IN THE DISTRICT COURT
OF NEW SOUTH WALES
CIVIL JURISDICTION

COLEFAX SC DCJ

10 AUGUST 2012

ZEHRA IDIK
Plaintiff

v.

CALLIDEN INSURANCE LIMITED (ABN 47 004 125 268)
Defendant

Matter No. 2011/00187647

REASONS FOR JUDGMENT

Introduction:

1. In these proceedings the plaintiff (Mrs Idik) sues the defendant, Calliden Insurance Limited (Calliden), for damages as a result of Calliden refusing to pay out on a claim following a fire on 3 December 2010 at premises from which Mrs Idik conducted a smash repair business.

2. In general terms, Calliden says it was entitled to decline indemnity and to avoid the policy because, at the time the contract of insurance was made, Mrs Idik:

(a) failed to disclose that her husband (who was also the manager of her business and a co-owner of the premises from which that business was conducted) was a member of the Comanchero Motorcycle Club; and

(b) gave an allegedly untrue answer to a question in the application for insurance as to whether a person to be insured under the policy had been involved in a business which had previously become insolvent.

Factual Background:

3. Unless otherwise indicated, the following facts are uncontroversial. Where there is a controversy, I shall resolve it in this narrative on the balance of probabilities (again unless otherwise indicated).

4. On 3 May 2003 Mr Zekeriya Idik (Mr Idik) and Mrs Idik married.

5. On 2 July 2004 Idik Enterprises Pty Limited was registered. At that time Mr Idik was a director, and the company secretary, of that company. His brother (Mr Erdogan Idik) was the other director.

6. On 10 October 2007 Idik Enterprises lodged a change of company details document with the Australian Securities and Investment Commission. The change concerned the principal place of business address. The form was signed by both Mr & Mrs Idik, each

apparently (at first blush, at least) in the capacity of "company secretary" – a matter which gave rise to a factual controversy in the hearing (viz whether Mrs Idik was at any time the, or a, company secretary of Idik Enterprises). Mr Idik was that office holder. It is not clear why Mrs Idik signed the document because, apart from this document, there is no other evidence that she was the (or a) company secretary of Idik Enterprises – or that that company had two coincidental such office holders. Mrs Idik denied she was that office holder. She could offer no explanation as to why she signed the document. Perhaps (and I think the most likely explanation) because she had performed some secretarial function within the office, she was confused (and notwithstanding the view I express in paragraph 12 below) by the legal concept of a company secretary. Whatever the reason, on this topic I accept her evidence. Calliden (which bears the onus of proof) has not proved that Mrs Idik was, as at October 2007 or at any time, an office holder of Idik Enterprises.

7. On 1 July 2008 Mr Erdogan Idik ceased to be a director of Idik Enterprises. He was replaced by his wife, Mrs Dilek Idik.

8. By 2009 Mrs Idik was aware (because he told her) that her husband was a member of the Comanchero Motorcycle Club.

9. Mrs Idik was cross-examined closely as to her knowledge at that time of the Comanchero Motorcycle Club. On a number of occasions she asserted that the members of that club were "… just a group of people that like motorcycles" (see for example T54:16).

10. The following questions and answers are worth noting:

> "Q. Mrs Idik, I want to suggest to you that from the time your husband told you that he was a member of the Comancheros Motorcycle Club that was a time after the incident at Sydney Airport, wasn't it ['the incident' was a reference to an incident at Sydney Airport in 2009 between the Hells Angels Motorcycle Club and the Comancheros Motorcycle Club, see T62.48-63.20]?
>
> A. Yes.
>
> Q. I want to suggest to you that from the time that you had that information, you were aware at the very least of violence between the Comancheros and the Hells Angels at Sydney Airport?
>
> A. Yes.
>
> Q. You were aware from everything you'd seen and read since that time ['that time' being a reference to when she was first informed that her husband was a member of that club] that there were often references to motorcycle clubs in the newspapers and television in the context of being associated with violence?
>
> A. Yes.
>
> Q. I want to suggest to you that after you were told the information that your husband was a member of the Comancheros and based upon what you had seen before and what you knew since that time that you knew that you lived with a risk of attack to either your home, your business or your husband's café, didn't you?
>
> A. No, I didn't." (T73:35-T74:5)

...

"Q. Mrs Idik, at the time you took out this policy, you knew that there was a risk of violence associated with the Comanchero Motorcycle Club?

