the construction of the specific wording of a particular policy and the wider precedent value of the decision must accordingly be viewed through than lens. The judgment may also be appealed.

That said, there are some important takeaways as follows:

- A life insurer's right to 'offset' other income arising from the subject disability, arises solely from its policy wording. There is for example, no common law concept of set-off which allows it to make an adjustment to monies payable under the policy on account of other monies which may be received.
- Further, because such clauses seek to limit the value of a benefit which would otherwise be payable, like exclusion clauses, they will be construed strictly even pedantically against the insurer. On this basis, particular precision needs to be applied in the wording of such 'offset' clauses to ensure that all benefits which are intended to be caught, are indeed caught. An insurer cannot expect a court to do it any construction favours in this regard and employ an expansive construction approach even if such an approach accords with the underlying intentions behind the clause and just plain good sense.
- In this case, the Court found that defining the benefit sought to be offset by reference to the Act that modifies the benefit rather than the underlying source of the benefit i.e. the common law, was an ineffective basis on which to anchor an offset. Our concern is that the relevant wording used in this case is not uncommon in many IP policies on the market. Additionally the issue is not just restricted to how WC offset sub clauses are framed. Motor Accident benefits, which also have as their source the common law, are defined in a similar fashion in many offset sub clauses. It follows that offset clauses which do not reference the underlying source of the benefit (particularly WC and MVA benefits) may be open to challenges similar to the one in this case.
- Against this background it would be timely to review the wording of all relevant offset clauses and at least in the first instance, identify whether such clauses are likely to operate in the manner intended.