

Case number: 351588

13 February 2015

1 Overview

1.1 Dispute

This dispute is about the decision of the Financial Services Provider (FSP) to avoid, under section 29(3) of the Insurance Contracts Act 1984 (the Act), the policy it issued to the Applicant.

A Financial Ombudsman Service (FOS) Case Manager provided the parties with a Recommendation on the issues in dispute. The Recommendation was in favour of the FSP. A copy of the Recommendation is attached to this Determination.

1.2 Issues and Key findings

Were the findings of the Recommendation correct?

The findings contained in the Recommendation were correct and are adopted in this Determination. Further submissions provided after the Recommendation have been considered. I agree with the reasons for the Recommendation and the recommended outcome.

The case relied on by the Applicant in his submission in response to the Recommendation, while having some similar facts, is clearly distinguishable on a number of grounds. The FSP's underwriting decision was consistent with the Applicant's medical history and its underwriting guidelines.

1.3 Determination

This Determination is in favour of the FSP.

Subject to the refund of any premiums paid by the Applicant, the FSP is entitled to avoid the policy under section 29(3) of the Act.

2 Reasons for Determination

2.1 Were the findings in the Recommendation correct?

I have decided this dispute based on what is fair in all the circumstances, having regard to the relevant law, good industry practice, codes of practice and previous FOS decisions. I have taken into account all the material submitted by the parties, both before and after the Recommendation. I am satisfied that the documentation I have relied on has been provided to both parties.

I am satisfied that the Case Manager's Recommendation contains an accurate summary of the dispute, the issues to be determined, any applicable paragraphs of the Terms of Reference and any relevant law.

The findings, reasons and outcome in the Recommendation are correct and are adopted in this Determination. The following is added, after taking into account the submissions provided in response to the Recommendation.

Applicability of case cited in Applicant's response submission

The response submission referred to the recent Federal Court decision in *Graham v Colonial Mutual Life Assurance Society Limited (No 2)* [2014] FCA 717 (Graham). There were some similarities between the facts in Graham and the Applicant's dispute but also some important differences.

In Graham, the life insured's knowledge of his medical conditions was found not to justify a decision to avoid for fraudulent non-disclosure rather than innocent non-disclosure as is alleged by the FSP in this dispute. Given the seriousness of an allegation of fraud, it must be proved by clear and cogent rather than vague or circumstantial evidence.

The medical notes indicate the Applicant received advice and treatment relating to his use of alcohol. This was not disclosed to the FSP when the Applicant applied for insurance. The Applicant's mental health issues were significantly understated in his application for insurance.

As the Applicant conceded, each dispute turns on its facts. I am satisfied that, on the balance of probabilities, the Applicant failed to comply with his duty of disclosure.

Underwriting evidence

The Applicant's response submission on the underwriting evidence did not adequately address the additional risk of the combination of the Applicant's mental health history and medical issues resulting from his alcohol use.

While individually, the risk from each of those issues may have been underwritten, the FSP's underwriting evidence clearly showed that in combination cover would have been declined.

Case number: 351588

28 November 2014

1 Overview

1.1 Dispute

The Applicant held a life insurance policy (Policy), which provided Income Protection and Critical Illness cover, with Financial Service Provider (FSP). The Applicant lodged a claim for under the Policy (Claim).

The FSP then notified the Applicant that it had avoided the Policy pursuant to section 29(3) of the Insurance Contracts Act 1984 (Cth) (the Act) due to the Applicant's failure to comply with his duty of disclosure.

This dispute is primarily about whether the FSP was entitled to avoid the Policy pursuant to section 29 (3) of the Act and if not, whether the FSP was entitled to deny the Claim.

1.2 Issues and key findings

Was the Policy a contract of general insurance or a contract of life insurance?

Whether the Policy was a contract of general or life insurance determines the relevant legislation to be considered.

The Policy was a contract of life insurance as it provided a death benefit which was not restricted in the event of death by accident or death resulting from specific sickness.

Was the FSP entitled to avoid the Policy pursuant to section 29(3) of the Act?

The FSP was entitled to avoid the Policy pursuant to section 29(3) of the Act as the Applicant failed to comply with his duty of disclosure in respect of his history of mental health and alcohol related medical advice. The FSP has demonstrated that it would not have offered a contract of insurance on any terms had the Applicant complied with his duty of disclosure.

Was the FSP entitled to deny the Claim?

The Applicant is not entitled to a benefit as the Policy was avoided pursuant to section 29(3) of the Act.

1.3 Recommendation

This Recommendation is in favour of the FSP.

The FSP is entitled to avoid the Policy pursuant to section 29(3) of the Act. The FSP is required to refund any premiums paid by the Applicant within 30 days if it has not already done so.

2 Reasons for Recommendation

2.1 Was the Policy a contract of general insurance or a contract of life insurance?

The two types of cover (or Plans) under the Policy are to be viewed as separate contracts of life insurance

The Policy provided both Critical Illness and Income Protection (Plans). Section 27A of the Act (which took effect from 28 June 2013 and applies to all contracts of insurance entered into before or on or after 28 June 2013) provides that if a contract of life insurance contains two or more groups of provisions, and each group of provisions could form a single contract of life insurance, then the remedies of non-disclosure apply as if each group of provisions was a separate contract of life insurance.

As both Plans could individually formed a single contract of life insurance under section 27A, they will be reviewed separately.

Both Plans under the Policy provided for an unrestricted death benefit

The Policy held by the Applicant was a contract of life insurance because:

- pursuant to section 9(1)(a) of the *Life Insurance Act 1995* (Cth) (the LI Act) both types of cover provided a Death Benefit, that is a payment of money on the death of the insured and
- The exception under section 9(2) of the LI Act does not apply as neither of the Plans provided a restriction that the death benefit is only to be made in the event of death by accident or death resulting from a specified sickness.

