SUPREME COURT OF QUEENSLAND

CITATION:	*Anderson v AON Risk Services Australia Ltd & Anor* [2004] QSC 049
PARTIES:	**MALCOLM ANDERSON** (plaintiff) **v** **AON RISK SERVICES AUSTRALIA LIMITED** ACN 000 434 720 (first defendant) **HISCOX DEDICATED CORPORATE MEMBER LTD** (second defendant)
FILE NO/S:	S 2097 of 2000
DIVISION:	Trial Division
PROCEEDING:	Civil Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	19 March 2004
DELIVERED AT:	Brisbane
HEARING DATE:	9, 10, 11, 12, 13 and 16 February 2004
JUDGE:	McMurdo J
ORDER:	**Judgment for the second defendant against the plaintiff**
CATCHWORDS:	INSURANCE – GENERAL – MISREPRESENTATION AND NON-DISCLOSURE – STATUTORY REMEDIES – where agreed value policy pending independent valuation – where insured values grossly exceed market values – where alleged misrepresentation and nondisclosure by insured – where misrepresentation and nondisclosure not fraudulent – whether insurer is entitled to reduce its liability to the amount that would place the insurer in a position in which the insurer would have been if the misrepresentation had not been made PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PLEADING – GENERALLY – where plaintiff says that insured items were stolen – where defendant did not deny nor admit this statement – where defendant provided particulars suggesting fraudulent claiming by the plaintiff – whether the defendant can advance a fraud case absent a denial that the goods were stolen *Insurance Contracts Act* 1984 (Cth), s 28(3) *Uniform Civil Procedure Rules*, r 150, r 166, r 166(4) *Advance (NSW) Insurance Agencies Pty Ltd v Matthews*

(1989) 166 CLR 606, followed
CIC Insurance Limited v Midaz Pty Ltd & Anor (1998) 10 ANZ Insurance Cases 61-394, cited
Orb Holdings Pty Ltd v Lombard Insurance Co (Australia) Ltd [1994] QCA 155; [1995] Qd R 51, cited
Palamisto General Enterprises S A v Ocean Marine Insurance Co Ltd [1972] 2 QB 625 (CA), cited
Simon v NRMA Insurance Ltd (Unreported, Supreme Court of New South Wales Court of Appeal, 22 October 1991), cited

COUNSEL: E J Lennon QC for the plaintiff
S S Couper QC for the first defendant on 9 February 2004
G E Hiley QC, with S S Couper QC and S R Lumb for the second defendant on 9-10 February 2004
S S Couper QC, with S R Lumb, for the second defendant on 11-16 February 2004

SOLICITORS: Lyonsmith Commercial Lawyers for the plaintiff
Sparke Helmore Solicitors for the first defendant
Phillips Fox Lawyers for the second defendant

[1] **McMURDO J:** The plaintiff, Mr Anderson, is a 52 year man who for many years has conducted an apparently successful business of the provision of security services. He has spent a considerable amount of his leisure time in hunting, both in this country and overseas. His safaris have taken him to Africa, North America and elsewhere. Many of the animals he shot were sent to a taxidermist to provide him with what hunters call their trophies. At the beginning of 1999, his trophies decorated rooms of his house at Bellbird Park near Ipswich, where he then lived with his wife and children. His collection also included the trophies of other hunters, including some animals said to have been shot by his great uncle, a Mr George Middleton. He also had something of a collection of other items in the nature of curios and antiques, such as tribal hunting bows, Zulu shields, a pair of ivory tusks, other ivory items, silver objects and what he says was a 16th century Samurai sword.

[2] In July 1999, he insured this collection of trophies and curios under a policy issued by the defendant, under which each item was insured for a certain agreed value. Those amounts totalled approximately $1.5 million. The plaintiff claims that most of the insured items were stolen over the weekend of 27 to 29 August 1999.

The issues in outline

[3] This is a claim for $1,320,000 which is the insured value of the items said to have been stolen. The defendant disputes the claim on several bases. It does not admit, although it does not deny, that the items were stolen. It also alleges that it issued the policy in consequence of certain nondisclosure and misrepresentations concerning the value of the items. The non disclosure and misrepresentation is not in any respect alleged to have been fraudulent, but the defendant says that but for those matters, it would not have entered into a contract of insurance with the

plaintiff at all, so that in consequence of s 28(3) of the *Insurance Contracts Act* 1984 (Cth), it is not liable for any sum. In essence, the defendant's case is that the plaintiff misrepresented that the agreed values of the items corresponded with market values. The plaintiff's principal answer to this claim is that he made it clear that the insured amounts for the trophies were not reached by an estimate of market value, but by an estimate of the costs of his hunting replacements.

[4] The plaintiff commenced these proceedings against both the defendant insurer and the broker, AON Risk Services Australia Ltd ("AON"), because the insurer had contended that the effect of the policy was that the items were insured not for certain agreed values, but for whatever were their true values. This resulted in a claim against AON that it had misled the plaintiff as to the effect of his policy. It was not until the commencement of the trial that the insurer abandoned that contention and conceded that it had agreed to pay the amounts specified in the policy. It is now common ground that these were to be the insured amounts pending their adjustment in accordance with an independent valuation of the items which was being sought at the time when the policy was issued. As it happened, the alleged loss of the items occurred before that valuation was obtained. Once the insurer conceded that it had issued an agreed values policy, there was no loss to be claimed from AON. The plaintiff was given leave to discontinue against it, with the costs of his claim against AON being reserved. That left the insurer as the only defendant.

