

(2) If person did not know (and it was unreasonable to expect to know) that the statement was relevant

Prepaid Services Pty Ltd v Atradius Credit Insurance NV [2013] NSWCA 252

- S27 does not apply where the insured knew the circumstances and gave an incomplete statement that was inconsistent with their knowledge.

Week 10 – post contractual issues relating insurance contracts.

- Policy will generally contain terms which:
 - Define the risks covered (the insuring clause)
 - Set out the exclusions to that cover (exclusion clauses)
 - Identify conditions which must be fulfilled, or occur, before the insurer is liable
 - Set limits to the period, or amount, of cover (often in schedule)

Dealing with Insurance contract terms:

Note: ASIC may bring action against insurer for breach of utmost good faith. – s14A ICA

Step 1: Identify the relevant term breach/potentially breached.

3. IF the question concerns a post contractual issue:

- a. **1 Construct the contract: Write:** In interpreting insurance contracts, court usually attribute words/phrases their natural and ordinary meaning, unless there is a settled meaning in insurance contracts, in that case, court will be hesitant to depart from that meaning. (Messagemate Aust Pty Ltd)
 - i. **Where there is an ambiguity, it will be constructed contra proferentem.** (ibid)
 - ii. Example: *Legal & General Insurance v Eather* (1986)
 1. ‘all reasonable precautions’ was interpreted to limit precautions to reasonable precautions, thus, courts found that recklessness was required for breach.
 - iii. **Contra proferentem for obscure wording:**
 1. *Manufacturers Mutual v Star Gifts* (1984)
 - a. Damage caused by evaporation was within ‘damage caused by store water’
 2. Burden on insurer (*prima facie*) to show exclusion clause applies – *Forbes v AAMI*:
 - a. Policy excluded liability if car being driven by intoxicated person – unless owner didn’t consent

- i. Husband was drunk while he crashed the car – held that wife consented to him driving but not to drive while intoxicated.

b. **Terms:**

i. **Deviation from standard form cover:**

1. **Write:** Pursuant to s35(1) ICA where a claim is made under a prescribed contract and the event giving rise to the claim is a prescribed event in the contract, the insurer must not refuse to pay the minimum amount or claim that insurance cover was not provided for in the contract.(c and d respectively)

- a. **Exception:** However, as provided by s35(2) ICA, an insurer may refuse to pay the minimum amount or deny coverage to the claim if the insurer **Clearly** informed the insured in writing **prior to the contract**, or the insured/reasonable person in the circumstances knew or would have known.

ii. **Unusual terms:**

1. Write: an insurer may not an unusual term in a contract that is not a prescribed contract unless, **before the contract was entered into** the insurer **clearly informed** the insured **in writing of the effect of the provision** (whether by providing the insured with a document containing the provisions, or the relevant provisions, of the proposed contract or otherwise).

- a. Where a term is unusual unreasonable or unexpected, party will need to go to extra lengths to give notice of it (provide warning/explanation): Denning LJ, *J Spurling Ltd v Bradshaw*
- b. Courts also take into account the circumstances to determine whether the term was fair. (*Interfoto*)

Expiration, Renewal, Cancellation:

- Section 11(9) – A reference to entering into a contract includes agreement to renew, extend or vary.
- The insured is under a duty to disclose any change in circumstances that increases the risk insured against prior to each renewal of the insurance contract.
- Section 58 – Renewable insurance
- Notice must be given at least 14 days before expiry of cover stating
- Day and time insurance cover will expire; and
- Whether insurer is prepared to renew
- If no notice given, insurance cover continues
- No premium payable unless claim made

Cancellation:

- Cancellation
 - s 60 permits cancellation for general insurance in certain cases
 - See fraudulent misrepresentation

- But, in particular, if contract in force because of failure to notify of renewal (s 58), insurer can cancel at any time: s 60(4)
- s 59A permits cancellation for life insurance for contracts if insured makes a fraudulent claim etc.
- Section 59 sets out cancellation procedure
 - Notice in writing must be given
 - Cancellation takes effect in accordance with s 59(2)

Who can make a claim:

4. Making a claim:

- a. Prior to the ICA, only parties privy to the contract could make claims in respect of the insurance contract. Now, persons benefited need not be named
 - i. Section 48: Third party in a contract of insurance, has a right to recover under the policy though not a party to the contract.
- b. In making a claim, the insured must prove facts necessary to establish claim, this includes establishing that the loss or damage was caused by event covered by policy. (**Toikan International Insurance**)
 1. 'Caused by' = Proximate cause (direct, real, dominant, operative) – *Leyland Shipping Co v Norwich Union Fire* [1918] AC 350
 2. "Dominant purpose test" – *Skandia Insurance Co Ltd v Skoljarew* (1979) 142 CLR 375 – the event is the dominant, effective or operative cause of the loss.
 - ii. Once established, loss falls prima facie within the terms of the policy.
- c. **Claim by a 3rd party:**
 - i. Pursuant to s48 ICA, a 3rd party beneficiary has the right to recover any loss suffered in accordance with the contract even if they are not a party to the contract.
 - ii. Note: a 3rd party beneficiary has same obligations as an insured and insurer has same defences as it would against insured (s 48(2) and (3))
 1. S48(1A) extends to insurance in relation to a life policy linked to an RSA (retirement savings account)
 - iii. **Section 49:** Where there's loss and insurer's liability is less than its notional liability under the contract, third party who has also suffered loss may inform insurer of their interests and recover. (**where TP has ¼ in house and it burns down**)
 1. Section 50: Vendors/Purchasers. If
 2. Under contract for sale of premises;
 3. Risk passes from vendor to purchaser;
 4. P is deemed to be insured under V's policy;
 5. Until completion of purchase
 6. *Or other time as specified in section*

Insured's obligations: