

SUPREME COURT OF NOVA SCOTIA

Citation: *Collicutt v. Great-West Life Assurance Company*, 2014 NSSC 206

Date: 20140612

Docket: Hfx. No. 422886

Registry: Halifax

Between:

Dr. James A. Collicutt and J.A. Collicutt M.D.,
FRCSC INCORPORATED, a body corporate

Applicants

v.

The Great-West Life Assurance Company, a body corporate

Respondent

Judge: The Honourable Justice Denise M. Boudreau

Heard: April 29, 2014, in Halifax, Nova Scotia

Counsel: Michelle Awad, QC, for the Applicant
Scott McTaggart, for the Respondent

By the Court:

[1] This matter concerns the interpretation of a disability insurance policy, issued by the respondent for the benefit of the applicant.

[2] The applicant Dr. James Collicutt is an orthopaedic surgeon in Sydney, Nova Scotia, who has been practising as such since December 1994. On December 6, 1999, the applicant entered into a disability insurance policy issued by the respondent, in order to provide financial security for himself in the event that he became disabled. The policy was provided as an exhibit to this court (affidavit of Dr. James Collicutt, December 18 2013, at Tab 2).

[3] The applicant experienced serious health problems in or around 2005. He claimed disability insurance benefits from the respondent pursuant to the policy he had purchased. Although it would appear that the respondent initially denied the applicant's claim, it eventually was accepted and benefits were paid.

[4] The applicant became entitled to disability benefits on September 15, 2005, and those benefits continued through the entire 60 month period of entitlement (as

contained in the policy). Payments actually commenced on December 14, 2005 (upon satisfaction of the appropriate waiting period) and ended November 17, 2010. The parties are in agreement that the applicant was entitled to benefits throughout this entire period as he was either totally or partially disabled. In particular, during the period December 26, 2006 to March 15, 2007, the parties agree that the applicant was totally disabled, and therefore was entitled to and received the maximum amount pursuant to the policy. Those months are not in dispute.

[5] With respect to all other months within the above noted dates, the parties agree that the applicant was not totally disabled, but was disabled to some partial or proportionate extent. This entitled him to some portion of the total disability monthly payment. It is the calculation of this payment which has led to the present dispute.

[6] The Notice of Application filed December 23, 2013, requests an order “declaring that when benefits are payable for Proportionate Disability under The Great West Life Assurance Company policy number 41077998, and the income loss is 20% or more, but less than 80%, the amount payable is the lesser of a) the

amount of the actual monthly income loss; and, b) the maximum monthly benefit amount payable under the policy”. At the time of the hearing, the Court was advised that all other issues between the parties, including prejudgment interest and costs in relation to this application, had been resolved.

[7] According to the policy here, where an insured person is disabled but not totally disabled, two options for payment exist: a “partial disability” claim/calculation, or a “proportionate” claim/calculation. I refer to page 7 of the policy, which further provides that the benefit for partial disability is payable unless the insured elects payment of the proportionate disability benefit.

[8] At the time the applicant’s disability claim was accepted, the respondent provided him with benefits pursuant to the “partial disability”, provisions of the policy. On April 30, 2010, the applicant, by letter from his counsel, confirmed that he elected to proceed with his claim under the “proportionate disability” provision of the policy, which called for a different calculation. As a result, the respondent recalculated his entitlement for the months in issue (excepting the months he was totally disabled as listed herein above) and provided an additional amount.

[9] The issue in dispute between the parties concerns this calculation for proportional disability monthly payments. It was arrived at by the respondent, by way of a certain interpretation of the insurance contract provisions. The applicant disagrees with the respondent's calculation and argues that his monthly disability payment for those months should be calculated by way of a different interpretation.

[10] I quote the relevant provisions of the insurance policy for these purposes:

1. At page 1:

Benefits:

Monthly income benefit:

<u>Benefits Start Date</u>	<u>Benefit End Date</u>	<u>Monthly Benefit Amount</u>
from the 91 st day	last day of the 63 rd month	\$17,000.00

2. At page 3:

INTERPRETATION

The use of capital letters in this policy or any rider attached to this policy indicates a term which is defined below or elsewhere in this policy or in a rider. A defined term in bold letters where it first appears.

The use of *italicized* letters indicates a reference to a heading or subheading shown on the benefits specifications, unless otherwise indicated.

3. At page 6:

Proportionate disability and proportionately disabled mean the *Insured* is not Totally Disabled and is working full or part-time in any Gainful Occupation but, due directly to Injury or Sickness, is unable to earn more than 80% of Indexed Prior Earned Income as defined below.

4. At page 7:

MONTHLY BENEFITS FOR DISABILITY

The **Monthly Benefit for Disability** payable at the end of a particular Month during a Period of Disability or a Period of Recurrent Disability is:

...

- *the Monthly Benefit Amount* multiplied by the Percentage of Earned Income Loss determined under the Earned Income Loss provision, if the *Insured* has been Proportionately Disabled without interruption during the particular Month (the “**Monthly Income Benefit for Proportionate Disability**”).

