

Concise Statement

No. NSD of 2022

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

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Applicant

ONEPATH LIFE LIMITED (ACN 009 657 176)

Respondent

A. NATURE OF PROCEEDING

1. This proceeding raises important issues about what an insurer's duty of utmost good faith requires of that insurer prior to taking the significant step of determining to avoid an insurance policy on the grounds of fraudulent non-disclosure. The respondent (**OnePath**) entered into a life insurance contract (the **Policy**) with the **Insured** (a pseudonym). OnePath later investigated a claim made by the Insured, before determining to avoid the Policy. The applicant (**ASIC**) alleges deficiencies as to OnePath's conduct before determining to avoid the Policy, and the contents of OnePath's avoidance letter.
2. ASIC contends that by:
 - (a) proceeding to avoid the Policy on the basis of fraud without properly investigating or taking account of the Insured's explanations as to apparent non-disclosures and misrepresentations;
 - (b) proceeding to avoid the Policy without first giving notice that it held concerns that the Insured's application for cover had been fraudulent, the basis for those concerns, and without giving an opportunity to address those concerns; and/or
 - (c) failing, in its avoidance letter, to notify the Insured of appeal and dispute resolution processes,

(in each instance as outlined more fully below), OnePath contravened s 13(2A) of the *Insurance Contracts Act 1984* (Cth) (**ICA**).

B. IMPORTANT FACTS GIVING RISE TO THE CLAIM

B1. OnePath

3. At all material times, OnePath held Australian Financial Services Licence No 238 341 under which it engaged in the business of offering to consumers contracts of insurance within the meaning of the ICA.
4. From 30 November 2009 to 30 May 2019, OnePath was a wholly owned subsidiary of the ANZ Banking Group Limited (**ANZ**). On 31 May 2019, OnePath became a wholly owned subsidiary of Zurich Financial Services Australia Limited.

B2. The Policy

5. The Insured was born in December 1957. She worked as a nurse until 2018.

Filed on behalf of	Australian Securities and Investment Commission, the Applicant
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6. On 15 March and 18 May 2016, the Insured met with an ANZ financial adviser (the **Financial Adviser**) at an ANZ branch in Grafton, New South Wales. The Financial Adviser recommended that the Insured seek income protection and life insurance cover with OnePath. The Financial Adviser assisted the Insured in completing a OnePath Application form (the **Application Form**).
7. On 18 May 2016, the Financial Adviser submitted the Application Form to OnePath.
8. On 15 June 2016, OnePath offered income protection and life insurance cover to the Insured. On 28 June 2016, the Insured accepted. The Policy's income protection cover was subject to a mental health exclusion.
9. OnePath applied the mental health exclusion further to:
 - (a) information set out in the Application Form relating to depression and a mental health history dating back to 1999; and
 - (b) the Insured's general practitioner (**GP**) having declined to prepare a report requested by OnePath in relation to the Insured's mental health, blood pressure and general health.

B3. The Shoulder Injury Claim

10. On or about 14 November 2018, the Insured submitted an income protection claim under the Policy. The claim related to a shoulder injury sustained by the Insured on or around 14 February 2017.
11. On 21 November 2018, OnePath notified the Insured that it was undertaking an initial assessment of the Insured's claim and that it required further documentation from the Insured. The Insured responded on 22 November 2018.

B4. The OnePath Investigation

12. On or around 27 November 2018, OnePath accepted the Insured's claim. OnePath began paying the Insured benefits under the Policy, accruing from 27 June 2018.
13. In the meantime, and without informing the Insured, OnePath commenced a 'non-disclosure investigation' as to a shoulder injury occurring prior to the Insured's entry into the Policy.
14. In or around November and December 2018, and in early 2019, OnePath sought further information from the Insured regarding the prior shoulder injury, as well as medical records from the Insured's GP and the Insured's orthopaedic specialist.
15. In or around November 2019, OnePath obtained a Statement of Claims from the Insured's previous health fund. The Statement of Claims provided details of claims made by the Insured in the period from 19 January 1996 to 27 November 2019. This included references to admissions to the Grafton Base Hospital between May 2001 and November 2005.
16. On or about 27 April 2020, OnePath obtained records from the Grafton Base Hospital which included details of six admissions during the period 2001 to 2005. The records variously referred to the admissions as being for suicidal ideations, overdose and self-harm (the **Grafton Base Hospital Admissions**).
17. The Application Form did not disclose the details of the Grafton Base Hospital Admissions. It included box-tick responses to the effect that the Insured had never attempted suicide or self-harm.
18. In or around June 2020, OnePath sought a retrospective underwriting opinion as to if it had been aware of the Grafton Base Hospital Admissions, it would have:

