HIGH COURT OF AUSTRALIA

McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

PERMANENT TRUSTEE AUSTRALIA LIMITED & ANOR — APPELLANTS

AND

FAI GENERAL INSURANCE COMPANY LIMITED (IN LIQ) — RESPONDENT

Permanent Trustee Australia Limited v
FAI General Insurance Company Limited (In Liq)
[2003] HCA 25
8 May 2003
S124/2002

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders of the New South Wales Court of Appeal dated 12 March 2001 and, in place thereof, order that:*

   (a) the appeal to that Court be allowed with costs,

   (b) the orders made by Hodgson CJ in Eq in proceeding No. 3032 of 1996 dated 24 April 1998, as varied on 28 May 1998, be set aside and, in lieu thereof, order that:

      (i) judgment be entered for the appellants in the sum of $211,862.82 together with interest thereon pursuant to s 57 of the Insurance Contracts Act *1984 (Cth) from the date of payment by the appellants of each component of the judgment sum; and*

      (ii) the respondent pay the costs of the appellants at first instance;

   (c) the orders made by Hodgson CJ in Eq in proceeding No. 3037 of 1996 dated 24 April 1998 be set aside and, in lieu thereof, order that:

(i) *judgment be entered for the appellants in the sum of $9,998,137.18 together with interest thereon pursuant to s 57 of the* Insurance Contracts Act *1984 (Cth) from the date of payment by the appellants of each component of the judgment sum; and*

(ii) *the respondent pay the costs of the appellants at first instance;*

(d) *the orders made by Hodgson CJ in Eq dated 24 April 1998 requiring the repayment by the respondent to the appellants of $4,242.22 be set aside; and*

(e) *the orders made by Hodgson CJ in Eq dated 3 June 1998 be set aside.*

On appeal from the Supreme Court of New South Wales

Representation:

R J Ellicott QC with J T Svehla and G A Elliott for the appellants (instructed by Church & Grace)

D F Jackson QC with E G Romaniuk for the respondent (instructed by Colin Biggers & Paisley)

CATCHWORDS

Permanent Trustee Australia Limited v FAI General Insurance Company Limited (In Liq)

Insurance – Obligations of insured to disclose to insurer – Where decision "probably not" to renew policy for following year – Whether decision was a failure to disclose a "matter relevant to the decision of the insurer whether to accept the risk" to extend policy under s 21(1)(a) of the *Insurance Contracts Act* 1984 (Cth) – Whether non-disclosure was a misrepresentation in breach of s 26(2) of the Act.

Fraud – Whether trial judge erred in failing to consider that evidence of an alleged misrepresentation became fraudulent – Whether fraud was clearly and distinctly pleaded and put at trial – Whether appellate court was warranted in finding error on this ground.

Insurance Contracts Act 1984 (Cth), ss 21(1)(a), 26(2).

1 McHUGH, KIRBY AND CALLINAN JJ. This appeal is concerned with the proper construction of ss 21 and 26 of the *Insurance Contracts Act* 1984 (Cth) ("the Act") and their application to arrangements between the parties for a brief extension of a current policy of insurance.

The Facts

2 Permanent Trustee Australia Limited and Permanent Trustee Company Limited ("the appellants") effected multi-layered professional indemnity insurance cover of $70 million with a number of insurers for a period of twelve months from 1 October 1990 to 30 September 1991. The primary layer (which was held by a number of Lloyds syndicates) was for $5 million. The first excess layer was for $10 million in excess of $5 million, the second excess layer was for $20 million in excess of $15 million, and the third excess layer was for $35 million in excess of $35 million. FAI General Insurance Company Limited (In Liq) ("the respondent") was one of the insurers that provided excess cover. It was responsible for 35 percent of the first excess layer ($3.5 million of cover), and 33.5 percent of the second excess layer ($6.7 million of cover).

3 On 18 and 19 September 1991 Mr Welsh, a junior employee of Sedgwick James Ltd ("Sedgwick") (insurance broker for the appellants), in accordance with instructions he had received from Mr Daly, who had the day to day responsibility for the appellants' account, prepared, and then sent on 19 September 1991, letters to AMP, GIO and CIC, inviting them to participate in a renewal program of insurance for the appellants. Enclosed with that letter was a copy of a proposal completed by the appellants and in a form suitable for submission to the existing insurers. Although the fourth Australian insurer on the appellants' program was the respondent, because Mr Daly instructed Mr Welsh to hold off "for now" from approaching the respondent no letter was sent to it.

4 Sedgwick did not approach the respondent because, by then, the appellants had made at least a provisional decision not to offer any opportunity of annual renewal to the respondent, and that the respondent's share of the program should, if possible be placed elsewhere. The primary judge (Hodgson CJ in Eq) made this finding as to those matters[1]:

> "In my opinion, the true position is that the Permanent companies had, prior to 30 September 1991, decided that quotes should be obtained from insurers other than FAI, which should then be considered before any

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1 *Permanent Trustee Australia v FAI General Insurance Co Ltd* (1998) 44 NSWLR 186 at 257-258.

> approach was made to FAI, and had through Sedgwick Australia actually set about doing this; the Permanent companies contemplated that, so long as the quotes from other insurers were satisfactory, then FAI would not be invited to participate; and their broker, Sedgwick Australia, had been instructed accordingly. In my opinion, it is not therefore strictly correct to say that the plaintiffs had, prior to 30 September 1991, decided that FAI was to be replaced as an insurer of the plaintiffs."

5 The evidence of Mr Hunter, the underwriting officer of the respondent who dealt with the appellants' account was that the respondent would support the extension, if the lead underwriter were prepared to do so, on the terms proposed. The respondent considered the appellants' business to be one of its "good accounts", to be a "blue chip" and a "major account", to have had a history of notifying the respondent of claims or circumstances which might give rise to claims as and when they occurred, and not to have had a history of "claims dumping".

6 The case for the respondent was that if it had known of the appellants' intention to seek another insurer in its place it would have rejected any extension of the existing cover, for *commercial* reasons associated with the breakdown of the relationship between FAI and Sedgwick, and as an emotional reaction [to the appellants' intentions] and not because the renewal was relevant to the assessment of the risk.

7 By 28 September 1991 the commercial relationship between the respondent and Sedgwick, despite representations by the respondent, had seriously deteriorated. A Sedgwick London Security Committee had instructed Sedgwick to reduce its business with the respondent because of the latter's downgrading to a rating of BBB minus by a rating agency, Standard & Poor's.

8 On 27 August 1991 the appellants wrote to Sedgwick to seek quotations for the existing level of cover ($70 million) for the next period of 12 months from 1 October 1991 to 30 September 1992, at the same time enclosing a completed proposal in a form provided by Sedgwick.

9 On 20 September 1991 Sedgwick received a facsimile from an associated company in England, Sedgwick London, informing it that the lead underwriter for the primary layer required further information about the appellants' involvement in property trusts before it was prepared to finalize terms of renewal.

10 Because the inquiry was made so close to the expiry date of the existing policies, the lead underwriter (a Lloyds syndicate) was prepared to grant the appellants an extension of 30 days of their existing insurance contract at pro rata

120 per cent of the expiring premium, "all other terms unchanged" (the "extension").

11 On 23 September 1991 Sedgwick wrote to the appellants informing them of the terms of the proposed extension and recommending that they agree to them.

12 The appellants accepted the recommendation and asked Sedgwick to "complete the formalities on our behalf".

13 In accordance with its instructions, Sedgwick set about obtaining the agreement of the four Australian insurers (including the respondent) to the extension. In consequence, on or about 24 September 1991 Mr Daly, who had already spoken to AMP, instructed Mr Welsh to contact FAI, CIC and GIO to arrange the extension.

14 When Mr Daly gave these instructions to Mr Welsh he told him to be careful when he spoke to the respondent, because of the sensitivities involved in the proposal to exclude it from participation in the renewal.

15 On 26 September 1991, Mr Welsh telephoned Mr Hunter, an employee of the respondent to ask whether the respondent would grant the extension. Mr Welsh prepared a contemporaneous note of the conversation. Mr Welsh did not inform Mr Hunter of the appellants' intention not to seek another renewal of its policy with the respondent.

