
Contents

- page 22 **General Editor's note**
Paul Baram MERIDIAN LAWYERS
- page 24 **Can insurance help schools with unpaid school fees?**
Toby Blyth and Paul O'Halloran DENTONS
- page 27 **QBE Insurance (Australia) Ltd V NTI Ltd — a cautionary tale of exclusion clauses in the context of double insurance**
Natasha Burn and Benjamin Wong HBA LEGAL
- page 30 **Clark v Avant Insurance Ltd; Stevens v Avant Insurance Ltd — definition of a “claim” in the context of a “claims made and notified policy”**
Debra Lane DW FOX TUCKER LAWYERS
- page 33 **AIA Australia Ltd v Sharma — continuing misrepresentations and s 29(2) of the Insurance Contracts 1984 (Cth)**
Laina Chan 2 SELBORNE CHAMBERS

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AIA Australia Ltd v Sharma — continuing misrepresentations and s 29(2) of the Insurance Contracts 1984 (Cth)

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In *AIA Australia Ltd v Sharma*,¹ the key issue was whether Colonial Mutual Life Assurance Society Ltd (CommInsure) could rely upon s 29(2) of the Insurance Contracts Act 1984 (Cth) to avoid the life insurance policy of Dr Sharma. The Australian Financial Complaints Authority Ltd (AFCA) said CommInsure could not as no fraudulent misrepresentation had been made to CommInsure. On appeal to the Federal Court, the judge affirmed the decision of AFCA that CommInsure could not rely upon s 29(2). The primary judge also found that CommInsure could not avoid the policy on the basis that it had been fair and reasonable for CommInsure to have done so. This case note only focuses on the former issue which was dispositive of the entire appeal to the Full Federal Court.

Facts

Dr Sharma had been a member of the HEST Australia Superannuation Fund (HEST) and prior to March 2011 had default death/terminal illness and default income protection cover as a member of the fund.

Dr Sharma fraudulently obtains additional insurance cover from OnePath

On 22 March 2011, Dr Sharma had applied for additional underwritten insurance cover to the trust of HEST for death, total and permanent disability and income protection cover. OnePath Life Ltd had been the insurer for the group insurance policy. In completing the form, Dr Sharma had answered the following question in the negative:

Have you ever been diagnosed with, had symptoms or signs of, or sought (or intend to seek) medical advice, treatment or investigations for . . . heart trouble, murmur, chest pain, palpitations?²

On 21 April 2011, Dr Sharma completed a personal statement and declaration as part of a standard medical examination form conducted by United Healthcare Group in relation to his application for the additional cover, in which he responded in the negative to two further

questions:

Have you EVER had any of the following . . . high blood pressure, chest pain, high cholesterol, stroke, rheumatic fever or any heart or vascular complaint? . . .

Have you required medical treatment, including surgery, for any illness or injury not mentioned above?³

These answers were all false to the knowledge of Dr Sharma. Dr Sharma had suffered a heart attack and had had surgery by which three stents were inserted in his coronary arteries in 1999. Nevertheless, the application for additional cover was successful.

CommInsure takes over the group life and income protection policies

From 1 December 2011, CommInsure took over as the group life insurer and group income protection insurer of HEST. CommInsure did not reassess the risk of insured members. Dr Sharma was not required to provide further or updated medical information or declarations to CommInsure.

Dr Sharma dies and CommInsure avoids the Life Policy for the additional benefits

Dr Sharma died from heart failure on 21 April 2017. CommInsure paid the default cover portion of the terminal illness claim but avoided the additional cover and refunded the additional premiums. The basis of the decision of CommInsure was the fraudulent misrepresentations of Dr Sharma in obtaining the additional cover and s 29(2) of the Insurance Contracts Act.

Dr Sharma's widow lodged a complaint with AFCA which determined that CommInsure was not entitled to rely upon s 29 of the Insurance Contracts Act but upheld the decision of CommInsure on the basis that it was fair and reasonable in the circumstances.

The key issue: was there a continuing fraudulent misrepresentation to CommInsure

There were several grounds in the notice of appeal and in the notice of contention. However, the key issue

was whether there was a misrepresentation to CommInsure entitling it to rely directly upon s 29(2) of the to avoid the additional benefits.

There was a continuing misrepresentation

The Full Federal Court said that CommInsure could rely upon the fraudulent misrepresentations that Dr Sharma had made to OneLife, to avoid the policy pursuant to s 29(2) of the Insurance Contracts Act. The fraudulent misrepresentations were continuing misrepresentations in that the misrepresentations were not “spent” when OnePath acted upon them because CommInsure was a member of a class of persons who could be expected to act (again) on the misrepresentations.⁴ The Full Federal Court relied upon the principle in *Commercial Banking Co of Sydney Ltd v RH Brown & Co*⁵ that for a fraudulent misrepresentation to be actionable the representation can be made to a group which the plaintiff belongs so that the plaintiff is one of those intended to be deceived. It is unnecessary for the fraudulent misrepresentation to be made to any particular person.⁶

Dr Sharma made continuing misrepresentations to CommInsure as a member of a class of persons who could be expected to act on the misrepresentations. The misrepresentations were therefore made within the meaning of s 25 of the Insurance Contracts Act, in a continuing sense, by Dr Sharma during the negotiations for a contract of life insurance before it was entered into between HEST and CommInsure with effect from 1 December 2011.⁷

Conclusion

This is an important case that brings clarity to the full effect of s 29(2) of the Insurance Contracts Act. Life Insurers can rest easy when taking over group life

policies that fraudulent misrepresentations made to previous group life insurers by a life insured remain of operative effect for the purposes of s 29(2).



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Footnotes

1. *AIA Australia Ltd v Sharma* [2023] FCAFC 42; BC202301934.
2. Above, at [3].
3. Above n 1, at [4].
4. Above n 1, at [61]–[62]. See the discussion of authorities on continuing misrepresentations at [56]–[59].
5. *Commercial Banking Co of Sydney Ltd v RH Brown & Co* (1972) 126 CLR 337; BC7200380 at 343.
6. See above n 1, at [53]–[55].
7. Section 25 of the Insurance Contracts Act 1984 (Cth) provides that:

Where, during the negotiations for a contract of life insurance but before it was entered into, a misrepresentation was made to the insurer by a person who, under the contract, became the life insured or one of the life insureds, this Act has effect as though the misrepresentation had been so made by the insured.

Note that the Full Federal Court, at [28]–[31], refer to ss 25, 27A and 32 of the Insurance Contracts Act to address the complexities arising from the fact that under a group life scheme, the life insured is not the insured. Instead, the trustee is the insured.