- (a) accepted the proposal for insurance and entered into the contract with the Insured on the same terms as it was entered into;
 - (b) declined the proposal in its entirety;
 - (c) sought modifications to the proposed contract of insurance (and if so, the modifications it would have sought to the contract); or
 - (d) taken other action.
19. The underwriting opinion concluded that, if it had been aware of the Grafton Base Hospital Admissions, the underwriter would have:
- (a) declined the Insured's request for income protection cover; and
 - (b) accepted the Insured's request for life insurance cover, at standard rates.
20. From as early as 11 June 2020, OnePath held concerns that non-disclosures or misrepresentations within the Application Form were fraudulent and/or was considering whether there was a basis to avoid the Insured's income protection cover by reason of the same.

B5. Procedural Fairness, Determination and Avoidance

21. On or about 7 July 2020, OnePath wrote to the Insured, *inter alia*:
- (a) stating that the purpose of the letter was 'to make [the Insured] aware of the information that we will take into consideration when making a decision about whether you meet the criteria for payment of Income Protection benefits under the policy and to draw specific issues to your attention which may be adverse to your claim, and to give you an opportunity to respond to the matters raised in this letter';
 - (b) noting that it appeared that the responses provided in the Application Form were incorrect or incomplete;
 - (c) informing the Insured that it was considering its rights under section 29 of the ICA to avoid a contract of insurance where there has been non-compliance with the duty of disclosure, or where an insured has made a material misrepresentation, prior to the parties entering into the contract; and
 - (d) purporting to provide the Insured with an opportunity to provide an explanation as to why she failed to disclose and/or misrepresented her mental health medical history in the Application Form and requiring any written response within 21 days from the date of this letter,
- (the **Procedural Fairness Letter**).
22. The Procedural Fairness Letter did not:
- (a) state that OnePath held concerns that non-disclosures or misrepresentations within the Application Form were fraudulent and identify the basis for such concerns;
 - (b) state that OnePath was considering whether there was a basis to avoid the Insured's income protection cover by reason of fraudulent non-disclosures or misrepresentations within the Application Form and identify the basis for such considerations;
 - (c) invite the Insured to address the concerns and considerations referred to in (a) and (b) above.
23. On 29 September 2020, the Insured (through the Financial Rights Legal Centre) responded to the Procedural Fairness Letter (the **Response Letter**).

24. By the Response Letter, the Insured stated as follows:

In 2016, [the Insured] attended an ANZ branch and was referred to an adviser, [Financial Adviser]. Details of the adviser are listed on the insurance application.

[The Financial Adviser] helped [the Insured] answer the mental health questions on the application form. [The Financial Adviser] asked [the Insured] whether she ever had any mental health issues and [the Insured] answered yes. The questions that followed were more specific and [the Insured] asked for clarification about how far back in time she needed to go when responding to the questions. [Financial Adviser] stated that she would need to go back 5 years.

During a conversation with [the Financial Adviser], [the Insured] discussed her mental health issues and [the Financial Adviser] asked whether [the Insured] was taking medication, and if so, whether it was working well. [The Insured] confirmed she was taking medication and was stable. [The Financial Adviser] then confirmed that she did not have to go back beyond 5 years.

25. These matters were, if correct, capable of alleviating concerns or averting the conclusion that non-disclosures or misrepresentations within the Application Form were fraudulent.

26. On or about 30 September 2020, OnePath determined that it would proceed with a denial of the Insured's insurance claim and avoid her income protection cover under the Policy (the **Determination**).