[5] As I have mentioned, the plaintiff's allegation that his items were stolen is the subject of a non admission and not a denial. Indeed the defendant's counsel told me at the commencement of the trial that apart from the issues of non disclosure and misrepresentation, and subject to the proof of the plaintiff's ownership of the items, the defendant conceded its liability to pay the amount claimed. On the second day of the trial, counsel for the defendant drew my attention to the non admission of the allegation that the items were stolen. At that stage, the defendant's pleading contained a non admission of a loss of the items accompanied only by a statement that the allegation could not be admitted "because such matters were outside the knowledge of the … defendant and despite reasonable inquiry the … defendant remains uncertain as to the truth or falsity of the allegations". Subsequently, but not until the plaintiff had undergone much of his cross-examination, the defendant provided some particulars of the basis for its non admission. Those particulars suggest that the plaintiff has not lost the items and that he has fraudulently claimed upon his insurer.

[6] Accordingly, the defendant has put the plaintiff to proof that the items were stolen. There are then issues upon which the defendant bears the onus, relating to the alleged non disclosure and misrepresentation. They involve questions of whether there was any non disclosure or misrepresentation as well as its impact upon the insurer's liability according to s 28(3).

Events prior to the issue of the policy

[7] First I shall set out the facts and circumstances as they were to the date of the issue of the policy, in so far as they are not controversial. There are substantial disputes as to what was said in various conversations which are the subject of further findings later in these reasons.

[8] The plaintiff's collection of trophies had been accumulated over many years and substantially the whole of his collection had been housed on the walls and floors of several rooms of the Anderson family home at Bellbird Park. The trophies and other relevant items had not been insured under any of the policies covering the contents of that house. From time to time Mr and Mrs Anderson had considered insuring the collection but they had found it difficult to find an insurer that would cover such objects.

[9] The plaintiff had long been a member of an association called Safari Club International. He attended its Australian convention in early 1999, and upon his return from that event, he told Mrs Anderson that he had learnt at the convention that there were some insurers who would cover a hunter's trophies. For the purpose of obtaining insurance, the plaintiff then prepared at least one handwritten list of some, but not all, of the trophies. Exhibit 2 is part of a writing pad in which the plaintiff listed and described some of the trophies which were eventually insured. Also tendered as part of that exhibit were four pieces of paper, each with details of an insured item, two of which[1] were written by the plaintiff and two by a person or persons now unknown. Within the writing pad, he wrote certain details of a trophy such as when and where it was hunted, its dimensions and whether it was a relatively rare specimen, describing some as a "record" and some as "irreplaceable". At the same time, he wrote a dollar amount against each of the items described. Within the writing pad itself, there are these details for some 26 trophies. Each of them became insured under the subject policy, and in an agreed amount equal to that which was written against the item in these notes. What I have described so far appears in his handwriting in blue ink. Also upon those same pages are other words and figures written in black ink. These are notes of the estimated costs of the plaintiff hunting a replacement animal and bringing it back as a trophy. Such costs were noted against most of the trophies within his list, but notably not against some of them. For example, against the details (in blue ink) of the Albino buffalo said to have been shot in the Northern Territory in 1976, and for which the plaintiff had written in blue ink an amount of $35,000, the handwriting in black ink reads simply "cannot hunt". For those items where the re-hunting costs are noted, in many cases those costs do not total the amount written against the item in blue. I find, as the plaintiff agrees, that the notes in black were written subsequently to what appears in blue ink, although I am unable to determine when was that subsequent occasion.

[10] Of the items ultimately insured, there were some 42 which could be described as trophies, in the sense that they are the remains of some part of an animal which had been hunted, by the plaintiff or someone else. So of those 42 insured trophies, there were but 26 of them described within this handwritten list in the writing pad.

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1 In relation to the "Gemsbok" and the "Buffalo Skull"

Returning then to the four pieces of paper also tendered as part of Exhibit 2, those two which are in the plaintiff's handwriting refer to trophies also described in the list in the writing pad. One contains the details of a buffalo skull to which an amount of $7,000 is attributed and which appears to correspond with a reference to the "Cape buffalo", to which no amount is attributed within the writing pad. This separate piece of paper for this trophy contains the notation "can no longer hunt". There is nothing in black ink against this item in the writing pad, and no note of any cost of re-hunting. The other piece of paper in the plaintiff's handwriting contains details of the cost of re-hunting a Gemsbok. The writing on this paper is in black ink and the costs there noted correspond with those written in black ink against that item in the writing pad. The two other pieces of paper within exhibit 2 were not written by the plaintiff. They contain details of two items which were ultimately insured but were not in the nature of hunting trophies, being a "leopard claw" bracelet and a "bushman's hunting bow" and three arrows. The amounts respectively attributed to these items correspond with the amounts for which they were subsequently insured. These are the only items described within Exhibit 2 which are not hunting trophies.

[11] The plaintiff handed at least the notes in Exhibit 2 to Mrs Anderson so that she could type them out, which she did. Mrs Anderson was a competent typist, having worked in many senior positions as a legal secretary. She typed on A4 paper this information in a form which she described as "tabulated in a manner" so that it described the animal, gave its trophy lengths or measurements and then a statement of how much that animal would cost to re-hunt. What she typed, at least in the form of an A4 document, was not in evidence.

[12] I find, according to Mrs Anderson's evidence, that whatever she did type relevant to this insurance came from Exhibit 2. It follows that her A4 document could have referred to only 26 of the 42 trophies which were subsequently insured. Even had she typed from the separate notes referring to the bracelet and the hunting bow and arrows, her document could have referred to but two of the 16 items ultimately insured by this policy which were not in the nature of hunting trophies.

