IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL DIVISION
GENERAL LIST

Revised
Not Restricted
Suitable for Publication

Case No. CI-15-05271

EMAD EBRAHAM Plaintiff

V

AAI LIMITED T/AS GIO INSURANCE (ACN 005 207 807) Defendant

JUDGE:	HER HONOUR JUDGE A RYAN
WHERE HELD:	Melbourne
DATE OF HEARING:	27 & 28 September, 2, 3, 4, 5 & 12 October 2017
DATE OF JUDGMENT:	1 February 2018
CASE MAY BE CITED AS:	Ebraham v AAI Limited t/as GIO Insurance
MEDIUM NEUTRAL CITATION:	[2018] VCC 18

REASONS FOR JUDGMENT

Subject: INSURANCE

Catchwords: INSURANCE – plaintiff seeking indemnity under insurance policy for stolen jewellery – whether defendant entitled to deny indemnity on the basis the plaintiff did not reasonably substantiate ownership and valuation of the stolen items

INSURANCE CONTRACTS ACT 1984 (Cth) whether plaintiff made fraudulent claim under s56 and failed to comply with duty of utmost good faith under s13 – application of s54 and s31 in answer to denial of indemnity - whether defendant entitled to cancel policy under s60

EVIDENCE – *Evidence Act 2008* (Vic) admissibility under s63 of evidence from overseas witnesses not called at trial – application of coincidence rule under s98 arising from prior burglaries

Legislation Cited: *County Court Civil Procedure Rules* 2008
Evidence Act 2008 (Vic)
Evidence (Miscellaneous Provisions) Act 2008 (Vic)
Insurance Contracts Act 1984 (Cth)

Cases Cited: *Briginshaw v Briginshaw* (1938) 60 CLR 336
Camellia Properties Pty Ltd v Wesfarmers General Insurance Pty Ltd [2013] NSWSC 1975

CGU Insurance Limited v AMP Financial Planning Pty Ltd (2007) 235 CLR 1*;* [2007] HCA 36
Chan Muk-Ying v Tripathi [1993] 2 QDR 599
Ferrcom Pty Ltd v Commercial Union Assurance Co of Australia Pty Ltd (1993) 176 CLR 332
Insurance Manufacturers of Australia Pty Ltd v Heron [2005] VSC 482
Jones v Dunkel (1995) 101 CLR 298
Maxwell v Highway Hauliers Pty Ltd [2014] HCA 33; (2014) 312 ALR 530
Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd (1992) 67 ALJR 170
Sgro v Australian Associated Motor Insurers Ltd [2015] NSWCA 262
Small Business Consortium Lloyds Consortium No 9056 v Angas Securities Ltd [2015] NSWSC 1511
Tiep Thi To v AAMI Limited [2001] VSCA 48; (2001) 3 VR 279
Walton v The Colonial Mutual Life Assurance Society (2004) 13 ANZ Insurance Cases 61-620

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr S Lowry	V M Roccisano Barrister and Solicitor
For the Defendant	Ms S Cherry	Ligeti Partners Lawyers

HER HONOUR:

Introduction

1 On New Year's Eve in 2014, the plaintiff was holidaying at the BIG4 Ballarat Goldfields Holiday Park caravan site with members of his family. Upon returning to his home at Roxburgh Park the following day, he discovered his house had been burgled. The plaintiff submitted a claim under a home and contents insurance policy held with the defendant ("GIO"). He sought indemnity in respect of gold jewellery worth $186,629 which he claimed was stolen in the burglary.

2 GIO denied indemnity and cancelled the policy.

3 The plaintiff claims GIO breached the policy by refusing indemnity. The loss and damage claimed is the value of the stolen items and loss of insurance cover from 21 August 2015 to 25 August 2015.

4 The following issues arise for consideration:

(a) was GIO entitled to refuse indemnity on the basis the plaintiff failed to provide:

(i) strict proof that a burglary had occurred;

(ii) reasonable proof of ownership of the jewellery claimed to have been stolen;

(ii) a valuation by a qualified jeweller or professional valuer;

(iii) honest and complete information for any claim, statement or documents supplied to GIO.

(b) alternatively, can GIO rely upon ss13 and 56 of the *Insurance Contracts Act* 1984 (Cth) ("the ICA") as a basis for refusing indemnity;

(c) can the plaintiff rely upon ss31 and 54 of the ICA in answer to GIO's denial of indemnity;

(d) was GIO entitled to cancel the policy under s60 of the ICA.

5 For the reasons that follow, I find GIO was entitled to refuse indemnity on the basis the plaintiff did not provide reasonably sufficient proof of ownership nor a proper valuation of the claimed stolen items.

Background

6 The plaintiff was born in Hasakah in Syria on 26 May 1970. He had worked in the aluminium trade prior to leaving Syria in 1991. He initially went to Hanover in Germany, before moving to Holland where he established a successful painting and plastering business. The plaintiff came to Australia in 2006.

7 At the time of the burglary, the plaintiff was living at 30 Simmonds Place, Roxburgh Park ("the home"). He resided there with his wife, Mirvat Mansour, and their three young children. Ms Mansour emigrated from Iraq in 2002. The plaintiff receives benefits from Centrelink, including a carer's pension for caring for his wife. Ms Mansour receives a disability pension.

8 The plaintiff met with his father, Gifergis Abraham,[1] in Lebanon in November 2013. An itinerary produced showed he arrived in Beirut on 27 November 2013 and returned to Melbourne on 5 December 2013. The plaintiff said his father had contacted him to tell him he had to come over to Lebanon to get his share, meaning a share of his father's business. The plaintiff said he had previously given his father US$30,000 in 2000 to make his father's business grow bigger. (In his first record of interview dated 15 January 2015 with Mr Morgan, an investigator appointed by GIO, he said he had given his father 30,000 Euro). The plaintiff's evidence was unclear as to the precise nature of his father's business but it seems the father traded various goods in large quantities.

[1] The plaintiff's surname is spelt differently to his father's and also his brother, Abrahim Abraham who gave evidence at trial. No explanation for the difference in spelling was forthcoming: see T656

9 The plaintiff met his father at St George's Church in Beirut, where he went after getting a taxi from the airport. He then returned to his father's apartment.

10 The plaintiff said his father gave him a quantity of gold jewellery together with a receipt the following day and said to him, "This is your share". The receipt was in Arabic dated 26 October 2013 and from a jeweller known as "Samir Jewellery Products" ("Samir"). His father told the plaintiff he was unable to give him money because of the difficulties in exchanging money into US Dollars and smuggling money from one country to another. Because he could not carry more than $10,000, his father decided to buy some gold instead as this was the only way he could give his son his share of the business. The Samir receipt was in the name of the plaintiff although the father had bought the jewellery. The plaintiff said the reason for this was that his father had his permission to use his name because the items belonged to him. The plaintiff's father gave him 19 items of women's gold jewellery in all. The jewellery included snake bracelets, bracelets known as English Pound bracelets, a gold chain, and two sets of jewellery comprising four pieces each. One of the sets, known as a Rashadi set, included a necklace, bracelet, earrings and a ring.

11 The plaintiff later went to a market with his father taking the gold jewellery with them. The plaintiff bought a black bag at the market which he could wear around his waist to carry the jewellery.

12 The plaintiff took the gold jewellery with him when he returned to Australia carrying it in the black bag. He agreed in evidence in chief that he did not declare the jewellery to Australian Customs upon arrival in Melbourne. He said that he was unable to read the passenger declaration form in English. He sought the assistance of a young man on the plane in completing the form for him which he then signed. The plaintiff also said the form did not mention anything about jewellery. It was put to him in cross-examination that there was a question on the form which required him to declare goods that were obtained or purchased overseas that were worth more than $900, including gifts. The plaintiff said no

one had asked him that question. The declaration form was not adduced into evidence.

13 Since the visit to Lebanon in 2013, the plaintiff has not spoken to his father and claims he does not know where he is because of the war in Syria.

14 Some months later the plaintiff took the jewellery to be valued at a jewellery shop known as Baghdad Jewellery at 815 Sydney Road, Brunswick. He saw a man there, later identified as Mr Abbas Al Saffar, who conducted a valuation of the gold jewellery at the plaintiff's request. The plaintiff said he went on his own and took the gold jewellery with him in a black bag together with the Samir receipt. He said the valuation took about 60 to 80 minutes. The jeweller weighed each piece separately on a scale and used a special liquid to test the carat of the gold. The plaintiff said he paid $200 to $250 in cash for the valuation. Neither the plaintiff nor Mr Al Saffar produced a receipt for the cash payment.

15 Two documents were produced on behalf of Baghdad Jewellery both dated 23 December 2013. The first is a tax invoice/statement addressed to the plaintiff. The invoice lists and values each of the four items contained in the two sets of jewellery identified as 1 "ladis twist Rob" (*sic)* and 1 "ladis Rishady set" (*sic*). The second document is in a similar format. It is also addressed to the plaintiff and states it is a valuation for insurance only. Both documents are littered with spelling mistakes. The second document lists 19 items of jewellery to which the carat of gold is ascribed at 21 carats, the individual weight of each item is listed and the resulting value. The total value of the jewellery listed is in the sum of $186,629. The items of jewellery described in the Baghdad Jewellery valuation are identical to those identified in the Samir receipt and listed in the same order. The value of the jewellery in the Samir receipt is given in Syrian Pounds whereas the Baghdad Jewellery valuation is in Australian Dollars.

16 The plaintiff sought and subsequently obtained home and contents insurance with GIO despite having insured with AAMI Insurance ("AAMI") on two previous

occasions and having prior claims met. His evidence was that his brother advised him to go with GIO because "they were very good".

