Article Information

Authors: Shannon Adams, Elaine Cheung, Jack Dean, Kane McAskill
Service: Banking & Finance, Banking & Finance Litigation, Competition & Trade, Regulatory Compliance & Investigations
Sector: Financial Services

Breach your insurance policy by bringing home groceries? The Federal Court doesn't read it that way: ASIC v Auto & General

On 22 March 2024, the Federal Court of Australia found that terms included in Product Disclosure Statements (PDS) provided by Auto & General Insurance Company Limited (Auto & General) were not unfair within the meaning of ss 12(BF)(1)(a) and 12BG(1) of the Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act). This is the first time the unfair contract terms regime (UCT regime) has been applied to an insurance contract, and provides some useful guidance about the UCT regime and how future cases could be dealt with. We do however note that this is a decision by a single member of the Federal Court of Australia and judges in the future may take a different approach.

Facts

This case concerned contracts for home or contents insurance offered by Auto & General between 5 April 2021 and 21 March 2023.[1]

The thrust of ASIC's claim was that a term which required insured customers to tell Auto & General "if anything changes about your home and contents" was unfair because it:

- required customers to notify Auto & General if "anything" changes in respect of their home or contents and therefore imposed an obligation which insured customers could not practically meet;
- created a broader right for the insurer – than is available under the *Insurance Contracts Act 1984* (Cth) (**ICA**) – to refuse claims or reduce amounts paid under claims if the customer breached the obligation by failing to notify Auto & General of any change; and
- could mislead or confuse customers as to their true obligations and rights under the contract (ASIC did not, however, allege misleading or deceptive conduct).

The Notification Clause

The contract term in question required customers of Auto & General to notify it "*if anything changes about your home or contents*" (**Notification Clause**). It outlined the consequences of failing to notify, providing Auto & General the discretion to:[2]

- refuse to pay a claim;
- cancel [the customer's] contract;
- reduce the amount [it was required to] pay;
- not offer to renew [the customer's] contract;

Immediately after the Notification Clause, 11 examples of changes were provided, all of which related to changes in the nature and use of the house and contents.

Judgment

Interpretation of the Notification Clause

Justice Jackman rejected ASIC's submission that the Notification Clause should be interpreted literally, remarking that such an interpretation would require an insured to notify Auto & General whenever groceries were brought home and once they had been consumed; a result which leads to absurdity.[3] His Honour concluded, that upon proper construction (after considering the overall context), the Notification Clause required the insured consumer to notify Auto & General where there was any change to the information about the insured's home or contents the insured had disclosed prior to entering into the contract (i.e. correct any information previously provided).[4]

His Honour further concluded that where the insured consumer failed to comply with the Notification Clause, Auto & General's rights were exercisable only to the extent that it would be consistent with commercial standards of decency and fairness as required by the duty to act in the utmost good faith per s 13 of the ICA.[5]

Was the term unfair?

Pursuant to s 12BG(1) of the ASIC Act, a term will be determined as unfair where it:

- causes a significant imbalance in the parties' rights and obligations arising under the contract; and
- is not reasonably necessary in order to protect legitimate interests; and
- it would cause detriment if it were applied or relied on.

Having already dealt with the interpretation of the Notification Clause, his Honour held that "…the reference to 'term of a contract' in the opening words of s 12BG(1) means in general *the term on its proper construction*…".[6]

Significant Imbalance?

The Court held that the Notification Clause, on its proper construction, *did not* create an imbalance in the parties' rights and obligations. Given the nature of insurance is such that the insurer takes on the insured's risk, it was held that the insurer ought to be fully and *accurately* informed as to the risks it covers, and continues to cover.

Reasonably necessary to protect legitimate interests?

The Court found the Notification Clause was reasonably necessary to protect Auto & General's interests. An insurer has a legitimate interest in being able to choose which risks the insurer will insure, and the information-gathering process ensures an insurer is not covering risks that it would otherwise not be willing to insure against.[7]

Cause detriment to the insured?

Justice Jackman found the Notification Clause would "cause some detriment in the sense of some disadvantage to the consumer which need not necessarily be significant".[8] The Notification Clause imposed a burden upon the insured consumer and Auto & General's liability to the insured could be reduced or the policy could be cancelled by operation of the Notification Clause if an insured customer did make relevant disclosures, necessarily causing a detriment.[9]

Transparency

Finally, his Honour determined that the concept of transparency, which is defined in s 12BG(3) of the ASIC Act, includes clarity of meaning and thus any ambiguity will point towards a lack of clarity.[10] Further, whether the term was expressed in a manner which allows consumers to readily know and understand their rights and obligations is an aspect of the concept of "transparent".[11]

It was accepted that the Notification Clause lacked transparency to a "significant degree" in that customers would not be able to readily understand their rights and obligations.[12] Although his Honour had expressed a clear view as to the proper construction of the Notification Clause, it was acknowledged it was approached as a question for judicial determination[13] and it was feasible to conclude consumers generally may not have reached the same interpretation.[14]

On this understanding, the lack of transparency was taken into account in reasoning whether the term was unfair under each of the criterion. Justice Jackman held:

- notwithstanding that ordinary consumers would not be able to readily understand their rights and obligations due to a lack of transparency in the language used in the term, on its proper construction the term did not contribute to significant imbalance in the parties' rights and obligations;[15]
- as the term, properly construed, was found to be reasonably necessary to protect the legitimate interests of Auto & General, the lack of transparency in the expression of the term did not yield any different result;[16] and
- the lack of clarity and certainty causing a consumer to not understand their rights and obligations is in itself a

relevant detriment, irrespective of whether the term was applied or relied on.[17]

Ultimately, Jackman J concluded only two of the three criteria in ss 12BG(1)(a) and (b) had been satisfied, and ASIC was therefore not able to establish the Notification Clause was an unfair term.

Takeaways

The case includes some important takeaways regarding the UCT regime, namely:

- An analysis as to whether a term is unfair must first begin with an analysis as to its proper construction.
- An assessment as to whether a term is unfair requires consideration of the legal environment in which the term operates, including both statutory and non-statutory law.
- Although a court may ultimately construe a term in a way which is clearly correct, that does not mean that it is transparent within the meaning of s 12BG(3) of the ASIC Act.
- Where a term lacks clarity and certainty such that a consumer would not be able to understand their rights and obligations, this in itself, will be a relevant detriment.
- When assessing whether a term is reasonably necessary to protect legitimate interests, it is important to bear in mind the purpose of the contract (i.e. the "bargain" being struck) and that what is "reasonably necessary" is not the same as "absolute necessity".
- Where a statutory regime applies to a contract, and that regime imposes certain rights and obligations, a term which goes further and creates rights and obligations beyond that regime is not, by itself, unfair.

Equipped with the ability to seek significant penalties,[18] we expect ASIC and the Australian Competition and Consumer Commission will continue to monitor standard form contracts and take action in the Courts in respect of terms which they consider to be unfair.

[1] *Australian Securities and Investments Commission v Auto & General Insurance Company Limited* [2024] FCA 272, [1].

[2] Ibid.

[3] Ibid [41]

[4] Ibid [62].

[5] Ibid.

[6] Ibid [66] (emphasis added).

[7] Ibid [91].

[8] Ibid [96] (emphasis added).

[9] Ibid.

[10] Ibid [101].

[11] Ibid [102], [103].

[12] Ibid.

[13] Ibid [51].

[14] Ibid [103].

[15] Ibid [104]-[107].

[16] Ibid [109].

[17] Ibid [110]-[112].

[18] Due to the commencement *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* (Cth) which empowers ASIC and the ACCC to seek significant penalties in respect of the UCT regime.