[13] Precisely what was typed by Mrs Anderson received particular attention, at least in the plaintiff's case, because it was suggested that her document was used by the plaintiff to produce a series of captions for photographs of items within an album submitted to a valuer for the purposes of this insurance, and that the plaintiff had thereby provided information in writing as to the costs of replacing trophies by re-hunting, consistent with his intention to insure the items for their replacement costs and not their values. It is common ground that an album containing photographs of at least most of the items to be insured was sent to the valuer, Lawsons, on about 24 May 1999, but there is an issue as to whether the album contained any writing, and in particular any description against each photograph of the costs of hunting a replacement for that trophy. Because the document typed by Mrs Anderson from the notes in Exhibit 2 could have contained details of only some of the items said to have been depicted and described within that album, it follows that if there were captions containing the details as asserted by the plaintiff, about a half of them must have been typed by someone else and from some material other than Exhibit 2. I shall discuss below what probably was the content of that album.

[14] I am satisfied that in 1999, some insurance of hunters' trophies was offered through the organisation Safari Club International, which covered a member for the costs of replacing a lost trophy by hunting a replacement animal, including the costs of travel and taxidermy. There was a product offered by the description "SCI Hunt & Trophy Replacement Insurance". However, it was available only to those members of the association who resided in the United States and therefore was not available to the plaintiff. I am satisfied that at least by the time of his return from the Safari Club convention in early 1999, the plaintiff had become aware of that type of insurance.

[15] The plaintiff had a long time friend and hunting companion in Mr Christopher Hortle. They met in the mid 1980s and shared what Mr Hortle describes as a great passion for hunting. Over many years they regularly went on hunting trips together and Mr Hortle visited the Anderson home two or three times a year. Mr Hortle has a Bachelor of Arts, majoring in psychology, from the University of New England. For some years he was a consultant within the New South Wales school system, after which he moved to Queensland to be involved in a wool broking and export business based in Warwick, where he was in 1999. He was then a well educated man with considerable professional and business experience, which had included dealings with insurance brokers, although he had no particular expertise in insurance matters. The plaintiff sought and obtained Mr Hortle's assistance in seeking insurance for his collection. Mr Hortle spoke to insurers and brokers on the plaintiff's behalf. In particular, he spoke to someone at Commercial Union Insurance at about the beginning of February 1999. That insurer could not assist, but through that contact Mr Hortle came to speak with Ms Conway at the Toowoomba office of AON. Ms Conway had more than twelve years of experience in the insurance industry by 1999 and was an affiliate of the Australian Insurance Institute. She was then an account broker at AON, and her duties included dealing with a proposed insured, preparing quotes and arranging for the issue of the policy, as well as dealing with any claims. In early 1999 she had a phone call from a person at Commercial Union Insurance as to whether she could arrange insurance for what was said to be a collection within a private museum of the plaintiff. She was given Mr Hortle's phone number and rang him. This was followed by telephone conversations between her and the plaintiff, before Ms Conway went on leave for a few weeks from late April 1999. The content of her discussions with Mr Hortle and the plaintiff is disputed and is discussed later in these reasons.

[16] On 5 May 1999, AON Toowoomba received a typed letter dated 20 April 1999 from the plaintiff. I accept Mr Hortle's evidence that he typed and sent this letter on the plaintiff's request. The letter enclosed a sketch plan of the Anderson house, showing the areas in which the collection was kept. It also enclosed a five page typed schedule of the items proposed to be insured. This schedule was later used as part of the insurance policy, to identify each insured item and its agreed value for the policy. I also accept Mr Hortle's evidence that he typed this schedule. I have attached a copy of the schedule to these reasons for judgment. The letter was marked to the attention of "Monica or Trevor". Monica is Ms Conway, and Trevor is another employee at AON Toowoomba with whom, during Ms Conway's absence, Mr Hortle had had some discussion, although none of any suggested consequence.

[17] The letter of 20 April 1999 is one of three documents relied upon for the defendant's misrepresentation case. I set it out in full:

> "ATTENTION **Monica or Trevor**
>
> 20th. April 1999
>
> Enclosed is a list of items which have been prepared to be on display in a private museum collection at the below address.
> The items are predominantly taxidermist prepared animals, the items have been valued by different groups and bodies on their quality of specimen and there [sic] availability in the area in which they were "gathered". Please note the values are purely guides.
> (Please forgive any spelling errors, our data base service is yet to be on line)
>
> I am expressing interest in an insurance protection policy on the following listed specimens and articles with an immediate cover note made available.
>
> Also enclosed is a *rough* map of my house and security facilities in which the specimens and articles are currently displayed in.
>
> If you have any quires [sic] please don't hesitate to call me on the below listed numbers
>
> Yours Faithfully
>
> Mr Malcom Robert Anderson
>
> Malcom Robert Anderson
> D.O.B. 18th. of June 1951
> 176 Jones Road
> Bellbird Park 4301
> Queensland
>
> …
>
> The following Displays are of the Head Shoulder Mounts of animal specimens which have been personally collected. (There are some full mounts which are mentioned after the animal description)"

[18] This list was passed on by AON, Toowoomba, to Rebecca Jones at AON, Sydney, on 6 May 1999 by fax, with a message as follows:

> "Rebecca, attached is list of items & values. Client is obtaining valuation from Lawsons but this may take a further month.
>
> You have discussed this with Monica who is now on rec. leave, agreeing to hold covered pending receipt of valuation."

[19] On the same day, Ms Jones faxed to AON, London, as follows:

"**NEW BUSINESS – MR MALCOM ANDERSON**

Dear Roy,

Please provide a quotation for the above client as per the following terms:

Insured:	Mr Malcom Robert Anderson
Situation:	176 Jones Road, Bellbird Park, Queensland Private museum collection in residence
Interest Insured:	Various taxidermist prepared animals (schedule attached)
Sum Insured:	$1,496,000 (approx. value client is currently having a valuation completed on the collection).
Security:	6ft fence surrounding premises, guard dogs, deadlocks/security doors and window locks

Could we please hold covered effective 6 May 1999 and terms can be finalised shortly.