17 GIO agreed to insure the plaintiff's home and contents pursuant to a "Classic Extras Home and Contents Insurance" Policy No. HGC022890127 ("the policy"). A certificate of insurance in the name of the plaintiff and his wife, Ms Mansour was issued on 26 August 2014.[2] There was a further certificate of insurance in evidence issued on 29 August 2014 in the name of the plaintiff only with the same policy number.[3] The certificates are the same except for the dates of issue and named insured. In the plaintiff's statement of claim, the plaintiff relies upon the certificate issued between himself and GIO. GIO referred to the certificate issued in the joint names in paragraph 2(c) of its Defence. Counsel for GIO subsequently confirmed during her final address that the wife had been removed and it was not said she was a co-insured.[4] Consequently, I have proceeded on the basis as pleaded by the plaintiff that the relevant certificate of insurance is the one issued in his name alone.

18 The period of insurance was from 25 August 2014 until 11.59 pm on 25 August 2015. The premium due of $1,308.45 was paid on 5 September 2014. Under the section in the certificate headed "Insurance and criminal history" on page 3, it is noted the insured advised of a burglary (with break in) in 2011. This section requires the insured to disclose certain information, such as prior claims within the past three years.

19 The policy was constituted by the Certificate of Insurance and Product Disclosure Statement ("PDS").[5] The general contents sum insured was $275,000. Specified contents under the policy comprised various items of gold jewellery, namely:

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2 Exhibit "P3"
3 Exhibit "P2"
4 T603
5 CB 38 – 67W

- Ladies Chain, 21ct gold, covered up to $16,489;
- Ladies Queen bracelet, 21ct gold, covered up to $16,489;
- Ladies Queen bracelet, 21ct gold, covered up to $16,489;
- Ladies Queen bracelet, 21ct gold, covered up to $16,489;
- Ladies Queen bracelet, 21ct gold, covered up to $16,489;
- Ladies Twist Chain, 21ct gold, set of 4, covered up to $29,700;
- Ladies Rishadi Set, 21ct gold, covered up to $24,843.

20 The total value of the specified items was $136,988. Portable valuables, being unspecified items were also covered for $4,000 up to $1,000 per item, set or collection. The fixed limit for cash was $400.

21 The plaintiff said he told the GIO male telephone operator over the phone when seeking insurance that he wanted to include 6 snake bracelets in addition to the items listed in paragraph 19. He claims he was told that as the items were under $10,000 they would not be added specifically but would be insured.

22 The PDS imposed an obligation upon the plaintiff to provide honest and complete information for any claim, statement or document supplied to GIO. If the plaintiff did not meet his responsibilities, GIO could reduce or refuse to pay the claim and/or cancel the insurance policy (PDS page 11). The PDS also contained the following provisions in relation to proving ownership and value of items alleged to have been stolen:

(i) You must validate your claim by giving us details of when and where items were purchased and reasonable proof of ownership and value (PDS page 83);

(ii) We have minimum proof requirements for some items set out below on pages 83 to 85 (PDS page 83);

(iii) The minimum proof for assessment where the amount claimed for each item or set is over $3,000 - proof of purchase that identifies the item plus a valuation by a qualified jeweller or professional valuer. A close-up photograph might also help us (PDS page 83);

(iv) "Proof of purchase" is defined as "includes documents such as sales receipts or debit details on a credit card or bank statement. The proof of purchase should include the item description or code, a purchase price, date purchased and where the item was purchased."

(v) "Sales receipt" includes the item description or code, a purchase price, date purchased and where the item was purchased."

(vi) "Valuation" is defined as "a document completed by an Australian qualified professional valuer before the loss occurred. This includes an item description, specifications and the cost to replace the item in Australian dollars."

(vii) "Close-up photograph" is defined as "a photograph taken from 1 metre away from the item(s) that clearly shows the item(s)."

23 If the insurer decides that the insured has been unable to reasonably substantiate the claim, even if the insured has provided the minimum proof set out in the tables on pages 83 to 85 of the PDS, the insurer might reduce or refuse the insured's claim.

24 GIO can cancel cover where the law permits it to do so. If that occurs, the insured is entitled to be refunded the unexpired portion of the premium, less the cancellation fee of $30 and non-refundable government charges if the refund is more than $10. If GIO cancels the policy due to fraud, the insurer will not refund any money (PDS page 96).

25 The plaintiff and his family went on holiday to the BIG4 Ballarat Goldfields Holiday Park on 30 December 2014. They were booked to stay four nights in a

Studio Cabin at the holiday park. The plaintiff's brother, Abrahim Abraham and his family joined the plaintiff's family on vacation. Mr Abraham's wife is the plaintiff's wife's sister.

26 The plaintiff said he checked on the gold jewellery about 30 to 60 minutes before they left home at about 1pm. He removed $1,500 in cash from the bag in which the jewellery was also stored, leaving some $2,500 in the bag. The bag was stored on a shelf in the walk-in robe next to his bedroom, between some nappies and children's clothing. The plaintiff said he and his wife checked the door and windows were locked before leaving.

27 On 1 January 2015 at 6.21am, ADT Security sent a text message to Ms Mansour's mobile phone notifying her that:

- a regular test signal had not been received from the home;
- the system may not be reporting correctly;
- more information was at available at ADT's website.

The plaintiff's wife woke him up shortly after 9am to tell him about the message from ADT Security. Mr Abraham received a similar message in respect of his home. The two families decided to cut their holiday short and return to Melbourne. The plaintiff did not ring the security company despite giving evidence that he started to feel anxious and panicky after receiving the text message. Both families left the caravan park before noon.

28 On arriving home in the afternoon, the plaintiff and his wife discovered their house had been burgled. The bag containing the gold jewellery and $2,500 in cash was missing. The plaintiff produced a bundle of photographs taken by him after the police arrived showing the displacement of furniture and clothes at the home.[6] Ms Mansour rang the police who attended some hours later. Whilst the police could not find any sign of forced entry after an extensive search of doors

6 Exhibit "P4"

and windows, the manhole was found open, tiles on the roof had been removed and the alarm disabled with damage to the front of the alarm box.

29 The attending police officers had earlier visited Mr Abraham's house who was also burgled in similar circumstances and had valuable gold jewellery stolen. The police told the plaintiff it appeared the same thieves had burgled his brother's house, given the same point of entry, exactly the same damage to the alarm box and valuable gold jewellery had been taken. (The brother is also said to have received gold jewellery from the father in Lebanon in repayment of moneys he invested in the father's business.) Despite this coincidence, the plaintiff was adamant no one knew that he and his brother had valuable gold jewellery at their homes or they were holidaying together at Ballarat. To date, no stolen property has been recovered and no offenders identified.

30 The police asked the plaintiff and his wife to complete a form setting out details of the property stolen. Ms Mansour completed the form[7] and submitted it to the police. The list of items included cash in the sum of $2,500, some platinum jewellery listed in the sum of $750 and 19 items of gold jewellery. Ms Mansour was emphatic in her evidence that she had compiled the list in the police form from memory without looking at any documents before doing so. Given the items listed in the police form are in the same order as the Bagdad valuation and contain the same unusual spelling mistakes, such as "laydis snack" bracelet instead of "ladies snake" bracelet, this evidence was unconvincing.

31 The plaintiff subsequently engaged a handyman who performed repairs to the roof and replaced the manhole damaged in the burglary. An invoice for the repairs in the sum of $1,435.59 and dated 15 January 2015 was paid by AAI Limited on behalf of the plaintiff.

32 On 2 January 2015 at 1.37pm, the plaintiff's wife notified GIO of the burglary and made a claim under the policy.

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7 CB 91A and 91B

33 GIO investigated the claim. An investigator appointed by GIO, Mr Stuart Morgan of Surete Investigations, interviewed the plaintiff, his wife, the plaintiff's brother and Mr Al Saffar from Baghdad Jewellery.

34 Mr Morgan prepared a Schedule of Loss which was signed by the plaintiff on 15 January 2015.[8] The schedule included 6 snake bracelets in the sum of $8,415 each, being a total of $50,490. The schedule also included platinum jewellery valued in the sum of $700. The snake bracelets and the platinum jewellery were not listed as specified contents in the certificate of insurance. The total amount claimed in the Schedule of Loss, including the specified items of jewellery, was $186,629.

35 The evidence of Mr Benedick of GIO revealed the plaintiff had originally sought to include the 6 snake bracelets as specified items. The 6 items were then removed as specified contents at the request of the plaintiff according to Mr Benedick. This is reflected in GIO's computer screen shots which have the specified items commencing at No.7, thus confirming there had been 6 items listed previously.[9]

Denial of indemnity by GIO

36 On 14 August 2015, GIO wrote to the plaintiff advising him that GIO had decided to decline payment of his claim in its entirety in accordance with the terms and conditions of the policy and s56 of the ICA on the basis the claim had been made fraudulently. Additionally, GIO considered the plaintiff had failed to comply with his duty of utmost good faith in accordance with s13 of the ICA.

37 GIO gave notice of its reasons for decision in its letter. GIO considered the plaintiff had deliberately provided false and misleading statements regarding the circumstances of his claim. The principal issues relied upon were the lack of proof of ownership and the valuation provided was from an unqualified

8 CB 99 – 100
9 CB 313 – 314

person. The insurer gave notice of cancellation of the policy under s60 of the ICA effective from 21 August 2015. It advised no refund of premium would be made. The policy had been due to expire on 25 August 2015.