16 On 27 September 1991 Mr Welsh sent placing slips for the extension by facsimile to Mr Hunter. In the facsimile, Mr Welsh asked Mr Hunter to confirm the respondent's agreement to the extension, by signing and dating the placing slips and returning them, also by facsimile. When Mr Hunter agreed to the extension on behalf of FAI, he believed that the respondent would be invited to quote for participation in the renewal. The respondent would not have granted the extension had it been informed of the different intentions of the appellants.

17 During the period of the extension the appellants became aware of circumstances which might, and did subsequently give rise to a claim arising out of their trusteeship of the Aust-Wide Property Trusts, and the development of an office block at 1 O'Connell Street, Sydney. The appellants notified the respondent of these circumstances in accordance with the terms of the insurance contract on or about 15 October 1991 when legal proceedings on behalf of unitholders were commenced for breach of trust in the Supreme Court of New South Wales. The appellants sought indemnity from their insurers, including the respondent. The proceedings came to be settled, by the payment of some

$100.1 million, of which the appellants' insurers' contribution would be $38.45 million in total.

The trial

18 The respondent refused to meet its share of the money payable on the settlement. That refusal triggered proceedings by the appellants against the respondent. The respondent raised a number of defences. It succeeded at first instance on one of them, that the failure of Sedgwick to inform the respondent of the intended renewal elsewhere was a breach by the appellants of their duty of disclosure (s 21(1)(a) of the Act). The primary judge found that had the respondent been informed of the appellants' intention not to renew their policy with the respondent, it would not have granted the extension. His Honour held that in these circumstances the appropriate, and only remedy was the one for which s 28(3) of the Act provided, an order that the respondent repay the appellants the premium that it had received for the extension (some $4,242.22). His Honour held that the respondent had no other liability to the appellants, and was not obliged to pay what would otherwise be its share of the money payable to satisfy the terms of the settlement that the appellants had made of the litigation against them.

19 The primary judge's findings as to misrepresentation by the appellants were these[2]:

> "There was no misrepresentation. Mr Welsh, in his conversation with Mr Hunter, did not withhold anything or say anything so as to convey something he did not believe. He understood Mr Daly's instruction to him to be careful as merely indicating that he should not lead Mr Hunter to believe either that FAI was to be invited or was not to be invited to renew the insurance. Mr Hunter did not raise the topic, so there was no occasion for Mr Welsh to say anything about it. Mr Hunter's reference to what should happen *if* renewal material was to be sent in fact indicated that FAI did not have a settled belief that it was to receive renewal material. There was no duty on Mr Welsh to say anything to Mr Hunter on this matter, nor did Mr Welsh say anything which implied the false position. Mr Hunter did not suggest that any statement had misled him, merely that he did not believe that FAI would have been asked for the extension unless the

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2 *Permanent Trustee Australia v FAI General Insurance Co Ltd* (1998) 44 NSWLR 186 at 256.

Permanent companies had intended to offer renewal to FAI. That was not sufficient to amount to a misrepresentation: see *Kahlbetzer v Cincotta*[3]".

20 His Honour's conclusion was stated in this passage[4]:

> "It was relevant to FAI's decision to accept the risk of the thirty-day extension of insurance from 1 October 1991, on the terms on which it did, that the Permanent companies had decided to obtain quotes for the following insurance year from insurers excluding FAI and had actually set about doing so; and that they had decided to seek insurance from FAI only if satisfactory quotes could not be obtained from insurers excluding FAI."

The appeal to the Court of Appeal

21 The appellants appealed to the Court of Appeal (Meagher, Handley and Powell JJA). Handley JA, with whom the other members of the Court agreed, after referring to a number of cases said this[5]:

> "In my judgment s 21(1)(a) [of the Act] leaves no room for the continued operation of the previous test of materiality. The changes are too many and too substantial to allow this, and they must have been deliberate. The section appears in a code and it is not possible to construe it as codifying the previous law. It follows, in my judgment, that the appellants' submission that the relevant matter did not have to be disclosed fails."

22 His Honour was also of the opinion that a misrepresentation by conduct, omission or silence is encompassed by the word "statement" where it appears in s 26(2) of the Act, and that Mr Welsh, as an insurance broker employed by Sedgwick, in making a statement to an underwriter of the respondent which was literally true, but incomplete, made a "statement" which was a misrepresentation for the purposes of s 26(2) of the Act. A further holding of the Court of Appeal was that the knowledge of Messrs Daly and Welsh on behalf of Sedgwick with respect to the appellants' intentions was the knowledge of the appellants for the purposes of deciding whether it had acted in breach of its duty of disclosure

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3 (1982) NSW Conv R ¶55-105 at 56,804-56,805.

4 *Permanent Trustee Australia v FAI General Insurance Co Ltd* (1998) 44 NSWLR 186 at 265.

5 *Permanent Trustee Australia Co Ltd v FAI General Insurance Co Ltd* (2001) 50 NSWLR 679 at 687 [36].

under s 21(1)(a) of the Act: the appellants had therefore made a misrepresentation under s 26(2) of the Act to the respondent. Furthermore, despite the trial judge's exoneration of the appellants from fraud, Handley JA held that the appellants had acted fraudulently in failing to correct a representation after they discovered that it was not true.

The applicable provisions of the *Insurance Contracts Act*

23 The Act was enacted as ameliorative legislation following a report on insurance contracts by the Australian Law Reform Commission in 1982 in which the Commission said[6]:

> "The duty should itself extend to facts which the insured knew, or which a reasonable person in the insured's circumstances would have known, to be relevant to the *insured's assessment of the risk*." (emphasis added)

24 The Second Reading Speech of the Insurance Contracts Bill contained this[7]:

> "At common law an insurer may avoid a contract whenever the insured fails to disclose, whether innocently or fraudulently, a fact which is *material to assessing the risk* and which is known to the insured … . Clause 21 both clarifies and ameliorates the existing law. It clearly states that the insured's duty is only to disclose those facts which he knew, or which a reasonable person in the circumstances could be expected to have known, to be relevant to the insurer's assessment of the risk." (emphasis added)

25 And pars 59 to 62 (Pt IV - Disclosures and Misrepresentations) of the Explanatory Memorandum to the Insurance Contracts Bill were as follows:

> "59. Present Law – An insured is required to disclose to the insurer all material facts relating to the insurance he proposes to effect and which are material to the insurer's assessment of the risk he is incurring or as to the premium he should charge. At common law, some lines of authority support the proposition that the insured's obligation is to disclose every material fact known to him and which a reasonable man would realise to be material. Other authorities, and particularly more recent Australian

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6 Australian Law Reform Commission, *Insurance Contracts*, Report No 20, 1982 at 111.

7 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 29 May 1984 at 2332 per Mr Lionel Bowen.

cases have rejected this approach in favour of the 'prudent insurer' test ie a fact is material if it would have reasonably affected the mind of a prudent insurer in determining whether it will accept the insurance, and if so, at what premium and on what conditions.

60. The duty exists before the contract is entered into and continues until the contract is concluded. If an insured fails to do so, the insurer may, on discovering the full facts, elect to avoid the contract of insurance ab initio and he may do so whether or not any loss has occurred. An insured need not disclose facts

(1) which are known, or presumed to be known, to the insurer;

(2) which are of common knowledge;

(3) which tend to diminish the risk;

(4) which are covered by or dispensed with by a warranty or condition; or

(5) as to which the insurer has waived the requirement.

61. Proposed Law – An insured will have, before the contract is entered into, a duty to disclose to the insurer all material facts of which he is aware. His duty will be to disclose those facts which he knows or which a reasonable person in the circumstances could be expected to know would be relevant to the insurer *in his decision to accept the risk and, if so, on what terms* (clause 21(1)). The insured is not required to disclose matter

(1) that diminishes the risk;

(2) of common knowledge;

(3) that the insurer knows or in the ordinary course of his business as an insurer ought to know; or

(4) as to which compliance with the duty of disclosure is waived by the insurer. An insurer will be deemed to have waived compliance if, in response to a question in a proposal form, the insured failed to answer the question or gave an obviously incomplete or irrelevant answer to it.