Should you require any further information please let me know.

I look forward to receiving your response overnight."

[20] A fax dated 11 May 1999 from Rebecca Jones to AON, London, shows that by that date, terms had been offered to the plaintiff which he had accepted. In that fax she said:

> "The client has accepted the terms quoted, can we please issue policy from 6 May 1999 and a completed proposal and our closings will follow in May binder.
>
> The revised valuation of collection may not be completed for another month, can we please issue cover based on sum insured of $1,496,000 and alter policy once valuation has been received."

[21] The plaintiff completed and submitted his proposal which was dated 16 May 1999. This is the second document relied upon in the defendant's misrepresentation case. Paragraph 9 of the proposal called for information to be provided in relation to the "amounts to be insured". The proposal form contained these words:

> "All items must be individually listed by the proposer stating for each item the amount for which insurance is sought, which is to be the market value. The list must be submitted with this proposal. An independent professional valuation/appraisal may be required and should be forwarded with this proposal if available."

Against the question "Do the amounts insured represent current market value?", the plaintiff ticked the box next to "Yes". He described the items by writing these words:

> "Items are ivory tusks, trophy mounts, rare artefacts, all supplied for valuation with photographs with one of your valuers."

The plaintiff also wrote these words in his proposal:

> "All details regarding theft or damages available from C.I.C. Insurance. Presently insured and had full inspection & security however they cannot cover ivory or expensive rare/items 95% of my rare items in my museum so I have been introduced to your firm."

[22] AON had proposed that the required valuation of the items should be conducted by Lawsons whose name it gave to the plaintiff or Mr Hortle. A letter dated 24 May 1999 was sent by the plaintiff or Mr Hortle to Lawsons. This letter is the third of the documents which are the bases for the misrepresentation case. It was marked to the attention of Mr Grana, who worked in Lawsons' Brisbane office. The letter was in these terms:

> "Enclosed is a list and accompanying photographs of specimens and artefacts which have been prepared to be on display in a private museum collection at the below address.
>
> The items are predominantly taxidermist prepared animals, the items have been valued by different groups and bodies on their quality of specimen and there [sic] availability in the area in which they were gathered. Referees in Valuations are:
>
> Museums Australia
> University of New England
> Safari International
> Queensland Police Museum
> Australian Customs Office
> James Cook University
> University of Queensland
>
> I am seeking a conformation [sic] on valuation for the following listed articles. There is a current active cover note insurance policy for approx. $1,500,000.00 on the below listed articles.
>
> Pending your confirmation of valuation, please contact the below listed insurance company.
>
> I have enclosed at your request a list and photographs of the specimens.
>
> The insurance policy is with A.O.N. Insurance
>
> CONTACT: **Trevor at A.O.N. Insurance**

Telephone 0746 324400

> If you have any quires [sic] please don't hesitate to call me on the below listed numbers
>
> Yours Faithfully
>
> Malcom Robert Anderson"

[23] There is a controversy as to what was enclosed in that letter to Lawsons. The letter refers to an enclosed "list and accompanying photographs". All of the relevant evidence indicates that the enclosed photographs were sent within a photo album. As I have mentioned, there is an issue as to whether that album contained any writing, and in particular information as to the cost of hunting trips. This is discussed below, as is the question of what "list" was enclosed in this letter.

[24] The 24 May letter to Lawsons was not copied to AON, but at least the letter, if not all of its enclosures, came into the hands of AON on about 19 July 1999 after Lawsons told AON that they felt unable to perform this valuation and passed on the letter.

[25] By 6 July 1999, AON had in mind the firm Rushton Group ("Rushtons") to perform the valuation work which Lawsons had declined. On that date, Ms Conway wrote to AON, Sydney, enclosing the "attached closing and proposal form" and referring to the proposed valuation in these terms:

> "As discussed, the sum insured is based on the schedule supplied by the client pending a valuation being obtained.
>
> We hope Rushtons will be able to do this valuation in August or September and are in the process of organising this.
>
> Once you have the photos from Lawsons, could you please hold them until we make arrangements with Rushtons and then they will probably want them."

[26] At this stage AON had not seen the photo album which had been sent to Lawsons. Also on 6 July, Ms Conway wrote to the plaintiff as follows:

> "Please find attached our invoice for your new Fine Arts Policy. The policy document will be forwarded to you shortly.
>
> As discussed, the sum insured for the policy is currently based on the schedule you have provided, pending a valuation being obtained.
>
> I am in the process of finding out full details of the Valuer and when he will be available to do the valuation. Once I have these details, I will advise you immediately."

[27] On 14 July 1999, Ms Conway faxed to the plaintiff a copy of the policy, signed for the insurer by AON and dated 9 July 1999. The contract of insurance was thereby made no later than 14 July 1999.

The policy

[28] The sum insured was expressed to be $1,496,000, and the premium $3,740. In the schedule to the policy against the words "Listed Insured Property and Agreed Values" was inserted "Various as per attached schedule $1,496,000". As I have said, the attached schedule was a photocopy of that sent to AON with the letter of 20 April 1999, and which I have attached to these reasons. The property was insured against physical loss or physical damage. Under the heading "Basis of Valuation" the policy provided as follows:

> "a) The basis of valuation for settlement will be:
>
> i) for items individually listed, the value agreed by the underwriters and shown in the Schedule. The underwriters will not be liable for more than the agreed value;
> ii) for items not individually listed, the market value immediately prior to the loss.
>
> Nevertheless in no event will the underwriters be liable for more than the applicable limits of liability set out in the Schedule.
>
> b) In the event of partial loss of or damage to any item insured the amounts payable will be the cost and expense of restoration plus any resulting depreciation but not exceeding the full value of that item, valued as in a) above.
>
> c) Following payment of the full amount insured for any item, pair or set, the underwriters will become the full owners and reserve the right to take possession of the item, pair or set."