2.2 Was the FSP entitled to avoid the Policy pursuant to s 29(3) of the Act?

The FSP informed the Applicant of his duty of disclosure prior to entering into the contract of insurance

Under section 22 of the Act, an FSP is required to inform an insured of their duty of disclosure. Matters that should be disclosed by an insured are those that the insured knows or a reasonable person in the circumstances could be expected to know were matters relevant to the decision of the insurer whether to accept the risk and if so on what terms.

The Application Form dated 16 April 2013 completed by the Applicant, through his agent, referred to the duty of disclosure contained in the PDS. The Applicant acknowledged:

- "We have read the [Product name] Product Disclosure Statement, current at the time of the application, including Your Duty of Disclosure notice set out in the Significant risks section and understand its contents and what is meant by my duty to disclose.

- I/We understand that my duty to disclose continues after I have completed this application until [FSP] has accepted the risk.”

The PDS provided both the duty of disclosure and the effects of non-disclosure. The FSP has therefore informed the Applicant of his duty of disclosure prior to the entrance of the contract of insurance which was formed in May 2013.

The Applicant failed to comply with his duty of disclosure by not informing the FSP that he received medical advice regarding use of alcohol

Section 21 of the Act provides that an Insured has a duty of disclosure.

The Application form contained the question “Have you ever used illicit drugs or received advice, treatment or counselling for the use of alcohol or illicit drugs?” The Applicant answered “No”.

The Progress Attendance Notes by Dr R demonstrate that the Applicant had attended his medical doctor on the following occasions and received advice regarding his use of alcohol:

Date	Progress Attendance Notes
12 August 2008	Consultation Dr S: <ul style="list-style-type: none"> • History: completion of last visit • Has reduced etoh – 8 AFD in last 1 month • Joined Next Gen • CT scan – unremarkable • Bloods show elevated GGT and LDL • Results of CT, blood biochemistry, Lipid Studies, blood glucose analysis, complete Blood Exam (CBE) given to patient
22 July 2008	Consultation Dr S: <p>History: for check up Etoh excess – 1 bottle of white per day Previous liver abnormalities</p> <ul style="list-style-type: none"> • Reason for visit: alcohol abuse • Management: discussed etoh – aim for 1 afd per week • Blood taken for fasting bloods • Rest of exam next visit
21 December 2005	Consultation Dr R: <ul style="list-style-type: none"> • No alcohol for 10 days and he initially felt very tired but this symptom is improving. Maintaining positive thoughts about not drinking. Mood good ...plans re his house also going well <p>Reason for visit: mood disorder</p>
30 November 2005	Consultation Dr R: <ul style="list-style-type: none"> • Feels that he is drinking too much wine each night • Reason for visit: Alcohol excess

	<ul style="list-style-type: none"> • Management: for MI strategies - weekly support offered
21 September 2005	Consultation Dr R: <ul style="list-style-type: none"> • Reason for visit: Mood disorder • Mood state is excellent – all areas of life going well and hasn't been drinking
6 September 2005	Consultation Dr R: <ul style="list-style-type: none"> • Concerns re alcohol intake explored. Drinks 1-2 bottles of wine most nights • Reason for visit: Regular high intake of alcohol • Management: for assessment and support

Dr R's email correspondence to the Applicant's solicitor dated 1 May 2014 supports the conclusion that the Applicant had received advice regarding the use of alcohol when he states: "I assessed him as taking more than the recommended dose of alcohol daily and suggested that a reduction in intake to the recommended 4 standard daily would assist his weight loss." This would be defined as receiving advice regarding the use of alcohol.

The Applicant was therefore required to answer yes to the question as he had received advice regarding his excessive use of alcohol and reduction of intake in 2008 and 2005. Further on 12 August 2008 Dr S gave the Applicant the results of the blood tests and discussed the elevated GGT levels indicating liver enzyme abnormalities. These results were provided as a follow up to the Applicant's previous attendance with Dr S on 22 July 2008 which dealt with alcohol excess.

Further, a reasonable person in the Applicant's circumstances would have known that that the information was relevant to the FSP's consideration of risk if the question was put directly to him/her.

The Applicant failed to comply with his duty of disclosure by not informing the FSP of his mental health history between 2004 and 2008

The Applicant was also asked in the Application whether he had ever suffered symptoms of, or received advice or treatment for mental illness. He answered that he had.

When asked to describe his symptoms, the date they started and how long they commenced, the Applicant answered the symptoms of stress/depression lasted from 2000 to 2003 and that he had 3 years of monthly counselling and he took Zantax.

He was then asked whether he had recurrences of this condition. He answered that he had not. He was then asked to advise of all treatment he has received and/ or is receiving including counselling, name/s of medications, hospitalisation etc. His response was "As previous question 3 years counselling with my GP".

The medical history notes of Dr R demonstrate that the Applicant failed to disclose that:

- he had received advice and treatment for mood disorder and depression between 2004 and 2006;

- he was prescribed medication Lexapro which was an anti-depressant. He took Lexapro in 2004, 2005, 2006, 2007 until he ceased in July 2008.
- He was also prescribed Valproate Sodium Enteric for his mood disorder which was ceased in July 2008.

The Applicant states that he disclosed what he recalled to be the most severe symptoms namely during period between 2000 and 2003 which is supported by Dr R's email correspondence to the Applicant's solicitor dated 1 May 2014. Further that the Applicant did not have the benefit of his doctor's notes and the events arose more than a decade before the Applicant applied for the policy.

However Dr R's email correspondence confirms that the Applicant had suffered a recurrence of the same condition when he said:

- the Applicant suffered from low level depression from December 2001 and made a full recovery during 2002 with minor fluctuations in 2003 and
- The Applicant suffered a relapse of symptoms of depression between June 2004 and September 2004. He also states that Applicant's mood continued to fluctuate over the next year.