27. On 7 October 2020, OnePath wrote to the Insured stating that it had avoided her income protection cover under the Policy from inception pursuant to section 29(2) of the ICA (the **Avoidance Letter**).

28. OnePath did not, prior to the Determination or the Avoidance Letter:

- (a) enquire of the Financial Adviser as to, or otherwise investigate, the contents of the Response Letter as set out in paragraph 24 above (despite also being on notice that the Financial Adviser had (i) assisted the Insured with the completion of the Application Form and (ii) submitted the Application Form to OnePath);
- (b) make any further enquiries of the Insured in consequence of the matters raised in the Response Letter;
- (c) consider, adequately or at all, whether the apparent non-disclosures or misrepresentations within the Application Form were fraudulent, in view of the:
 - (i) matters raised in the Response Letter; and/or
 - (ii) structure and format of questions, and the format of responses, within the Application Form.

29. By the Avoidance Letter, OnePath also variously stated to the effect that:

- (a) the Insured had not informed Onepath of her correct medical history and other important matters when she applied for income protection insurance;
- (b) had OnePath had this knowledge at the time of the Insured's application for income protection cover, that application would have been denied; and
- (c) the Insured had breached her duty of disclosure, and that this breach was fraudulent.

30. The Avoidance Letter did not inform the Insured of her rights and/or the availability of processes (internal to OnePath and external) to dispute or appeal in respect of OnePath's decision to avoid the income protection cover within the Policy.

C. SUMMARY OF RELIEF SOUGHT FROM COURT

31. ASIC seeks declarations and pecuniary penalties as set out in the Originating Process.

D. PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

32. A duty was implied into the Policy requiring OnePath to act towards the Insured in respect of any matter arising under or in relation to the Policy with the utmost good faith: s 13(1) of the ICA.

33. OnePath's handling of the claim, including the Procedural Fairness Letter, the Determination and the Avoidance Letter, was a matter arising under or in relation to the Policy.

34. In the circumstances outlined above, by proceeding to make the Determination and/or send the Avoidance Letter without first:

- (a) enquiring of the Financial Adviser as to, or otherwise investigating, the contents of the Response Letter as set out in paragraph 24 above;
- (b) making any further enquiries of the Insured in consequence of the matters raised in the Response Letter;
- (c) considering, adequately or at all, whether the apparent non-disclosures or misrepresentations within the Application Form were fraudulent, in view of the:
 - (i) matters raised in the Response Letter; and/or
 - (ii) structure and format of questions, and the format of responses, within the Application Form,

OnePath failed to act towards the Insured with the utmost good faith.

35. Further or alternatively and in the circumstances outlined above, by proceeding to make the Determination and/or send the Avoidance Letter without first in the Procedural Fairness Letter (or otherwise):

- (a) notifying the Insured that OnePath held concerns that non-disclosures or misrepresentations within the Application Form were fraudulent, identifying the basis for such concerns;
- (b) notifying the Insured that OnePath was considering whether there was a basis to avoid the Insured's income protection cover by reason of fraudulent non-disclosures or misrepresentations within the Application Form, identifying the basis for such considerations;
- (c) inviting the Insured to address the concerns and considerations referred to in (a) and (b) in view of the bases for such concerns and considerations,

OnePath failed to act towards the Insured with the utmost good faith.

36. Further or alternatively and in the circumstances outlined above, by failing within the Avoidance Letter to inform the Insured of her rights and/or the availability of processes (internal to OnePath and external) to dispute or appeal in respect of OnePath's decision to avoid the income protection cover within the Policy, OnePath failed to act towards the Insured with the utmost good faith.

37. In the premises referred to in each of paragraphs 34 to 36 above, OnePath breached the requirements of s 13 of the ICA and thereby contravened s 13(2A) of the ICA.

E. HARM SUFFERED

38. OnePath avoided the Insured's income protection cover under the Policy in the circumstances alleged in Part B5 above.

Dated: December 2022

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Signed by Gina Wilson
Lawyer for the Applicant

This concise statement was prepared by Dean Luxton of Counsel.

Certificate of Lawyer

I, Gina Wilson, certify to the Court that, in relation to the concise statement filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date:

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Signed by Gina Wilson

Lawyer for the Applicant