Events after the policy

[29] The day after Ms Conway had faxed the policy to the plaintiff, she posted it to him under cover of a letter[2] in which she wrote:

> "As you are aware a valuation will still be required as soon as this is able to be done. Following are details of a Valuer I have been in contact with who [sic] should be able to conduct the valuation in September:
>
> Name Simon Storey Level 10

[2] Dated 15 July 1999

Firm	Rushton's Group	6-10 O'Connell Street
Phone Number	(02) 9223 4422	SYDNEY 2000
Mobile	0419 408 580	Norwich House
Fax	(02) 923 0976	

I have asked Simon to give you a call to discuss the valuation."

[30] Also on 15 July 1999, Ms Conway sent a fax to Mr Storey of Rustons in these terms:

> "The above client wishes to appoint you to value a private collection of Taxidermy items and other artifacts. Malcolm's details follow and we ask that you contact him direct to discuss your fees etc.
> …
> A list of the items is attached and I will also forward photographs shortly."

The fax included the five page schedule of items attached to the policy.

[31] On 19 July 1999, Ms Conway received a letter from Lawsons signed by Mr Thomas of their Sydney office who there wrote:

> "Acting under your instructions we have inspected photographs of prepared animals in our rooms and cannot estimate a value for insurance due to the specialist nature of the items.
>
> We recommend that you contact a known taxidermist in the Brisbane area."

Ms Conway said, and I accept, that this letter enclosed the plaintiff's letter to Lawsons of 24 May 1999 and the photographs which the plaintiff had sent with it.

[32] On 26 July 1999 Ms Conway wrote to Mr Storey enclosing photographs of the items to be valued. The parties agree that these were photographs, or least copies of the photographs which were within the album sent by the plaintiff to Lawsons and by Lawsons to Ms Conway. They also agree, as Mr Storey recalls, that the photographs sent to Mr Storey were within an album. Ms Conway says that the album she sent to Mr Storey was that which she had received a week earlier from Lawsons. For the plaintiff, it is suggested that Ms Conway caused another album to be prepared using copies of the photographs she had received. The suggested purpose for this was that AON would then have a photographic record of the items insured. I shall return to this issue in the course of my findings concerning Ms Conway's evidence where it is disputed.

[33] Mr Storey did not proceed to value the items before they were allegedly lost in late August. But he had by then formed the view that the amounts for which the trophies and other items were insured exceeded whatever were their market values. He said, as I find, that he rang Ms Conway just prior to the weekend of 28-29

August and told her that he would not perform the valuation but that the items were over insured. As it happened the alleged loss occurred over that weekend.

The items go missing

[34] Mr and Mrs Anderson had separated in about May 1999. Mrs Anderson and their children then remained in the house at Bellbird Park, and the plaintiff moved to a unit at Redbank Plains. On the weekend of 28-29 August 1999, Mrs Anderson and her children were staying elsewhere. They stayed with Mrs Anderson's sister in Brisbane on the Friday night, and Mrs Anderson attended a wedding and stayed in central Brisbane on the Saturday night. Mrs Anderson did not return to the house until late on the Sunday afternoon, when she found that a door to the house apparently had been forced and most of the trophies were missing.

[35] The plaintiff says that he went to the house at about midday on the Sunday and saw that the gate to the grounds was partly open and its chain had been removed. He says that a sliding door was unlocked and that he then found most of his trophies were missing. He reported the matter to police and signed a statement dated 31 August 1999.

[36] The Andersons' house did not have an alarm system. Apart from locked gates to the grounds and locks to the sliding doors to the house, the only security was provided by their dogs. It seems that there would be little difficulty for the experienced criminal to break the lock upon the gates and force open the locked sliding door, apart from the presence of the dogs.

[37] Mrs Anderson's evidence was that there were two dogs, each a rottweiler, which were used as guard dogs and had been left in the grounds over that weekend. Mrs Anderson said that one of these dogs was called "Hunter", and he patrolled the front yard. She said that he was a savage dog. She has no recollection of any injury to this dog when she returned to her house on that Sunday. The plaintiff's evidence indicates otherwise. When interviewed by an insurance investigator in October 1999, he recalled that although a dog was usually always at the front of the house to greet him, on that afternoon it was not and he added that the dog "might have (been) around the side having a drink or something". In that interview, the record of which the plaintiff does not dispute, he said:

> "Then I went to see where my dog was, I called for the dog and the dog was in the back area … back yard and in the back I separate [sic] the two dogs. The dog that's usually in the front, which is Hunter had dug under the gates and was in next-door, in the back section. So the first thing I did then was to re-separate them so they wouldn't fight."

He was then asked whether the dog appeared to be stressed at that time to which he answered:

> "No, he didn't, he seemed to be all right. But talking, my wife spoke to the next door neighbour and said that that all day he had been down on the bottom corner beside her fence whimpering, yowling and whimpering. That was on the Saturday. When I actually saw the dog he appeared all right."

However, in his examination-in-chief, the plaintiff recalled in relation to his dogs on that Sunday afternoon:

> "I was concerned about my rottweiler dogs because either they would have got out. One rottweiler dog was dead in the front yard. The other one was down the back yard very sick. I later took my second dog to the vet and he said that they'd been poisoned."[3]

He repeated that account in cross-examination before he was challenged with the version given in his signed record of the interview by the insurance investigator. The cross-examination then took this course:

> "But you say that dog Hunter died, did he? – No, not Hunter.
>
> Which dog died? -- Ras, a dog called Rasputin.
>
> And when do you say you found Rasputin dead? – When?
>
> When? -- Possibly that afternoon.
>
> Possibly that afternoon. You can't recall? -- I can't remember the exact time but it would have been the afternoon because I arrived home at 12.
>
> Well, what did you mean when you said to the interviewer that in the back you separated the two dogs? – That ----
>
> …
>
> MR COUPER: I'll rephrase it and I'll refer to the next line, where you say, Mr Anderson, "So the first thing I did then was to reseparate them so they wouldn't fight." What did you mean when you said that? – Rasputin and Hunter ran the front and Utu and some other dogs ran the back. There was possibly four or five dogs I had on my property, your Honour.
>
> You say that on the weekend of the – the weekend when your trophies disappeared, you didn't have only two dogs in the yard of your house, you had four or five dogs; is that what you're saying? – That's right.

