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Précis Paper

Interpreting a disability policy of insurance

A consideration of *Birdsall v Motor Trades Association of Australia Superannuation Fund Pty Ltd* [2015] NSWCA 104.

Discussion Includes

- Whether a claimant is "totally and permanently disabled" is dependent on the specific words used in the policy
- The necessity for some retraining does not mean that a claimant will be able to claim total and permanent disablement benefits automatically
- The difference between "own occupation" and "any occupation" clauses
- The need for insurers to consider all relevant factors in determining whether a claimant is totally and permanently disabled

Précis Paper

Interpreting a disability policy of insurance

1. In this edition of BenchTV, Julian Sexton SC discusses the Court of Appeal (Basten, Meagher and Gleeson JJA) decision in *Birdsall v Motor Trades Association of Australia Superannuation Fund Pty Ltd* [2015] NSWCA 104 which considered a group life insurance contract held by a trustee of a superannuation fund. Mr Sexton SC acted for the successful respondent, superannuation fund, on appeal.

Material Facts

2. The plaintiff (appellant), a 20-year-old, qualified motor mechanic, suffered an injury to his wrist in the course of his employment in February 2009. He sought total permanent disablement benefit from his superannuation fund having ceased working completely in April 2011. The trustee of the fund (beneficiary of the policy) and the insurer (issuer of the policy) independently determined to decline his claim on the basis that he was not totally and permanently disabled as per the specific wording of the clause in his policy. The plaintiff sued the trustee and the insurer in the NSW Supreme Court, seeking a declaration that he was totally and permanently disabled.

3. "Total and Permanent Disablement" was defined in the relevant clause to mean:

> …in our opinion is incapacitated to such an extent as to render the Insured Person unlikely ever to engage in or work for reward in any occupation or work which the Insured Person is reasonably capable of performing by reason of education, training or experience. (Emphasis added)

4. Medical evidence established that the plaintiff was unable to perform his specific, pre-accident occupation but that he could perform sales or customer service related roles in the same industry on a full-time basis.

5. The plaintiff brought further evidence in support of his application that he had made over 50 unsuccessful job applications to promote his claim that he was unlikely to ever be able to "engage in or work for reward in any occupation or work which [he] is reasonably capable of performing".

Supreme Court: *Birdsall v Motor Trades Association of Australia Superannuation Fund Pty Ltd* [2014] NSWSC 632

6. The plaintiff alleged that the trustee and the insurer acted unreasonably in failing to consider and analyse relevant evidence, namely the 50 unsuccessful job applications.

7. In the first instance decision, Hallen J determined that in making the decision to decline the claim, the insurer and trustee had not taken into account the applications made by the plaintiff although they were entitled to take into account the medical evidence that he was capable of alternative, sedentary work. However, his Honour did not find the unsuccessful applications determinative. He notes at [156] that the mere failure to obtain a job that had been advertised by reference only to having made an application sent by email to a proposed employer, when one does not know what steps Mr Birdsall took apart from submitting the application, did not lead to the conclusion that he would not ever obtain work which he was reasonably capable of performing by reason of his education, training or experience.

8. Accordingly, Hallen J determined that the appellant did not satisfy the definition of total and permanent disablement in his group life insurance policy. His Honour accepted the medical evidence that the plaintiff remained able to complete the sales work related above. Although the plaintiff would be required to undertake minimal training in order to be suitable for such a role, Hallen J determined that the training, education and experience required for such a role was not sufficiently onerous on top of that required for his pre-accident role such that he was not totally and permanently disabled pursuant to the policy.

Court of Appeal: *Birdsall v Motor Trades Association of Australia Superannuation Fund Pty Ltd* [2015] NSWCA 104

9. Hallen J's determination was made on the evidence notwithstanding the definition of total and permanent disablement in the policy provided that the relevant opinion as to incapacity was to be that of the insurer. As a result, the appellant-plaintiff challenged the correctness of the determination. The majority of the Court of Appeal (Meagher and Gleeson JJA, Basten JA disagreeing) found that the "in our opinion" clause did not prevent the court from making the relevant determination rather than remitting the decision back to the insurer.

10. The court dismissed the appeal and the appellant-plaintiff was ordered to pay the respondents' costs. Further, the primary judge did not err in not being satisfied the appellant was within the definition of total and permanent disablement as set out in the policy. This determination was explained by Meagher JA at [77]: in that "the expression "reasonably capable" recognises the reality that a person may have to undertake specific training or

certification to enable him or her to engage in particular employment for which he or she is otherwise qualified by education, training or experience."

Implications

11. These decisions of the Supreme Court and the Court of Appeal in *Birdsall* are indicative of the scrutiny applied to assessing the capacity of a plaintiff to work in relation to a determination of total and permanent disablement. In particular, the necessity of some retraining does not necessarily preclude a person from being reasonably fitted for a particular occupation, consistent with the decision in *Hannover Life Re of Australasia Ltd v Dargan* [2013] NSWCA 57; 83 NSWLR 246.

12. Further, when determining a claim for total and permanent disablement, insurers/trustees should be diligent in considering every relevant issue and document and ensuring that each of these are referred to and discussed if the application is to be declined. Where an insurer/trustee does not transparently engage in such a process, a court may find that their decision-making process was unreasonable and will determine whether the claimant falls within the relevant clause itself, notwithstanding wording to the effect that it is a decision solely for the insurer.

BIOGRAPHY

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Julian Sexton SC was called to the Bar in 1984 and appointed Senior Counsel in 1999. He is entitled to appear in all Australian jurisdictions and has appeared in many important cases including representing the ACT in the civil litigation surrounding the 2003 Canberra bushfires.

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BIBLIOGRAPHY

Focus Case

Birdsall v Motor Trades Association of Australia Superannuation Fund Pty Ltd [2015] NSWCA 104

Lower court: *Birdsall v Motor Trades Association of Australia Superannuation Fund Pty Ltd* [2014] NSWSC 632

Benchmark Link

http://benchmarkinc.com.au/benchmark/weekly_insurance/benchmark_01-05-2015_weekly_insurance_law_review.pdf

Judgment Link

https://www.caselaw.nsw.gov.au/decision/5534772ae4b0fc828c995edf (Court of Appeal)

Cases

Dargan v United Super Pty Ltd [2011] NSWSC 1316
Edwards v Hunter Valley Co-op Dairy Co Ltd (1992) 7 ANZ Ins Cas 61-113
Finch v Telstra Super Pty Ltd [2010] HCA 36
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Sayseng v Kellogg Superannuation P/L and Anor [2003] NSWSC 945
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Legislation

Insurance Contracts Act 1984 (Cth), ss 13, 14, 48A
Superannuation (Resolution of Complaints) Act 1993 (Cth), ss 6, 14, 18, 37, 41, 46
Superannuation Industry (Supervision) Act 1993 (Cth)
Superannuation Industry (Supervision) Regulations 1994 (Cth), reg 6.01