A. No, I did not." (T77:35)

11. I do not accept the evidence of Mrs Idik that at the time her husband told her that he was a member of the Comancheros Motorcycle Club, and therefore at the later time that she took out the policy, she was not aware of a risk of violence associated with those who were members of the Comanchero Motorcycle Club and persons associated with those members. I do not accept her evidence for two reasons.

12. First, Mrs Idik struck me as an intelligent and well-informed person. The reputation of the Comanchero Motorcycle Club for involvement in violence and other serious criminal activity (whether that reputation was deserved or not) was in 2009 a matter of common knowledge to which I am entitled to have regard (cf section 144 of the *Evidence Act*). It is improbable that an intelligent and well-informed person such as Mrs Idik would have been unaware of that reputation (and indeed I understand her answer to the third question asked of her at T73 referred to in paragraph 10 above to be an admission of that fact).

13. The second reason was her evidence concerning an incident at a café with which her husband was associated – as to which see below at

[27]. Mrs Idik gave evidence on this topic at T66:44, 67:3; and (in re-examination) T130:35.

14. I must say that I found that evidence surprising. Ordinarily it would be expected that a wife would be very interested in the circumstances in which her husband came to be assaulted by a number of people. The answer which Mrs Idik gave in re-examination did not in my view redeem the position. I have concluded that the evidence given by Mrs Idik on that topic was not accurate – and deliberately so. I have therefore approached her evidence generally with caution.

15. I should observe that my comments in relation to the reputation of the Comanchero Motorcycle Club are precisely that – comments in relation to the club. I make no adverse finding at all against Mr Idik.

16. Returning to the narrative, on 24 April 2009 Mr Idik ceased to be both a director, and the company secretary, of Idik Enterprises. Mrs Dilek Idik assumed the role of company secretary (and continued thereafter as the sole director).

17. On 15 June 2009 a Liquidator was appointed to Idik Enterprises pursuant to a Creditor's Voluntary Winding Up. At that time, Idik Enterprises had assets of $5,000.00 (being cash at bank); and

unsecured creditors of $252,000.00, including the Australian Taxation Office ($100,000.00), and Mr Idik ($150,000.00).

18. On 14 April 2010 Mrs Idik, Mr Idik, and Mr Erdogan Idik became the registered proprietors as tenants-in-common of certain premises in Sunnyholt Road, Blacktown (the subject premises).

19. On 25 June 2010 Mrs Idik registered the business name of "1st Choice Smash Repairs Blacktown" with the Department of Fair Trading. The principal place of business recorded was the subject premises.

20. On 14 July 2010 Mrs Idik obtained a motor vehicle repairer's licence in that registered business name; and the licensed premises were the subject premises.

21. The business commenced trading at the subject premises in about August 2010. In that business Mr Idik was, as I have already indicated, the manager. At around that time there was a discussion between Mr and Mrs Idik and Mr Erdogan Idik. I find that in that conversation Mrs Idik was acting in two capacities: as part owner of the subject premises; and as the person who would be operating a business from those premises. There was no written lease referable to that business occupying the subject premises, but there was in my view at least a licence agreement. In that conversation it was

effectively agreed that a condition of the licence agreement was that Mrs Idik (as occupier/licensee) would arrange relevant insurance against damage to the building constructed on the subject premises.

22. On 13 September 2010 Mrs Idik applied to, and Calliden issued, the relevant policy of insurance. Amongst other things, it covered damage to the building on the subject premises up to the sum of $500,000.00.

23. The policy was taken out when Ms Telfer, an employee of Mrs Idik, made a telephone call to an insurance broker to arrange on-line insurance cover for the building. In this conversation the broker received specific information requested from Ms Telfer. He in turn entered that information into a computer which was open at Calliden's website and in particular at that section providing for on-line applications for insurance to be made. The relevant information was given to Ms Telfer by Mr Idik but nothing of significance in my view turns upon that. When she was given the information, Ms Telfer provided it to the broker who entered in on-line with Calliden. At the completion of this process Calliden effectively issued the policy.

(My reasons for stating that it was not of significance that the relevant information provided to Ms Telfer came from Mr Idik were because: first, Ms Telfer was acting as Mrs Idik's agent; and secondly, in these proceedings, Mrs Idik said that if, at the time the policy had been

taken out, she had been directly asked that question by the broker, she would have provided the same answer.)