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[3] Transcript 139

> So when you said, "Then I went to see where my dog was. I called for the dog and the dog was in the back area, backyard. In the back I separate the two dogs. The dog that's usually in the front, which is Hunter, had dug under the gates and was in next-door in the back section", what you were intending to convey, that of the four or five dogs in your property, you separated two? Is that what you're saying? – That's what I'm saying.
>
> And a third dog was dead? – That is correct."

[38] Mrs Anderson, who was still living in the house at the time, seemed clear that there were but two dogs, and had no recollection of any harm to either of them. I see no reason to doubt her recollection on those matters. The plaintiff's version given on October 1999 has only the two rottweiler dogs at the property. His evidence in chief is consistent with there being but two dogs. I do not accept his subsequent evidence that there were "possibly four or five dogs" on his property. In accordance with Mrs Anderson's evidence, I find that no apparent harm had come to either of these two savage guard dogs.

[39] The only items which were missing were insured by this policy. Other items such as televisions and other appliances were not taken. Each of the items insured by this policy was missing with the exception of a moose, a caribou, the giant eland, the sable, the leopard, the zebra skin "hunted in Kenya", the silver cruet, and the silver pickle jar and tongs.

The plaintiff's photograph album

[40] The reported break-in was investigated both by the insurer and by the police. The insurance investigator was not called. The defendant called two investigating police officers but for the specific purpose of proving the contents of a photograph album, in order to establish the likely contents of the album which had been provided by the plaintiff or Mr Hortle. In January 2000, the police had an album which they had gathered in the course of their investigation. The person who sent them that album cannot be identified with certainty. It is either the album which had been sent to Lawsons and sent on to AON, or if it be different, that which AON had sent to Rushtons. The police no longer have the album and it cannot be found. The whereabouts of the album prepared by the plaintiff, if different from that which the police saw, is unknown. Over the defendant's objection, I allowed the plaintiff to give secondary evidence of the contents of his album by reference to what is said to be an accurate replica of the album (Exhibit 7). Whilst the police had the album in their hands, they photographed its cover and each of the photographs within it. It is common ground that the photographs of the various items as thereby produced by the police correspond with those within the replica album.

[41] The evidence of the police officers is that anything which was considered to be potentially relevant would have been photographed by the police in the ordinary course. I accept that evidence, as I do the police evidence that had the album in their hands contained the detailed captions found within the replica, that text would

also have been photographed by police, because it would have been considered as potentially relevant evidence.

[42] Whether the album, which the plaintiff caused to be sent to Lawsons, contained details of hunting costs is relevant to the question of whether the plaintiff put forward the amounts in his list as hunting costs or market value. His evidence that he and Mr Hortle made it clear enough that the amounts were hunting costs could be more readily accepted if in fact he provided details of those costs to AON.

[43] The plaintiff's evidence was that he prepared the photograph album, with what he says were the captions describing re-hunting costs, by using what Mrs Anderson typed from his notes in the writing pad. His evidence on the matter was as follows:

> "On the Exhibit 2 there appear to be some writing which you've identified as your handwriting in a different colour blue?-- In a different colour blue?
>
> Mmm?-- Yes.
>
> Can you explain to his Honour the significance of the different colour?-- And this is in the description of the animal or the pricing?
>
> Well, the pricing?-- Oh, yes. Because it was such a lengthy process to do this it took me quite a few days. I decided to do the description of the animals and the measurements of the individual animals and did them all at one stage over a period of a couple of days. Then I decided then to go into the individual animals then and go back and do the pricing of those animals.
>
> And then, did Mrs Anderson become involved in the finalisation of the work that you were doing?-- Yes, I did do a copy of all these details, wrote them down on a pad for which I was going to cut up and put underneath every individual animal. My wife looked at that. She said, "You can't send that. The writing's terrible. I will type that for you."
>
> And did she do some typing for you?-- Yes, she did. She typed all the details that I had put down on the pad.
>
> Did she give you some pages back?-- She gave me the pages with everything that I had previously written down.
>
> And what did you do that – when she did that?-- I then – the album had two – per page had two virtually pockets to it. In one pocket went the photograph, in the pocket underneath went the details. The paper was bigger than the pocket so I cut the pieces of paper so they would fit neatly inside that pocket."

[44] I reject this evidence, because the use of his notes in exhibit 2 would not have provided him with any information in relation to nearly half of the trophies. In the replica album there are captions detailing the hunting costs of the item where that item is not mentioned in his notes in the writing pad and, on his version, could not have been typed by Mrs Anderson. He did not suggest any other means by which he had typed information in relation to those items. Examples are the springbok, the moose, the giant eland, the wart hog, the rusa deer, the samba, the fallow deer, the sable, the caribou (smaller mount), the goat and the crocodile.

[45] As I have mentioned, the album was sent to Mr Grana, who sent it to the Sydney office of Lawsons before that office posted it to Ms Conway, and a week after she received the album, she sent an album to Mr Storey. Some months later (January 2000) the police came into possession of an album which they photographed. Evidence was given by Mr Grana, Ms Conway, Mr Storey and the police officers. None of those witnesses gave evidence to the effect that the album he or she saw contained any caption resembling that which the plaintiff and Mr Hortle say is reliably reproduced in the replica album which is Exhibit 7.