38 GIO contends that the valuation provided by Baghdad Jewellery did not meet its minimum standards of proof required under the PDS for the following reasons:

(a) the valuation was handwritten on a tax invoice/statement form which was stamped with the name 'Baghdad Jewellery' and not signed;

(b) the valuation provided contained numerous spelling mistakes, was unprofessional in appearance and did not identify who had conducted the valuation;

(c) when Mr Al Saffar of Baghdad Jewellery was interviewed he confirmed he had prepared the valuation, but conceded he held no formal qualifications and was not a professional valuer or qualified jeweller;

(d) Mr Al Saffar confirmed he had not taken any photographs of the items at the time he prepared the valuation.

39 GIO was also concerned about the validity of the Samir receipt. Enquiries made by investigators appointed on behalf of GIO revealed no business in the name of Samir Products existed. The plaintiff had told Mr Morgan on 15 January 2015 that Samir was a jeweller in Aleppo, Damascus. An English translation of the Samir receipt[10] disclosed no street address or location details for Samir Products. The mobile phone listed on the receipt, when called by GIO's investigator, produced a recorded message which stated that "the number you are calling is not presently assigned". Further enquiries conducted by GIO's investigator showed the telephone number on the receipt had never been assigned to any business or person.

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10 CB 281

40 GIO's investigator ascertained the Syrian government requires receipts to include the total price in words as well as numerals. The Samir receipt refers to numerals only and therefore did not comply with the mandatory obligations imposed by the Syrian government.

41 The Samir receipt incorporated details of an association known as "The General Union for Artisans Association in the Syrian Arab Republic/Union of Artisans Association in Aleppo Governorate/Association of Goldsmiths Artisans in the Aleppo Governorate". Evidence from investigators retained by GIO disclosed that no such organisation exists either in trade directories in Syria or via internet searches.

42 The receipt was issued in the name of the plaintiff despite the fact that his father purchased the jewellery. The plaintiff claimed, when interviewed on 15 January 2015 by Mr Morgan, that his father had put the plaintiff's name on the receipt because the jewellery was for him, it was his share.

43 The plaintiff does not have any photos of the gold jewellery said to have been stolen. Further, the plaintiff advised he had not declared any of the claimed items when he returned to Australia with the gold jewellery. Accordingly, GIO considered the plaintiff had failed to comply with the proof of ownership requirements in the PDS.

44 GIO was of the view that the Samir receipt did not meet its minimum standard of proof required under the PDS and/or in the alternative, was a fraudulent document prepared or procured by the plaintiff with the intention of inducing GIO to accept the plaintiff's claim.

45 As a result of these matters, GIO maintains in its Defence it was entitled to refuse indemnity as:

(a) it denied the burglary had occurred and required strict proof;

(b) the plaintiff had failed to comply with the proof requirements set out in the PDS;

(b) the plaintiff had failed to act towards GIO with the utmost good faith in breach of s13 of the ICA;

(c) the plaintiff had lodged a fraudulent claim for the purposes of s56 of the ICA;

(d) the plaintiff had provided information or documentation which was incorrect and/or untruthful and/or fraudulent in breach of the obligations imposed on page 11 of the PDS.

Plaintiff's previous burglaries

46 The plaintiff has had two prior insurance claims arising from domestic burglaries. The first occurred on 4 February 2009 when he was insured with AAMI. The amount claimed was $33,115 which AAMI paid. The items claimed included $15,000 worth of Syrian gold jewellery which the plaintiff said he had bought for his wife as a wedding present.

47 The second burglary took place on 24 March 2013. The plaintiff lodged a claim under a home contents policy with AAMI in respect of an alleged burglary and theft of a substantial amount of gold jewellery from his home at 11 Magra Place, Roxburgh Park. On that occasion, he relied upon a valuation from "Medina Jewellery" dated 30 July 2012 which listed 10 ladies bracelets and a Syrian chain necklace in 21 carat gold and valued at $191,082. The plaintiff claimed the sum of $333,100. AAMI agreed to pay $318,000 after rejecting some items claimed. There are certain similarities to the current claim lodged with GIO. The thieves apparently gained access via the roof whilst the plaintiff was away on holidays, an electronic alarm system had been disabled and valuable gold jewellery was stolen. The plaintiff also relied upon receipts from Samir in respect of proof of purchase of jewellery stolen in the second burglary.

48 The plaintiff said he was unhappy with AAMI because the insurer had refused to indemnify him for all the items he claimed were stolen in the second burglary, including a number of expensive Armani suits.[11]

49 Neither the first nor the second burglary were disclosed to GIO at the time the policy was taken out.

The plaintiff's brother's previous burglaries

50 Mr Abraham has also been the victim of three home burglaries. His first burglary occurred on 3 November 2011. He made a claim on GIO for $120,000 in respect of stolen gold jewellery which was paid.

51 On 23 September 2012, Mr Abraham made another claim on GIO for theft of gold jewellery worth $176,000 which the insurer accepted.

52 The third burglary is on the same date as the plaintiff's claim, the subject of this proceeding, being 1 January 2015 whilst the brothers were at the caravan park at Ballarat. Mr Abraham made a claim upon GIO for Syrian gold jewellery worth $265,000 which has been rejected. Mr Abraham also relied upon a valuation obtained from Baghdad Jewellery dated 25 November 2013.[12] The gold jewellery allegedly stolen was also said to have been given to the brother by his father in Lebanon as repayment for moneys he contributed to his father's business. Mr Abraham relied upon receipts from a Syrian jeweller called "Manjalo Jewellers" as proof of ownership. Enquires by GIO's investigators revealed this jeweller did exist but when questioned, the jeweller, Mr Alba Manjalo, denied issuing the receipt in question and said they were fakes.[13]

53 Mr Abraham has referred the decision of GIO to refuse indemnity in respect of this third burglary to the Financial Services Ombudsman for review. A determination has yet to be made.

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11 T182 – 183, T249
12 Exhibit "D10"
13 See Exhibit "D9"

The witnesses

54 The plaintiff gave evidence, as did his wife, his brother and Mr Al Saffar of Baghdad Jewellery. The plaintiff also seeks to rely upon sworn statements from his father and Mr Khoury, an attorney from Syria, both of whom were not called to give evidence. The plaintiff sought to rely upon s63 of the *Evidence Act* 2008 (Vic) ("Evidence Act") to have their statements admitted into evidence. I deal with the admissibility of their statements in paragraphs 70 to 95 below.

55 The plaintiff was an unimpressive witness. He was argumentative, had convenient lapses of memory when it suited and was generally unconvincing in the way in which he gave his evidence. In respect of questioning about matters pertaining to Centrelink, the plaintiff was provided with a certificate under s128 of the *Evidence Act*. He did not seek a similar certificate in respect of the evidence he gave for not declaring the jewellery to Customs.[14]

56 Parts of his evidence stretched credulity. Examples of this include:

(a) his marked reluctance to give evidence as to what he had done with the balance of the proceeds of sale of his home following the sale earlier this year. The plaintiff owned the home with a mortgage to the Bank of Melbourne in the sum of $190,000. He purchased the home for $375,000 in April 2014 applying some moneys from an earlier insurance payout by AAMI. The plaintiff sold the home at auction this year for $516,000. The plaintiff received an amount in excess of $270,000 after the mortgage was repaid on the home. He is presently renting at 15 Flower Street, Roxburgh Park. He pays $1,500 per month in rent and has paid a year's rent in advance in cash. The plaintiff was initially very reluctant to answer and, upon being pressed, gave conflicting answers that he had given some of the money to his mother and his brother. The plaintiff went on to say that he had given his mother $50,000, which she had taken back to Lebanon. The plaintiff then volunteered that she had declared it whilst

14 T668

going through Customs as she was leaving the country, even though he was not with her at the airport.

(b) his evidence that he had no photographs of the gold jewellery and kept it unsecured on a shelf in a walk-in robe again was difficult to accept in circumstances where he had been burgled twice before and had valuable gold jewellery stolen. Mr Morgan, the investigator retained by GIO, asked him why he had not taken the jewellery with him to the caravan park given the previous burglaries. The plaintiff's answer that it would be not safe there rang hollow when he had left it unprotected at home;

(c) after having received notification of possible break-ins from their respective security companies and returning to Melbourne on 1 January 2015, his evidence that neither he nor his brother contacted each other nor did their wives (who are sisters and close) to find out what had happened until days later was implausible.

57 The plaintiff's wife, Ms Mansour, was also argumentative and not a reliable witness in my view. Ms Mansour's total lack of ability to remember any particular dates or the number of burglaries or insurance claims made by her and her husband was particularly unconvincing.

58 The plaintiff's brother, Mr Abraham, claimed to suffer from depression and said this affected his memory although there was no medical evidence provided of any illness. In the course of his evidence, he was given s128 certificates concerning his dealings with Customs regarding the importation of gold jewellery into Australia, together with matters relating to Centrelink. Whilst not as argumentative in his demeanour as his brother and Ms Mansour, his evidence was again riddled with inconsistencies and an inability to answer straightforward questions. I treat his evidence with considerable caution.

59 The jeweller, Mr Al Saffar, gave evidence. Mr Al Saffar emigrated from Iraq. He became the owner of the Baghdad Jewellery business in May 2013. Prior to this, he worked in an aluminium factory. Mr Al Saffar did not have any independent memory of meeting the plaintiff. He said it was only by looking at the documents he could say he saw the plaintiff on the date of the valuation document, being 23 December 2013. He acknowledged he held no formal qualifications as a jeweller or professional valuer and had not been to "school for jewellery business" or done an apprenticeship.[15] Mr Al Saffar maintained he was qualified by experience and that it was not that hard to make the valuation.