The Applicant was able to recall information from between 2000 and 2003. On this basis, it would be reasonable for the Applicant to have been able to recall more recent information which was:

- The recurrence of the condition of depression in 2004 and
- The prescription of Lexapro between 2004 and 2008 on an ongoing basis.

Further, a reasonable person in the Applicant's circumstances would have known that both the recurrence of his condition of depression and the length of history of taking Lexapro which was a prescribed anti-depressant would be relevant to the FSP's consideration of risk in light of the direct questions put to him/her.

The FSP would not have entered into the contract of insurance for either of the Plans had the Applicant complied with his duty of disclosure

Section 29(3) of the Act allows a life insurer to avoid a contract of insurance within 3 years of its commencement for innocent non-disclosure or misrepresentation by the policy owner. However, the life insurer must demonstrate that it would not have entered into the contract of life insurance on any terms had the insured complied with the duty of disclosure

The FSP has provided its Underwriting Opinion by Ms S dated 20 June 2014 in which she states that the FSP would not have entered into a contract of insurance on any terms had the Applicant complied with his duty of disclosure regarding both:

- The receipt of advice regarding his use of alcohol and
- Mental health history between the period 2004 and 2008.

The Underwriter states the FSP would have requested further information from the Applicant's treating doctor including a copy of the applicant's clinical file and/or Personal Medical Attendance Reports and completion by the treating doctor of the Attending Physician's Mental Health Questionnaire.

The Underwriter states that upon receipt of the information contained in Dr R's medical file, it would not have issued cover at all on the basis of the following factors combined:

- the Applicant's mental health history would have been categorized as a recurrent depressive disorder with continuing treatment and with counselling and anti-depressant medical and rating of mild/moderate would have been applied and
- the Applicant's past excessive alcohol consumption less than 10 years ago prior to the date of the application together with the Applicant's previous liver enzyme abnormalities containing high LFTs. The Underwriter has referred to the high LFTs in 2003, 2008 and 2009 and refers specifically to the GGT levels contained therein being a liver enzyme and marker for excessive alcohol consumption.

The GGT levels in the biochemical reports show:

- Report dated 14 March 2003: GGT 109 U/L against a range of (0-60)
- Report dated 18 June 2004: GGT 412 U/L against a range of (0-60),
- Report dated 22 July 2008: GGT 184 U/L against a range of (0-60)
- Report dated 6 February 2009: GGT 165 U/L against a range of (0-60).

The FSP has provided Underwriting Guidelines which support the Underwriter's Opinion that:

- the Applicant's Critical Illness policy application would have been assessed as "postpone" under the Reinsurance Guidelines . The FSP has provided internal Underwriting Guidelines which states it does not postpone. It states that when the life insured cannot be offered terms, cover must be declined.
- the Applicant's Income Protection policy application would be assessed as "Decline".

The FSP has therefore demonstrated that it would not have entered into a contract of insurance on any terms for each of the Critical Illness Plan and the Income Protection Plan had the Applicant complied with his duty of disclosure and informed the FSP of both his history of advice regarding use of alcohol and mental health history for the period 2004-2008.

The FSP was entitled to avoid the contract of insurance pursuant to section 29(3) of the Act as it had avoided the Policy within 3 years of its commencement

The FSP has avoided the Policy within 3 years of its commencement. The FSP was entitled to avoid the Policy under section 29(3) of the Act on the basis of innocent non-disclosure.

Therefore the FSP is required to refund premiums paid by the Applicant since inception of the Policy if it has not already done so.

2.3 Was the FSP entitled to deny the Claim?

The Applicant is not entitled to a benefit as the FSP was entitled to avoid the Policy from inception.

3 Supporting information

3.1 On which date was the contract of insurance formed?

As the FSP was entitled to avoid the contract of insurance based on the failure to disclose information on the application form for the Policy, the issue as to whether the contract of insurance was formed on 9 May, 13 or 14 May 2013 ceases to have any relevance to the outcome of the dispute.

3.2 Legislation

INSURANCE CONTRACTS ACT 1984 - SECT 27A

Certain contracts of life insurance may be treated as if they comprised 2 or more separate contracts of life insurance

(1) If:
(a) a [contract of life insurance](#) includes 2 or more groups of provisions (for example, provisions that are grouped into 2 or more separate parts); and
(b) each group of provisions could form a single [contract of life insurance](#);
then this Division applies as if each group of provisions were a separate [contract of life insurance](#).

(2) If:
(a) a [contract of life insurance](#) includes 2 or more groups of provisions (for example, provisions that are grouped into 2 or more separate parts); and
(b) because of subsection (1), this Division applies as if each group of provisions were a separate [contract of life insurance](#); and
(c) the contract also includes provisions (**related provisions**) that relate to or affect the operation of one or more of the groups of provisions referred to in paragraph (a);
then the related provisions are, for the purposes of this Division, to be regarded as provisions included in each relevant separate [contract of life insurance](#) referred to in paragraph (b).

(3) If a [contract of life insurance](#) provides insurance cover in relation to 2 or more life insureds, this Division applies as if the insurance cover provided in relation to each life insured were provided by a separate [contract of life insurance](#).

(4) If a [contract of life insurance](#) provides:
(a) insurance cover in relation to a life insured that is underwritten on particular terms; and
(b) insurance cover in relation to that life insured that:
(i) is not underwritten; or
(ii) is underwritten on different terms;

then this Division applies as if the insurance cover referred to in paragraph (a) and the insurance cover referred to in paragraph (b) were each provided by a separate [contract of life insurance](#).

