

# Court finds underwriting evidence sufficient for insurer to reduce its liability to nil where an innocent misrepresentation has been made

Priya Paquet, Mathew Short & Daniel Turk | February 2014 | Insurance & Financial Services

## Summary

*Prepaid v Atradius (No 2) [2014] NSWSC 21*

The New South Wales Supreme Court has decided that a non-fraudulent or innocent misrepresentation in a proposal for a policy of trade credit insurance entitled the insurer to reduce its liability to nil as the insurer would not have entered into the policy had the misrepresentation not been made. Justice McDougall of the Supreme Court decided the case after it was remitted back to him for determination on that issue alone from the Court of Appeal.

## Background/Facts

Atradius issued a trade credit insurance policy to Prepaid Services (PPS), Optus and Virgin Mobile (the plaintiffs). The policy insured trading debts owed to the plaintiffs by Bill Express Pty Ltd (BXP), in the event that BXP became insolvent and was unable to pay its business debts.

BXP was a supplier of prepaid mobile phone sim cards and ultimately became insolvent resulting in the plaintiffs making a claim on the policy for a sum of \$27 million, being the policy limit.

At first instance, the primary judge found in favour of Atradius on the basis that the answers given at the time of completing the proposal were provided with 'reckless indifference to their truth or otherwise' and were thus fraudulent.

The Court of Appeal overturned the decision on the basis that the primary judge's reasons did not justify a finding of 'reckless indifference' to the truth and remitted the question of whether the misrepresentations (even though not fraudulent) entitled Atradius to refuse the claim on the basis that it could reduce its liability to nil pursuant to s28(3) of the *Insurance Contracts Act 1984 (Cth)*<sup>1</sup>.

For a review of the previous decisions, please click on the following links:

[Non-disclosures held to be fraudulent in trade credit claim](#)

[Court of Appeal overturns finding that reckless indifference constituted fraudulent misrepresentation](#)

## The Decision

It was not disputed that the plaintiffs had made a misrepresentation in the proposal form relating to late payments by BXP to Optus and payment plans which BXP had entered into with the plaintiffs.

His Honour Justice McDougall noted that the question was not whether an alternative policy would have been issued but whether the policy that was actually issued would have been issued at all. The Court of Appeal had been critical of the decision at first instance because the evidence in relation to what Atradius would have done had the answers been provided had not been considered, but the Court of Appeal's decision was only in relation to fraudulent misrepresentation.

Having had the matter remitted back to him, His Honour was required to consider the hypothetical inquiries that would have been made by Atradius, the hypothetical answers the plaintiffs would have provided and the hypothetical reaction of the underwriter to that further information.

Atradius' evidence was that it would not have issued the policy at all had the payment plans been disclosed unless it was 'absolutely satisfied' that the payment plans were not related to BXP's financial position, the problems in BXP's financial position had been resolved and the plaintiffs had improved their internal credit control procedures to spot potential payment problems early.

His Honour Justice McDougall accepted Atradius' evidence that the hypothetical additional material which the plaintiffs would have provided was still insufficient to 'absolutely' satisfy Atradius' concerns and therefore had truthful and complete answers been provided the policy would not have been issued at all.

Judgment was entered in favour of Atradius on the basis that Atradius was entitled to reduce its liability for the claim to nil as a result of the innocent misrepresentation.

## Implications

This decision serves to remind insurers, when seeking to rely on a non-disclosure or misrepresentation to deny a claim and reduce their liability to nil, that it is important to consider the underwriting evidence in relation to whether a policy would have been issued, establish what further inquiries would have been made and consider the further information that might be provided by the proposer when determining what the subsequent underwriting decision would have been as to whether the policy would have been issued at all.

An insurer needs to establish what steps the underwriter would have actually taken such as any further inquiries and what decision the underwriter might have reached as a result of the steps taken in order to establish its prejudice and reduce its liability to nil.

Practically, it is not sufficient for an underwriter to simply indicate whether he or she would have issued the policy at all. This decision reinforces the importance of strong underwriting evidence which is vital to establishing the extent of prejudice to enable an insurer to reduce its liability for a claim to nil.

<sup>1</sup>Section 28 sets out the remedies that are available to an insurer if a misrepresentation is made. Section 28(3) allows an insurer to reduce its liability for a claim by the amount of the prejudice it has suffered as a result of a non-disclosure or misrepresentation.

## For more information, please contact:



Priya Paquet  
Senior Associate  
T: 02 8257 5729  
M: 0434 115 260  
priya.paquet@turkslegal.com.au



Mathew Short  
Lawyer  
T: 02 8257 5772  
M: 0405 219 636  
mathew.short@turkslegal.com.au



Daniel Turk  
Partner  
T: 02 8257 5727  
M: 0408 667 220  
daniel.turk@turkslegal.com.au

[www.turkslegal.com.au](http://www.turkslegal.com.au)

Syd | Lvl 44, 2 Park St, NSW 2000  
T: 02 8257 5700 | F: 02 9264 5600  
Melb | Lvl 10 North Tower, 459 Collins St, VIC 3000  
T: 03 8600 5000 | F: 03 8600 5099