‘AILA/ANZIIF Life Insurance Law Annual Review

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Fraudulent Non-Disclosure and Misrepresentation

- When can you avoid a life policy?

- Avoidance under s.29(2) Insurance Contracts Act ("ICA") the insurer must show:

  - A failure to comply with the duty of disclosure or a misrepresentation before policy entered into
  - Had the insurer known the true facts it would not have entered into the same policy with the insured ("underwriting hurdle")
  - If the non-disclosure or misrepresentation was fraudulent the insurer may avoid the contract from inception, subject to s.31 ICA

What is fraud?

- Intentionally deceitful or reckless disregard for the truth.
- Fraud usually involves:
  - Dishonesty; or
  - No belief in the truth of what is said or not said; or
  - An attempt to mislead insurer as to the nature of the risk.
- Standard of proof is to "*Briginshaw"* standard – can the court be reasonably satisfied on the balance of probabilities that the insured has been fraudulent?

What is fraud?

- Fraud is in the mind, usually proved by way of circumstantial evidence

- Must disprove “alternative honest explanations” for the failure to disclose or misrepresentation

Montclare v Metlife Insurance Limited [2015] VSC 306

Facts

- In 1998 Mr Montclare obtained cover from MetLife over the life of Mr Shilton as the life insured. The initial application was for $300,000 and a second application to increase cover to $1.1m.

- In 2001 Mr Shilton committed suicide at age 43 and Mr Montclare claimed the $1.1m death benefit.

- In December 2001 MetLife denied the claim and avoided the policy under s.29 of the ICA as a result of misrepresentation and non-disclosure by Mr Montclare (as policy owner) and Mr Shilton (as life insured).

Montclare v Metlife Insurance Limited [2015] VSC 306

- MetLife argued that Montclare and Shilton misrepresented or failed to disclose:
  - Who signed Shilton's signature on the two applications
  - The purpose of the insurance
  - Montclare's previous unsuccessful attempts to obtain cover
  - Shilton's medical history

Montclare v Metlife Insurance Limited [2015] VSC 306

Key Issues

- Was Montclare an insured and subject to the ICA?
- Whether Montclare had made any fraudulent non-disclosures or misrepresentations; and
- Whether Shilton, as life insured, made any misrepresentations.

Montclare v Metlife Insurance Limited [2015] VSC 306

'The Signatures'

- Issue at trial as to whether Montclare forged Shilton's signature.
- Montclare gave evidence that he had Shilton's authority to sign the medical authority and the 2 letters but denied he signed the declarations on the applications.
- The Court in fact found that Montclare had signed all of Shilton's signatures, BUT;
- The Court accepted that Shilton had authorised Montclare to sign his name and there was no dishonest purpose.
- No remedy as the underwriting evidence from MetLife was that had it known it would have required Shilton to complete the application correctly and would still have offered cover.

Montclare v Metlife Insurance Limited [2015] VSC 306

'Other Cover'

- Shilton denied in the second application that other cover had ever been denied or withdrawn.
- In fact, NMRA declined a proposal after Shilton's first application to MetLife.
- Court found this was a fraudulent misrepresentation and non-disclosure, BUT
- Again, no remedy as MetLife would still have offered life cover even if it knew of the refusal.

Montclare v Metlife Insurance Limited [2015] VSC 306

Medical History

- Shilton denied in his application that he "ever had a mental or nervous disorder or breakdown".
- In fact:
  - He had suffered from depression for a number of years with 2 suicide attempts in 1981 and 1989.
- Montclare argued this question was referring to mental illness sufficiently serious "as to raise a real risk of suicide after 13 months from issue of cover". Instead, he had sought 'counselling' and suicide attempts were 'cries for help'.

Montclare v Metlife Insurance Limited [2015] VSC 306

Medical History (cont.)

Court found that:

- MetLife had not proved that Montclare knew of Shilton's medical history.
- As such Montclare did not fraudulently breach his duty of disclosure.
- However, Shilton made a fraudulent misrepresentation by his 'No' answer
  - "persistent occasions of being unable to cope … and feelings of depression would be regarded by a reasonable person as a mental or nervous disorder or condition"
- Depression was discussed with Shilton by his medicos.
- Telling that disclosure was made of minor ailments.
- Court satisfied the misrepresentation was fraudulent and attributable to Montclare by virtue of s.25 ICA.