Note: The effect of this section in relation to a [contract of life insurance](#) to which subsection (1), (3) or (4) applies is that different remedies may be available to the insurer in respect of each separate [contract of life insurance](#) that is taken to exist by virtue of the relevant subsection

LIFE INSURANCE ACT 1995 - SECT 9

Life policy

- (1) Subject to subsection (2), each of the following constitutes a life policy for the purposes of this Act:
- (a) a contract of insurance that provides for the payment of money on the death of a person or on the happening of a contingency dependent on the termination or continuance of human life;
 - (b) a contract of insurance that is subject to payment of premiums for a term dependent on the termination or continuance of human life

- (c) a contract of insurance that provides for the payment of an annuity for a term dependent on the continuance of human life;
 - (d) a contract that provides for the payment of an annuity for a term not dependent on the continuance of human life but exceeding the term prescribed by the regulations for the purposes of this paragraph;
 - (e) a continuous disability policy;
 - (f) a contract (whether or not it is a contract of insurance) that constitutes an investment account contract;
 - (g) a contract (whether or not it is a contract of insurance) that constitutes an investment-linked contract.
- (2) A contract that provides for the payment of money on the death of a person is not a life policy if:
- (a) by the terms of the contract, the duration of the contract is to be not more than one year; and
 - (b) payment is only to be made in the event of:
 - (i) death by accident; or
 - (ii) death resulting from a specified sickness

LIFE INSURANCE ACT 1995 - SECT 9A

Continuous disability policy

- (1) Subject to this section, a continuous disability policy is a contract of insurance:
- (a) that is, by its terms, to be of more than 3 years' duration; and
 - (b) under which a benefit is payable in the event of:
 - (i) the death, by accident or by some other cause stated in the contract, of the person whose life is insured (the *insured*); or
 - (ii) injury to, or disability of, the insured as a result of accident or sickness; or
 - (iii) the insured being found to have a stated condition or disease.
- (2) A contract of insurance that is, by its terms, to be of a duration of not more than 3 years is taken to comply with paragraph (1)(a) if:
- (a) contracts of insurance of the same kind as the contract are usually of more than 3 years' duration; and
 - (b) the contract is of a lesser duration only because of the age of the owner of the policy at the time when it was entered into.
- (3) A contract of insurance is not a continuous disability policy if the terms of the contract permit alteration, at the instance of the life company concerned, of the benefits provided for by the contract or the premiums payable under the contract.
- (4) A contract of insurance the terms of which permit alteration, at the instance of the life company concerned, of the benefits provided for by the contract is not thereby excluded by subsection (3) from being a continuous disability policy if, by those terms, the only alterations that are permitted to be made are alterations that improve the benefits and are made following an offer made by the life company and accepted by the owner of the policy.
- (5) A contract of insurance the terms of which permit alteration, at the instance of the life company concerned, of the premiums payable under the contract is not thereby excluded by subsection (3) from being a continuous disability policy if the terms of all contracts of the same kind as the contract only permit such alterations if they are made on a simultaneous and consistent basis.
- (6) A contract of consumer credit insurance within the meaning of the [Insurance Contracts Act 1984](#) is not a continuous disability policy.
- (7) A contract of insurance entered into in the course of carrying on health insurance business is not a continuous disability policy

Section 21 of Insurance Contracts Act 1984

Section 21 The insured's duty of disclosure

- (1) Subject to this Act, an insured has a duty to disclose to the insurer, before the relevant contract of insurance is entered into, every matter that is known to the insured, being a matter that:
- (a) the insured knows to be a matter relevant to the decision of the insurer whether to accept the risk and, if so, on what terms; or
 - (b) a reasonable person in the circumstances could be expected to know to be a matter so relevant.
- (2) The duty of disclosure does not require the disclosure of a matter:

- (a) that diminishes the risk;
 - (b) that is of common knowledge;
 - (c) that the insurer knows or in the ordinary course of the insurer's business as an insurer ought to know; or
 - (d) as to which compliance with the duty of disclosure is waived by the insurer.
- (3) Where a person:
- (a) failed to answer; or
 - (b) gave an obviously incomplete or irrelevant answer to;
- a question included in a proposal form about a matter, the insurer shall be deemed to have waived compliance with the duty of disclosure in relation to the matter.

Section 22 of Insurance Contracts Act 1984

Section 22 Insurer to inform of duty of disclosure

- (1) The insurer shall, before a contract of insurance is entered into, clearly inform the insured in writing of the general nature and effect of the duty of disclosure and, if section 21A applies to the contract, also clearly inform the insured in writing of the general nature and effect of section 21A.
- (2) If the regulations prescribe a form of writing to be used for informing an insured of the matters referred to in subsection (1), the writing to be used may be in accordance with the form so prescribed.
- (3) An insurer who has not complied with subsection (1) may not exercise a right in respect of a failure to comply with the duty of disclosure unless that failure was fraudulent.

Section 29 of Insurance Contracts Act 1984

Section 29 Life insurance

- (1) This section applies where the person who became the insured under a contract of life insurance upon the contract being entered into:
- (a) failed to comply with the duty of disclosure; or
 - (b) made a misrepresentation to the insurer before the contract was entered into;
- but does not apply where:
- (c) the insurer would have entered into the contract even if the insured had not failed to comply with the duty of disclosure or had not made the misrepresentation before the contract was entered into; or
 - (d) the failure or misrepresentation was in respect of the date of birth of one or more of the life insureds.
- (2) If the failure was fraudulent or the misrepresentation was made fraudulently, the insurer may avoid the contract.
- (3) If the insurer would not have been prepared to enter into a contract of life insurance with the insured on any terms if the duty of disclosure had been complied with or the misrepresentation had not been made, the insurer may, within 3 years after the contract was entered into, avoid the contract.

3.3 Policy Documents

PDS

Additional information about your policy [p97]

[...]