24. The specific information requested of Ms Telfer and supplied by her to the broker included the following question and answer:

> "Has the insured, or anyone to be insured under this policy:
>
> ...
>
> - Been declared bankrupt or ever been involved in a company business which became insolvent or subject to any form of insolvency administration (e.g. liquidation, receivership or voluntary administration)? – *No.*"

25. The on-line application did not, whether by a general statement or a specific question, in effect ask whether there was any other information within Mrs Idik's knowledge that would be likely to affect Calliden's consideration of the proposal. Nor was there any general statement or specific question which, if properly answered, would have required Mrs Idik to reveal to Calliden that her husband was a member of the Comancheros.

26. In mid to late December 2010 Mr Idik, whilst still the manager of the smash repair business conducted at the subject premises, opened a Turkish Internet Café in Mt Druitt.

27. Towards the end of November 2010 Mr Idik was assaulted at that café by a number of people.

28. On 3 December 2010 a fire occurred at the subject premises. Subsequently, Mrs Idik made a claim for damage to the building on those premises of approximately $382,000.00.

29. On 9 December 2010 the broker (through its employee, Ms Owen) wrote to Calliden (in circumstances not revealed in the evidence):

> "In reference to the above and the incorrect name, when I quoted the policy I was told the name was 'First Choice Smash Repairs' and quoted in that name.
>
> When client accepted the quote, they didn't advise that it should be in the name of Zekeriya Idik. He is both owner & tenant of the property.
>
> He has another property with Calliden, [policy number] in his name.
>
> ..."

30. On 31 May 2011 Calliden wrote to Mrs Idik's broker and informed the broker that it had declined to indemnify Mrs Idik and purportedly avoided the claim, citing those matters referred to at the commencement of these reasons.

31. Although Calliden took that action in relation to Mrs Idik's policy, it took no step to avoid the policy in Mr Idik's name the subject of the communication on 9 December 2010.

Issues for Determination:

32. No legal issues arise for determination in Mrs Idik's case in-chief. She has proved the existence of a contract of insurance; an event to

which that contract applies; and some loss or damage as a result of that event.

33. The legal issues which arise are substantially based upon the contentions of Calliden.

34. Those legal issues are as follows.

35. First, in not disclosing that Mr Idik was a member of the Comanchero Motorcycle Club, did Mrs Idik fail to comply with her duty of disclosure as required by section 21 of the *Insurance Contracts Act* 1984 (C'th) (the Act)?

36. Secondly, if the first question is affirmatively answered, was that non-disclosure made fraudulently, thereby entitling Calliden to avoid the policy pursuant to section 28(2) of the Act?

37. Thirdly, and alternatively, if the first question is affirmatively answered, and if the non-disclosure were not made fraudulently but innocently, then should the liability of Calliden be reduced to nil pursuant to section 28(3) of the Act?

38. Fourthly, if the second question is affirmatively answered, should the court exercise its discretion to disregard that matter on the basis that it would be harsh and unfair not to do so (cf section 31 of the Act)?

39. Fifthly, in (allegedly) not disclosing that a person to be insured under the policy had been involved in the business that previously became "insolvent", did Mrs Idik fail to comply with the duty of disclosure as required by section 21 of the Act?

40. Sixthly, if the fifth question is affirmatively answered, was that non-disclosure/misrepresentation made fraudulently thereby entitling Calliden to avoid the policy pursuant to section 28(2) of the Act?

41. Seventhly, and alternatively, if the fifth question is affirmatively answered, and if that non-disclosure/misrepresentation were not made fraudulently but innocently, then should the liability of Calliden be reduced to nil pursuant to section 28(3) of the Act?

42. Eighthly, if the sixth question is affirmatively answered, should the court exercise its discretion to disregard that matter on the basis that it would harsh and unfair not to do so (cf section 31 of the Act)?

43. Finally, if Mrs Idik otherwise succeeds, what is the proper measure of her damages (both principal and interest)?

The First Issue: In not disclosing that Mr Idik was a member of the Comanchero Motorcycle Club, did Mrs Idik fail to comply with her duty of disclosure as required by section 21 of the Act?

44. Section 21(1) of the Act provides as follows:

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

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

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

45. Mr Heath of counsel who appeared for Calliden submitted that both these alternative limbs were satisfied.

46. Specifically, he submitted that:

(a) Mr Idik's membership of the Comanchero Motorcycle Club;

(b) his relationship with Mrs Idik (both as her husband and as the manager of the business); and

(c) his co-ownership in the premises from which that business was conducted

were matters which would have been relevant to the decision of Calliden whether to accept the risk of insuring the building and, if so, on what terms.