Montclare v Metlife Insurance Limited [2015] VSC 306

Key Points

- MetLife pursued some non-disclosure points which did not impact on whether cover would have been offered.
- This nonetheless went to Montclare's credit "a number of aspects of Montclare's evidence raise real doubts about his credit" and "require the court to exercise caution in accepting his account of events".
- Highlights the importance of obtaining strong underwriting evidence for each allegation of non-disclosure or misrepresentation.
- Build evidence to disprove 'alternative honest explanations'.

Hitchens v Zurich Australia Ltd [2015] NSWSC 825 (Date of judgment: 30 June 2015)

Hitchens applied for IP, TPD and life cover in 2004. In his application form, he disclosed:

- He had consulted doctors and medical centres for 'stitches/antibiotics'.
- A MVA in 1996, but no treatment required for knee and neck injuries suffered since 1998, occasional headache.
- He had taken 'pain medication' in last 5 years as a result of the MVA.
- He had been treated for malignant melanoma in his groin in 1989.
- He had mild lymphedema left leg.
- Answered 'No' to 'usual doctor' question and left blank the question as to 'last doctor attended'.

Hitchens v Zurich Australia Ltd [2015] NSWSC 825

- In September 2007, Mr Hitchens severed some of his fingers with a power saw and subsequently submitted claims under the policies for IP and TPD benefits. In August 2010, Zurich avoided both policies on the basis of medical misrepresentation and non-disclosure.

Hitchens v Zurich Australia Ltd [2015] NSWSC 825

At trial, the true picture of Mr Hitchens' medical history emerged as follows:

- The removal of melanoma from his left calf and removal of lymph nodes from the left side of his groin in 1989.
- From 1989, he suffered chronic lymphedema and cellulitis in his left leg.
- Following the MVA he suffered depression, had multiple attendances at numerous medical clinics and multiple prescriptions for oxycodone analgesics for severe pain continuing up to and during 2004 ('doctor shopping').

Hitchens v Zurich Australia Ltd [2015] NSWSC 825

- Zurich's u/w gave evidence that history of drug dependence with depression would have resulted in a decline.

Mr Hitchens argued that:

- Any failure to disclose or misrepresentation was not fraudulent
- To the extent that he failed to answer questions or gave obviously incomplete answers, Zurich waived compliance with the duty of disclosure.
- Zurich was on notice of his medical history, the pain medication and the treatment at medical centres. Because Zurich failed to make enquiry of these medical practitioners, it waived the duty of disclosure in relation to those matters. (s.21(2)(d))

Hitchens v Zurich Australia Ltd [2015] NSWSC 825

The Court's findings

- The Court found that Mr Hitchens made misrepresentations and failed to comply with his duty of disclosure as follows:
- His statement that the reason for his visits to numerous medical centres in the past 2 years was for "stitches and antibiotics" was substantially false – the principal reason for attending was to obtain strong pain relief for lymphedema and cellulitis.
- His statement that he suffered mild lymphedema in the left leg misrepresented the extent of the condition and concealed the extent of pain relief medication.
- His statement that he had not ever had depression, stress, anxiety, behavioural disorder or other mental or nervous condition was false.
- His failure to disclose his ongoing consumption of Endone and Tramal and his habit of obtaining prescriptions from multiple doctors was a breach of his duty of disclosure.

Hitchens v Zurich Australia Ltd [2015] NSWSC 825

The Court's findings in relation to waiver

The Court then considered those findings in the context of Mr Hitchens' argument that Zurich had waived compliance with the duty of disclosure:

- Has there been a 'fair presentation of the risk?'
- 'Mr Hitchens disclosed the fact that he was taking pain medication. But that information did not disclose the nature or frequency of the pain medication he had been taking or of his concealment from doctors that he was obtaining prescriptions for the same drugs from other doctors. Those were unusual matters that were not revealed by the proposal form.'
- 'On any view, an underwriter is not required to be a detective.'