Guaranteed renewable [p98]

We guarantee to renew your benefit each year until the Expiry Date of the benefit as long as you pay the required premium. This will apply regardless of changes in your health, occupation or pastimes or if you have made a claim under the Income Protection or Business Expenses Plan.

Health and Information required

We will ask for medical and other information about you, such as health, income, occupation, residency, travel details, lifestyle and pastime. We will treat this information as confidential. The information will enable us to assess:

- Your eligibility for the type of cover you have selected
- Any exclusion or special conditions that may apply to your policy
- The correct premium of your policy.

In some cases we may request additional information including further medical evidence depending on your personal situation or the amount of cover you are applying for.

Information on your policy

When your application has been approved for cover by us, we will mail or deliver to you or the trustee (where applicable) a policy document and your policy schedule free of charge.

Our contract with you and the policy owner includes this PDS, relevant policy documents and the policy schedule (including any conditions or endorsements mention in or attached to the policy schedule.

[...]

What is the cooling-off period?

If you are not happy that the policy and benefits meet your needs you may cancel the policy within the 28 –day cooling-off period and receive the full refund of all premiums paid.* The cooling-off period starts from when you (or the trustee) receive the policy document or from the end of the 5th day after the day on which we sent the policy document, whichever is the earliest to occur.

Significant Risks [p101]

Pre-existing Condition

If a claim for an insurance benefit relates to a Pre-existing Condition (as defined on page 58) that you have not disclosed the full details of to us before the benefit commencement date (as shown on your Policy Schedule) or the date of any increase, reinstatement or improvement of the benefit, then the claim will not be paid in respect of that benefit.

Your duty of disclosure

Before you enter into a contract of insurance with an insurer, you have a duty under the Insurance Contracts Act 1984, to disclose to the insurer every matter that you know, or could reasonably be expected to know, is relevant to the insurer's decision whether to accept the risk of insurance and, if so, on what terms.

You have the same duty to disclose those matters to the insurer before you renew, extend, vary or reinstate this contract of insurance.

Your duty however does not require disclosure of a matter:

- That diminishes the risk to be undertaken by the insurer;
- That is common knowledge;
- That your insurer knows or, in the ordinary course of this business, ought to know;
- As to which compliance with your duty is waived by the insurer.

[...]

Non-disclosure

If you fail to comply with your duty of disclosure and the insurer would not have entered into the contract on any terms if the failure had not occurred, the insurer may avoid the contract within three years of entering into it. If your non-disclosure is fraudulent, the insurer may elect to avoid the contract at any time from its inception.

An insurer who is entitled to avoid a contract of insurance may, within three years of entering into it, elect not to avoid it but to reduce the Sum Insured in accordance with a formula that takes into account the contribution that would have been payable if you had disclosed all relevant matters to the insurer.

Policy

1. Introduction [p4]

The policy document and the application for this insurance, including any declaration and statements relating to this insurance, together with the Product Disclosure Statement and Policy Schedule constitute the entire contract ('the Policy'). The term 'the Policy' includes any endorsements and rider Benefit conditions applicable. Any variation of this contract must be evidenced in writing bearing the signature of one of Our authorised officials.

The Policy is issued, on the date the Policy Schedule was sent, by [FSP] to the Policy Owner named on the attached Policy Schedule:

- (i) in consideration of the payment of the premium and stamp duty as stated on the Policy Schedule; and
- (ii) on the basis of the application, declaration and any other statements made by the Policy Owner and the Life Insured to Us in connection with the Policy.

Pre-existing condition

If a claim for an insurance benefit relates to a Pre-existing Condition (as defined in condition 8) that You have not disclosed the full details of us before the benefit commencement date (as shown on Your Policy Schedule) or the date of any increase reinstatement or improvement of the benefit, then the claim will not be paid in respect of that benefit.

Your Duty of Disclosure

[As per PDS]

Non-disclosure

[As per PDS]

2. General Terms and Conditions

2.1 Your Priority Protection Policy

We have issued the Policy in accordance with the contents of Your application and any supporting documents We have obtained. The contract between You and Us is based completely on the accuracy of these documents, and You have a duty to disclose in them any information which is material to the risks We are insuring.

The policy document is evidence of the contract between You and Us. The contract is one of offer and acceptance and commences when Your application has been accepted

by Us. If we do not accept your application but instead make you a counter-offer in relation to this Policy, the contract commences when You accept the counter-offer.

The enclosed Policy Schedule is a summary of the premium and benefit amounts under Your Policy and forms part of the contract.

2.2 Cooling-Off Period

[..]

2.3 Renewal Statement

Each year You will receive a renewal statement showing the level of Your selected benefits. Any change to the fees and charges and to the taxation treatment of the Policy and any other matter relevant to the Policy over the preceding year will also be shown in the renewal statement.

[...]

2.8 Term

The Policy runs for 12 months. It may be renewed annually, by payment of the renewal premium within the 60 days of grace, until the Expiry Date shown on the Policy Schedule.

2.9 Guaranteed Renewable

Provided You pay the appropriate premium in full when due, each benefit under the Policy is guaranteed renewable each year to the Expiry Date of that benefit regardless of changes in the Life Insured's health, occupation or pastimes and in the case of the Income Protection Plan and the Business Expenses Plan, whether a claim has been made.

4. Crisis Recovery Stand Alone Plan

4.1.2 Death Benefit

If the Life Insured dies prior to the Expiry Date of the Crisis Recovery Stand Alone benefit and no benefit is payable in respect of a Crisis Event, a lump sum will be payable.

The amount of the lump sum death benefit will be the lower of \$5,000 and the Crisis Recovery Stand Alone Sum Insured.

4.6.1 Expiry Dates

Premiums and cover for each benefit cease at the Expiry Date of that benefit.