47. Mr Seton SC who appeared for Mrs Idik submitted that Calliden had not proved that those three matters were such relevant matters.

48. Specifically, Mr Seton drew attention to the fact that in the context of considering Mrs Idik's claim, Calliden became aware that Mr Idik had his own policy; and that Calliden took no steps to avoid that policy.

49. Mr Seton further submitted that the onus falling on Calliden had not been discharged because the relevant underwriter who accepted the application was not called to give evidence – instead a (possibly more) senior underwriter was called who had had no involvement in the decision to accept Mrs Idik's application.

50. Additionally, Mr Seton submitted that although "moral risk" was a matter relevant to section 21 considerations, Calliden had narrowly defined what it regarded as a relevant moral risk by reference to the underwriting manual, section 4.1.1 "Declinations" (see exhibit 2, Volume 1, Tab 9, pages 16-17).

51. I reject each of Mr Seton's submissions.

52. As to Mr Seton's first submission, in the context of a large corporation, it is readily understandable that the significance of Ms Owen's communication of 9 December 2010 might well have been overlooked. Indeed, given the attitude which Calliden took to Mrs Idik's claim, it would be surprising indeed if Calliden consciously made a decision not to take the opportunity of avoiding Mr Idik's

policy. In my view, it was more likely than not an administrative oversight on Calliden's part in not avoiding, or purporting to avoid, Mr Idik's policy.

53. As to Mr Seton's second submission, I would be surprised if any reasonably well-informed underwriter would have taken a different attitude to that of Mr Richardson, whose evidence on this topic I accept. I draw no adverse inference to Calliden for failing to call the specific underwriter on this topic.

54. As to Mr Seton's third submission, it may be accepted that the matters specifically nominated in the manual do not extend to circumstances such as those presently under consideration. However, I accept Mr Richardson's evidence that those instances in the manual are not closed categories and that the insurer would have regarded the question of Mr Idik's association with the Comanchero Motorcycle Club as a relevant "moral risk".

55. I therefore find that the three matters referred to in paragraph [46] above would have been matters relevant to Calliden's decision whether to accept the risk involved in Mrs Idik's application and, if so, on what terms.

56. Turning to the first limb of section 21(1) of the Act, it is necessary to take a closer look at the particular evidence that Mrs Idik gave on this topic.

57. The specific evidence relied upon by Mr Heath can be found in Mrs Idik's cross-examination (T77 23.37):

> "Q. Just listen to this question, if you could, please. If there is a risk of violence associated with being a member of the Comancheros Motorcycle Club as your husband was, that was a matter that you understand in your mind would be relevant to an insurer?
>
> A. Yes.
>
> Q. You were dealing with a broker in relation to this insurance company?
>
> A. Yes.
>
> Q. You later became aware that that insurance company was Calliden?
>
> A. Yes.
>
> Q. Mrs Idik, at the time you took out this policy, you knew that there was a risk of violence associated with the Comanchero Motorcycle Club?
>
> A. No, I did not."

58. As Mr Seton pointed out in submissions, the first of those questions was expressed in the present tense and the last in the past tense. Specifically focussing at the time that the policy was taken out, I do not regard Mrs Idik's answer to the first quoted question as positively proving that as at the date that she took out the policy she then knew

that her husband's membership of the Comanchero Motorcycle Club would be a matter relevant to Calliden. The fact that I have some reservations as to the reliability of some of her evidence does not, on this topic, assist Calliden.

59. Accordingly, in the absence of any other direct evidence, I find that Calliden has not proved the relevant subjective intention required by section 21(1)(a) of the Act.

60. Turning to the second limb of section 21(1), Mr Heath cited, amongst other authorities, the decision in *Lindsay v ICI Insurance* (1989) 16 NSWLR 673. That was a case in which the subject premises were being used as a brothel – a fact not disclosed to the insurer at the time the contract of insurance was entered into. In that case Rogers CJ Comm D said at page 684 that the matter was relevant to the insurer's decision to accept the risk because:

> "... such use of premises could put the safety of the premises in danger. Arson, standover tactics, fights, dissatisfied customers, seem to be all dangers attendant on the conduct of a brothel and, in turn, put the safety of the premises at risk."