(clauses 21(2) and 21(3))

62. Rationale – Clause 21 clarifies the existing law by specifying the test of materiality. It also *ameliorates* the existing law, particularly in so far as the 'prudent insurer' test has been applied, for this test takes no account of the insured's circumstances or the circumstances in which the contract of insurance is negotiated. Clause 21 mitigates the application of the duty by providing that the insured's duty is only to disclose those facts which he knew or a reasonable person in the circumstances would have known to be relevant to the insurer's assessment of the risk. As an examination of what a reasonable man would know cannot take place in a vacuum, a court would not be precluded from considering an insured's position and circumstances in applying the test. Clause 21 also clarifies the circumstances in which an insurer will be deemed to have waived compliance with the duty." (emphasis added)

26 Section 21 of the Act provides as follows:

"**The Insured's duty of Disclosure**

(1) Subject to this Act, an insured has a duty to disclose to the insurer, before the relevant contract of insurance is entered into, every matter that is known to the insured, being a matter that:

(a) the insured knows to be a matter relevant to the decision of the insurer whether to accept the risk and, if so, on what terms; or

(b) a reasonable person in the circumstances could be expected to know to be a matter so relevant.

(2) The duty of disclosure does not require the disclosure of a matter:

(a) that diminishes the risk;

(b) that is of common knowledge;

(c) that the insurer knows or in the ordinary course of the insurer's business as an insurer ought to know; or

(d) as to which compliance with the duty of disclosure is waived by the insurer.

(3) Where a person:

(a) failed to answer; or

(b) gave an obviously incomplete or irrelevant answer to;

a question included in a proposal form about a matter, the insurer shall be deemed to have waived compliance with the duty of disclosure in relation to the matter."

27 Section 26 of the Act is as follows:

"**Certain Statements not Misrepresentations**

(1) Where a statement that was made by a person in connection with a proposed contract of insurance was in fact untrue but was made on the basis of a belief that the person held, being a belief that a reasonable person in the circumstances would have held, the statement shall not be taken to be a misrepresentation.

(2) A statement that was made by a person in connection with a proposed contract of insurance shall not be taken to be a misrepresentation unless the person who made the statement knew, or a reasonable person in the circumstances could be expected to have known, that the statement would have been relevant to the decision of the insurer whether to accept the risk and, if so, on what terms.

(3) This section extends to the provision of insurance cover in respect of:

(a) a person who is seeking to become a member of a superannuation or retirement scheme; or

(b) a person who is a holder, or is applying to become a holder, of an RSA [Retirement Savings Account]."

Matters relevant to the decision of the insurer whether to accept the risk

28 The first and most important question raised by the appeal is what the expression "matter relevant to the decision of the insurer whether to accept the risk and, if so, on what terms" where it appears in ss 21(1)(a) and 26(2) of the Act comprehends: whether, for example, it includes considerations, commercial or otherwise which may be relevant to that insurer's assessment of the risk; and specifically, whether here the possibility or likelihood that the respondent might be replaced as an insurer of the appellants was a "matter" within the meaning of the statutory description. If the appellants succeed on this issue, it will be unnecessary to decide any of the other grounds of appeal.

29 In applying the Act according to its proper meaning we are bound to accept the findings of the trial judge. We do so notwithstanding our reservations

about the reliability of the opportunistic evidence on behalf of the respondent, after the event, that had it known of the unlikelihood of its participation in a renewal of the insurance, it would not have granted any extension[8].

30 The first matter to notice about s 21(1)(a) is that "every matter that is known to the insured" is qualified by the expression "being a matter that the insured knows …". The word "knows" is a strong word. It means considerably more than "believes" or "suspects" or even "strongly suspects". And the matter, to answer the description that par (a) of the sub-section states, must be a matter that is not only "relevant to the decision of the insurer whether to accept the risk, and if so, on what terms", but also one that the insured knows to be such a matter. The alternative for which par (b) of the sub-section provides, is also important: if the insured does not "know", the question becomes, whether a "reasonable person in the circumstances" would "know [the matter] to be a matter so relevant". It is also noteworthy, particularly if it should become necessary to deal with the other grounds of appeal, that the knowledge of which the sub-section speaks, either actual or constructive, is the knowledge of the insured, and not of any insurance intermediary, a term defined by the Act and clearly embracing an agent of the kind that Sedgwick was. This is at least to suggest that the reference to the insured is intended to be a reference to the insured personally and not to its agent or broker. However, it is not essential to our reasons to determine this point.

31 The appellants submit that the language of s 21(1) (and of s 26(2)) derives in part at least from the common law and from s 24(2) of the *Marine Insurance Act* 1909 (Cth), which itself picks up the common law: and that ss 21(1)(a) and 26(2) also pick up the particular meaning which "the risk" has in insurance law[9].

32 It is right in our opinion to concentrate on the language of the Act and to derive its intended meaning and operation from that language. Approaching the issue for decision in that way, it is significant that the Act uses the words "accept the risk" in s 21(1)(a) and not a phrase such as "to enter into the contract of insurance" or, "to renew a contract of insurance" the former of which is in substance used in the introductory words to the section. The words, "accept the risk" are key words. The Second Reading Speech and the Explanatory Memorandum make it clear that they were deliberately chosen. The words may have a long settled meaning at common law. That does not however mean that

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8 *Rosenberg v Percival* (2001) 205 CLR 434 at 485 [155], 501-502 [214]; cf *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553 at 560, 581.

9 *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 112 per McHugh J.

the Act was an enactment of it. The common law was generally concerned with materiality. This Act is concerned with relevance. Another indication that the decision, whether the matter should be disclosed, is a decision about the relevant risk, rather than, for convenience, what we will call the "commerciality" of the contract of insurance, is given by the reference in s 21(2) of the Act to the "disclosure … that diminishes the risk". The focus of attention is upon the *risk*, ie the particular insurance hazard. It is not, as such, upon the much broader question of the commercial willingness of the insurer to accept the risk, still less emotional or individual reactions to that question. Assessment of the *risk*, ie the insurance hazard, is susceptible to objective ascertainment. Assessment of other considerations including commercial and emotional responses, would ordinarily be much less readily ascertained on retrospective assessment. We do not consider that there is any particular difficulty in keeping these concepts separate as the language of the Act requires. The Act focuses on the particular risk of the insurance propounded. The alternative hypothesis opens a Pandora's box involving a large range of other considerations, such as are illustrated by the facts of the present case.

33 The legislature made no attempt to redefine "risk" itself. To require an insured to disclose to an insurer every matter known to the insured, or reasonably knowable by the insured, relevant to the decision of the insurer to enter into a contract of insurance would be to impose an extraordinarily high burden upon an insurer, indeed a burden that few insureds could ever fully discharge. Take this respondent. It is now in liquidation. The evidence, for example, of its downgrading by the rating agency at about the time of the events the subject of this case, shows that it is likely that it would have had many commercial anxieties, and that it would very much have wished to enter into any insurance contract that it could, particularly with good customers. This is a matter relevant to the respondent's decision to enter into the insurance contract. The appellants knew of the downgrading. The interpretation that the primary judge and the Court of Appeal gave to the Act could have the unlikely consequence that the appellants, knowing, or being in a position to know, that the respondent was keen or desperate to write insurance contracts, should have told the respondent that it would not be writing one with them for the next year or the year after that. Here the Court of Appeal imputed the knowledge of Sedgwick to the appellants. Let it be assumed that that imputation is correctly made. It could extend, if commercial considerations were the, or some of the relevant matters, to use the language of Handley JA in the Court of Appeal, to "[any relevant commercial] knowledge acquired … in the Australian insurance market."[10] That it seems to us would be

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10 *Permanent Trustee Australia Co Ltd v FAI General Insurance Co Ltd* (2001) 50 NSWLR 679 at 698 [96].

not to treat the enactment as ameliorative, but to allow it to be used as a charter for avoidance of claims by insurers.

The absence of misrepresentation by silence

34 The unreality of such a requirement is further highlighted by one of the other holdings of Handley JA[11]:

> "[The respondent] undoubtedly knew, or ought to have known, that the appellants were free to place their insurance elsewhere, and were not bound to offer renewal. However it did not know that the appellants had already decided to do this, provided they could obtain satisfactory cover elsewhere at an acceptable cost. This converted the known risk into an unknown near certainty. The relevant matter was not the chance that renewal would not be offered, but the decision, albeit a qualified one, not to do so."

