

CASES AND TRIBUNAL DECISIONS

Group Cover - The Duty of Disclosure and the Remedy of Avoidance

Sharma v LGSS Pty Ltd [2018] FCA 167

[Link to decision](#)

Summary

On 1 March 2018 the Federal Court delivered judgment in *Sharma v LGSS Pty Ltd* [2018] FCA 167 being an appeal from the Superannuation Complaints Tribunal (SCT) which had affirmed the insurer's right to avoid the "voluntary" portion of the cover of a member under a group policy.

Background

The insured member became a member of the Super Fund in April 2005 and completed an application for additional TPD and SC cover, known as Voluntary Insurance Cover, in March 2007.

In 2012, the insured member lodged a claim for a TPD benefit arising from a major depressive disorder from May 2007 and schizophrenia from March 2008.

Based on his health records which were obtained by the insurer, the insured member was diagnosed with major depression in 2003 and treated with a variety of antidepressants following the sudden death of his wife in 2001.

He continued to receive treatment in the form of counselling and medication throughout 2003 and 2004 until he ceased in January 2005. At that point in time he was advised to continue to take his medication despite no longer feeling depressed.

The insurer assessed the claim and admitted that insured member was entitled to his automatic TPD benefit but ultimately declined the "voluntary" benefit.

It elected to treat that cover as void under s 29(2) of the *Insurance Contracts Act 1984* (ICA) due to his intentional misrepresentation and non-disclosure of his history of tachycardia and depression.

The SCT upheld the insurer's decision and agreed it was fair and reasonable.

Decision

The SCT noted that the form included questions asking whether the insured member had ever had heart disease, any mental disorder, depression, stress, anxiety or any ear disorder. The SCT also noted that notice of his duty of disclosure was detailed on the form.

The SCT determined that the insured member should have been aware that he was required to disclose to the insurer any matters that he knew, or could reasonably have been expected to know, were relevant to the insurers' decision whether or not to accept the insurance risk and found that he had breached that duty in circumstances where the omission was deliberate. This included the matters relied on by the insurer.

An appeal from a decision of the SCT to the Federal Court can only be brought under section 46(1) of the *Superannuation Complaints Act 1993* in relation to a question of law. Mr Sharma's amended notice of appeal ultimately identified six questions of law, though the Court came to a substantive view about only one of them in reaching its judgment.

The ability of group life insurers to avoid individual cover based on non-disclosure prior to the 2013 amendments to the ICA was always problematic due to historic deficiencies in the key provisions of the original legislation. These problems were identified in the process which led to the passing of the *Insurance Contracts Amendments Act 2013* and led to the introduction of section 31A which expressly extends the duty of disclosure to the life insured.

Her Honour Justice Gleeson's grounds for upholding the insured's appeal are principally found in paragraph 48 where she said:

'I accept that it (the SCT) probably assumed or considered that the duty arose from section 21, which it had cited as a relevant provision of the ICA. In doing so, it erred as to the proper construction of section 21. Properly construed, section 21 did not impose such a duty on Mr Sharma.'

Her Honour consequently found that a life insured in an insured member situation does not have a duty of disclosure under section 21 of the ICA. Having found that no such duty existed, the remainder of the SCT's decision fell away and the matter was remitted back to it for redetermination by the SCT in accordance with law.

While the insurer argued that even if there was no duty of disclosure under section 21, it was still entitled to avoid the cover on the basis of misrepresentations using the combination of sections 25 and 32 of the ICA. Her Honour did not attempt to reach a final determination on those issues because the SCT did not consider them in its determination.

Consequently, these questions will be among those left for the SCT to consider now that the matter has been remitted to it.

Implications

Those who were involved in the consultation process around the 2013 ICA amendments will recall that the way the duty of disclosure was originally expressed in the ICA, led to sufficient doubt about how it would apply in a group situation to make reform in this area desirable.

Section 31A, which expressly extends the duty of disclosure to the life insured, was inserted in the ICA to remove any doubt that the duty of disclosure was intended to apply to lives insured, even when they were not also the policy owner.

The need for there to be a legally enforceable duty to give proper disclosure to the insurer in this situation is, of course, self-evident; bearing in mind the life insured's unique knowledge of their own state of health.

The current decision consequently merely serves to confirm that the reforms reflected in section 31A of the ICA were warranted.

Other important issues relating to the ability of group insurers to avoid voluntary cover that predates the commencement of section 31A on 28 December 2015 were raised, but not determined by the Court. Those issues will remain at large to be resolved in the subsequent phases of the matter before the SCT.

Of course, most voluntary cover will, like the cover obtained by the insured member, be the subject of at least a questionnaire which, if not correctly answered, will give rise to a misrepresentation that will trigger a right to a remedy, such as avoidance in the insurer.

Insurers should be mindful (particularly in matters currently progressing through the SCT) that the tribunal has paid due regard to the misrepresentation aspect in its final determination and that they also do so when framing their correspondence avoiding cover.