

## CASES AND TRIBUNAL DECISIONS

# Fraud - A Conscious Indifference to the Truth

*Denise Finadri v Westpac Life Insurance Services Limited* [2018] VCC 1636

[Link to decision](#)

## Summary

In this case the Court considered the issue of fraudulent misrepresentation, and whether the insurer was entitled to avoid contracts of life insurance pursuant to section 29(2) of the Insurance Contracts Act 1984 (the Act).

The Court also considered the concept of continuing representations in circumstances where Ms Finadri's alleged fraudulent misrepresentations had been contained in an earlier, unrelated insurance proposal. This earlier proposal was ultimately relied upon by the insurer when it accepted the unrelated application and issued the policies it later sought to avoid.

## Background

Ms Finadri had been employed in a family owned business, Finadri Windows Pty Ltd as an office manager/booker. In or around June 2009, an insurance agent of the insurer, Mr Campbell (the agent), met with Ms Finadri and her brothers to review the policies of insurance that were held by the business.

Following this meeting, Ms Finadri subsequently met with the agent again and signed a personal information statement, which included a number of questions and answers pertaining to her health. The personal information statement formed part of an insurance proposal (the June proposal) relating to insurance policies for the benefit of the business. Later, in August 2009, Ms Finadri met with the agent again and completed a further insurance proposal, this time for the purposes of individual insurance cover (the August proposal).

At trial, Ms Finadri submitted that she had not agreed to the insurer using the information from the earlier June proposal, as part of its assessment of the August proposal. However, evidence was given by the agent, that at the time of the August proposal, he would have explained to Ms Finadri that because she had completed the personal statement in the June proposal, it wasn't necessary for her to complete it again.

His Honour Judge Murphy found the evidence of the agent persuasive, particularly in light of the covering letter that had been sent with the August proposal, asking that the personal statement from the June proposal be referred to for the purposes of the subsequent application.

Murphy J found that the earlier June proposal remained an **"unwithdrawn continuing representation"** by Ms Finadri as to the matters contained therein. Accordingly, the insurer was entitled to rely on Ms Finadri's representations in the June proposal when it determined to avoid the policies that had been issued in response to the August proposal.

On the question of fraudulent misrepresentation, Murphy J referred to and followed the *Briginshaw* standard, but he also went further to uphold the commentary in *Prepaid Services Pty Ltd & Ors v Atradius Credit Insurance NV* (2013) 302 ALR 732, noting that:

*"a finding of fraud could be made in the face of conscious indifference to the truth".*

In *Prepaid Services*, the Court stated that:

*"conscious indifference means more than carelessness. It must be shown that, before and at the time that the insured signed the proposal form, he or she did not care whether the answers were true or false. It is not necessary, however, to show that the insured knew that there was a substantial prospect that the answers were not true".*

Murphy J was prepared to find that if the insured was willfully apathetic as to the veracity of his or her answers in an insurance application, this was sufficient to satisfy the threshold of fraud for the purposes of section 29(2) of the *Insurance Contracts Act 1984*.

Murphy J considered that Ms Finadri had been "consciously indifferent to the truth" in completing the June proposal. He found the "mountain of contemporaneous medical material" was in direct contrast to the "blanket negative answers to the questions" in the June proposal.

Together with Ms Finadri's responses to cross-examination which impacted on her credibility, he found that Ms Finadri's answers in the June proposal could "only be characterized as answers proffered with a state of mind that meets the requirements set out in *Prepaid Services*".

Accordingly, Murphy J found that the insurer was entitled to avoid the policies under s 29(2) of the Act. Further, because the avoidance of the policies were rendered void from inception, he formed the view that the insurer was entitled to recover any money paid under the policies.

### **Implications**

*This case is a good reminder that whilst insurers still have the onus of discharging the burden of proof when alleging fraud, the third limb in the Derry v Peek test remains (that fraud can be proved when it is shown that a false representation was made without caring whether it be true or false). In this matter, Murphy J was satisfied that the threshold for fraud had been met due to the combination of the written misrepresentations in the June proposal, together with Ms Finadri's credibility issues which became apparent in cross-examination at trial.*