61. By analogy, Mr Heath submitted that the premises from which Mrs Idik conducted her business in circumstances where a member of the Comancheros was a part owner of those premises and the manager of the business conducted therefrom, could put the safety of the premises

in danger. Mr Heath submitted that a reasonable person in the position of Mrs Idik would have known of the unsavoury (my word) reputation which that organisation had, including a reputation for involvement in violence and other serious criminal activities. I have already found as a fact that that was so. There is in my respectful opinion much force in that submission.

62. Mr Seton submitted that a reasonable person in the position of Mrs Idik would not have known of the reputation of the Comanchero Motorcycle Club; nor that that reputation would extend to Mr Idik. For the reasons I have identified, I do not accept that submission.

63. Mr Seton also submitted that attention needed to be focused on the words "in the circumstances". In substance, Mr Seton drew attention to the narrow focus of matters about which specific questions were asked by Calliden. By contrast, he noted in those submissions that words which are commonly contained in proposals and which are more broadly based were not specifically included in the present proposal (cf T324). (It should be noted that a related submission concerning the implications of Calliden not giving Mrs Idik notice conformably with section 22 of the Act was withdrawn by Mr Seton after he reflected upon the implications of section 71 of the Act.)

64. In this context after I reserved my decision, both counsel referred me generally to *Thompson v GIO*, Supreme Court of New South Wales, unreported 15 June 1994; BC9402653, but no precise submissions on that case were made. In that case Rolfe J found that there had been a material non-disclosure by the insured when, in submitting a small business insurance proposal and renewing a home contents insurance policy, he failed to reveal: numerous convictions for traffic offences; as well as convictions for stealing and assault occasioning actual bodily harm.

65. In the course of his judgment his Honour cited authorities for the related propositions that:

(a) irrespective of questions asked in the proposal, the general duty of disclosure continued, and a proposer must disclose material facts not covered by the questions in the proposal; but

(b) in an appropriate case, that general duty of disclosure might be limited or circumscribed by the particular form of questions asked in the proposal.

I respectfully accept those propositions as being correct statements of the law.

66. In considering the two policies under consideration, Rolfe J ultimately held that the general duty of disclosure would have required the proposer to reveal that criminal history; and that, if revealed, the insurer would not have entered into either contract of insurance.

67. Applying the qualification in paragraph 65(b) above, his Honour found that in relation to the home contents insurance policy, the obligation of disclosure had been limited by the form of the proposal; whereas that result did not apply to the small business insurance proposal, viz the obligation of disclosure had not been limited by the specific questions asked in the proposal.

68. The small business proposal contained the general statement:

> "Your duty of disclosure ... you have a duty ... to disclose to [the insurer] every matter that you know, or could reasonably be expected to know, is relevant to [the insurer's] decision to accept the risk of insurance."

The proposal included the following specific question:

> "Is there any other information within your knowledge that is likely to affect our consideration of this proposal?"

69. The home contents proposal also contained a general statement in similar terms to the small business proposal. It then sought answers to specific questions under headings such as "security", "previous insurance history" and "previous loss of claims". Each of those topics was introduced by the sentence "Please note – it is essential to the

acceptance, the setting of the premium, and the terms of this insurance, that the following questions be answered fully."

The home contents proposal, however, did not contain the specific question in the small business proposal set out above.

70. On the basis of this authority, I understand it to be submitted by Mr Seton that Calliden's defence must fail because nowhere is a general statement or a specific question of the kind in the small business proposal. Rather, there were a series of questions on restricted topics – without even the general statement found in both the small business and home contents proposals in *Thompson*.

71. I understand Mr Heath, however, to have submitted that that case was distinguishable because effectively the statutory general duty in the present case had not been restricted by a series of specific questions before the policy was actually entered into. This was because of the manner in which the proposal was completed – by a broker and on-line. Accordingly, I understand it to have been submitted by Mr Heath that the general duty of disclosure had not been restricted in the manner in which Rolfe J found that the home contents proposal in *Thompson* had been restricted.

72. The issue for consideration therefore is whether, by the questions sought during the on-line application, the general duty of disclosure was limited or circumscribed by those specific questions.

73. In considering this issue, the confirmation of answer documents subsequently sent by Calliden to Mrs Idik can be disregarded because by that stage the policy had been issued.