The Expiry Date for each benefit is the latest Policy Anniversary prior to the Life Insured attaining a specific age. The specific ages for each benefit are as follows:

Benefit	Age
Crisis Recovery Stand Alone	70

5. Income Protection Plan (Agreed or Indemnity)

5.1.8 Death Benefit

If the Life Insured dies while the Income Protection Plan is in force We will pay You or Your nominated beneficiary six times the Insured Monthly Benefit up to a maximum death benefit of \$60,000.

5.8.4 Expiry Date

Premiums and cover for each benefit ceases at the Expiry Date of that benefit.

The Expiry Date for the Income Protection benefit (Agreed Value or Indemnity), [...] [PO] benefit is the latest Policy Anniversary prior to the Life Insured's 65th birthday (Occupation Categories AAA) [...].

The Expiry Date for the Income Protection Lump Sum Benefit is the latest Policy Anniversary prior to the Life Insured's 65th birth day (Occupation Categories AAA).[..].

7. Policy Schedule

The Policy Schedule sets out the benefits purchased under the Policy. The Policy Schedule should be read in conjunction with the Policy Terms and Conditions.

8. Definitions

'WE, US, OUR' relates to FSP

'YOU, YOUR' relates to the Policy Owner

'LIFE INSURED, HE SHE, HIS HER, HIMSELF, HERSELF' means the person named as the Life Insured on the Policy Schedule.

'POLICY OWNER' means the person or persons named in the Policy Schedule as the 'Policy Owner' and any successor in title of that Policy Owner.

Expiry Date for a benefit means the premiums expiry date shown on the Policy Schedule for that benefit.

Policy Schedule

Policy Number: XXXXXXX5	Sum Insured Indexed: YES
Policy Owner: Applicant	Age next birthday: 54
Life Insured: Applicant	Occupation Code: AAA
Commencement date: 14/5/2013	
First Premium Due:	12/5/2013
Expiry Date:	12/5/2029

Benefit Details

Benefit Name:	Sum Insured	Premium Expiry Date	Premium Type
Crisis Recovery Stand Alone Plan	\$200,000	12/5/2029	Stepped
Crisis Reinstatement	\$200,000	12/5/2029	Stepped
TPD (any Occupation)	\$200,000	12/5/2029	Stepped
Income Protection Agreed Plan	Insured Monthly	Premium Expiry	Premium Type
Benefit	Date		
Income Protection	\$10,000	12/05/2024	Stepped

Claim Escalation	\$10,000	12/05/2024	Stepped
[PO] \$10,000	12/05/2014	Stepped	

3.4 Claim documents

Record	Key points
<p>Underwriting Application Summary and Decision including e express Application for Policy dated 16 April 2013</p>	<p>Document was prepared by the Applicant's broker CH: G Personal History [.] Do you drink alcohol? Yes Have you ever used illicit drugs or received advice, treatment or counselling for the use of alcohol or illicit drugs? No</p> <p>Alcohol State number of standard drinks per week 20 Describe the type of drinks Beer/wine</p> <p>Medical History: Have you arranged to have any of the following? No examination arranged</p> <p>Have you ever suffered symptoms of, or had, or been told you have, or received any advice, investigation or treatment for any of the following: High blood pressure, chest pains, high cholesterol, heart murmurs, rheumatic fever, any heart complaint or stroke NO Asthma, chronic lung disease, sleep apnoea or other respiratory disorder NO Depression, anxiety/stress state, fatigue, panic attacks, psychiatric treatment/counselling, mental illness or nervous disorder YES Indicate the condition(s) you have had or received treatment Stress [...] Describe your symptoms including the dated started and how long they lasted. Year 2000, stress due to marriage breakdown at the time. No time off work, counselling from GP. Went for about 3 years counselling monthly. Took Zantax over the 3 years. [...] Have you ever had suicidal thoughts or attempted suicide? Yes Provide details including what triggered the suicide attempt or thought, how often they have occurred and when was the last occurrence. Back in 2000 due to stress depression period did certainly think of suicide but never since and did not ever try.</p>

	<p>Date symptoms commenced: 2000 Have you had any recurrences of this condition? No</p> <p>Advise of all treatment you have received and /or are receiving including counselling, names/s of medications, hospitalization etc. As previous question 3 years counselling with my GP</p> <p>[...] Declaration</p> <ul style="list-style-type: none"> • Adviser declaration confirms that the Applicant has been provided with a copy of the PDS; Applicant has checked the answers in the Application Form and the Life insured has checked the health information provided. • The Life Insured/ Policy Owner, [Applicant] has declared the following to me: • I/We understand that the information contained in the attached statements or input into the computer using the electronic application system is true and correct and that no information material to the insurance has been withheld • I/We understand that [FSP] will send a copy of the statement I have provided to my personal address, that I/we must review this information and advised [FSP] of any inaccuracies or omissions, and of any changes in health or circumstances up until the time a policy issued • I/We agree that any personal statements made or completed electronically together with any relevant documents shall form the basis of the proposed contract of insurance with [FSP] . I/we acknowledge that these personal statements may result in certain exclusions or special acceptance terms becoming applicable. In anticipation of any exclusions or special terms applying to my policy, the effects of the exclusions and special acceptance terms have been explained to me. [...] • I/We have read the [Product name] Product Disclosure Statement , current at the time of the application, including Your Duty of Disclosure notice set out in the Significant risks section and understand its contents and what is meant by my duty to disclose. • I/We understand that my duty to disclose continues after I have completed this application until [FSP] has accepted the risk. • Electronic signature • Acceptance date: 16/4/2013
<p>Special Acceptance Terms signed 9 May 2013</p>	<p>FSP sends Applicant Special Acceptance Terms Varying the premium amount and asking further health of the Owner ; Applicant signs the document</p>
<p>Email from Applicant's agent to FSP dated</p>	<p>Emailed to: info section of the FSP</p>