60 After explaining the process of how he tested the jewellery, Mr Al Saffar confirmed he did not test every piece for the purpose of the plaintiff's valuation. When asked this directly, his evidence was "it'll be most of them. I did test them. I did most of them, yes".[16] Mr Al Saffar was unable to provide a receipt for the valuation and agreed he had not taken any photographs of the jewellery. He also agreed that he had been shown the Samir receipt by the plaintiff but denied in cross-examination that he had merely copied this out without seeing the gold.

61 Whilst Mr Al Saffar claimed to have tested the jewellery, the subject of this claim, he was more equivocal in his interview with Mr Morgan on 8 January 2015 about the brother's claim. He was unable to recall the paperwork or the gold when asked about Mr Abraham attending his shop. He went on to say, when asked, "Did he bring in the receipt for you to transcribe or did he bring in the jewellery?" His answer was "I don't know. Probably the gold or usually the gold and the, for the paper or without paper. I'm not really sure…" Later in the interview, he said we always have to see the gold.

62 Mr Al Saffar's evidence changed somewhat about when he met the brothers saying he had met the plaintiff first, which is contrary to the valuations in evidence which reveal he met Mr Abraham in November 2014, a month before

15 T500 – 501
16 T486

he met the plaintiff. He later gave conflicting evidence that the brothers came in together to his shop which was contrary to their evidence. Whilst I did not regard him as being deliberately untruthful, I consider he has little memory of what actually occurred and has assumed he tested the gold in accordance with his usual practice.

63 On behalf of GIO, Mr Mark Benedick gave evidence. Mr Benedick is a senior investigations adviser from Suncorp. He provided evidence of GIO's policies and procedures, including an explanation of the numbering system in the claims screens. He gave brief evidence about unsuccessful attempts by him to locate Samir by conducting internet searches using two search engines.

64 Mr Stuart Morgan, an investigator with Surete Investigation and retained by GIO, gave evidence of the interviews he had had with the plaintiff, the plaintiff's wife, the plaintiff's brother and Mr Al Saffar. The transcript of his interviews and his reports were tendered into evidence. Mr Morgan gave evidence that as a result of his investigations, he had not been satisfied there was credible evidence to show the jewellery ever existed. This was his opinion based on the fact that the Samir jeweller could not be located, the gold jewellery had not been declared at Customs and there were no photographs of it.

65 Mr Graham Thomas gave evidence by video link from Cyprus. He is the Group Business Development Manager from Rime Information Bureau Ltd's (Rime) headquarters in Cyprus. Mr Thomas is experienced in conducting international investigations. Rime was engaged on GIO's behalf to investigate the veracity of the Samir receipt. Mr Thomas confirmed the contents of his statement dated 28 July 2015, together with the receipt by him of two reports by him from Mr Al Homsy dated 28 July 2015 and 11 July 2017. Mr Al Homsy is employed by Rime and located in its Damascus office. He was asked by Mr Thomas to conduct searches to investigate the veracity of the Samir receipt.

66 Mr Thomas gave evidence about the inability of Mr Al Homsy to give *viva vice* evidence on the basis that the latter is resident in Damascus, the lack of video conferencing facilities in the company's office in Damascus, the need therefore to travel across Damascus at night to get to witness facilities due to the time difference with Australia, and his assessment of that travel as being too dangerous to undertake.

67 During cross-examination, Mr Thomas confirmed he had also conducted some searches of the internet websites referred to in Mr Al Homsy's statement dated 28 July 2015. Significantly, the searches he conducted did not reveal the existence of Samir.

68 Mr Manoug Hagolian, a freelance investigator engaged by Rime, gave evidence by video link from Cyprus. He was asked to translate the Samir receipt from Arabic into English. His report dated 28 July 2015 went into evidence unchallenged. The accuracy of his translation was not disputed and he was not cross-examined.

69 All of GIO's witnesses gave their evidence in a straightforward and credible manner. No issues about their credit arose.

Admissibility of evidence from overseas witnesses

70 Both parties sought to adduce statements from persons who were overseas and not called as witnesses. As a starting position, such evidence offends the hearsay rule in s59 of the *Evidence Act*.

71 Each party sought to rely upon the exception to the hearsay rule contained in s63 of the *Evidence Act* where the maker is unavailable to give evidence. This section provides as follows:

> **"63 – Exception – civil proceedings if maker not available**
>
> (1) This section applies in a civil proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.

(2) The hearsay rule does not apply to –

(a) evidence of the representation that is given by a person who saw, heard or otherwise perceived the representation being made; or

(b) a document so far as it contains the representation, or another representation to which it is reasonably necessary to refer in order to understand the representation."

72 The previous representation to which s63(1) refers is a reference to previous representation "that was made by a person who had personal knowledge of an asserted fact": s62(1).

73 Section 67 imposes notice requirements in relation to the application of s63. A party is required to give reasonable notice in writing to each other party of the party's intention to adduce evidence. Under s67(4), the court may still direct that one of the exceptions to the hearsay rule may apply despite the failure to give notice. There is an issue in this case as to whether the relevant notices have been served in respect to the overseas witnesses whose evidence is sought to be relied upon under s63.

Affidavit of Mr Gifergis Abraham Abraham ("the father")

74 The plaintiff seeks to rely upon an affidavit sworn by the plaintiff's father on 24 August 2016. The plaintiff says the affidavit is admissible under s124(3) of the *Evidence (Miscellaneous Provisions) Act* 2008 (Vic) ("EMP Act"), and in the alternative, s63 of the *Evidence Act*.

75 The plaintiff notes the father's affidavit bears the signature of the deponent on 24 August 2016 at Latakia, signed and sealed before Mikhael Elias Khoury, attorney at law. The document was certified by Mr Maksim Al Boudy, the Director of Consulate in the Ministry of Foreign Affairs and Emigrants, Syrian Arab Republic in Latakia on 7 March 2017.

76 Section 124(3) of the EMP Act deals with the persons with authority to administer oaths outside Victoria. Assuming the requirements of the section are met, then any affidavits shall be admissible for all purposes with further proof of the signature or seal of the judicial officer concerned. But even assuming the affidavit was validly witnessed, the affidavit could not be relied upon at trial as the father's evidence had to be given orally in accordance with r40.02 of the C*ounty Court Civil Procedure Rules* 2008.

77 GIO contends the document is inadmissible, but if admitted, should be given little or no weight. The matters relied upon by GIO in support of its submission included:

- the plaintiff's claimed inability to contact his father or provide contact details for him, other than one ineffective telephone number;
- the plaintiff has been vague about father's rental accommodation location – despite staying with him;
- when convenient, the plaintiff managed to produce his father's statement signed by Mr Khoury;
- a separate statement provided by Mr Khoury makes absolutely no mention of having organised or signed a statement for the father;
- the plaintiff referred to telephone systems being out of action – but did not adduce any evidence of this – the only evidence is Mr Thomas' evidence that he is usually able to speak to Mr Al Homsy in Damascus by telephone, subject to sporadic cut-outs;
- there is no evidence that the father is in Damascus – the plaintiff's own statement refers to him being a resident in Latakia such that difficulty with phone calls in Damascus is irrelevant;
- the evidence is critical because it is the only evidence of the purported purchase from 'Samir';
- the plaintiff has actively discouraged the defendant from attempting to find the father, for 'safety' reasons, although this did not extend to the Samir jeweller;[17]
- a copy of the father's affidavit was produced in March 2017, some 6 months after it was signed in Latakia. No explanation was given about why it was

[17] CB 251 and 251 are letters written by the plaintiff's solicitors to GIO dated 11 and 23 March 2015 respectively asking GIO not to attempt to contact the plaintiff's father

not produced soon after it was signed or why there was a 6 month delay in certification;

- the plaintiff offered no explanation of how he came into possession of this document, other than production of a photocopy of an express post bag bearing the name of an unknown person as the sender.

78 Part 2 of the Dictionary to the *Evidence Act* refers to the unavailability of persons. In this instance, the matters set out in clause 4(1)(f) appear to be the relevant clause upon which the plaintiff would seek to rely although not expressly stated at trial. This sub-section provides that a person is taken not to be available to give evidence if "all reasonable steps have been taken, by the party seeking to prove the person is not available, to find the person or secure his or her attendance, but without success".

79 The plaintiff gave evidence that he had not spoken to his father since leaving Lebanon in 2013. He did not know where his father was now. He gave some evidence of trying to locate him but without success. The plaintiff also said he had contacted his solicitor in Syria asking him if he knew where his father was. The plaintiff said his father's last address was in Aleppo and he had been unable to contact him on his mobile telephone. The father's attorney, Mr Khoury is said to have witnessed the father's statement in August 2016. Assuming this to be correct, the father was available then. No explanation has been given as to how the father's statement came to be prepared. It is curious Mr Khoury makes no mention of having met the father in his statement which the plaintiff seeks to rely upon which was produced on the first day of trial. Nor does he give any evidence about the father's current whereabouts or any attempts made to locate him, which is surprising given the plaintiff says he spoke to Mr Khoury on 20 September 2017.

80 I am not satisfied on the evidence put before me that all reasonable steps were taken to find the father or secure the father's attendance such that it can be said

he was unavailable to give evidence in accordance with clause 4(1)(f). The position might have been different if Mr Khoury had given evidence as to what steps had been taken to secure the father's attendance but without success. Consequently, I will not admit the statement of the father into evidence under s63.

Statement of Mikhael Elias Khoury

81 The plaintiff seeks to rely upon a statement of Mr Mikhael Khoury sworn 23 September 2017. The plaintiff says the statement is admissible under s63.

82 GIO objects to any reliance on a document said to be a translation of Mr Khoury's statement dated 23 September 2017. GIO noted that no advance notice was given as required under s67 and the statement was a mixture of hearsay and unqualified expert opinion.