[46] Mr Grana has a definite recollection of receiving some typewritten material detailing the costs of hunting trips. But his evidence was that this was not in the form of captions on pages of the album, but that it appeared on a separate sheet also enclosed in the letter of 24 May 1999. He described this document as being "divided into sections where they said there was an animal and it had a price to actually go overseas",[4] but as a different document from the five page schedule later annexed to the policy or the album itself. It was, he said he remembered clearly, a "loose letter" but not the letter of 24 May itself.[5] In cross-examination he described it as "a letter from the album". I have no reason to doubt that Mr Grana was endeavouring to be a careful and helpful witness, although he would have an obvious difficulty in precisely recalling everything which he received some years ago and without the benefit of any file or note. However, he was definite in his recollection that the information in relation to hunting trip costs was on a distinct document and not typed on pages of the photo album. I note here that Mrs Anderson recalled typing her list of animals and hunting costs upon A4 paper.

[47] Ms Conway is adamant that the album did not contain these captions. Mr Storey has a recollection of receiving an album with yellow post-it notes upon photographs but he thought that this could be a recollection of what he received on a distinct occasion in late 2000, when he was asked to provide evidence to the insurer in relation to this claim. When he was shown the replica album and his attention was drawn to the pictures and text, it "did not quite ring a bell" with him and his recollection was of photographs with the post-it notes. The police officers did not have a specific recollection of the content of the album but were able to say that the way in which they do this work, had the text been in it, then it would have been photographed by them.

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4 Transcript 248

5 Transcript 248-249

[48] I am not persuaded by the suggestion that the album sent to Rushtons was different from that which the plaintiff had sent to Lawsons. I think it is relatively unlikely that Ms Conway compiled her own album of photographs to send to Rushtons. Had she wished to keep photographs of the collection for AON's purposes, it is unlikely that she would bother to buy a photograph album and make up some copy of what she had been sent, rather than simply sending on to Rushtons what she had received and retaining copies of the photographs, or vicé versa. And had she retained the original album, it was likely to have been that album which was given to the police to investigate this matter. The evidence then of Mr Grana, Ms Conway, Mr Storey and the police officers, presents a strong likelihood that the album which was sent to Lawsons did not contain the text which is in the replica album. I find that the original album did not contain that text. However, I accept Mr Grana's evidence that he was provided with a document that set out some details of the costs of hunting trips. I accept Ms Conway's evidence that she was not provided with such a document by the plaintiff or Mr Hortle, and she has no recollection of receiving such a document from Lawsons. I infer that the document which Mr Grana recalls as detailing these hunting costs was not passed on by Lawsons to AON.

The representation case in outline

[49] The defendant's misrepresentation case relies upon these three written communications: the letter dated 20 April 1999 with its enclosed list, the proposal and the letter dated 24 May 1999 addressed to Lawsons. As I have found, however, the letter to Lawsons was not seen by AON until after the insurance contract was made. The defendant also relies upon what it alleges the plaintiff said to Ms Conway in a conversation preceding the letter of 20 April. The case ultimately advanced is that the plaintiff represented that the items had been valued by "different groups and bodies", and the amount attributed to each item was its market value, each of which was a false statement in relation to each and every item. The plaintiff's response is that when those documents are read in the context of what he says was the substance of certain conversations with Ms Conway, they were representations of the costs of replacing his trophies by hunting like animals and having them made into trophies by a taxidermist. The plaintiff does not suggest that the trophies had market values in the amounts for which they were insured, or that he ever believed that to be the case. As I find below, the market value of each trophy was but a small proportion of its insured amount. Further, I find that he had not had any of the trophies valued by any "group" or "body", even as "purely guides". Alternatively, the defendant pleads non disclosure, by the plaintiff's not disclosing that the amounts for the trophies were hunting costs rather than market values. The substantial issue on both the misrepresentation and non disclosure cases then is whether the plaintiff and Mr Hortle made it clear enough to Ms Conway that the amounts put forward for the trophies were not representations of market value, but were estimates of the cost of hunting replacements. Unless that issue is resolved in the plaintiff's favour, the defendant would establish from the terms of the 20 April letter and the proposal the alleged misrepresentations at least in relation to the items which were the trophies. The non disclosure case would add nothing because its outcome turns on the same point.

[50] The defendant also alleges that the plaintiff misrepresented that the items which were not trophies had been valued and that the amounts insured were their approximate values. Later in these reasons I find that the items which were not trophies were also insured for amounts far exceeding their market values. As to these items, the plaintiff's case is that various persons had provided him with some estimate of value, upon which he believed for each item that its insured amount approximated its market value.

The market values

[51] The expert evidence as to value was given by four witnesses, each of whom was called by the defendant. The plaintiff called no evidence to support the insured amounts as representing market value. Mr Storey gave expert evidence which valued all but seven of the trophies and all of the other items (apart from the Samurai sword) at amounts totalling no more than $87,150 compared with the amounts insured for those items which totalled $1,259,000. The hunting trophies are not items which Mr Storey commonly values but his competence as an expert witness in relation to the insured items was not challenged and I accept his valuations as reliable. Valuation evidence in relation to most items was also given by Dr Davies who is an eminent scientist rather than a valuer; but his expertise in the valuation of these hunting trophies was not challenged. He valued most of those items in amounts totalling $86,300**,** compared with the insured amounts for them which totalled $1,197,000. His values differ from those of Mr Storey but the differences are of no significance compared with the vast difference, in the case of each and every item, between the insured amount and the value attributed by either witness. There is not one item valued by either expert of an amount at all approximating the insured amount. The item having the highest insured amount was a pair of ivory tusks, said to have been from an elephant shot by the plaintiff's great uncle, Mr Middleton. The plaintiff insured them for $415,000. Dr Davies values them at $42,500, and Mr Storey values them within a range of $20,000 to $25,000. As I have mentioned, the plaintiff has not attempted to justify the insured amounts *for the trophies* on the basis that they were indeed an approximation of market value.