Hitchens v Zurich Australia Ltd [2015] NSWSC 825

The Court's findings in relation to fraud

- Hitchens argued that he had disclosed every important matter regarding his health in the knowledge that Zurich would contact his doctors to find out whatever further details they wished.
- He also argued that he had not knowingly made false statements or concealed material matters as he expected that further details would be sought from his doctors.
- The Court was not persuaded by this argument. Hitchens did not provide contact details for his usual doctors from 2000 to 2004, or even for the last doctor he consulted – he left that part of the form blank. The absence of any answer to this question is 'relevant to the question of fraud.'

Hitchens v Zurich Australia Ltd [2015] NSWSC 825

The Court also expressed the view that:

- '… his failure to refer to the nature and extent of the pain medication he was taking was deliberate and the form was carefully prepared to seek to reduce the likelihood of the insurer asking more questions. In my view the concealment of these material matters was deliberate and fraudulent.'

Hitchens v Zurich Australia Ltd [2015] NSWSC 825

Key Points

- When considering applications, insurers should carefully follow up any answers that are left blank or are obviously incomplete so as to avoid allegations of waiver of the duty of disclosure.
- However, the reasonable insurer need not be a ‘detective’ and waiver is unlikely to arise where an applicant has deliberately misrepresented the facts so as to alter the perception of the risk.

Westpac Life Insurance Services Limited v Thereze Guirgis [2015] VSCA 239

The Facts

- Ms Guirgis, a pharmacist, applied for an IP policy in September 2007. In the application, she disclosed her most recent medical consultation was with Dr Gibson for 'tiredness', with the treatment being 'Vitamin D and iron supplements.' The application form asked whether Ms Guirgis had a range of medical conditions, including 'fibromyalgia' and 'bowel disorder'. Ms Guirgis answered yes to 'arthritis, rheumatism or joint problems', shoulder pain that was 'fully resolved', and answered no to all other medical conditions.
- In October 2011, Ms Guirgis made a claim under the policy for 'fibromyalgia' and 'arm and shoulder pain'.
- In June 2012, Westpac avoided the policy under s 29(2) ICA on the basis that Ms Guirgis had failed to disclose the conditions of irritable bowel disorder and fibromyalgia.

Westpac Life Insurance Services Limited v Thereze Guirgis [2015] VSCA 239

Submissions

- Ms Guirgis submitted that she did not disclose the condition of IBS as 'she did not consider irritable bowel syndrome to be a bowel disorder' and she had answered 'no' to the question regarding fibromyalgia 'because no one had told her at that time she had fibromyalgia.'
- At trial, two rheumatologists, both of whom had diagnosed the plaintiff with fibromyalgia prior to policy commencement, gave evidence that whilst they could not recall the specific consultations with the plaintiff, 'their usual practices would have been to have discuss their diagnoses with [her]'.
- The original underwriter gave evidence, that fibromyalgia was an extremely debilitating disease and cover would not have been offered based on the underwriting guidelines at that time. However, these guidelines were not produced at trial.

Westpac Life Insurance Services Limited v Thereze Guirgis [2015] VSCA 239

County Court decision

- The trial judge found as a matter of probability, that fibromyalgia had at least been mentioned to the plaintiff. However, in considering whether the plaintiff had fraudulently misrepresented or fraudulently non-disclosed the existence of fibromyalgia, the judge noted that the plaintiff had disclosed her consultation with a rheumatologist in the application form. The judge considered the disclosure of this consultation to be a 'real anomaly', asking:

> "Why would Ms Guirgis wish to mislead the insurer as to the existence of fibromyalgia or indeed irritable bowel syndrome in her application for insurance, and then advise in that same application that she had recently seen Dr Andrew Gibson who is acknowledged to be a specialist rheumatologist?"

Westpac Life Insurance Services Limited v Thereze Guirgis [2015] VSCA 239

- Because of this anomaly, the judge ultimately found that he could not be "comfortably satisfied" that the plaintiff was aware of the fibromyalgia diagnosis to the requisite standard or proof.
- The judge also found that Westpac had not established that it would not have entered into the policy were it not for the plaintiff's failure to disclose the condition of fibromyalgia. In reaching this view, the judge made particular note of Westpac's failure to produce the underwriting guidelines that were in force at the date of the application, drawing an inference that these guidelines would not have assisted Westpac.