ELECTION FOR PROPORTIONATE DISABILITY

If the Insured is disabled, the monthly income benefit for partial disability will be payable during the period of Proportional Disability, unless the Owner elects or has elected payment of the Monthly Income Benefit for Proportionate Disability.

This election is made by providing written evidence satisfactory to Great-West Life of prior earned income (the “**Election for Proportionate Disability**”).

5. At page 11:

EARNED INCOME LOSS

Percentage of Earned Income Loss, for a particular Month, means the percentage determined as follows:

1) by performing the following calculation:

$$\frac{\text{Indexed Prior Earned Income} - \text{Earned Income}}{\text{Indexed Prior Earned Income}} \times 100$$

= Income Loss

2) and then determining the Percentage of Earned Income Loss from the table below by reference to the Income Loss calculated above.

Income Loss	Percentage of Earned Income Loss
80% or more	100%
20% or more, but less than 80%	Income Loss
less than 20%	0%

[11] The parties have agreed that the applicant was proportionately disabled during the months at issue. The parties have also agreed as to the applicant's prior earned income, as well as, the applicant's earned income during the period at issue. The sole issue for this court to determine is the meaning of the expression "Income Loss", as is found under the right-side column entitled "Percentage of Earned Income Loss", at Step 2 of page 11 of the policy. In other words, what is to be paid, when the Step 1 "Income Loss" calculation, results in a percentage higher than 20% but lower than 80%?

[12] The applicant submits that he must be paid his actual lost income. On the other hand, the respondent submits that the expression "Income Loss" in the policy refers only to a percentage of the maximum payable benefit, and not to the

dollar value income lost by an insured. I shall explore those submissions in more detail.

[13] The applicant first argues that the expression “income loss” does not meet the definition of “a defined term” as contained in the Interpretation section quoted hereinabove (page 3 of the policy), as it is not in bold letters when it first appears. (It first appears at Step 1 of the test for “Percentage of Earned Income Loss” at page 11). It is, therefore, the applicant’s position that the “Income Loss” calculation which is found at Step 1 of the calculation, is only useful to determine where the loss lies in the percentages category (less than 20%, 20 to 80%, and 80% or more). In the applicant’s submission, once that determination has been done, that concludes the use that can be made of the percentage definition of “Income Loss”.

[14] The parties agree that in all months that are in issue here, the applicant’s “Income Loss” as defined by Step 1 of the calculation, fell within the range of 20% to 80% shown in Step 2. In Step 2 under the column “Percentage of Earned Income Loss” where the range is 20 - 80%, the document provides this answer:

“Income loss”. The applicant specifically rejects the notion that this “Income Loss” in Step 2, has the same meaning as the “Income Loss” result from Step 1.

[15] It is the applicant’s further submission that in this context, “Income Loss” in Step 2 should have its usual everyday meaning: that is, the actual dollar amount of income that the insured was not able to earn due to his disability. In other words, the difference between his prior earned income and his actual earned income.

[16] In the submission of the applicant, therefore, if the Step 1 calculation results in a percentage of more than 20% but less than 80%, the amount payable should be the actual income loss of the insured person, and not a percentage. The applicant argues that if this interpretation is accepted, the analysis would end at that point, since the amount payable is then determined. One would not need to go on to the provisions at page 7 providing for the calculation of “monthly benefits for disability” (as the monthly benefit amount multiplied by the “percentage of earned income loss”).

[17] It is the applicant's alternate submission that these provisions create an ambiguity in the meaning of the words in the insurance contract. As per the rule in *contra proferentem*, this ambiguity should be resolved in favour of the applicant.

[18] The respondent argues that there is no ambiguity in this contract. They submit that the starting point for determining benefits payable for "proportionate disability", is the section relating to monthly benefits. This section (at page 7) states that the "Monthly Benefit Amount" (earlier defined as \$17,000.00) is to be multiplied by the "Percentage of Earned Income Loss" as defined on page 11, in order to determine the appropriate payment per month. The "Percentage of Earned Income Loss" is calculated at the "Earned Income Loss" section (at page 11), already referred to.

[19] The respondent submits that the calculation of "Percentage of Earned Income Loss" (at page 11) seeks to calculate a percentage, to be determined by a two-step process. Step 1 provides a calculation that gives us a result; that result is called "Income Loss". Step two determines the percentage, by reference to the "Income Loss" already calculated. Where the "Income Loss" is between 20 and 80%, the "Percentage of Earned Income Loss" is, in fact, the same number as is already

defined as “Income Loss” within that provision. For example, if the Income Loss as defined by the Step 1 calculation is 50%, since that falls within 20 to 80%, the “Percentage of Earned Income Loss” is also 50%. On the other hand, if the Income Loss (Step 1) was 85%, that would equal a “Percentage of Earned Income Loss” of 100%. If the Income Loss (Step 1) were 10%, that would equal a “Percentage of Earned Income Loss” of 0%.

