



HIGH COURT OF AUSTRALIA

29 September 2010

MILLER & ASSOCIATES INSURANCE BROKING PTY LTD v BMW AUSTRALIA FINANCE LIMITED

[2010] HCA 31

The applicant ("Miller"), an insurance broker, negotiated a \$3.975 million loan with the respondent ("BMW") on behalf of a client, Consolidated Timber Holdings Ltd ("Consolidated Timber"). The loan was sought to fund a premium for an insurance policy insuring against credit risks in connection with a plantation investment scheme. In the course of negotiations, BMW requested details of the insurance policy from Miller. In response, Miller provided a certificate of insurance issued by HIH Casualty and General Insurance Limited that included a list of four properties on which plantations were operated. Premium funding lenders generally require the insurance policy for which a loan is sought to be cancellable. Cancellable policies provide the lender with a form of security: the lender can require the borrower to assign its rights under the policy, including cancellation rights, and in the event of default the lender may cancel the policy and recover the unused premium. BMW concluded from the list of properties on the certificate of insurance that it concerned property insurance, which is generally cancellable. Later, Miller provided the policy itself as part of a bundle of materials. The policy in respect of which Miller negotiated the loan with BMW was a cost-of-production policy and was not cancellable. Miller did not explicitly draw BMW's attention to this fact.

After the third repayment, Consolidated Timber defaulted on the loan. BMW sued Miller in the Supreme Court of Victoria for recovery of its loss, alleging among other things that Miller had engaged in misleading or deceptive conduct contrary to s 52 of the *Trade Practices Act 1974* (Cth). The claim was put in two ways. The first was that Miller's supply of the certificate of insurance in response to BMW's request for details of the insurance policy was misleading or deceptive. The second was that Miller's failure to tell BMW that the policy for which funding was sought was not cancellable constituted misleading or deceptive conduct. The primary judge found against BMW. His Honour also rejected oral evidence given by the two employees of BMW who had responsibility for the loan that they had not understood that the policy later provided by Miller was connected to the loan.

BMW successfully appealed against the primary judge's decision to the Court of Appeal. The Court overturned the rejection by the primary judge of the BMW employees' evidence on the ground that the finding was based on a mistaken understanding of an agreed fact and the inferences arising from it. The Court also held that Miller's provision of the certificate of insurance conveyed a representation that the policy was cancellable. As a result of a combination of this and Miller's failure to inform BMW about the policy's non-cancellability, the Court of Appeal considered Miller to have engaged in misleading or deceptive conduct.

Miller applied to the High Court for special leave to appeal against the decision of the Court of Appeal. Its application was referred for consideration by the Full Court, which heard the application on 16 April 2010 as if on appeal. The Court today overturned the Court of Appeal's decision and reinstated the decision of the primary judge. It held that the Court of Appeal had

erred in overturning the primary judge's rejection of the oral evidence. The Court of Appeal had mistaken the basis of that finding by the primary judge. The High Court also held that the Court of Appeal's finding that Miller had engaged in misleading or deceptive conduct could not be sustained. There was no foundation for the conclusion that the known importance of the cancellability of the insurance policy gave rise to a reasonable expectation, in the circumstances of the particular transaction, that Miller would not supply the certificate of insurance without disclosing that the policy was non-cancellable.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*