83 GIO relies on the following matters in respect of the Khoury statement:

- the document was produced by the plaintiff on Day 1 of the trial;
- the opening paragraphs of the Khoury statement contain generalised comment about alleged smuggling of gold jewellery out of Syria, with no attempt to claim personal knowledge or to state the source of any information or belief;
- the official statement from 'The President of the Aleppo Craftsmen and Jewellery Associate' referred to is not produced nor any other method of identification or checking the alleged source document;
- if it is relevant at all, it refers to 'about 700' gold businesses, and Mr Al Homsy's statement of 11 July 2015 refers to a listing of 807 jewellers from the relevant area – if Mr Khoury's evidence is accepted, it suggests Mr Al Homsy's list was reasonably comprehensive, but Samir was not on it, undermining the authenticity of the Samir document;

- the document refers to personal contact between Khoury and the plaintiff on 22 September 2017– the plaintiff makes no attempt to explain why he was able to make contact with the 'family lawyer' but has not been able to make any contact with his father, particularly, given Mr Khoury's involvement in the statement of the plaintiff's father;

- Mr Khoury makes no mention at all of meeting with the father, speaking with him, witnessing his signature, organising his statement, his last known whereabouts or any other relevant information.

84 As with the father, if reliance is sought to be made of the statement by Mr Khoury, it must be established that the maker is not available to give evidence in accordance with the requirements of s63. The relevant paragraph for the purposes of clause 4 of Part 2 of the Dictionary would appear to be sub-s(1)(d), which provides that a person is taken to be unavailable if "it would be unlawful for the person to give the evidence".

85 The plaintiff gave evidence that he spoke to Mr Khoury 3 days prior to 27 September 2017, who said that he was unable to give evidence at the hearing because it was contrary to Syrian law. The statement which has been provided by Mr Khoury makes the same allegation. No primary source or document is referred to in the affidavit provided by Mr Khoury in support of that assertion and it is curious that he has not done so. In the absence of any independent verification as to the state of Syrian law, it would seem remarkable that an attorney would not be able to give evidence by video link or by some other means in a foreign country.

86 But given the matters alleged appear to fall within sub-s4(1)(d), I am prepared, with some reservation, to admit the statement of Mr Khoury into evidence and dispense with the requirement for notice under s67(4). I do, however, take into account the matters raised by GIO when assessing the weight I should give the statement, and the fact that Mr Khoury cannot be cross-examined. Mr Khoury's

statement contains many generalised assertions about the effects of the Syrian war on the dislocation of goldsmiths in Aleppo, none of which is supported by any independent evidence. He does say that Samir cannot be found which is consistent with other evidence led by GIO.

Statement of Mr Osama Al Homsy signed 28 July 2015

87 GIO seeks to rely upon two statements from Mr Al Homsy, a Senior Investigator for Rime Information Bureau Ltd, based in Rime's Damascus office.

88 Mr Al Homsy's first statement signed 28 July 2015 was ruled admissible during the trial as a business record under s69 of the Evidence Act.[18] He was asked by Rime's Cyprus office to investigate the veracity of the Samir receipt. He undertook various internet searches in Arabic and English including business directories but was unable to find a jeweller in the name of Samir. Whilst the entity called "General Federation of Artisan Association in Syria" ("GFAA") existed, the other two entitles named on the Samir receipt did not, these being the "Union of Artisans Associations in Aleppo Governorate" and "Association of Jewellers Association in the Aleppo Governorate" respectively. Mr Al Homsy rang the telephone number on the Samir receipt several times but each time there was an automatic reply from the service provider saying "the number you are calling is not presently assigned". Mr Al Homsy also stated there was a requirement in Syria that receipts should always have the total amount of the sale written in words as well as numbers, especially those relating to expensive purchases. He says the Samir receipt did not have this.

89 The plaintiff submitted the statement should not be given any weight for the reasons identified at trial. This included the fact that the email of instructions sent by Rime's Cyprus head office was not exhibited nor a copy of the receipt from Samir Products, plus statements referred to from an unidentified acquaintance about the non-existence of the General Federation of Artisans Association in Syria were clearly hearsay. I have taken these matters into

18 T533, CB 277

account when assessing the weight to be given to the second Al Homsy statement.

90 GIO conceded the unavailability of the maker must have some impact on weight, but it submitted it should be minimal given the evidence is largely limited to the outcome of Mr Al Homsy's unsuccessful attempts to locate 'Samir' using internet searches.

Statement of Mr Osama Al Homsy signed 11 July 2017

91 GIO contends that Mr Al Homsy's second statement of 11 July 2017[19] should be admitted under s63, as the maker of the statement is not available to be called.

92 The issue of this witness's availability turns upon a consideration of clause 4(1)(f) of Part 2 of the Dictionary. Having regard to the evidence given by Mr Thomas of Rime Investigations about the difficulties in securing the physical attendance of Mr Al Homsy by way of video link, I am satisfied the requirements of this sub-section have been met in that all reasonable steps have been taken to secure his attendance but without success.

93 The plaintiff says GIO failed to comply with notice requirements under s67 of the *Evidence Act*. If the notice requirement is dispensed with, the plaintiff argued the statement failed to meet requirements for an admissible affidavit under s124 of the EMP Act although this point was ultimately not pressed in final address.[20] But even assuming compliance with the EMP Act, this did not render Mr Al Homsy's statement admissible at trial in the absence of oral evidence.

94 Both statements of Mr Al Homsy were provided to the plaintiff some months before trial although formal notice was not given under s67. As the statements were provided in their entirety well in advance of the hearing, I am willing to

19 CB 325
20 T630 – 631

dispense with the notice requirement under s67(4). Accordingly, I will admit the second statement of Mr Al Homsy into evidence.

95 In his second statement, Mr Al Homsy refers to a request received by him from Cyprus headquarters to undertake research to try and locate a jeweller by the name of "Mr Samir Alsayegh". He undertook research on 8 and 9 July 2017 on Syrian Yellow Pages, trade directories and other internet sites. He could not find any reference to the jeweller's name either in Arabic or English. A search of a website of some 807 jewellers listed in Aleppo did not reveal the subject individual. Telephone calls made by Mr Al Homsy to seven Aleppo jewellers listed on another website to ask whether any of them knew Samir Alsayegh were unfruitful, as they all had engaged tones as a result of telecommunication equipment being damaged in the Syrian war in 2015/16.

Coincidence rule - s98 of the *Evidence Act*

96 GIO sought to rely upon s98 of the *Evidence Act* on the basis that the evidence of two or more events (being previous and concurrent insurance claims by each of the plaintiff and his brother and the similarities between the various claims) will either by itself, or having regard to other available evidence, have significant probative value.

97 The coincidence rule is set out in s98 of the *Evidence Act*, which provides as follows:

98 "**The coincidence rule**

> (1) Evidence that 2 or more events occurred is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally unless—
>
> (a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence; and

(b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value."

99 An issue arose in the trial as to whether GIO had provided sufficient notice of its intention to rely upon s98. The plaintiff submitted that GIO had failed to comply with the notice requirements set out in s99 and Regulation 7. The plaintiff also said that GIO had not pleaded these matters as it was required to do so under r13.07(1) of the *County Court Civil Procedure Rules* 2008. The plaintiff's second burglary was referred to in paragraph 14 of the Defence but not the first burglary or those of his brother. Section 98 was not referred to in the pleading.

100 GIO maintained that reasonable notice in writing had been given to the plaintiff for the purposes of s98.[21] Counsel for GIO said at the start of the case a notice had been served in respect of coincidence evidence.[22] The notice served by GIO was not put before the court. Therefore, I am unable to determine whether the notice complied with the requirements under Regulation 7(2). The court may dispense with the requirement for notice under s100(2) on the application of a party but no such application was made by GIO, consistent with its position that proper notice had been provided as required. As it was the plaintiff's case that the notice was defective, in my view it was incumbent upon the plaintiff to have produced the notice in order to prove this point. In the absence of the notice, I accept the assurance given by GIO's counsel to the court that adequate written notice was given as required under s98.

101 GIO said the court could be satisfied that the evidence will, having regard to the other evidence adduced, have significant probative value within the meaning of sub-s98(1)(b). GIO contended that the matters alleged were not matters that were required to be pleaded as they were matters going to evidence. No doubt, a notice under s98 serves the purpose of giving the other side adequate notice

21 Paragraph 64 of the defendant's closing submissions dated 11 October 2017
22 T42

of the matters to be relied upon the coincidence rule. It does not seem to be a matter that is raised often in civil as opposed to criminal cases. As I have found s98 does not apply, it is unnecessary for me to determine whether the section should have been specifically pleaded. The application of the section and the matters relied upon were the subject of very detailed submissions by both parties at trial.

102 GIO sought to rely upon the number of events under consideration – namely, three burglaries for the plaintiff and three for his brother in a period over six years. GIO relied upon an alleged degree of similarity, which was varied but increasing over time and on the last occasion striking. For the plaintiff's own claims, GIO relied upon the burglary being conducted in an unusual way by someone with knowledge of the system, substantial amounts of jewellery taken, whilst he and his family were away and his brother being burgled in an identical manner. For the plaintiff and his brother's claims, GIO relied upon the fact that the burglaries were almost indistinguishable, including police advising the plaintiff that they had been committed by the same person and occurring around the same time. For the plaintiff's brother's claims, GIO relied upon the fact that the brother had also made three claims for jewellery stolen in a burglary.