Westpac Life Insurance Services Limited v Thereze Guirgis [2015] VSCA 239

Court of Appeal

Westpac appealed to the Supreme Court of Victoria on the following grounds:

- The trial judge's finding that the plaintiff was not fraudulent was made in error, as the condition of fibromyalgia was mentioned to the plaintiff.
- The trial judge misapplied the authority in *Briginshaw* by applying a standard of proof intermediate between reasonable doubt and the balance of probabilities.
- The trial judge's finding that Westpac would have issued the policy had it been aware of the fibromyalgia was contrary to the underwriter's sworn evidence, which was unchallenged in cross-examination and uncontradicted by other evidence.

Westpac Life Insurance Services Limited v Thereze Guirgis [2015] VSCA 239

- The Court of Appeal refused leave to appeal and made the following observations:
  - The Court noted that while the term fibromyalgia may have been mentioned to the plaintiff, it may not have registered with the plaintiff as a diagnosis, particularly in circumstances where the plaintiff saw the rheumatologists 'to exclude more serious diagnoses'.
  - The Court also considered that the trial judge applied the correct standard of proof, being the balance of probabilities, noting that his references to 'a tipping of the scales' and not being 'comfortably satisfied' are taken from *Briginshaw*.

Westpac Life Insurance Services Limited v Thereze Guirgis [2015] VSCA 239

- Noting that the underwriter's evidence was based on a written guideline that was never produced, the Court considered this to be 'a failure by [Westpac] to prove the very thing [it] sought to prove – namely, that it's written guidelines would have prevented the writing of the policy.'

- The Court also noted that the (PMAR) completed by the plaintiff's GP when she applied for the policy contained no reference to fibromyalgia. The Court commented that:

> "if fibromyalgia was so serious as to mandate no policy being written, then there would be a question dealing with fibromyalgia amongst the other questions asked of treating medical practitioners. The absence of such a question, coupled with the failure by the applicant to produce the guidelines to which we have referred almost mandated a finding unfavourable to the applicant on the issue of whether it had established it would not have entered into the policy had fibromyalgia been disclosed by the [plaintiff]."

Westpac Life Insurance Services Limited v Thereze Guirgis [2015] VSCA 239

Key Points

- Gather evidence to satisfy the court as to the insured's state of mind.
- 'Show cause' letters can be used to good effect, as can statements obtained by assessors.
- Where possible, be in a position to produce underwriting guidelines to reinforce an underwriter's evidence at trial.

Poole v Chubb Insurance Company of Australia Ltd [2014] NSW SC 1832

Facts

- Andrew Poole was formerly a director of a company to whom exploration licenses were issued by the Minister without competitive tender.
- He was called before the ICAC to answer questions about the process and incurred legal costs totalling $658,745.16.
- He claimed the legal costs under a D & O Policy held by the company with Chubb.
- Chubb denied liability based on non-disclosure.

Poole v Chubb Insurance Company of Australia Ltd [2014] NSW SC 1832

Key Issues

- Was there a breach of duty of disclosure?

  - Did he know that the submission for the Exploration License contained false and misleading statements?

Poole v Chubb Insurance Company of Australia Ltd [2014] NSW SC 1832

Key Points

Onus of proof rests with the party alleging fraud.

Here the insurer failed to prove to the requisite standard that Mr Pool was aware that the answer in the application were untrue.

Vella v R; Siskos v R [2015] NSW CCA 148

Facts

- July 2010, Ms Vella and Mr Siskos obtained life insurance cover on Mr Siskos' life from One Path for $1,723,000.
- Ms Vella and Mr Siskos agreed that he would commit suicide so that she could recover under the Policy.
- After the 13 months suicide preclusion period he stopped attending work, started living in train stations in contemplation of committing suicide but didn't.

Vella v R; Siskos v R [2015] NSW CCA 148

Facts

- Both were charged and convicted of a crime under the common law of conspiring to defraud an insurance company.
- Offence under S.192(1)(b) of the Crimes Act 1990 of dishonesty for obtaining a financial advantage in the form of a life insurance policy on the life of Mr Siskos.

Vella v R; Siskos v R [2015] NSW CCA 148

Key Points

The Crown alleged that the fraud was not in the possible making of the claim but in obtaining the policy.

The relevant imperilment was said to be the underwriting of an insurance policy by One Path.

For more information, please contact:

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