35 Insurers do business in a commercially competitive world. They must know that any rational insured would look for three particular qualities in its insurer: capacity to meet a claim; diligence and expedition in its dealings with it; and, the amount and competitiveness of the premium. If there were an obligation upon the appellants here to make the disclosure of their intention not to renew, what would the position be of an insured who intends to, and expects to dispose of the insured property within a month or so of a renewal of its policy? Would not that insured be under a similar obligation of disclosure? The range of relevant commercial considerations, is, it seems to us, almost boundless. Insurers have no right to, and cannot credibly be believed to have any right to the perpetual or unchanging goodwill, and therefore custom, of each and all of its insureds. To find, as the primary judge and the Court of Appeal did, could have the consequence, that whenever there is any real chance that an insured might go into the market to seek a competitive price, the insured must, if it wishes to continue to do business with its insurer for, or over any period, disclose its intention to look for a better or different insurance contract. Speaking of intention, we cannot believe that such a result could have remotely been contemplated by the legislature. Indeed we would have thought that the real possibility of a continuing search by an insured for an insurer possessing the three particular, and perhaps other qualities in greater degree than the current insurer, would be a matter of common knowledge, or something which any

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11 *Permanent Trustee Australia Co Ltd v FAI General Insurance Co Ltd* (2001) 50 NSWLR 679 at 699 [101].

insurer should itself in the ordinary course of business know within the meaning of s 21(2)(b) or (c) of the Act.

36 It is unnecessary to decide in this case whether the words "acceptance of the risk of the particular peril or perils intended to be insured against" extend to a "moral hazard" or "moral risk" recognized as relevant by the common law[12]. Whether the appellants did or did not intend to renew their policy beyond a month (for which they were to pay a standard commercial pro rata fee or surcharge) was most certainly not a matter relevant to the decision of the respondent whether to accept the risk. Nor was it a matter which would, or could reasonably be likely to affect the terms upon which the decision to accept the risk would be made. The appellants were not guilty therefore of any relevant non-disclosure. Nor accordingly did they make any misrepresentation, by silence or otherwise. The trial judge was correct in so holding and the Court of Appeal in error in deciding to the contrary.

The erroneous appellate finding of fraud

37 What we have said would be sufficient to dispose of the appeal in the appellants' favour but there is a further finding of the Court of Appeal, that Mr Welsh's alleged misrepresentation to Mr Hunter was fraudulent, and to be attributed to the appellants, that should be dealt with. What Handley JA did was to hold that the primary judge was in error in failing to consider that the evidence established that what was originally an innocent misrepresentation by Mr Welsh became a fraudulent one because Mr Hunter of the respondent took more from Mr Welsh's remarks than Mr Welsh had intended, and that Mr Welsh had become aware of this: his continuing silence as to Mr Hunter's misunderstanding therefore constituted fraud[13].

38 Several observations may be made about this holding. The trial judge made no such finding to ground it. The trial judge expressly found that the non-disclosure was not fraudulent[14]. An allegation of fraud should be clearly and

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12 *General Accident Insurance Co Australia Ltd v Kelaw Pty Ltd* (1997) 9 ANZ Ins Cas ¶61-369; *Locker and Woolf Ltd v Western Australian Insurance Co Ltd* [1936] 1 KB 408; *Avon House Ltd v Cornhill Insurance Company Ltd* (1980) 1 ANZ Ins Cas ¶60-429.

13 *Permanent Trustee Australia Co Ltd v FAI General Insurance Co Ltd* (2001) 50 NSWLR 679 at 705 [127]-[128] per Handley JA.

14 *Permanent Trustee Australia v FAI General Insurance Co Ltd* (1998) 44 NSWLR 186 at 265.

distinctly pleaded and put. This one was not. The exchanges during the trial to which the respondent referred the Court fell short of what is required in that regard. They do not take proper account of a credible answer in cross-examination that Mr Welsh did not understand that he was under any obligation to send renewal information to Mr MacIver (a director of the respondent). There could in any event be no obligation "to correct" a state of mind of one party by another in respect of a matter not relevant to the risk. The principle that the maker of a representation believed to be, or actually true when made, but which the maker later discovers to be false, but refrains from correcting, well knowing that the representee is acting upon the representation, and intends the representee to do so, will be guilty of fraud, does not therefore have any application in this case. Accordingly the finding of fraud by the Court of Appeal was not open and should be overruled.

39 The appeal should be allowed with costs. Judgment should be entered for the appellants against the respondent for $211,862.82 together with interest pursuant to s 57 of the Act. In matter number 3037 of 1996, judgment should be entered for the appellants against the respondent for $9,988,137.18 together with interest at 13 percent pursuant to s 57 of the Act from the date of the payment by the appellants of each of the components of the judgment sum. The respondent is therefore entitled to retain the premium of $4,242.22 and accordingly the orders of the trial judge and the Court of Appeal requiring repayment of that sum by the respondent to the appellants should be rescinded. The respondent should also pay the appellants' costs of the trial and the appeal to the Court of Appeal.

40 GUMMOW AND HAYNE JJ. In 1991, the appellants ("the Permanent companies") wanted to obtain professional indemnity insurance for the year beginning on 1 October 1991. They then had insurance cover for $70 million in respect of claims made between 1 October 1990 and 30 September 1991. The existing cover was in a number of layers, and each layer was provided by a number of insurers. The respondent ("FAI") provided $3.5 million, or 35 per cent, of the first excess layer of cover, and $6.7 million, or 33.5 per cent, of the second excess layer.

41 The Permanent companies retained Sedgwick James Ltd ("Sedgwick Australia") as its intermediary to procure cover for the 1991-92 year. Shortly before the existing cover was to expire, the lead underwriter for the primary layer of cover asked for some more information about the business of the Permanent companies. The lead underwriter, a Lloyds syndicate, offered to provide a 30 day extension of the existing cover while the necessary information was obtained. The extension was offered at a premium fixed as one-twelfth of the current year's premium, plus 20 per cent. The Permanent companies instructed Sedgwick Australia to obtain the extension that was offered by the lead underwriter.

42 By this time, so the trial judge (Hodgson CJ in Eq) was later to find[15], the Permanent companies had decided to obtain quotes, from insurers other than FAI, for the professional indemnity cover the Permanent companies required for the 1991-92 year. The Permanent companies would consider these quotes before any approach was made to FAI. They contemplated that, so long as the quotations from other insurers were satisfactory, FAI would not be invited to participate in the Permanent companies' professional indemnity insurance arrangements for 1991-92.

43 It was against this background that, in late September 1991, Sedgwick Australia asked FAI to extend its cover for a month. FAI agreed to do so for a premium calculated in the same way as the premium fixed by the lead underwriter – one-twelfth of the existing premium, plus 20 per cent. The trial judge found[16] that had FAI known that it may not be invited to participate in the renewal of the insurance, it would not have provided the one month extension.

44 During the period of the extension, the Permanent companies notified their insurers of circumstances which may give rise to a claim on the policies. A

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15 *Permanent Trustee Australia v FAI General Insurance Co Ltd* (1998) 44 NSWLR 186 at 257.

16 (1998) 44 NSWLR 186 at 263-264.

claim was later made. The Permanent companies sought indemnity from their insurers who, by granting the month's extension, were on risk at the time the claim was taken to have been first made and notified. Insurers other than FAI agreed to indemnify the Permanent companies. The claim was settled and the insurers, other than FAI, contributed a large amount to that settlement.

45 The Permanent companies brought action against FAI, in the Supreme Court of New South Wales, claiming that FAI was obliged to indemnify them. Many issues were agitated in that litigation. Of those, four were argued in this Court. Three concerned the operation of ss 21 and 26 of the *Insurance Contracts Act* 1984 (Cth) ("the Act") (and attention can largely be confined to s 21). The fourth concerned a finding of fraudulent misrepresentation made by the Court of Appeal[17], despite the trial judge having found the person, whose conduct was thus condemned, to be not a dishonest person[18].

The *Insurance Contracts Act*

46 As its long title reveals, the Act was intended "to reform and modernise the law relating to certain contracts of insurance so that a fair balance is struck between the interests of insurers, insureds and other members of the public". It was enacted following a long and very detailed examination by the Australian Law Reform Commission of the law relating to insurance contracts[19] and insurance agents and brokers[20]. The Act was enacted in a form which followed very closely the draft legislation which had been proposed by the Australian Law Reform Commission in its report on Insurance Contracts.

