

NOTICE OF FILING AND HEARING

Filing and Hearing Details

Document Lodged: Notice of Appeal (Fee for Leave Not Already Paid) - Form 122 - Rule 36.01(1)(b)(c)
Court of Filing: FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment: 18/04/2024 4:25:12 PM AEST
Date Accepted for Filing: 19/04/2024 11:51:59 AM AEST
File Number: NSD463/2024
File Title: AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v AUTO & GENERAL INSURANCE COMPANY LIMITED (ACN 111 586 353)
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing: To Be Advised
Time and date for hearing: To Be Advised
Place: To Be Advised



Sia Lagos

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.



Notice of appeal

No. of 2024

Federal Court of Australia
District Registry: New South Wales
Division: General Division

On appeal from the Federal Court of Australia

Australian Securities and Investments Commission

Appellant

Auto & General Insurance Company Limited ACN 111 856 353

Respondent

To the Respondent

The Appellant appeals from the judgment as set out in this notice of appeal.

1. The papers in the appeal will be settled and prepared in accordance with the Federal Court Rules Division 36.5.
2. The Court will make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence. You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

Time and date for hearing:

Place: Law Courts Building, 184 Phillip St, Queens Square, Sydney, NSW 2000

Date:

Signed by an officer acting with the authority
of the District Registrar

Filed on behalf of (name & role of party)	Australian Securities and Investments Commission, Appellant
Prepared by (name of person/lawyer)	Tina Beltrame, Litigation Counsel
Law firm (if applicable)	N/A
Tel	0402 955 439
Fax	N/A
Email	tina.beltrame@asic.gov.au ; elizabeth.honey@asic.gov.au
Address for service (include state and postcode)	Level 5, 100 Market Street, Sydney, NSW 2000 tina.beltrame@asic.gov.au



The Appellant appeals from the whole of the judgment of the Federal Court of Australia given on 22 March 2024 at Sydney.

Grounds of appeal

1. The primary judge erred in:
 - a. construing the Notification Term as imposing an obligation on the insured consumer to notify the Respondent if there is any change to the information about the insured's home or contents that the insured disclosed to the Respondent prior to entry into the contract; and
 - b. not construing the Notification Term as imposing an obligation on the insured consumer to notify the Respondent if anything changes about the insured's home or contents relevant to the insured risk.

2. The primary judge erred in not finding that the Notification Term would cause a significant imbalance in the rights and obligations of the parties arising under the contract for the purposes of s 12BG(1)(a) of the *Australian Securities and Investments Act 2001 (ASIC Act)*, by:
 - a. considering the criterion in s 12BG(1)(a) by reference to an erroneous construction of the Notification Term as stated in Ground 1;
 - b. interpreting s 12BG(1)(a) such that the transparency of a term (and a consumer's consequent ability to understand the term and its operation) is of no relevance to whether the term would cause an imbalance in the rights and obligations arising under the contract, which interpretation is inconsistent with the requirement in s 12BG(2)(b) to take into account the extent to which a term is transparent in determining whether a term of a contract is unfair under s 12BG(1);
 - c. undertaking an independent and separate inquiry as to whether the Notification Term would cause a significant imbalance in the rights and obligations arising under the contract, in doing so failing properly to take into account the extent to which the Notification Term is transparent as required by s 12BG(2)(b); and
 - d. not finding that the impairment of the consumer's ability to comply with their obligations and avail themselves of their rights arising under the contract caused by the want of transparency of the Notification Term, would cause a significant imbalance in the parties' rights and obligations for the purposes of s 12BG(1)(a).



3. The primary judge erred in finding that the Notification Term is reasonably necessary to protect the Respondent's legitimate interests for the purposes of s 12BG(1)(b) of the ASIC Act by:
- a. considering the criterion in s 12BG(1)(b) by reference to an erroneous construction of the Notification Term as stated in Ground 1;
 - b. interpreting s 12BG(1)(b) as applying only to the "term on its proper construction" and not also to the language actually used in expressing the term, such that the transparency of the term is of no relevance to whether the term is reasonably necessary to protect the Respondent's legitimate interests, which interpretation is inconsistent with the requirement in s 12BG(2)(b) to take into account the extent to which a term is transparent in determining whether a term of a contract is unfair under s 12BG(1);
 - c. undertaking an independent and separate inquiry as to whether the Notification Term is reasonably necessary to protect the Respondent's legitimate interests, in doing so failing properly to take into account the extent to which the Notification Term is transparent as required by s 12BG(2)(b); and
 - d. not finding that there were other terms which the Respondent could have employed to protect its legitimate interests to the same extent, but which were not significantly lacking in transparency such that the Notification Clause, as drafted, such that the Notification Term is not reasonably necessary to protect its legitimate interests.

Orders sought

1. Orders 1 and 2 made by the primary judge on 22 March 2024 be set aside.
2. In their place, order that:
 - a. the declarations sought by prayers 1, 2 and 4 of the Originating Process be made; and
 - b. the Respondent pay the Appellant's costs of the proceeding at first instance.
3. The proceeding at first instance be relisted before the primary judge, or another judge of this Court, for consideration of the balance of the relief sought by the Originating Process.
4. The Respondent pay the Appellant's costs of the appeal.

**Appellant's address**

The Appellant's address for service is:

Place: Level 5, 100 Market Street, Sydney NSW 2000

Email: tina.beltrame@asic.gov.au

The Appellant's address is Level 5, 100 Market Street, Sydney NSW 2000.

Service on the Respondent

It is intended to serve this application on the Respondent.

Date: 18 April 2024

A handwritten signature in blue ink, appearing to be 'Tina Beltrame', written over a horizontal dotted line.

Signed by Tina Beltrame
Litigation Counsel, Appellant