103 By contrast, the plaintiff argued that the past burglaries were not strikingly similar and fell far from the requirement that the evidence must have significant probative value. The plaintiff submitted the similarities were few and insignificant. The fact that the brother had been burgled three times did not in itself establish that it cannot be a coincidence that the plaintiff was burgled on 1 January 2015. There were differences in the goods and the amount of goods that were stolen, the exact entry and exit points of robberies, the burglaries occurred at different residences, the jewellery was stored differently and the whereabouts of the brothers were different whilst being burgled. The fact that the brothers were both burgled, their alarms were disabled, they both had

jewellery stolen and both brothers attended the same jeweller for valuations was not sufficiently striking.

104 I am not satisfied that s98 is engaged in the circumstances of this case. The fact that the brother has been burgled three times does not in itself establish that it cannot be a coincidence the plaintiff was burgled on 1 January 2015. The requirement is that the evidence must have significant probative value which in my view has not been made out on the brother's burglaries. Nor am I satisfied the circumstances of the plaintiff's previous burglaries are sufficient to give rise to coincidence evidence under s98. There are some similarities but the circumstances are not sufficiently similar so as to have significant probative value. The fact that the two brothers were burgled on the same date on the third occasion could be readily explained by the burglar having knowledge of the brothers' absence in Ballarat and thus taking the opportunity to burgle their homes on the same night using the same method. The police were of the view the same thieves were involved but that alone, does not prove that it cannot be a coincidence that the plaintiff was burgled on 1 January 2015. Therefore, the evidence sought to be relied upon GIO is not admissible for the purposes of s98.

Jones v Dunkel

105 The plaintiff in closing submissions raised two *Jones v Dunkel*[23] points.

106 Mr Lowry submitted that GIO ought to have called the person on the end of the phone from GIO when the plaintiff was seeking insurance. Alternatively, the person making the entries on the computer screen (of which items 1-6 were withdrawn) ought to have been called by the defendant. He said it was within the defendant's ability to identify those witnesses and call them, and contradict the evidence that was given by the plaintiff and his wife as to representations that were said to be made to them by telephone.

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[23] (1995) 101 CLR 298

107 It was also suggested that GIO could have called the police in respect of the *modus operandi* relating to the similarities between the various burglaries.

108 The rule in *Jones v Dunkel* is that the unexplained failure by a party to call a witness may lead to an inference that the uncalled evidence would not have assisted the case of the party failing to call the witness. The rule in *Jones v Dunkel* will apply where "it might reasonably have been expected" or "it would be natural for one party to call or produce a witness" who is in the camp of that party.[24]

109 The allegation made by the plaintiff was that he was told by the GIO telephone operator that the snake bracelets did not have to be specifically insured and would be covered under the policy. The wife's evidence did not refer to this alleged discussion. Mr Benedick gave evidence about the deletion of the first six items on the computer screen in accordance with GIO's usual practice with the result that those items had been deleted by the plaintiff's request. In my view, the evidence of Mr Bendick sufficiently contradicted the plaintiff's evidence on this topic. I do not consider there was a requirement upon GIO to call the telephone operator in these circumstance, such that it can be said a *Jones v Dunkel* inference should be made.

110 In respect of the suggestion that GIO ought to have called the police officers, this submission also fails. There is no dispute on the evidence about, for example, that the police had attended in respect of the burglaries which occurred for the brother and the plaintiff on 1 January 2015, and that the police had said that the same thieves appeared to have committed the burglaries. It was unclear to me as to what evidence the plaintiff was suggesting the police officers may have given to found a *Jones v Dunkel* inference. Furthermore, it could not be said that the police were in the camp of GIO. It was equally open for the plaintiff to have called any police officers had he wished to do so.

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24 Cross on Evidence. LexisNexis Butterworths at [1215]

Consequently, I do not consider the *Jones v Dunkel* inferences claimed by the plaintiff's counsel have any merit and I do not accept this submission.

Was GIO entitled to deny indemnity under the terms of the policy?

111 The question that falls to be determined is whether the plaintiff failed to comply with the terms of the policy and if so, was GIO entitled to deny indemnity as a result.

112 GIO submits the plaintiff has not established the alleged burglary occurred at all.

113 The plaintiff and his wife gave evidence that a burglary took place. There is evidence before the court that they were notified by the security company as they allege at the caravan park about the home alarm being defective. There were signs of a break-in as noted by the police who investigated the burglary and attended the homes of both the plaintiff and his brother. The police were of the view that both burglaries had been committed by the same thieves, given the similarities in the way the break-ins occurred and the fact that the brothers were both away at the same time.

114 The plaintiff and his wife were interviewed by the police and provided a schedule of loss. There is evidence that repairs to the house were undertaken in respect to damage that had occurred.

115 Whilst there are difficulties associated with the reliability of the plaintiff and his wife, nevertheless, I do not consider GIO has proved, on the balance of probabilities, that a burglary did not take place.

116 Given these circumstances, I am of the view that GIO would not have been entitled to refuse indemnity on the basis the plaintiff had failed to establish the alleged burglary took place, if that were the only ground upon which GIO sought to deny indemnity.

117 The evidence provided of ownership, being the Samir receipt, was unsatisfactory. Experienced investigators retained by GIO were unable to find any record of Samir or any record of two of the three affiliated entities named on the document. The document itself was missing the mandatory details required of having the amounts written in words as well as numbers. GIO submitted it is significant that the plaintiff, having been placed on notice of these concerns, might have been expected to produce some evidence showing at least that Samir once existed. The plaintiff did not adduce any independent evidence, whether by way of internet searches or otherwise, to prove the existence of Samir. The plaintiff had not dealt with Samir as the jewellery was allegedly purchased by his father. The onus was on the plaintiff to establish proof of ownership which raises the issue of the validity of the Samir receipt. To counter that, the plaintiff did make submissions to the effect that regard should be had pursuant to s144 of the *Evidence Act*, about the civil war in Syria and the potential effect this may have had in locating Samir in Aleppo. Whilst both parties referred to the civil unrest in Syria which is undoubtedly a matter of common knowledge, the fact remained there is a paucity of evidence to show that Samir ever existed.

118 There was no evidence by way of a Customs declaration, disclosure to Centrelink or anyone else for that matter which could substantiate the plaintiff's claim to ownership of the jewellery. The plaintiff had no photographs of the gold jewellery despite having had valuable jewellery stolen beforehand and made previous insurance claims. Whilst photographs are not an essential requirement under the PDS, photographs were stated as being helpful under the PDS (p83).

119 The plaintiff had not discharged the burden of establishing the value of the jewellery. It was obvious, and properly conceded by counsel for the plaintiff, that the valuation conducted by Mr Al Saffar was not done by a qualified jeweller or professional valuer as required under the PDS at page 83.

120 Given the failure to provide sufficient proof of ownership and an acceptable valuation, the plaintiff did not meet the requirements imposed upon him to establish a claim to be indemnified under the policy. Consequently, GIO was entitled to refuse indemnity.

121 If, contrary to my findings, the plaintiff was entitled to be indemnified, the 6 snake bracelets valued at $50,490 were not covered by the policy. As they were not specified items, the plaintiff would not be entitled to be indemnified in relation to the 6 snake bracelets beyond the maximum of $4,000 in total for unspecified portable items. I reject the plaintiff's evidence that he was told they did not need to be specified and would be insured in any event. I accept the evidence of Mr Benedick that these items were removed as specified items at the request of the plaintiff.

122 GIO also pleaded that the plaintiff had not given honest or complete information contrary to the requirements imposed under the PDS. I am not satisfied that this part of the defence is made out. The lack of evidence of Samir's existence or that the valuation was inadequate does not, in my view, establish that the plaintiff acted dishonestly or failed to give complete information. It is more the case that the information supplied by the plaintiff was insufficient to meet the proof requirements under the policy.

Fraudulent conduct under s56 of the ICA

123 In the alternative, GIO pleads the plaintiff has submitted a fraudulent claim under s56 of the ICA. Section 56 provides as follows:

> "**Fraudulent claims:**
>
> (1) Where a claim under a contract of insurance, or a claim made under this Act against an insurer by a person who is not the insured under a contract of insurance, is made fraudulently, the insurer may not avoid the contract but may refuse payment of the claim.
>
> (2) In any proceedings in relation to such a claim, the court may, if only a minimal or insignificant part of the claim is made fraudulently and non-payment of the remainder of the claim would be harsh and unfair, order the insurer to pay, in relation to the claim, such amount (if any) as is just and equitable in the circumstances.

(3) In exercising the power conferred by subsection (2), the court shall have regard to the need to deter fraudulent conduct in relation to insurance but may also have regard to any other relevant matter."

124 In respect of fraud under s56, there was no dispute between the parties that GIO bore the onus of proof on the *Briginshaw* standard.[25] More recently, a majority in the High Court in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*[26] expressed the view that statements to the effect that "clear or cogent or strict proof is necessary" for matters so serious as fraud should not be understood as directed to the standard of proof, but merely reflect that members of society do not ordinarily engage in fraudulent conduct and therefore courts should not lightly conclude that a party to civil litigation has done so. In *Sgro v Australian Associated Motor Insurers Ltd*,[27] the Court of Appeal expressed the view that in an allegation of fraud, an insurer must plead and prove that any false statement was knowingly made by the insured for the purpose of inducing the insurer to pay the claim.

125 In order to satisfy s56, a claim is made fraudulently if the claimant:

- knowingly makes a false statement;
- in connection with the claim;
- to induce a false belief in the insurer;
- for the purposes of obtaining payment or some other benefit under the policy.