47 Part IV of the Act deals with disclosures and misrepresentations by an insured. Division 1 (ss 21, 21A and 22) deals with the duty of disclosure, Div 2 (ss 23-27) with misrepresentations and Div 3 (ss 28-33) with the remedies for non-disclosure and misrepresentation. Section 33 of the Act provides that the provisions of Div 3 of Pt IV "are exclusive of any right that the insurer has otherwise than under this Act in respect of a failure by the insured to disclose a matter to the insurer before the contract was entered into and in respect of a misrepresentation or incorrect statement". Section 7 of the Act declares

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17 *Permanent Trustee Australia Co Ltd v FAI General Insurance Co Ltd* (2001) 50 NSWLR 679 at 705 [127] per Handley JA.

18 (1998) 44 NSWLR 186 at 263.

19 Australian Law Reform Commission, *Insurance Contracts*, Report No 20, (1982).

20 Australian Law Reform Commission, *Insurance Agents and Brokers*, Report No 16, (1980).

Parliament's intention to be that the Act is not "except in so far as [it], either expressly or by necessary intendment, otherwise provides, to affect the operation of any other law of the Commonwealth, the operation of law of a State or Territory or the operation of any principle or rule of the common law (including the law merchant) or of equity". Whether, consonant with ss 7 and 33, there is room for the operation of Pt V of the *Trade Practices Act* 1974 (Cth) in relation to insurance contracts is a question that need not be considered. No claim under the *Trade Practices Act* was made in the present matter.

48 As four members of the Court said in *Advance (NSW) Insurance Agencies Pty Ltd v Matthews*[21]:

> "The evident intention of the legislature [in enacting Pt IV of the Act] is to replace the antecedent common law regulating non-disclosure, misrepresentations and incorrect statements by insured persons before entry into a contract with the provisions of Pt IV. To that extent Pt IV is a statutory code which replaces the common law. Accordingly, the circumstances in which it is legitimate to resort to the antecedent common law for the purpose of interpreting the statute are extremely limited[22]."

The duty of disclosure

49 Section 21(1) of the Act provides that an insured has a duty to disclose certain matters to the insurer before the relevant contract of insurance is entered into. The matters that must be disclosed are

> "every matter that is known to the insured, being a matter that:
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> (a) the insured knows to be a matter relevant to the decision of the insurer whether to accept the risk and, if so, on what terms; or
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> (b) a reasonable person in the circumstances could be expected to know to be a matter so relevant".

Sub-section (2) then limits that duty of disclosure. It provides that the duty of disclosure does not require the disclosure of four different kinds of matter. Those are (a) a matter that diminishes the risk; (b) a matter that is of common knowledge; (c) a matter that the insurer knows or in the ordinary course of the

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21 (1989) 166 CLR 606 at 615 per Mason CJ, Dawson, Toohey and Gaudron JJ.

22 See *Gamer's Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd* (1987) 163 CLR 236 at 243-244.

insurer's business as an insurer ought to know; and (d) a matter as to which compliance with the duty of disclosure is waived by the insurer. Sub-section (3) then qualifies the duty of disclosure further. It provides that the insurer is deemed to have waived compliance with the duty of disclosure in relation to a matter where a person either fails to answer, or gives an obviously incomplete or irrelevant answer to, a question included in a proposal form about that matter.

Misrepresentation

50 As we have already mentioned, Div 2 of Pt IV of the Act (ss 23-27) deals in a number of ways with misrepresentations made by an insured in connection with a proposed contract of insurance. In this appeal, some attention was directed to s 26 which identifies circumstances in which statements made in connection with a proposed contract of insurance, even if untrue, are not to be taken to be misrepresentations. Section 26(2) provides that:

> "A statement that was made by a person in connection with a proposed contract of insurance shall not be taken to be a misrepresentation unless the person who made the statement knew, or a reasonable person in the circumstances could be expected to have known, that the statement would have been relevant to the decision of the insurer whether to accept the risk and, if so, on what terms."

This provision, like s 21(1)(a), depends for its operation on the conclusion that (in the case of s 21(1)(a)) the matter or (in the case of s 26(2)) the statement is, or would have been, "relevant to the decision of the insurer whether to accept the risk".

The issues in this Court

51 The first of the issues debated in this Court invited attention to the ambit of that expression and it is convenient to examine it by reference to the operation of s 21. Was the decision of the Permanent companies to obtain and consider quotes from insurers other than FAI before making any approach to FAI, coupled with the contemplation that so long as the quotes from other insurers were satisfactory FAI would not be invited to participate in the arrangements for 1991-92, a matter "relevant to the decision" of FAI whether to accept the risk by insuring the Permanent companies for the period of the extension? The trial judge[23] and the Court of Appeal[24] held that the Permanent companies' intentions constituted a matter relevant to the decision of FAI whether to accept the risk

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23 (1998) 44 NSWLR 186 at 260.

24 (2001) 50 NSWLR 679 at 686 [29].

and, if so, on what terms. The Permanent companies contended in this Court that this gave too broad an operation to ss 21(1)(a) and 26(2) of the Act.

Matter relevant to the decision whether to accept the risk

52 The conclusions of the trial judge and of the Court of Appeal on this issue depended, in critically important respects, on findings of fact made at trial which were not challenged in the appeal to this Court. It is necessary to identify those findings of fact before considering the competing contentions about construction of the Act. It is convenient to do that without, at this stage, seeking to distinguish between the knowledge of the Permanent companies and the knowledge of Sedgwick Australia. Distinctions of that kind will require separate consideration later in these reasons.

53 When the Permanent companies instructed Sedgwick Australia to obtain a 30 day extension of cover from, among others, FAI, the employee of Sedgwick Australia who had the principal carriage of the matter, Mr Daly, instructed a subordinate, Mr Welsh, to contact FAI (and others) to get their agreement to a 30 day extension. Mr Daly told Mr Welsh to "be careful when speaking to FAI", an instruction which both men understood as requiring Mr Welsh not to volunteer to FAI's representatives that FAI had not been, and may well not be, invited to participate in the next year's insurance.

54 Mr Welsh then spoke with Mr Hunter, an underwriter employed by FAI. The substance of that conversation was recorded by Mr Welsh in a contemporaneous diary note. It recorded him telling Mr Hunter that London Underwriters had not finalised renewal terms yet, but were agreeable to a 30 day extension at pro rata plus 20 per cent; that Permanent had already agreed to this extension; and that he had asked Mr Hunter whether he, Hunter, was agreeable to this. Mr Hunter replied that if the lead underwriter had approved he, too, was happy to give the extension and would support it. Mr Hunter was recorded as having gone on to say that "if we were to send renewal information, this should be sent to Angus MacIver [of FAI] to look at, as [Mr Hunter would] be out of the office from the end of next week for the rest of October". Mr Welsh did not tell Mr Hunter that FAI had not been, and may well not be, invited to participate in the 1991-92 insurance.

55 At trial, Mr Hunter and Mr MacIver gave evidence that had FAI been told of what we will call the "conditional decision" reached by the Permanent companies, FAI would not have granted the 30 day extension, and the trial judge found as a fact that this was so[25]. He also found that both Mr Daly and Mr Welsh

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25 (1998) 44 NSWLR 186 at 258.

believed that the conditional decision of the Permanent companies was relevant to FAI's decision whether to grant the extension. Mr Daly's instruction to Mr Welsh to "be careful" about revealing this matter was at least consistent with that conclusion.

56 There was some debate in the course of argument in this Court about the reasons that FAI may have had for refusing a 30 day extension of cover under a claims made policy if it were told when the extension was sought that it would probably not be invited to tender for future business. It is not necessary to examine whether all of the matters considered in the course of argument were considered at trial.

57 At first sight, it may appear to be difficult to identify any sound commercial reason for FAI refusing to do business simply because it was possible, even probable, that it would, in the future, be denied the opportunity to offer to transact similar business with the insured in respect of another, later period. The difficulty of identifying any commercial reason for the refusal to grant the extension is made greater when it is recognised that FAI was then transacting less professional indemnity insurance than it wished. In particular, the amount of business placed with FAI by the Sedgwick group of companies had dropped sharply over the preceding months.

58 Moreover, would not an insurer expect an insured to obtain competitive quotes for business? Would not an insurer recognise that securing future business from an insured depended upon the insured being willing to place its business with it? Was it not to be expected that an insurer, faced with a large claim under a short-term contract, would be likely to seize upon any matter of which it was ignorant and say that had it known that fact, the extension would never have been granted? All these and other questions were asked at the trial of the action. All of them must now be treated as having been resolved against the Permanent companies. The finding of fact, which is not challenged, is that, had FAI known of the attitude of the Permanent companies, it would not have granted the extension which was sought. That is, had it known of this matter it would not have made the contract of insurance under which indemnity was sought.

