

1 Overview

1.1 Dispute

The applicant held a Home and Contents Insurance Policy with the financial services provider (FSP). The applicant lodged a claim after her home was damaged by fire on 30 September 2017. The FSP denied the claim on the basis of non-disclosure.

The FSP says the applicant breached her duty of disclosure by failing to disclose that her home was not “structurally sound and watertight”.

The applicant says she did not breach her duty of disclosure because the home was structurally sound and watertight.

1.2 Issues and key findings

Is the FSP entitled to deny the claim on the basis of non-disclosure?

The duty of disclosure only applies to matters that the applicant knew.

The FSP has not established that the applicant knew the building was structurally unsound or not watertight. Therefore, the FSP is not entitled to deny the claim on the basis of non-disclosure.

1.3 Determination

This determination is in favour of the applicant.

The FSP is required to settle the claim within the terms and conditions of the policy.

2 Reasons for determination

2.1 Is the FSP entitled to deny the claim on the basis of non-disclosure?

FSP clearly informed the applicant of the duty of disclosure

Section 22 of the *Insurance Contracts Act 1984* (the Act) provides that before entering into an insurance contract, an insurer is required to clearly inform a prospective insured of the nature and effect of the duty of disclosure.

The applicant's policy was renewed on 25 May 2017. On 3 May 2017, the FSP sent the applicant a document titled "Insurance Renewal". The applicant does not dispute that she received the document. Page 2 of the document contains the following statement:

What is your DUTY of DISCLOSURE?

Before you renew this contract of insurance, you have a duty of disclosure under the ***Insurance Contracts Act 1984***.

If we ask you questions that are relevant to our decision to insure you and on what terms, you must tell us anything that you know and that a reasonable person in the circumstances would include in answering the questions.

Also, we may give you a copy of anything you have previously told us and ask you to tell us if it has changed. If we do this, you must tell us about any change or tell us that there is no change.

If you do not tell us about a change to something you have previously told us, you will be taken to have told us that there is no change.

You have this duty until we agree to renew the contract.

On the balance of probabilities, the Panel is satisfied that the FSP clearly informed the applicant of the nature and effect of the duty of disclosure prior to entering into the contract. Therefore, the FSP has fulfilled its obligations under section 22 of the Act.

FSP provided a copy of matters previously disclosed

Under section 21 of the Act, an insured has a duty to disclose, before entering into an insurance contract, certain matters that are relevant to the insurer's decision whether (and on what terms) to offer insurance.

This duty of disclosure is generally limited to matters the insurer specifically asks about.

Section 21B(3)(b) of the Act says that before an insurance contract is renewed, the insurer may give the insured a copy of any matters previously disclosed and ask the insured to disclose any change in the matters.

Page 1 of the Insurance Renewal contained the following statement:

Notify any changes

Contact us if you wish to make any changes to your cover, or if any information in **Your Details** is incomplete or incorrect. It is a very important part of your **Duty of Disclosure** that you must keep us advised of any changes or any new information that is relevant to our decision to insure you (See Overleaf).

Page 3 was headed “Your Details”, and contained the following entry under the sub-heading “The Dwelling”:

Is the home structurally sound and watertight? **Yes**

The Panel is satisfied that by sending the Insurance Renewal to the applicant, the FSP has acted in accordance with section 21B(3)(b).

Section 21B(10) says that if the insurer acts in accordance with section 21B(3)(b) and the insured does not disclose any change in the matter, the insured is taken to have informed the insurer that there is no change in the matter.

The Panel is satisfied that the applicant did not disclose any change in the matter. Therefore, the applicant is taken to have informed the FSP that her home was structurally sound and watertight.

FSP says home was not structurally sound

The home has very large cracks in some walls. The applicant says this is due to ground movement caused by flooding in 2011.

The FSP has provided a report from its internal assessor, who inspected the home on 5 October 2017. The report cites “major cracking” (up to 100mm), and “unstable walls”. The report says repairs could not be warranted without underpinning the entire foundation of the house.

The FSP appointed ‘JHA’, engineers, who inspected the home on 4 October 2017. In an email to the FSP dated 19 December 2017, JHA states that the building “was structurally unsound prior to the fire”. JHA further states:

The building consists of a main dwelling with verandahs around all four sides... It is these enclosed verandah sections that... are structurally unsound. The original dwelling is not exhibiting signs of movement and appears to be structurally sound.

Applicant says home was structurally sound and watertight

In a letter to FOS received on 5 May 2018, the applicant states:

Prior to and at the time of the fire the building was solid, structurally sound and watertight.