13 May 2013 at 10.30am	Attached are the outstanding requirements for the above policy for [Applicant] The original of these documents as well as a cheque for the premium is being sent by express post today.
Disability Income Claim Form completed by Applicant dated 2 September 2013	Nature of sickness: Pulmonary embolism – after effects – shortness of breath + depression When did your symptoms first occur? 13/5/2013 [...] When did you first consult a doctor or medical provider for your condition? 13/5/2013 [...] Were you hospitalised? Yes Date admitted: 13/5/2013 Date discharged 15/5/2013
Medical Attendant Statement in support of Disability Income Form dated 18 October 2013	Condition: Pulmonary Embolism – cause likely related to plane flight Subsequent Moderate to Severe Depression These are both illnesses On what date did the condition first occur? 13/5/2013
FSP correspondence to Applicant dated 14 May 2013	Enclosing the Policy document and Policy Schedule
FSP letter to Applicant dated 17 December 2013	FSP states: <ul style="list-style-type: none"> • Advising intention to avoid policy pursuant to s29(3) of the ICA due to failure to disclose diagnosis of pulmonary emboli on 13 May 2013 • Underwriting confirm that FSP would have immediately withdrawn the Offer of Revised Terms and declined the application for insurance cover • Offer the Applicant opportunity to respond
Applicant letter to FSP dated 23 Dec 2013	Applicant states: He is advised that the policy was in force on 13 May 2013 at 10.30am when FSP received the SAT by adviser by email Timeline: 2/5/13 Received offer of SAT 9/5/13 Signed SAT & posted to adviser 13/5/13 SAT received by adviser in mail and emailed to FSP at 10.30am 13/5/13 11:30am went to Dr K 13/5/13 11.45am – Sent to Sound Radiology 12.04pm CT scan Dr K called ambulance at 12.30pm Admitted to Hospital
FSP letter to Applicant dated 14 January 2014	FSP states: <ul style="list-style-type: none"> • FSP received the SAT on 13 May 2013, the Policy was issued on 14 May 2013 • Policy was issued in reliance and on the basis of the application, declaration and the signed SAT, in which

	<p>Applicant declared there had been no changes to his health</p> <ul style="list-style-type: none"> • Duty of disclosure was ongoing; Applicant did not disclose: symptoms of left calf pain on 11 May 2013 Diagnosis of Pulmonary Embolism on 11 May 2013 • Had [FSP] been aware would have withdrawn the SAT and declined the Applicant's application for insurance cover on any terms. This is in light of the pulmonary embolism on 13 May 2013. • FSP avoiding the Policy pursuant to s29(3) of ICA
Statement of Underwriter MS dated 3 April 2014	<p>Underwriter states:</p> <ul style="list-style-type: none"> • FSP would not have offered contract of insurance for either plans on any terms had there been disclosure by the Applicant regarding : <ul style="list-style-type: none"> - Applicant's mental history between 2004 and 2008 - Receipt of advice regarding use of alcohol
Statement of Underwriter MS dated 20 June 2014	<p>Underwriter confirms:</p> <ul style="list-style-type: none"> • FSP would not have offered contract of insurance for either plans on any terms had there been disclosure by the Applicant regarding : <ul style="list-style-type: none"> - Applicant's mental history between 2004 and 2008 - Receipt of advice regarding use of alcohol
FSP General Guidelines	<ul style="list-style-type: none"> • FSP practice when considering declinature of cover can include some or all of the following: <ul style="list-style-type: none"> [...] • Medical evidence indicates the insured requires further investigation or results of preliminary tests are inconclusive • Diagnosis is unknown with or without investigations being undertaken [...] <p>When the life insured cannot be offered terms, cover MUST be declined – cases are not postponed or deferred</p>
Reinsurance Guidelines Alcohol Consumption	<ul style="list-style-type: none"> • Critical Illness Alcohol abuse/Harmful Drinking (> 6 units a day) In history With continued evidence of abuse eg more than mild liver enlargement, abnormal LFTs Decline • Income Protection No dependence GGT Known Harmful drinking 1P4: Dec
Reinsurance Guidelines Mental Illness	<ul style="list-style-type: none"> • Critical Illness Chronic or recurrent depression Associated drug and/or alcohol abuse Less than or equal to 10 years Postpone • Income Protection Recurrent depressive disorder Prior suicide ideation

Present > 3 years IP4: Dec

3.5 Mental Health history between June 2004 and 2008

Date	Progress History Notes for Dr R
22 July 2008	<ul style="list-style-type: none">• History: for check up atoh excess – 1 bottle of white per day• Previous liver enzyme abnormalities• Actions: Lexapro 20mg Tablet ceased• Valproate Sodium 200 mg enteric coated tablet ceased• Reason for visit: Alcohol abuse
19 September 2007	<ul style="list-style-type: none">• Prescriptions printed: Lexapro Tablet 20 Mg 2 mane• Prescription printed: Valproate Sodium Enteric coated Tablet 1 twice a day
29 August 2006	<ul style="list-style-type: none">• Prescriptions printed: Valproate Sodium Ec Tablet 200mg 1 b d
22 August 2006	<ul style="list-style-type: none">• Prescriptions printed: Lexapro Tablet 20 Mg 2 mane
4 July 2006	<ul style="list-style-type: none">• Tried reduction but had adverse reaction so has returned to former dose• Reason for visit: Mood• Management: Continue present therapy• Actions: Lexapro Tablet 20 mg dosage changed from 1 mane to 2 mane• Prescriptions printed: Lexapro Tablet 20 Mg 2 mane
13 June 2006	<ul style="list-style-type: none">• Excellent progression on fronts... Martin would like to reduce his medication and so will begin with a careful reduction of his Lexapro• Reason for visit: Mood disorder• Management: for reduction of Lexapro to 1 tab then review• Actions: Lexapro Tablet 20mg dosage changed from 2 mane to 1 mane•
12 April 2006	<ul style="list-style-type: none">• Describes his nihilistic feelings most of the time at the moment and yet can feel happy and content when he is home performing very simple tasks. He is self critical about this believing that he should be doing much more profound things to find joy• Reason for visit: mood disorder• Management: continue present therapy
29 March 2006	<ul style="list-style-type: none">• Reason for visit: mood disorder• Management: continue present therapy• Prescription printed: Lexapro Tablet 20 mg 2 mane
15 March 2006	<ul style="list-style-type: none">• Mood is slipping a little – discussed. Worried about [son] who is acting out at school• Reason for visit: Mood disorder• Management: Continue present therapy

