

Similarly, when drafting definitions for terms relating to the insured such as 'you' or 'yours' insurers should be alive to the possibility of claims made pursuant to the third party claim provision s 48 of the ICA.

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¹ [2016] NSWLC 9.

² Citing *Stock v Inglis* (1884) 12 QBD 564 and *Bank of New South Wales v The North British and Mercantile Insurance Company* (1882) 3 NSWLR 60.

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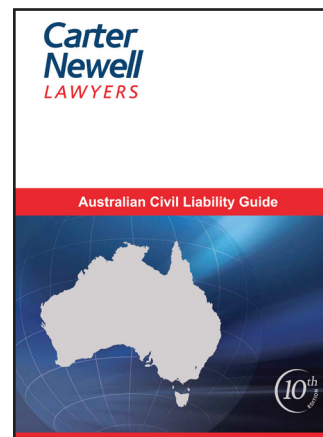
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Australian Civil Liability Guide 10th edition

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Insurance policy responds despite alleged misrepresentation

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Introduction

In modern commerce, customers often negotiate policies of insurance directly with insurers over the internet rather than with traditional methods such as over the phone, or through an insurance broker.

While online applications provide an efficient and convenient arrangement for the insurer and customer, insurers should give careful consideration to the form of the application (including any questions posed in the application) bearing in mind that closed questions may have consequences in regard to the insured's pre-contractual duty of disclosure.

The case of *Maria Gonzales & Keith Barrett v The Hollard Insurance Company Pty Ltd*¹ involved an insurer attempting to reduce its

liability under the policy to nil because of an alleged misrepresentation by the policyholder during the application process. This case provides a good illustration of how a court will consider alleged misrepresentations in circumstances where an insurer attempts to avoid liability under the *Insurance Contracts Act 1984* (Cth) (ICA).

The case also considers the application of s 48 of the ICA which provides for non-party beneficiaries referred to in a contract of insurance to claim under the policy.

Facts

Mr Barrett was the registered proprietor of a property in Newtown, New South Wales (**property**). His de facto spouse, Ms Gonzales lived with him at the property but was not listed as a registered title owner.



In January 2014 Mr Barrett asked Ms Gonzales to arrange home and contents insurance for the property. On 12 January 2014 Ms Gonzales made an online application on a website maintained by the defendant insurer.

As part of the application, Ms Gonzales was asked a number of questions. Most relevantly to the claim she was asked *'Do you own the home and live in it with only your immediate family?'* (**ownership question**) to which she answered 'yes'.

Based on the completed questionnaire, the insurer offered a home and contents insurance policy (**policy**) which Ms Gonzales accepted and paid the premium for. The policy was issued on 12 January 2014, in Ms Gonzales' name.

The property suffered storm damage in October 2014 and on 14 November 2014 Ms Gonzales lodged a claim under the policy for that damage.

The loss assessor's report described Ms Gonzales as a *'house-sitter'* and the insurer refused the claim on the basis that the policy was cancelled because Ms Gonzales breached her disclosure obligations.

Ms Gonzales and Ms Barrett commenced proceedings seeking to recover the cost to rectify the damage to the property.

Issues

The court was asked to consider:

1. Whether the insurer could cancel the policy due to Ms Gonzales' response to the ownership question; and
2. Whether Mr Barrett, not being named in the policy, had standing to sue under it.

Discussion

Could the insurer cancel the policy?

The insurer argued that Ms Gonzales was in breach of her duty of disclosure by misrepresenting that she was the owner of the property in the online questionnaire when she was not. The insurer gave evidence that had the ownership question been answered with the 'no' option then a drop down menu would have appeared on the screen providing a number of alternatives for Ms Gonzales to identify her interest in the property. By selecting 'no' to the question she would have been prompted to apply for a policy covering only the home's contents.

Ms Gonzales disputed that she breached her obligation of disclosure or that she made a misrepresentation to the insurer. Ms Gonzales contended that the question posed by the website was confusing. At trial, she stated *'..if I clicked "yes" my answer would be partly incorrect because I don't own the house, if I clicked "no" my answer would be partly incorrect because I do live in the house with only my family. In the end I answered "yes" because I felt this was the more correct answer'*.

The assessor who heard the matter in the Small Claims Division of New South Wales' Local Court was not satisfied that Ms Gonzales had made a misrepresentation or breached her duty of disclosure when she responded by saying yes to the ownership question.

Firstly, the assessor noted that the questionnaire did not provide any definition of the term 'owner' or 'own' and while the insurer has taken a restrictive interpretation and limited those terms to the legal owner or registered proprietor of a property, there is nothing on the website that supported such a restrictive interpretation.

The assessor found that the ownership question was reasonably capable of being construed with a wider meaning to include persons who were not the legal owner of the property such as Ms Gonzales, and as it was the insurer who drafted the question, the contra proferentem rule operated to interpret the ownership question in Ms Gonzales' favour.

Secondly, Ms Gonzales resided in the property and had possession and control over the property jointly with Mr Barrett, and would be prejudiced if it was destroyed. Ms Gonzales would have an 'insurable interest' having regard to the relaxed approach adopted by courts when determining whether individuals have such an interest.²

Thirdly, the assessor considered that the question used the term 'home' instead of 'house' and as the distinction is that a house is merely a building whereas a home is a place where people live, there was no doubt that Ms Gonzales considers the property to be her home.

Despite being satisfied that there was no misrepresentation, the court went on to consider s 28(3) of the ICA which requires the court to enquire as to position of the insurer if the alleged misrepresentation had not occurred. The assessor rejected the insurer's contention that had Ms Gonzales answered 'no' to the ownership question she would not have been offered a policy of insurance for the property itself (but instead only the home contents).

The evidence did not address the possibility of what would have happened had Ms

Gonzales contacted the insurer by phone (a reasonable scenario for a person who was unable to obtain assistance online). The assessor was not satisfied that the insurer would not have offered insurance and therefore found even if there had been a misrepresentation the insurer would not be entitled to avoid the claim.

Mr Barrett's entitlement to bring a claim

The insurer disputed Mr Barrett's right to bring a claim because he was not a party to the contract of insurance. The assessor agreed with that proposition however noted that s 48 of the ICA confers a right to non-party beneficiaries who are referred to or specified in a contract of insurance.

The policy contained a definition for the terms 'you' and 'yours' which relevantly meant:

'... A person living at the insured address who lives with, and is a family member of, the policy holder of the policy holder's spouse.'

The assessor found Mr Barrett being Ms Gonzales' de facto spouse living in the property satisfied the definition of a non-party pursuant to s 48 of the ICA and accordingly he was entitled to recover his loss.

Conclusion

The court found in favour of Mr Barrett and Ms Gonzales and the insurer was required to pay them the amount the loss assessor estimated for the costs of repairs.

Comment

This case highlights the need for insurers to ensure their policies and application forms are drafted with precision. Here, the lack of a definition of 'own' or 'ownership' in the application form or policy resulted in a person with no legal ownership of a property to nonetheless be considered an 'owner'.