There had been no water ingress to the building due to the condition of the building.

...

A previous flood event had caused some cracks in walls in a localised area due to ground movement, but at no time could the house be considered ‘unsound’.

I dispute the suggestion the house was unsound.

At no time have I experienced any water leaks in the roof or walls, and no mould or mildew has ever formed in the home.

The material provided does not contain any evidence that water had been entering the building before the fire.

FSP has not established breach of duty of disclosure

Under section 21(1) of the Act, the duty of disclosure is limited to matters that are “known to the insured”. The duty does not extend to matters that the insured merely believed, suspected, or ought to have known (see section 3.2 of this determination).

In order to deny the claim on the basis of non-disclosure, the FSP must establish that the applicant knew her home was not “structurally sound and watertight”.

The applicant says that the building was structurally sound and watertight; there is no evidence that this was not the applicant’s genuine belief.

The panel has carefully reviewed all of the exchanged material and in particular the expert reports provided. Given the applicant’s statements regarding that lack of leaks and JHA’s confirmation that the original dwelling is structurally sound, the panel is not satisfied that the FSP has established that the home was other than structurally sound.

The available evidence does not establish that, before the policy was renewed, the applicant knew her home was not structurally sound and watertight. Therefore, the FSP is not entitled to deny the claim on the basis of non-disclosure.

FSP must assess damage

The applicant has lodged a claim for damage caused by a fire. There is no dispute that the insured property was damaged by a fire, or that the policy provides cover for fire damage.

The FSP has not established that it is entitled to deny the claim on the basis of non-disclosure. The FSP has not established the application of any policy exclusion that entitles it to deny the claim. Therefore, the FSP must accept the claim.

The available evidence is not sufficient to establish the extent of the fire damage, or the cost of rectifying the damage. Therefore, the Panel is unable to determine the extent of the FSP’s liability for the claim.

If this determination is accepted by the applicant, the FSP must assess the fire damage and settle the claim within the terms and conditions of the policy.

The parties are requested to work together to resolve the claim.

3 Supporting information

3.1 FOS approach to this dispute

A full exchange of the relevant information has taken place between the parties and each party has had the opportunity of addressing any issue raised.

All of the provided material has been read and considered. The parties have raised numerous issues in their submissions. For the purpose of this determination, commentary is restricted to only those issues considered relevant.

3.2 Relevant law

Insurance Contracts Act 1984 (Cth)

Section 21: 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...

...

Section 21B: Eligible contracts of insurance--disclosure before contract renewed

Position of the insurer

- (3) Before the contract is renewed, the insurer may do either or both of the following things:
- (a) request the insured to answer one or more specific questions that are relevant to the decision of the insurer whether to accept the risk and, if so, on what terms;
 - (b) give the insured a copy of any matter previously disclosed by the insured in relation to the contract and request the insured:
 - (i) to disclose to the insurer any change to that matter; or
 - (ii) to inform the insurer that there is no change to that matter.

...

- (10) If:
- (a) the insurer gives the insured a copy of any matter previously disclosed by the insured and makes a request in accordance with paragraph (3)(b); and
 - (b) before the contract is renewed, the insured does not disclose any change to the matter;
- then the insured is taken to have informed the insurer that there is no change to the matter.

...

Section 22: Insurer to inform of duty of disclosure

- (1) The insurer must, before a contract of insurance is entered into, clearly inform the insured in writing:
 - (a) of the general nature and effect of the duty of disclosure; and
 - (b) if section 21A or 21B applies to the contract--of the general nature and effect of that section; and
 - (c) ...
 - (d) that the duty of disclosure applies until the proposed contract is entered into.

...

- (6) An insurer who has not complied with subsection (1)... may not exercise a right in respect of a failure to comply with the duty of disclosure, unless the failure was fraudulent.

...

Matters “known to the insured”

Under section 21(1), which establishes the insured’s duty of disclosure, the duty is limited to matters “known to the insured”.

Australian courts have interpreted this to mean that an insured cannot breach their duty of disclosure by failing to disclose something they did not know, even if it is something a reasonable person in the circumstances could be expected to know. The history of the courts’ consideration of this point is summarised by the Full Court of the Federal Court of Australia in *ABN AMRO Bank NV v Bathurst Regional Council* [2014] FCAFC 65 at [1679] – [1689].

In *Permanent Trustee Australia Ltd v FAI General Insurance Company Ltd (in liq)* [2003] HCA 25, a majority of the High Court of Australia considered section 21(1) and stated:

The word “knows” is a strong word. It means considerably more than “believes” or “suspects” or even “strongly suspects”.