

RECENT FOS & SCT DECISIONS

Retrospective Underwriting Opinion Key to Avoidance

[Link to determination](#)**Facts**

On 3 December 2013, the Applicant entered into four policies with the Financial Services Provider (FSP) which included trauma; life, Total and Permanent Disability (TPD), trauma; income protection and life and TPD. The Applicant made a claim in May 2015 against three policies following a diagnosis of prostate cancer. The FSP denied the claim, avoided the policies pursuant to section 29(3) of the *Insurance Contracts Act 1984* (ICA) and refunded all paid premiums on the basis that the Applicant failed to disclose a history of alcohol misuse, gout and tendonitis when he applied for cover.

The Applicant answered 'no' when asked if he 'ever received advice, counselling or treatment for the use of drugs or alcohol'. He answered 'no' to a medical history question which specifically asked if the Applicant had ever had symptoms of, investigation or treatment for, or received a diagnosis for gout or tendonitis. When asked whether he had consulted a health professional for any reason other than a cold/flu, he answered 'yes' and mentioned blood pressure tests, a colonoscopy and 6 monthly blood tests.

The medical evidence revealed, however, that the Applicant had consulted his GP to discuss alcohol, and had been referred to a psychiatrist who treated the Applicant for a diagnosed Alcohol Dependence Disorder between 19 November 2012 and 16 May 2013. The Applicant disagreed with his psychiatrist's diagnosis of Alcohol Dependence Disorder and obtained reports from his GP and an alternate psychiatrist which supported his argument that the diagnosis had been premature, given that the alcohol dependence had not been long term.

Clinical notes in December 2011 confirmed a history of gout and the Applicant's GP had made requests for physiotherapy in September 2013 for the Applicant's tendonitis. The Applicant argued that a failure to disclose the relevant information was an 'honest oversight'.

The FSP avoided the Policies and provided a retrospective underwriting opinion and statement dated 10 June 2015, supported by underwriting guidelines, which confirmed that had the Applicant disclosed his alcohol dependence, he would not have been offered cover on any terms.

Issues

1. Did the Applicant fail to comply with his duty of disclosure prior to entering into the Policies?
2. Is the FSP entitled to avoid the Policies under section 29(3) of the ICA?

Determination

The FOS determined that the FSP was entitled to avoid the policies under section 29(3) of the ICA. It found that the FSP had clearly informed the Applicant of the duty of disclosure. It also found that the Applicant had failed to comply with his duty of disclosure under section 21 of the ICA as he did not disclose his full medical history including advice and treatment he ought reasonably to have known would be relevant to the FSP's decision to enter into the contracts of insurance. Based on the underwriting evidence provided by the FSP, the FOS was satisfied that the FSP would not have entered into the contracts of life insurance with the Applicant on any terms had the Applicant complied with the duty of disclosure or not made the misrepresentation. As a result, the FOS determined that the FSP was entitled to avoid the Policies.

While the FOS did acknowledge the findings of the Applicant's two doctors that the diagnosis of Alcohol Dependence Disorder had been premature, it did not believe that these findings meant the Applicant had not breached his duty of disclosure. This is because the question contained on the application form did not call for a specific diagnosis for alcohol use or misuse but simply asked if the Applicant had ever received advice, counselling, or treatment of the use of alcohol.

Implications

Retrospective underwriting evidence is vital for an FSP to prove that it would not have entered into a contract of life insurance on any terms, had the applicant complied with the duty of disclosure or not made a misrepresentation, in accordance with section 29(3) of the ICA. As a result, FSPs should be diligent in keeping records of their underwriting guidelines which are subject to change over time.