59 In the appeal to this Court, the Permanent companies submitted that matters relevant to the decision whether to accept the risk confined attention to matters bearing upon the nature or extent of the risk which was to be the subject of the insurance contract; they did not extend to any other, broader, commercial consideration that the insurer might take into account in deciding whether to make the insurance contract. It was submitted that this construction was to be preferred because before the passing of the Act the insured would have been under no greater duty, and the Act, far from being intended to enlarge the duties of disclosure of an insured, was enacted to ameliorate the obligations imposed on

an insured at common law. Further, so it was submitted, had it been intended to require disclosure of matters affecting the insurer's decision to make the contract, s 21(1) would not have referred to the decision whether to accept the risk; it would have referred to matters relevant to the insurer's decision to make any contract of insurance, or a contract on the terms of the contract that was made.

Are matters relevant to the risk distinct from matters relevant to the contract?

60 Central to the submissions of the Permanent companies was the proposition that the Act requires a distinction to be drawn between matters relevant to an insurer's decision to accept a risk, and matters which do not bear upon the risk but are relevant to whether a contract of insurance would be made. The distinction is not required by the Act and is, in any event, a distinction that cannot be drawn with any clarity.

61 It is necessary to recall the circumstances in which s 21 will be engaged. First, it will apply only where a contract of insurance has been made. Secondly, it will be engaged only if there was a matter which was known to the insured before the contract of insurance was entered into and which the insurer did not know[26]. Thirdly, and most importantly, an insurer *accepts* a risk by making the relevant contract of insurance. Assessing the nature and extent of that risk may be an important step in deciding whether to accept the risk and, if so, on what terms. But the insurer *accepts* the risk when it agrees to insure the insured.

62 An insurer may make a contract of insurance in any of a number of ways[27]. So, to take one obvious example, there may or may not be a cover note before the insured completes any proposal or a policy is issued. The terms which are incorporated in a cover note may or may not be the same as those recorded in a later policy. In many cases the relationship between the terms governing a cover note and the terms of a later policy may depend upon what is revealed when the insured completes the relevant proposal. The contract on which an insurer sues may be a contract that is made only *after* the issue of a cover note. In some cases the contract on which the insured sues will have been formed only when that policy issues, and it will be a contract that replaces any earlier contract evidenced by a cover note.

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26 Section 21(2)(c) provides that the duty of disclosure does not require the disclosure of a matter that the insurer knows or ought to know in the ordinary course of that insurer's business as an insurer.

27 See, for example, *Southern Cross Assurance Co Ltd v Australian Provincial Assurance Association Ltd* (1939) 39 SR(NSW) 174 at 185-187 per Jordan CJ and Nicholas J.

63 Speaking of the insurer "accepting the risk", rather than "making the contract of insurance", embraces all of the many kinds of dealings by which an insurer agrees to insure the insured. Section 21 of the Act fixes the insured's duty of disclosure by reference to a matter's relevance to the insurer's decision to accept the risk and by reference to what is known to the insured before the relevant contract is entered into.

64 To attempt to distinguish between matters which bear upon the risk and those which concern the making of the contract under which the risk is undertaken, but not the risk, would require a very fine distinction. If such a distinction can be drawn, it is not one which the Act requires or permits.

65 Section 21(1) focuses upon two steps which an insurer may take in its dealings with an insured – deciding to accept the risk at all and deciding the terms upon which the risk would be accepted. The matters which an insured must disclose to the insurer are matters which are known to the insured and which are relevant to either of those steps. Section 21(1) does not require, however, the identification of the particular step in the insurer's decision-making process to which the matter in question relates. If a matter bears upon the decision to accept the risk, or bears upon the terms upon which the risk is to be accepted, or bears upon both, the matter must be disclosed. The obligation to disclose is fixed by reference to the relevance of the matter to the making of either decision by the insurer. It is the insurer's *decisions*, about whether to accept the risk or the terms upon which it will be accepted, that is the fulcrum about which s 21(1) turns.

66 What the Permanent companies seek to do is to shift the focus of attention from the insurer's decisions (and the relevance that the matter in question may have to those decisions) to the subject-matter of one of those decisions (the risk against which the insurance provides). The analysis which was made in the course of argument of cases decided before the Act was passed, and references made in those cases to matters affecting the risk, must be understood in that light.

67 Before the Act came into force, the obligation of an insured to disclose matters to an insurer was usually traced to Lord Mansfield's statement of the duty, in connection with marine insurance, in *Carter v Boehm*[28]:

"Insurance is a contract upon speculation.

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28 (1766) 3 Burr 1905 at 1909 [97 ER 1162 at 1164].

> The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only: the under-writer trusts to his representation, and proceeds upon confidence *that he does not keep back any circumstance in his knowledge, to mislead the under-writer into a belief that the circumstance does not exist, and to induce him to estimate the risque, as if it did not exist*." (emphasis added)

In marine insurance the duty to disclose was given statutory force and content[29], but in general insurance it remained a creature of the common law until the Act was passed. The extent to which s 24 of the *Marine Insurance Act* 1909 (Cth) accurately reflected the obligation of a person seeking general insurance to disclose matters to the insurer was, in at least some respects, not free from doubt. In particular, there was doubt about whether the test of materiality that was to be applied required consideration of the judgment that a prudent *insurer* would make about the matter or required reference to the judgment that a reasonable *insured* would make[30]. By the mid 1970s the weight of authority in Australia might be thought to have favoured a prudent *insurer* test[31]. Reference was commonly made to the test described by Samuels J in *Mayne Nickless Ltd v Pegler*[32] in the following terms:

> "The question is whether [the] information would have been relevant to the exercise of the insurer's option to accept or reject the insurance proposed.
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> It seems to me that the test of materiality is this: a fact is material if it would have reasonably affected the mind of a prudent insurer in determining whether he will accept the insurance, and if so, at what premium and on what conditions."[33]

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29 *Marine Insurance Act* 1909 (Cth), s 24.

30 *Guardian Assurance Co Ltd v Condogianis* (1919) 26 CLR 231 at 246-247; *Joel v Law Union and Crown Insurance Company* [1908] 2 KB 863 at 883-884.

31 *Babatsikos v Car Owners' Mutual Insurance Co Ltd* [1970] VR 297; *Mayne Nickless Ltd v Pegler* [1974] 1 NSWLR 228 at 238-239.

32 [1974] 1 NSWLR 228 at 239.

33 See also *Marene Knitting Mills Pty Ltd v Greater Pacific General Insurance Ltd* (1976) 11 ALR 167 at 172.

Other features of the insured's duty of disclosure remained open to some debate. So, for example, in the view of the Australian Law Reform Commission[34], an insured may also have been bound to disclose non-material facts which the insured knew to be material to the particular insurer. It is not necessary to pursue those controversies to a conclusion.

68 The cases decided before the Act, in which questions of disclosure are discussed, refer to the materiality of some matter to an insurer "accept[ing] the risk"[35], "accept[ing] the proposal"[36] or "accept[ing] the insurance"[37]. The Permanent companies submitted that these expressions, particularly "accept[ing] the risk" and cognate phrases, should be understood as confining considerations of materiality, under the law as it stood before the Act, to matters that affected the nature or extent of the risk to be insured. They further submitted that the Act should not be understood as extending the range of material matters.

69 All of the cases decided before the Act, or at least all to which we were taken, concerned the materiality of a particular piece of information to the nature or extent of the risk that was to be insured[38]. Even so, undue weight cannot be placed on the choice of particular verbal formulae in such cases when considering what the Act means when it speaks of the decision of an insurer whether to accept the risk. The expressions "accept the risk", "accept the proposal" and "accept the insurance" were used as if they were all synonymous expressions. Further, and no less importantly, they were used in the context of applying an objective test of materiality – in which the point of reference came to be understood as being the "prudent insurer". The decision of a prudent insurer to make a particular insurance contract was necessarily assumed to be a decision that would be taken on rational commercial grounds. Cases decided before the Act discussed the materiality of a particular matter in a context where it had been alleged that the prudent insurer would not have made the contract on which action had been brought, if the matter in question had been revealed. Because the test to be applied in those cases required consideration of the prudent insurer, it

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34 *Insurance Contracts*, Report No 20, (1982) at 95 [156].