74. Ultimately, I reject Mr Heath's submission. As I understand the on-line application process, it provided no mechanism for an applicant to make a disclosure of the kind under consideration. The insurer asked a series of questions; and, if there were no affirmative answers to those questions, the insurer prepared a quotation, and sent it to the applicant. When that quotation was accepted the policy was issued (see T321).

75. I have therefore concluded in the present case (just as Rolfe J concluded in *Thompson* in respect of the home contents insurance policy) that the general duty of disclosure otherwise falling upon Mrs Idik had been limited or circumscribed by the form of the questions contained in the on-line application.

76. Therefore, I am not satisfied that Calliden has proved that there has been a non-disclosure as required by section 21 of the Act regarding Mr Idik's membership of the Comanchero Motorcycle Club.

77. Because of my conclusion in this regard, it is not necessary to consider the second, third and fourth issues posed in the proceedings. However, in the event that I am wrong in the conclusion I have just expressed, I shall give brief reasons for my conclusions in relation to those issues.

The Second Issue: Was that (now assumed) non-disclosure fraudulently made thereby entitling Calliden to avoid the policy pursuant to section 28(2) of the Act?

78. This is a matter upon which Calliden bears the onus of proof to the standard required by *Briginshaw v Briginshaw* (1938) 60 CLR 386.

79. It is necessary for Calliden to prove to that level of satisfaction that, in withholding the information, Mrs Idik did so because she knew it would affect Calliden's decision.

80. However, I have found that there is no evidence that she subjectively knew those matters to be relevant; rather, that a reasonable person in those circumstances could be expected to know the matter to be so relevant.

81. I am therefore not satisfied that Calliden has proved to the relevant standard that the non-disclosure was fraudulent.

The Third Issue: If the (now assumed) non-disclosure were not fraudulently made but innocently, then should the liability of Calliden be reduced to nil pursuant to section 28(3) of the Act?

82. Section 28 of the Act provides:

> "(1) This section applies where the person who became the insured under a contract of general insurance upon the contract being entered into:
>
> (a) failed to comply with the duty of disclosure; …
>
> …
>
> but does not apply where the insurer would have entered into the contract, for the same premium and on the same terms and conditions, even if the insured had not failed to comply with the duty of disclosure or had not make the misrepresentation before the contract was entered into.
>
> …
>
> (3) If the insurer is not entitled to avoid the contract or, … the liability of the insurer in respect of a claim is reduced to the amount that placed the insurer in a position in which the insurer would have been if the failure had not occurred …"

83. It is, however, well established that the reduction of liability under section 28(3) focuses on the position of the insurer rather than that of the insured.

84. I am satisfied, having regard to the evidence of Mr Richardson, that if this matter had been disclosed, Calliden would not have entered into the contract at all.

85. Accordingly, if I had found there had been an innocent non-disclosure I would have allowed Calliden to reduce its liability to nil – giving rise to an entitlement to Mrs Idik for a refund of the premium.

The Fourth Issue: If the second question is answered affirmatively, should the court exercise its discretion to disregard that matter on the basis that it would be harsh and unfair not to do so?

86. Section 31 of the Act can only be engaged if the contract of insurance has been avoided:

> "... on the ground of fraudulent failure to comply with the duty of disclosure or fraudulent misrepresentation ..." (cf section 31(1))

87. If there had been a fraudulent non-disclosure on the question of Mr Idik's membership of the Comanchero Motorcycle Club, I would not have exercised the discretion in Mrs Idik's favour – and for the reason I identified in paragraph 84 above.

The Fifth Issue: In not disclosing that a person to be insured under the policy had been in a business that became "insolvent" did Mrs Idik fail to comply with the duty of disclosure as required by section 21 of the Act?

88. This issue concerns the specific question set out in paragraph 24 above.

89. It contains a number of discrete components:

(a) Whether Mrs Idik:

(i) has been declared bankrupt (not a relevant question on the evidence), or

(ii) ever been involved in a company or business which

(iii) became insolvent or subject to any form of insolvency administration (e.g. liquidation, receivership or voluntary administration)

or

(b) anyone to be insured under this policy:

(i) has been declared bankrupt (not a relevant question on the evidence), or

(ii) ever been involved in a company or business which

(iii) became insolvent or subject to any form of insolvency administration (e.g. liquidation, receivership or voluntary administration).

90. Insofar as Mrs Idik is concerned, this issue only could arise if she had been the company secretary of Idik Enterprises or held a senior employed position in that company.