15 February 2006	<ul style="list-style-type: none"> • Good progress this month and work issues discussed. Mood stable • Reason for visit: Mood disorder Management: continue present therapy
18 January 2006	<ul style="list-style-type: none"> • Continues to do well but has had 2 relapses in the last month. Motivation reviewed and a new job prospect has added to his desire not to drink • Reason: Mood disorder • Management: Continues present therapy
21 December 2005	<ul style="list-style-type: none"> • No alcohol for 10 days and he initially felt very tired but this symptom is improving. Maintaining positive thoughts about not drinking. Mood good ...plans re his house also going well • Reason for visit: mood disorder • Management: continue present therapy
21 September 2005	<ul style="list-style-type: none"> • Mood state is excellent – all areas of life going well and he hasn't been drinking • Reason for visit: mood disorder Management: continue present therapy Review in 2 months Actions: Prescription printed: Lexapro Tablet 20 mg 2 mane
20 July 2005	<ul style="list-style-type: none"> • Mood state is now stable and normal. Work,home life and his relationships are all satisfactory. Has had gastric banding and has begun weight loss • Reason for visit: Mood disorder – resolved • Management continue present therapy. Requests no change to his therapy
25 May 2005	<ul style="list-style-type: none"> • Mood and mental state is excellent at the moment. Happy with his work and home life. He has organised to undergo gastric banding with a view to weight loss. This has held his self esteem considerably • Management: Continue present therapy Review in 1 mth after gastric banding • Actions: Letter written Mental Health Plan formulated – to give copy to Applicant
14 April 2005	<ul style="list-style-type: none"> • Prescriptions printed: Lexapro Tablet 20mg 2 mane • Valproate Sodium Ec Tablet 200mg 1 bd
30 March 2005	<ul style="list-style-type: none"> • Mood is down again. Self esteem very low –mainly due to his weight increase • Reason for visit: mood disorder • Management: To restart the Valproate and review
24 November 2004	<ul style="list-style-type: none"> • Mood is excellent now. Work, home and relationships all going well • Management: continued present therapy
27 October 2004	<ul style="list-style-type: none"> • Mood is fair but rejection from people that he approaches still very painful • Discussion regarding his insurance claim reveals that in both 02 and 03 he had stopped the antidepressant medications prescribed earlier in the year because of side effects and

	<p>apparent lack of efficacy. Aropax prescribed in 01 made him drowsy and he didn't like the slight vertigo that the effexor gave him. When he renewed his insurance policy in mid 02 and 03 he asn't taking any medication and is quite sure he would have declared this if he had been.</p>
13 October 2004	<ul style="list-style-type: none"> • Ambivalence about alcohol intake explored • Actions Prescription printed: Lexapro tablet 20mg 2 mane
5 October 2004	<ul style="list-style-type: none"> • Out of medication • Prescription printed: Lexapro tablet 20mg 2 mane
21 September 2004	<ul style="list-style-type: none"> • Reason for visit: Mood disorder • Mood state is excellent – all areas of life going well and hasn't been drinking
22 September 2004	<ul style="list-style-type: none"> • Mood now good and mood state has been stable for the last two weeks. Relationship with his son is excellent and with his former wife is also much better. Management: continue present therapy •
25 August 2004	<ul style="list-style-type: none"> • Excellent progress with improved mood and growing insight
11 August 2004	<ul style="list-style-type: none"> • Mood very low, Suicidal thoughts discussed and contract made not to act on these thoughts. Anxious at times • Actions: Lexapro Tablet 20mg dosage changed from 1 mane to 2 mane
4 August 2004	<ul style="list-style-type: none"> • Mood fluctuates with some very good periods and some anxiety persisting
28 July 2004	<ul style="list-style-type: none"> • Mood has improved – relaxed when he is quietly at home. Encouraged to stay with this
21 July 2004	<ul style="list-style-type: none"> • Mood a little better. Insurance medical form completed. Mood disorder –depression – to end of sept
14 July 2004	<ul style="list-style-type: none"> • Mood very depressed with low self-esteem and some features of anxiety- nausea • Management: for trial of Valproate and expressive psychotherapy. Needs time off work and treatment plan • Prescription: Valproate Sodium EC Tablet 200mg
29 June 2004	<ul style="list-style-type: none"> • Feeling better today and feels the benefit of resting. To have some leave next week. • Management: Continue present therapy.
23 June 2004	<ul style="list-style-type: none"> • Mood remains low with very low self esteem and moderate level of hopelessness. Suicidal risk explore and whilst he had thoughts he states that he would not act them out, citing life damage to his sons as preventer. No access to firearms • Management: • Time off work to attend to his physical and mental health. He will explore his insurance options. To stat with focussed cares of his sons and fitness programs • Actions: Lexapro Tablet 10mg changed to Lexapro Tablet 20mg
9 June 2004	<ul style="list-style-type: none"> • Full hand of symptoms of severe depression including suicidal thoughts • Management: for medication and break from work

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- Actions: Prescriptions printed: Lexapro Tablet 10mg 1 mane