35 For example, *Barclay Holdings (Australia) Pty Ltd v British National Insurance Co Ltd* (1987) 8 NSWLR 514 at 523.

36 For example, *Western Australian Insurance Co Ltd v Dayton* (1924) 35 CLR 355 at 365.

37 For example, *Pegler* [1974] 1 NSWLR 228 at 239; *Barclay Holdings* (1987) 8 NSWLR 514 at 517.

38 For example, *Barclay Holdings* (1987) 8 NSWLR 514.

was well nigh inevitable that debate about issues of this kind focused upon the one commercial consideration that was central to the business judgment of any insurer – the nature and extent of the risk to be insured.

70 It by no means follows, however, that the focus must be so narrow when considering the Act's duty of disclosure. Under the Act, attention is shifted from the prudent insurer to the particular insurer. It is *that* insurer's decision which, as we have said, is the fulcrum about which the section turns. When it is then recognised that the matter must be "known to the insured", being either a matter which the insured knows or which a reasonable person in the circumstances could be expected to know to be relevant to the insurer's decisions, there is no evident reason to confine the class of matters in question to those which affect the nature and extent of the risk to be insured. That is, there is no reason to exclude from consideration matters which do not affect the nature or extent of the risk but which are known by the insured to be relevant to whether the insurer will make the contract proposed.

71 To construe s 21(1) as being capable of application when a matter that relates to the insurer's decision whether to make the *contract* of insurance is not disclosed, even if it does not affect the nature or extent of the *risk* to be insured, does not extend an insured's obligation beyond what may have been intended by those who promoted the Act. It must be recalled that the section applies only where a matter is not only known to the insured but also is either known by the insured to be relevant to the insurer's decision, or a reasonable person could be expected to know it to be relevant.

72 One of the principal purposes of the Act was "to reform … the law … so that a fair balance is struck between the interests of insurers [and] insureds". Taken as a whole, the changes that were effected by the Act can readily be seen to have "mitigate[d] the common law rule of duty of disclosure"[39]. That result was achieved by the combination of changes which the Act made to that duty and to the consequences that might follow from its breach. It is not to be assumed, however, that particular elements of the Act's statement of the duty were intended to adopt pre-existing common law concepts of materiality[40] – especially when materiality was now to be judged by reference to the particular insurer rather than the prudent insurer.

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39 Second Reading Speech for the Bill that became the *Insurance Contracts Act*: Australia, House of Representatives, *Parliamentary Debates* (Hansard), 29 May 1984 at 2332.

40 *Advance (NSW) Insurance Agencies Pty Ltd v Matthews* (1989) 166 CLR 606 at 615.

73 Further, the duty to disclose something that is known, and which either was known to be relevant or a reasonable person could be expected to know to be relevant, is not an unduly burdensome obligation. That conclusion is reinforced when it is recalled that the duty does not require disclosure of matters of common knowledge[41] or matters that the insurer knows, or in the ordinary course of its business as an insurer ought to know[42]. It will be rare indeed for an insured to know that an intention to seek alternative quotations for insurance, or an intention to consider placing business elsewhere, is relevant to an insurer's decision whether to accept the risk that is offered. It will be rare indeed for an insurer to be able to demonstrate that such common place commercial behaviour was not known to it. The facts in the present case are very unusual.

74 The trial judge, having made the findings of fact which he did, was right to hold that the Permanent companies' conditional decision was a matter relevant to FAI's decision whether to accept the risk. It follows that the Court of Appeal was right to reject this aspect of the Permanent companies' arguments in the appeal to that Court.

Knowledge

75 Did the Permanent companies know that this was a matter relevant to FAI's decision? Did Mr Daly or Mr Welsh, employees of the Permanent companies' broker, Sedgwick Australia, know it to be relevant? No-one else employed or engaged by the Permanent companies was shown to have known that. Could the knowledge of Mr Daly or Mr Welsh be imputed to the Permanent companies? Were the courts below right to decide that s 21(1) was engaged?

76 It is not always easy for a court to decide whether, at some time in the past, a person knew something. Cases like *He Kaw Teh v The Queen*[43] and *Vines v Djordjevitch*[44] consider some difficulties that can arise. The apparently irresistible urge to classify "knowledge" by the use of epithets like "actual", "constructive", "imputed", or by the use of metaphors like "Nelsonian knowledge"[45] emphasises that the task can be difficult. When the person whose

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41 s 21(2)(b).

42 s 21(2)(c).

43 (1985) 157 CLR 523.

44 (1955) 91 CLR 512.

45 *Baden v Société Générale SA* [1993] 1 WLR 509 at 576 per Peter Gibson J; [1992] 4 All ER 161 at 236.

"knowledge" is being considered is an inanimate legal construct, like a company, the difficulties may seem to be all the greater.

77 In the present case, Mr Daly said, in evidence, that he considered that neither the Permanent companies, nor Sedgwick Australia, had a duty to disclose the Permanent companies' conditional decision to FAI. He had told Mr Welsh, in effect, not to volunteer this information to FAI. Importantly, he agreed in cross-examination that, if Mr Welsh did refrain from volunteering the information, he (Welsh) "would be withholding from Mr Hunter [of FAI] a piece of information relevant to Mr Hunter's consideration of whether he would grant the extension and, if so, on what terms".

78 On this evidence alone, it was well open to the trial judge to conclude, as he did[46], that Mr Daly knew that the Permanent companies' conditional decision was a matter relevant to FAI's decisions whether to accept the risk and, if so, on what terms it would do so. It is, therefore, not necessary to consider whether Mr Daly held a suspicion, expectation or belief that fell short of knowledge. He acknowledged that he knew it to be relevant.

79 Nor is it necessary to attempt some general definition of what is meant by the word "know" when it is used in the Act[47]. Attempting to define the boundary between "belief" and "knowledge", except by reference to the facts of a particular case, is fraught with difficulty. The substitution of one set of value laden words for the word "know" (like "*informed* belief … *sufficient* ... to induce *any reasonable man*"[48] to adopt a course of action, or holding "a belief on which that person is prepared to act in the world of practical affairs"[49]) may do little more than restate the problem which the section presents.

80 Nor is it useful to apply the words "actual" or "constructive" to the two kinds of circumstances with which pars (a) and (b) of s 21(1) deal in considering whether a matter is known to be relevant to the insurer's decision. Section 21(1) refers both to the insured knowing that a matter is relevant and to matters that a reasonable person, in the circumstances, could be expected to know to be relevant. To inject notions of "actual" and "constructive" knowledge as

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46 (1998) 44 NSWLR 186 at 258.

47 cf (2001) 50 NSWLR 679 at 688-690 [40]-[52].

48 *Coastal Estates Pty Ltd v Melevende* [1965] VR 433 at 451.

49 (2001) 50 NSWLR 679 at 690 [54].

descriptions of these two different kinds of case may distract attention from the words of the Act[50]. It is the words to which effect must be given.

81 The critical question in this aspect of the present case was one of fact. There was evidence from which it was open to the judge to conclude that Mr Daly knew that the matter of the conditional decision of the Permanent companies was relevant to FAI's decision to accept the risk. It is, therefore, not necessary to consider Mr Welsh's state of mind.

Knowledge of the Permanent companies

82 The Permanent companies had delegated to Sedgwick Australia the task of securing an extension of the professional indemnity insurance. The trial judge found that the Permanent companies had wholly delegated to Sedgwick Australia the performance of their duty of disclosure in relation to that extension[51]. The Court of Appeal made the same finding[52]. There is no reason to disturb those findings.

83 That being so, it follows that the knowledge of Sedgwick Australia, whether gathered in the course of acting as agent for the Permanent companies or otherwise, was to be imputed to the Permanent companies. Indeed, the Permanent companies appear to have accepted as much in the Court of Appeal[53].

84 In this Court, the Permanent companies submitted that earlier decisions of trial or intermediate courts[54], to which the Court of Appeal had referred in this connection, did not establish, as a general proposition, that the knowledge of an agent (however acquired) will be imputed to an insured who has delegated to that agent performance of the insured's duty of disclosure. Rather, so it was submitted, they are properly understood as cases which depended upon the operation of s 21(1)(b) in circumstances where the agent was duty bound to

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50 *Lindsay v CIC Insurance Ltd* (1989) 16 NSWLR 673 at 680-681 per Rogers CJ in Comm Div.