It is accepted that the fraud must be in respect of the formulation and presentation of the claim as a general rule, although fraud is satisfied if the insured has a dishonest intent to induce a false belief in the insurer for the purpose of obtaining payment or some other benefit under the policy.[28]

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25 *Briginshaw v Briginshaw* (1938) 60 CLR 336 per Dixon J

26 (1992) 67 ALJR 170

27 [2015] NSWCA 262

28 See *Tiep Thi To v AAMI Limited* [2001] VSCA 48; Einstein J in *Walton v The Colonial Mutual Life Assurance Society* (2004) 13 ANZ Insurance Cases 61-620 at 144

126 There is an interaction between s56 and the duty to act in good faith contained in s13 of the ICA. The relationship between the two was described by Gillard J in *Insurance Manufacturers of Australia Pty Ltd v Heron*[29] where his Honour said:

> "Although the principle of utmost good faith is invariably linked with a fraudulent claim, nevertheless they are two different concepts. A failure to comply with a duty of utmost good faith does not mean that the claim is fraudulent. In all cases where a fraudulent claim is made, one can readily infer a breach of the obligation of utmost good faith. But it does not follow that a breach of the utmost good faith obligation means that the claim made is fraudulent. It must depend on all the circumstances."

127 GIO submits that in order to succeed under s56(1), the insurer need only establish the plaintiff has knowingly made a false statement in connection with a claim for the purpose of inducing the insurer to meet the claim.[30] In support of this submission, GIO submits it is plainly open to the Court to find that the plaintiff has knowingly made false statements in relation to at least his income, his assets, his claims history, the importing of goods into Australia, the acquisition of goods the subject of the claim, the value of goods the subject of the claim, the valuation of the goods, and his communications with his brother in relation to each of the acquisition and valuation, and alleged theft. GIO further submits that it is open to the Court to find the plaintiff made a knowingly false statement in relation to his knowledge or otherwise of his father's whereabouts and ability to be contacted, the authenticity of the Samir receipt, the legitimacy of the valuation provided by Baghdad Jewellery, the importation or otherwise of the jewellery as alleged, and the existence or otherwise of the jewellery.

128 Whilst GIO has relied upon a wide range of matters for which it asserts the plaintiff knowingly made false statements as set out above, in order to be able to rely upon s56, it must be shown that the plaintiff knowingly made a false statement which was done to induce a false belief in GIO for the purposes of obtaining payment under the policy. In that regard, the matters which fall for

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29 [2005] VSC 482 at [66]

30 *Tiep Thi To v AAMI Limited* [2001] VSCA 48 per Buchanan JA at [19]-[23]

consideration are not as wide as GIO contends in my view but include whether the plaintiff knowingly made a false statement in respect of:

(i) the burglary;

(ii) ownership of the jewellery and reliance upon the Samir receipt;

(iii) the valuation from Baghdad Jewellery.

129 Whilst I have serious concerns about the veracity of the plaintiff, I am not satisfied on the evidence presently before me that it could be said that the reporting of the burglary amounted to the plaintiff knowingly making a false statement. The plaintiff and his wife gave evidence that they received a notification from the security company at the caravan park about their home alarm and that a burglary took place. There were signs of a break-in and the matter was investigated by the police. Repairs to the house were later undertaken. In the absence of any cogent evidence to prove the burglary did not occur, or for example, that the plaintiff or his associates staged a break-in, I am not satisfied on the *Briginshaw* standard that the plaintiff made a false statement to GIO about the burglary occurring.

130 In respect of the second matter – namely, ownership and the production of the Samir receipt – it is a further step to say that the Samir receipt was fraudulently prepared by the plaintiff and presented to the insurer in order to induce a false belief for the purposes of obtaining payment. There are a number of concerns about the provenance of the Samir receipt. The existence of Samir was not established by way of internet searches although, as the plaintiff pointed out, this does not mean that it never existed. There is no actual evidence to prove the plaintiff fabricated the Samir receipt or caused someone else to create a false receipt for the purpose of deceiving the insurer. Counsel for GIO said in her opening that it was not said that the plaintiff personally manufactured this document.[31] Again, whilst there are considerable difficulties with the plaintiff's

[31] T28

evidence, the evidence did not establish to the burden of proof required – namely, the *Briginshaw* standard – that the plaintiff knowingly and deliberately presented the Samir receipt knowing it to be false. The same goes for the claim for ownership of the gold jewellery which is linked. The plaintiff said he received it from his father, his wife says she saw it and Mr Al Saffar says he tested the gold jewellery. Other than being sceptical about the truthfulness of this evidence, there is insufficient evidence to prove the claim to ownership was deliberately false.

131 Paragraph 12 of the Defence pleads the Samir receipt was a fraudulent document either procured by the plaintiff or procured with the plaintiff's knowledge or prepared by the plaintiff with the intention of inducing GIO to accept the plaintiff's claim. The evidence led in the case did not prove these alleged matters to the requisite standard.

132 The other aspect to the defence raised in respect of fraud is the reliance upon the valuation from Baghdad Jewellery. In order to make this claim good, I would have to find that not only did the plaintiff lie in that he did not take the jewellery to Baghdad Jewellery, it would need to be established that Mr Al Saffar also gave false evidence when he said he tested the gold jewellery. It was put to him that he did not see the gold jewellery, but he denied this in cross-examination. Again, whilst there is good cause to be suspicious of the circumstances in which this valuation was obtained by the plaintiff, the evidence, in my view, does not go so far as to establish, on the *Briginshaw* standard, that the Baghdad valuation is a fraudulent document. There is no evidence, for example, to prove that Mr Al Saffar was complicit in any alleged fraud on the part of the plaintiff to mislead GIO.

133 Having regard to the stringent requirements that must be met to rely upon s56, I am not satisfied GIO has proved on the *Briginshaw* standard that the plaintiff made a fraudulent claim. It follows that GIO is not entitled to rely upon s56 as a basis for denying indemnity.

Section 13 – Duty of disclosure

134 Section 13 of the ICA provides as follows:

> "(1) A contract of insurance is a contract based on the utmost good faith and there is implied in such a contract a provision requiring each party to it to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith.
>
> (2) A failure by a party to a contract of insurance to comply with the provision implied in the contract by subsection (1) is a breach of the requirements of this Act.
>
> (3) A reference in this section to a party to a contract of insurance includes a reference to a third party beneficiary under the contract.
>
> (4) This section applies in relation to a third party beneficiary under a contract of insurance only after the contract is entered into."

135 The section enshrines in statutory form the common law obligation to act in good faith placed upon both the insured and the insurer.

136 In its letter denying indemnity dated 14 August 2015, GIO relied upon s13 as a basis for denying indemnity. Section 13 is also relied upon in GIO's Defence but the context in which it is pleaded relates to the plaintiff's conduct in making the claim, namely, the fact of the burglary, the lack of adequate proof of ownership and an unprofessional valuation. These are matters which relate to the making of the claim.

137 GIO also sought to rely upon three further acts of non-disclosure said to be in breach of s13 of the ICA. These are identified in paragraph 78 of its written submissions.

138 The first matter is the failure to disclose the prior burglaries in 2009 and 2013 which resulted in claims being accepted by AAMI. Section 3 of the certificate of insurance required the plaintiff to disclose claims within the past three years. The plaintiff listed a claim in 2011 but, as seen above, this was not the date of either of his two former burglaries. On the basis of the form, he was not required to disclose the 2009 burglary as it occurred some five years before the policy with GIO was taken out. This raises the issue as to whether it is a matter he

should have disclosed it in any event under the general duty of disclosure referred to in the PDS.

139 The second matter was a failure to disclose some earlier motor vehicle claims which were disclosed in a Veda report. The plaintiff's evidence was that they concerned his wife but this is contrary to the Veda report which shows that he was involved.

140 The third and final act of non-disclosure relied upon by GIO was the failure of the plaintiff to disclose any prior refusal of an insurance claim. This was said to be the refusal of AAMI to accept all of the items claimed in the second burglary. As observed earlier, the plaintiff was paid some $318,000 of the total sum claimed of $330,000.

141 These three matters of alleged non-disclosure were not relied upon in the letter from GIO denying indemnity nor were they pleaded. In these circumstances, I will not permit GIO to raise these matters as a separate triable issue.

142 In *CGU Insurance Limited v AMP Financial Planning Pty Ltd,*[32] the High Court considered the meaning of "utmost good faith". The Court held it was not necessary to prove an insured acted dishonestly to find a breach of the duty of utmost good faith and that the conduct required may have elements in common with an absence of clean hands as is understood in equity.[33] Many of the cases, including *CGU*, involve allegations of a breach of utmost good faith on the part of the insurer. The position of an insured was considered by Sackar J in *Camellia Properties Pty Ltd v Wesfarmers General Insurance Pty Ltd.*[34]

143 His Honour said at 118:

> "The language of s 13 does not discriminate between the stringency of the duty owed by the insurer to the insured (on the one hand) and the stringency of the duty owed by the insured to the insurer (on the other). Nonetheless, some of the decided cases indicate that a less stringent standard of conduct applies to an insured (only honesty is required) as

32 (2007) 235 CLR 1; [2007] HCA 36
33 Ibid at [15] per Gleeson and Crennan JJ and [257] per Callinan and Heydon JJ
34 [2013] NSWSC 1975

> opposed to an insurer (reasonable conduct is required). ... It is difficult to find a basis for that distinction either in the language of s 13 or in High Court authority. Some cases indicate that honesty is not always sufficient, and that an insured is required, as a manifestation of the principle of utmost good faith, to take reasonable steps to reduce or minimise the liability of the insurer."

144 In *Small Business Consortium Lloyds Consortium No 9056 v Angas Securities Ltd,*[35] Ball J (of the New South Wales Supreme Court) proceeded on the basis of the insurer's formulation of conduct in "breach of the duty of utmost good faith in conduct that was capricious or unreasonable or involved unfair dealing".