[20] The respondent further submits that, as outlined on page 7 of the policy, where the percentage falls between 20% and 80%, that amount is then multiplied by the Monthly Benefit Amount (\$17,000.00) to arrive at a dollar amount payment per month. This is recalculated each month.

[21] There are no authorities which consider the specific language of this policy. Therefore, I am to apply generally accepted practice in relation to contract interpretation. I note the case referred to by both parties *Consolidated Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.*, [1980] 1 S.C.R. 888 wherein the Supreme Court of Canada stated that “... the normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at

the time of entry into the contract”. I also refer to *Progressive Homes Ltd. v. Lombard General Insurance Company of Canada*, 2010 SCC 33, where the Supreme Court of Canada stated:

The primary interpretive principle is that where the language of the policy is unambiguous the court should give effect to clear language, reading the contract as a whole.

[22] I also quote the generally accepted rule of the interpretation of contracts as found in Fridman “*The Law of Contract in Canada*” (6th ed., Carswell, 2011) at page 437:

There is no doubt that the cases emphasize this fundamental government of the written word, and in particular, the plain, literal and ordinary meaning of the written word in contract... The golden rule is that the literal meaning must be given to the language of the contract, unless this would result in absurdity.

[23] I have carefully reviewed and considered the provisions of this insurance policy. It is my conclusion that the expression “Income Loss”, as found multiple times at page 11, does not lead me to any ambiguity. In short, I accept the respondent’s submission as to the appropriate and reasonable interpretation that should be given to this provision.

[24] In Step 1 of the test for Percentage of Earned Income Loss, “Income Loss” is shown to be the result of a calculation. I agree with the applicant that it is not a bolded term, but I do not consider that as significant. The court must give this expression its most reasonable interpretation, in order to give effect to the policy and the intention of the parties. The expression “Income Loss” only exists within this one provision of the policy. In moving to Step 2, it is clear to me that that same result is meant to be applied in the range calculation (in the left column). It would be most logical, and I so find, that the expression “Income Loss” means the same throughout one same provision.

[25] In the right column the expression “Income Loss” is found under the heading “Percentage of Earned Income Loss”, which leads me to the obvious conclusion that it is meant to be expressed as a percentage. Further, I agree with the respondent that when calculating the amount payable in any particular month, the policy specifically provides that the monthly benefit amount (\$17,000.00) is to be multiplied by this percentage. This payment calculation is described at page 7. If the expression “Income Loss” is not a percentage, but in fact means a dollar loss as argued by the applicant, this payment calculation at page 7 of the policy is

nonsensical. It would result in payments many times over the maximum amount payable. This is obviously absurd in cases of partial disability, and cannot be the intention of the policy in relation to partial disability. The applicant's response to this absurdity is that he seeks an order declaring the amount payable to be "the lesser of" these two amounts, either the actual loss, or the maximum payable. This is completely unsupported by the evidence; no language in the policy would lead to that conclusion.

[26] With respect to the "Earned Income Loss Calculation" (at page 11), it is clear to me that in cases where the income loss is 80% or more, the insured is to receive, in fact, 100% of the maximum benefit payable. It follows, therefore, from a review of those sections of the policy, that where the loss is between 20 and 80%, the calculation is seeking a fair percentage of that maximum monthly amount. If one accepts the interpretation of the applicant, this might mean that a person suffering income loss of only 20%, for example, would still receive the entire dollar amount of his lost income, (assuming his lost income to be greater than \$17,000.00). In my view that is not in keeping with the intent of this policy.

[27] Many of the cases cited by the applicant refer to situations where the court found an ambiguity in language used in the insurance policy. There can be no doubt that, in such cases, courts will apply the *contra proferentem* doctrine, and apply the interpretation which is most favourable to the insured.

[28] However, in my reading of this policy, I do not see an ambiguity. While I would agree that the document is somewhat complicated in its calculation of monthly benefits payable, to some extent this is unavoidable. Some mathematical formula is required in order to make this determination. However, I do not agree that, simply by that fact, there is ambiguity.

[29] In relation to the expression “Income Loss” at page 11, it is first expressed as the result of a calculation, which is then used twice more in the very same section. I cannot accept, and I do not accept, that the same term appearing three times in one section of an insurance policy, could be subject to different interpretations.

[30] I therefore conclude that the plain, literal and ordinary meaning of the terms of this policy, and its most reasonable interpretation, is the interpretation proposed by the respondent. In accordance with this policy, the amount payable to an

insured, in any given month, is calculated by taking the Monthly Benefit Amount (\$17,000.00), and multiplying it by a percentage. This percentage is the “Percentage of Earned Income Loss”, as calculated on page 11. The expression “Income Loss” on page 11, does not equal the actual dollar amount income lost by the policy holder.

[31] I therefore dismiss the application.

J.