51 (1998) 44 NSWLR 186 at 262.

52 (2001) 50 NSWLR 679 at 691 [59].

53 (2001) 50 NSWLR 679 at 690 [56].

54 *Lindsay v CIC Insurance Ltd* (1989) 16 NSWLR 673; *Ayoub v Lombard Insurance Co (Aust) Pty Ltd* (1989) 97 FLR 284; *Macquarie Bank Ltd v National Mutual Life Association of Australia Ltd* (1996) 40 NSWLR 543; *Commercial Union Assurance Co of Australia Ltd v Beard* (1999) 47 NSWLR 735.

inform the insured of the matter in question. The Permanent companies submitted that, in the present case, where the immediate question concerned knowledge of the *relevance* of a matter to the insurer's decision, disclosure by Sedgwick Australia to the Permanent companies of its view of the relevance of the matter would have meant only that the Permanent companies had conflicting views of relevance – their own and Sedgwick's. It was therefore not established (so the argument proceeded) that the Permanent companies knew or ought to have known that their conditional decision was relevant to FAI's decision.

85 The analysis of the matter thus advanced by the Permanent companies puts the finding about delegation of the task of disclosure on one side. It seeks to analyse the matter on the assumption that it was for the Permanent companies to decide what would be disclosed when, on the facts that were found, this was a task they had given to Sedgwick Australia. When the fact of delegation is taken into account, the conclusion that Sedgwick Australia was bound to disclose what *it* knew (however it acquired the knowledge) is inevitable.

86 As Powell JA pointed out in *Macquarie Bank Ltd v National Mutual Life Association of Australia Ltd*[55], s 21 cannot be confined in its operation to natural persons under no legal incapacity. It must have operation in relation to persons (including corporations) who can act and who can "know" only through agents. That this is the intended operation of the Act may find some support in the reference in s 24 to statements that are made by "or attributable to" the insured. The knowledge of relevant employees and agents may, therefore, be taken into account[56].

87 Where the task assigned to the agent includes the task of making appropriate disclosures, it is not to the point to inquire whether the agent is obliged to communicate the knowledge it has of the relevant matter to its principal. It is, therefore, neither necessary nor appropriate to distinguish in such a case between information which the agent has acquired in the course of executing the agency and information acquired otherwise. As Handley JA rightly said[57]:

> "Where the agent acts within his authority with the knowledge in question present to his mind, the principal should be bound by that

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55 (1996) 40 NSWLR 543 at 611.

56 *Commercial Union Assurance Co of Australia v Beard* (1999) 47 NSWLR 735 at 745 [37].

57 (2001) 50 NSWLR 679 at 697 [89].

> knowledge, however acquired. I see no basis for ignoring any part of the agent's knowledge, present to his mind, when he is doing the authorised act. The source of the knowledge seems irrelevant. What must matter is the agent's state of mind when doing the authorised act."

88 The conclusion that, in the present case, the knowledge of Sedgwick Australia, however acquired, was the knowledge of the Permanent companies, is not inconsistent with the position that obtained, before the Act, where a person was appointed, as an agent to insure, to effect insurance on another's behalf[58]. The conclusion about the Act's operation does not depend, however, upon deciding that this was the previous law or upon adopting it. Rather, the conclusion is rooted in the words of the Act and, in particular, a proper understanding of what is meant by "the insured knows". A corporate insured can know something only through an agent. In the context of a section governing the duty of disclosure, the knowledge of an agent to effect the insurance is the knowledge of the insured.

89 It follows that the courts below were right to conclude that the insured (the Permanent companies) knew that their conditional decision was relevant to FAI's decision to accept the risk.

90 This conclusion is sufficient to dispose of the appeal to this Court. It is, nevertheless, as well to go on to deal with the fourth issue which was agitated in the appeal because it concerns a finding of fraud made in the Court of Appeal. It is to be noted, however, that in the context of the amounts otherwise at stake in this litigation, this issue had only very small monetary significance. The other conclusions reached in this case sufficed to excuse FAI from its obligation to indemnify the Permanent companies. The only monetary significance of the claim that there had been a *fraudulent* misrepresentation was to FAI's claim to avoid the policy under s 28(2) which, if successful, would lead to the refusal of an order for repayment of the premium paid by the Permanent companies – an amount of $4,242.22.

Fraudulent misrepresentation

91 FAI alleged that the Permanent companies had represented to it that there was nothing to be disclosed which was or might be relevant to it other than what was disclosed in the communication between Sedgwick Australia and Mr Hunter of FAI. It alleged that this was a misrepresentation that was made fraudulently. The trial judge concluded that Mr Hunter *took* what Mr Welsh had said as indicating that the Permanent companies and Sedgwick Australia intended to

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58 *Blackburn, Low & Co v Vigors* (1887) 12 App Cas 531.

invite FAI to quote for renewal[59]. This, so the trial judge found, was not just a conclusion that Mr Hunter arrived at; it was asserted by implication by Mr Welsh saying what he did[60]. Accordingly, he found that what Mr Welsh said to Mr Hunter, in the conversation we have described above, "was enough to assert to Mr Hunter that FAI was to be invited to quote renewal terms"[61]. Importantly, the trial judge said[62] that he did "not think an intention ha[d] been shown sufficient to justify a finding that the misrepresentation was fraudulent" and, a little later in his reasons[63], that he did "not think either Mr Daly or Mr Welsh are dishonest persons; and I think they did what they thought appropriate when they had to make a quick decision in a difficult situation". His Honour was "not prepared to find that the non-disclosure was fraudulent"[64].

92 Despite these findings, the Court of Appeal concluded[65] that Mr Welsh had been guilty of fraudulent misrepresentation. At the end of his conversation with Mr Welsh, Mr Hunter told him that if Sedgwick Australia were to send renewal information, it should be sent to Mr MacIver, not Mr Hunter. The Court of Appeal attached great significance to this statement. It said[66] that it "made it clear that Mr Hunter had assumed from the conversation that FAI were going to be invited to renew". The Court held[67] that Mr Welsh's failure to correct any impression that FAI would be invited to renew was significant and that insufficient weight had been given to Mr Welsh's acknowledgment, in answer to a question by the trial judge, that what he had done "could mislead Mr Hunter"[68].

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59 (1998) 44 NSWLR 186 at 263.

60 (1998) 44 NSWLR 186 at 263.

61 (1998) 44 NSWLR 186 at 263.

62 (1998) 44 NSWLR 186 at 263.

63 (1998) 44 NSWLR 186 at 263.

64 (1998) 44 NSWLR 186 at 263.

65 (2001) 50 NSWLR 679 at 705 [127].

66 (2001) 50 NSWLR 679 at 704 [124].

67 (2001) 50 NSWLR 679 at 705 [127].

68 (2001) 50 NSWLR 679 at 703 [121].

93 Although the Court of Appeal recognised[69] that an appellate court will be slow to revise the findings of a trial judge who acquits a witness of fraud[70], it concluded that, in this case, the evidence of Mr Welsh was "clear on its face"[71]. It took that evidence as revealing[72] that, in the light of the instructions Mr Welsh had received, "he felt constrained to remain silent but in doing so he *knowingly* allowed his deception of Mr Hunter, originally unintended, to continue to do its work". (emphasis added)

94 That conclusion was not open to the Court of Appeal. The evidence of Mr Welsh did not reveal any knowing deception by him. Indeed, the trial judge's conclusion that Mr Welsh was not dishonest was to the contrary. The highest that the evidence given by Mr Welsh went was that he did not think he had acted reasonably and that it *could* have misled Mr Hunter. That may be *consistent* with Mr Welsh having stayed silent knowing either that what he had said had conveyed a false understanding to Mr Hunter, or reckless as to whether it had. It did not compel that conclusion. The trial judge's conclusion that Mr Welsh had not acted fraudulently should not have been disturbed.

Order

95 The appeal should be dismissed with costs.

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69 (2001) 50 NSWLR 679 at 702 [118].

70 *Abalos v Australian Postal Commission* (1990) 171 CLR 167; *Nocton v Lord Ashburton* [1914] AC 932 at 945.

71 (2001) 50 NSWLR 679 at 705 [130].

72 (2001) 50 NSWLR 679 at 705 [130].