145 In my view, the submission of the documents seeking to prove the plaintiff's claim, namely, the Samir receipt and the Baghdad valuation, were not matters which give rise to a finding that the plaintiff breached his duty of utmost good faith. The fact was that he failed to substantiate his claim to the satisfaction of the insurer. I do not consider this showed dishonesty on his part or was conduct which was capricious, unreasonable or involved unfair dealing.

146 The breach of s13 which was pleaded related to the circumstances in making the claim. I am not satisfied the matters relied upon do establish a breach of the duty of utmost good faith as that expression is understood.

Defences – ss54 and 31 of the ICA

147 In the plaintiff's Reply dated 28 September 2017, the plaintiff seeks to rely on ss54 and 31 of the ICA. Section 54 provides that an insurer may not refuse to pay claims in certain circumstances. Section 54 is as follows:

> "(1) Subject to this section, where the effect of a contract of insurance would, but for this section, be that the insurer may refuse to pay a claim, either in whole or in part, by reason of some act of the insured or of some other person, being an act that occurred after the contract was entered into but not being an act in respect of which subsection (2) applies, the insurer may not refuse to pay the claim by reason only of that act but the insurer's liability in respect of the claim is reduced by the amount that fairly represents the extent to which the insurer's interests were prejudiced as a result of that act.
>
> (2) Subject to the succeeding provisions of this section, where the act could reasonably be regarded as being capable of causing or

35 [2015] NSWSC 1511 at 63

contributing to a loss in respect of which insurance cover is provided by the contract, the insurer may refuse to pay the claim.

(3) Where the insured proves that no part of the loss that gave rise to the claim was caused by the act, the insurer may not refuse to pay the claim by reason only of the act.

(4) Where the insured proves that some part of the loss that gave rise to the claim was not caused by the act, the insurer may not refuse to pay the claim, so far as it concerns that part of the loss, by reason only of the act.

(5) Where:

(a) the act was necessary to protect the safety of a person or to preserve property; or

(b) it was not reasonably possible for the insured or other person not to do the act;

the insurer may not refuse to pay the claim by reason only of the act.

(6) A reference in this section to an act includes a reference to:

(a) an omission; and

(b) an act or omission that has the effect of altering the state or condition of the subject-matter of the contract or of allowing the state or condition of that subject-matter to alter."

148 To engage s54, the relevant act or omission must have:

(a) occurred after a contract is entered into;

(b) not caused or contributed to the loss that gives rise to the claim.[36]

149 The prejudice has been defined as:

> "Prejudice will consist in the existence of a liability which in whole or in part, would not have been borne by the insurer if the act had not been done or the admission had not been made or in the non-receipt of an additional premium to which the insurer would have been entitled by reason of the doing of the act or the making of the omission."[37]

150 The plaintiff submits the relevant act or omission is its failure to comply with the defendant's proof requirements. Both the Samir receipt and Baghdad valuation were obtained by the plaintiff before the policy was issued. Thus the procuring of these documents were not acts or omissions which took place after the

36 *Ferrcom Pty Ltd v Commercial Union Assurance Co of Australia Ltd* (1993) 176 CLR 332, 339

37 Ibid at 345

contract was entered into, as is required before s54 can come into play. The issue then is whether the plaintiff's failure to substantiate his claim is an act or omission to which s54 applies. The failure to prove his claim was not an act or omission which caused or contributed to the loss so that s54(2) does not come into play. The loss arose as a result of the alleged burglary.

151 I do not accept the plaintiff's characterisation of his failure to reasonably substantiate his claim as being an act or omission which fits the requirements of s54. The plaintiff's failure was not, for example, a failure to notify of a material variation as was the case in *Ferrcom Pty Ltd v Commercial Union Assurance Co of Australia Pty Ltd*.[38] As the High Court said: "The construction of s54 is not without difficulty".[39] In that case, the insured failed to advise the insurer that a crane had become registered. The crane was damaged and the insured made a claim under the policy. The policy applied to unregistered cranes. The High Court held the failure to notify was an act to which s54 applied but had the insurer been notified it would have been entitled to cancel the policy and go off risk. The prima facie liability under s54(1) was thus reduced to nil. The instances where s54 have been invoked successfully appear to be cases where an insured has failed to comply with a particular term of the policy, such as notifying of a material variation or not giving notice of a potential claim within the time prescribed or at all. For example, in *Maxwell v Highway Hauliers Pty Ltd*,[40] the relevant act for the purposes of s54 was the fact that the insurer allowed a vehicle to be driven by an untested driver where the policy required drivers to undergo psychological testing of drivers' attitudes towards safety.

152 I consider the plaintiff's inability to prove his claim to the satisfaction of GIO is qualitatively different and not an act or omission to which s54 applies. The PDS imposed requirements relating to proof as a condition of the insurer granting indemnity. This condition was not met. The plaintiff did not engage in an act or

38 Ibid
39 Ibid at [343]
40 [2014] HCA 33; (2014) 312 ALR 530

omit to do an act after the inception of the policy, rather he did not comply with the terms of the policy relating to proof of ownership and value. The plaintiff's failure to substantiate his claim is not the same as doing or omitting an act during the currency of the policy, as is required under s54.

153 But if I am wrong on this, the prejudice caused to GIO would be the same as in the *Ferrcom* case on the basis that had the plaintiff told GIO he did not have adequate proof of ownership and valuation, GIO would have cancelled the policy and reduced its liability to nil.

154 Section 54 has no application to fraud cases that fall solely under s56. This is because s54 does not apply to prevent an insurer from avoiding a claim where the act relied upon to invoke the section is the very act giving rise to the claim. Thus, in circumstances where the act giving rise to the claim was held to be fraudulent, the insurer was held to be entitled to rely upon an exclusion in the policy relating to fraudulent conduct of the insured in order to avoid the claim in its entirety.[41]

155 Section 31 of the ICA provides as follows:

> "(1) In any proceedings by the insured in respect of a contract of insurance that has been avoided on the ground of fraudulent failure to comply with the duty of disclosure or fraudulent misrepresentation, the court may, if it would be harsh and unfair not to do so, but subject to this section, disregard the avoidance and, if it does so, shall allow the insured to recover the whole, or such part as the court thinks just and equitable in the circumstances, of the amount that would have been payable if the contract had not been avoided.
>
> (2) The power conferred by subsection (1) may be exercised only where the court is of the opinion that, in respect of the loss that is the subject of the proceedings before the court, the insurer has not been prejudiced by the failure or misrepresentation or, if the insurer has been so prejudiced, the prejudice is minimal or insignificant.
>
> (3) In exercising the power conferred by subsection (1), the court:
>
> (a) shall have regard to the need to deter fraudulent conduct in relation to insurance; and

41 See *Tiep Thi To v Australian Associated Motor Insurers Ltd* (2001) 3 VR 279 and *Chan Muk-Ying v Tripathi* [1993] 2 QDR 599

(b) shall weigh the extent of the culpability of the insured in the fraudulent conduct against the magnitude of the loss that would be suffered by the insured if the avoidance were not disregarded;

but may also have regard to any other relevant matter.

(4) The power conferred by subsection (1) applies only in relation to the loss that is the subject of the proceedings before the court, and any disregard by the court of the avoidance does not otherwise operate to reinstate the contract."

156 As I have not found any fraudulent conduct on the part of the plaintiff which entitled GIO to avoid the contact, the adjustment permitted under s31 in respect of the amount to be recovered does not fall to be considered.

Cancellation of the policy under s60 of the ICA

157 GIO gave notice in its letter denying indemnity that it was cancelling the policy in accordance with s60.

158 Given I have found the plaintiff did not breach s13, it follows that GIO was not entitled to cancel the policy on the basis of a breach of the duty of utmost good faith. The same applies to fraud. An insurer may also cancel a policy under s60(d) if the insured has failed to comply with a provision of the contract, including a failure to pay a premium. The plaintiff failed to comply with a provision of the contract, namely, the requirement to provide reasonable proof of ownership and valuation to substantiate his claim. Consequently, I find GIO was entitled to cancel the policy for the remaining 4 days of its duration.

Conclusions

159 In light of the above, I am satisfied GIO was entitled to deny indemnity as the plaintiff failed to reasonably substantiate his claim. It is clear from the foregoing the Samir receipt did not provide adequate proof of ownership of the gold jewellery. Further, the Baghdad Jewellery valuation relied upon by the plaintiff was not a valuation from a professional valuer or qualified jeweller as required under the PDS.

160 GIO did not establish a breach of the duty of utmost good faith under s13 of the ICA by reason of the plaintiff relying upon the Samir receipt and the Bagdad valuation in support of his claim for indemnity.

161 The requirements relating to cancellation of the policy under s60 were made out with the result that GIO was entitled to cancel the policy for the period from 21 to 25 August 2015.

162 Although I have considerable doubts about the plaintiff's credibility, I was not satisfied on the *Briginshaw* standard that GIO established a fraudulent claim within the meaning of s56 of the ICA.

163 Sections 31 and 54 of the ICA have no application in the circumstances of this claim.

164 As I have found GIO was entitled to deny indemnity under the policy, the plaintiff's claim must be dismissed. Subject to hearing from the parties, I propose ordering the plaintiff pay GIO's costs of the proceeding, including any reserved costs, on a standard basis to be taxed in default of agreement.

Certificate

I certify that these 46 pages are a true copy of the Reasons for Judgment of Her Honour Judge A Ryan delivered on 1 February 2018.

Dated: 1 February 2018

Elisabeth Buchan

Associate to Her Honour Judge A Ryan