91. However, I have already found that she was not the (or a) company secretary and there is no evidence that she performed any other duties other than some secretarial duties.

92. Insofar as the alternative limb is concerned (i.e. "anyone to be insured under this policy"), it was submitted by Mr Heath that as Mr Idik and Mr Erdogan Idik would receive a benefit under the policy because, as co-owners of the premises with Mrs Idik, they were financially interested in the claim being met.

93. I do not accept that the expression "anyone to be insured under this policy" is as broad as that contended for by Mr Heath. It certainly does not mean anybody who has a financial interest in an insured's claim being met. If that were so, Mrs Idik's bank may have been insured under this policy. Other examples can be imagined which substantially undermine the contention made on behalf of Calliden.

94. If I have been wrong in that conclusion, I do not have accept Mr Seton's submission that Idik Enterprises had not become "insolvent or subject to any form of insolvency administration (e.g. liquidation, receivership or voluntary administration)". In my opinion, that definition of "insolvency administration" is broad enough to have included the circumstances in which a liquidator was appointed to that company pursuant to the creditor's voluntary winding up.

95. Moreover, I would have rejected Mr Seton's submission that it was necessary for Mr Idik and Mr Erdogan Idik to have actually been

involved in the activities of the company at the time of the appointment of the Liquidator.

The Sixth Issue: if the fifth issue is affirmatively answered, was that (assumed) non-disclosure/misrepresentation made fraudulently thereby entitling Calliden to avoid the policy pursuant to section 28(2) of the Act?

96. To the extent that the (assumed) non-disclosure/misrepresentation related to the creditor's voluntary winding up of Idik Enterprises and the role of Mr Idik and Mr Erdogan Idik, I would not have been satisfied on the evidence that that non-disclosure/misrepresentation was fraudulently made.

The Seventh Issue: if the (assumed) non-disclosure referred to in the fifth question were not fraudulently but innocently made, should the liability of Calliden be reduced to nil pursuant to section 28(3) of the Act?

97. I earlier noted that the focus of attention to section 28(3) is the position of the insurer and not the insured.

98. Unlike the considerations attending upon the Comanchero Motorcycle Club, Calliden has not proved that it would not have issued the policy if the relevant disclosure had been made.

99. In this regard Mr Richardson made many concessions (properly) about inconsistent underwriting practices within Calliden where bankruptcies and insolvencies had been revealed to Calliden.

100. By having regard to that concession and the relatively innocuous circumstances of the creditor's voluntary winding up of Idik Enterprises, Calliden has not discharged the relevant onus.

101. If otherwise called upon to do so, I would not have reduced Calliden's liability to nil – or by any amount.

The Eighth Issue: if the six question is affirmatively answered, should the court exercise its discretion to discard that matter on the basis that it would be harsh and unfair not to do so?

102. If it had been necessary for me to consider this question, I would have exercised a discretion in favour of Mrs Idik because the inconsistent practices within Calliden were such that (unlike the Comanchero issue) it could not be said that any such non-disclosure was causative of any loss.

The Final Issue: the proper measure of damages:

103. Mr Heath submitted that Mr Idik and Mr Erdogan Idik were in effect "insured under the policy" and that accordingly the quantum of the claim made by Mrs Idik should be reduced to reflect that asserted fact.

104. I reject that submission. Mrs Idik took out the policy in her capacity as the occupier/licensee of the premises. It is a matter of mere coincidence that she was, in addition, one of the three owners of the building. In my view, that fact is entirely irrelevant.

105. Mrs Idik is therefore entitled to a verdict in the amount pleaded in the Statement of Claim, together with interest.

106. On the question of interest, Mr Seton in his opening submitted that the quantum of interest would depend upon a finding as to whether the appropriate rate was that fixed by section 57 of the Act or the relevant provisions of the *Uniform Civil Procedure Act*.

107. At the conclusion of the hearing I ordered that there be further submissions on that question if a verdict were entered for Mrs Idik on the principal sum.

Orders:

108. I make the following orders:

(1) Verdict for the plaintiff.

(2) Defendant to pay the plaintiff's costs, subject to Order 3.

(3) Direct parties to prepare written submissions as to the proper rate of interest (together with calculations); and any submissions as to costs, all such submissions to be forwarded by e-mail to my Associate by 5 p.m. on 31 August 2012.

DATED: 10 August 2012

JUDGE COLEFAX SC

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Judge Colefax SC