[52] The disparity between Mr Storey's valuations of the non trophy items and the amounts insured for those items is of a similar proportion. The silver cruet, for example, was valued by Mr Storey at $600 to $650, rather than $12,000, and the silver pickle jar and tongs at $400 to $450, rather than $9,000. Those silver items did not go missing in August 1999, but the plaintiff says he subsequently sold them, asserting that they were sold for about $2,000 each. So on his own evidence, items insured for some $21,000 were later sold by him for $4,000. Then there was evidence from Mr Kiernan who, it was conceded, had an expertise to enable him to value some of the non trophy items, as well as the ivory tusks. He valued the tusks at $24,000. For the most part his values differ insignificantly from those of Mr Storey for the same items. He also valued the Samurai sword, which was insured for $35,000, at $500 to $2,500. The fourth expert is Mr Courtney, who has a particular experience in heraldry and weapons, and for the last fifteen years has been the senior curator responsible for the heraldry and weapons collections at the Australian War Memorial. He has a detailed knowledge of Japanese swords and he

is a valuer of weapons for the Cultural Gifts Program conducted by the Commonwealth Government. Again his competence as an expert was conceded. He valued the Samurai sword at no more than $4,000.

[53] This sword received particular attention in the plaintiff's evidence. Of course the plaintiff, but none of the experts, has seen the sword. The experts were working from various copies of the plaintiff's photographs. The plaintiff claims that a Mr Nakamura, a Japanese gentleman with expertise in relation to swords, satisfied the plaintiff that the sword was a very rare and valuable piece, because it carried some marking which is said to have proved that it was made by the first generation of the line of sword makers named Tadayoshi. Mr Courtney said that a first generation Tadayoshi in good condition may well be worth in excess of $30,000. But Mr Courtney assessed the sword as being in poor condition. In addition, its value was only in the blade, for its mounting was worthless. Mr Courtney says that the mounting is plainly identifiable as what is commonly referred to as a Shogunto mounting, which he says was a type commonly used by the Japanese military in the 1930s and until 1945. Accordingly, if this was a rare and valuable first generation Tadayoshi, it had been married with a standard army mounting commonly used during the second world war. I accept Mr Courtney's evidence, which was not at all effectively challenged. There is of course no expert opinion against it. It follows that again, the insured amount was several times its market value.

[54] If I had to make precise findings as to the market value of each item in the light of these expert opinions, I would find it difficult to prefer the opinion of one expert against another in relation to the same item. It is unnecessary for me to do so, and it is sufficient to say that I am satisfied that no item had a higher value than the highest of the various values attributed to it by these witnesses.

Representations – the items other than the trophies

[55] Whatever the plaintiff had in mind for the trophies, he put forward the amounts for the other items as in some way resembling their market values. In his letter of 20 April, he wrote:

> "The items are predominantly taxidermist prepared animals, the items have been valued by different groups and bodies on their quality of specimen and there [sic] availability in the area in which they were gathered. Please note the values are purely guides."

At least on one view, in referring to a valuation "by different groups and bodies", he was referring only to those items which were "gathered", being the trophies. However, in the proposal, he stated that each of the amounts insured represented current market value. But any representation as to the value of these non trophy items must be understood in the context of it being known to all parties that there was no written valuation which the plaintiff could provide: hence the need for someone such as Lawsons or Rushtons to value them. I accept in the plaintiff's favour that his letter of 20 April 1999, and if it be relevant his letter to Lawsons of 24 May 1999, by its reference to valuations by "groups and bodies", should be

understood as referring only to the trophy items. Although the plaintiff ticked a box in the proposal form to the effect that the amounts insured represented market values, in the context of the acknowledged need for the items to be valued and absent a claim that these items had been valued by "groups or bodies", I conclude that the plaintiff represented no more than that he held a genuine belief that the true values of the non-trophy items were of the order of these amounts. Understood in this way, was there a misrepresentation in relation to the non trophy items? If he did not believe these amounts to represent market value, then plainly there was a misrepresentation. But in that case, his misrepresentation would have been fraudulent. The insurer has pleaded no case of fraudulent misrepresentation, and its counsel made it clear at the outset of the trial that fraudulent misrepresentation or non disclosure would not be advanced. Accordingly, it is no part of the misrepresentation case that the plaintiff believed the value of these items to be less than stated. In the result, defendant's misrepresentation case in relation to the non trophy items fails.

Representations – the trophies

[56] Mr Hortle's evidence is that he explained to Ms Conway that Safari Club International offered insurance which covered for the travel, hunting and taxidermy costs of replacing a trophy. He says that this was explained in the first conversation he had with Ms Conway which was at the beginning of February 1999. He has no recollection of speaking to her again before sending the letter of 20 April 1999.

[57] The plaintiff says that he told Ms Conway that he required the same insurance as offered by Safari Club International, which was the "full replacement of travel, hunting, guiding, taxidermy". His evidence was: "I asked her if they did do that type of insurance. She (said) yes, that she did". His evidence puts this conversation very soon after Mr Hortle's suggested explanation of the required insurance, i.e. in early February 1999. The plaintiff says his conversation occurred before he went to the Safari Club International convention in February, where he says he made extensive enquiries and acquired information as to the costs of hunting trips.

[58] As I have mentioned, Ms Conway denies any conversation with either Mr Hortle or the plaintiff to this effect. She has no recollection of the name Safari Club International. Her evidence was not challenged on the basis that she was lying about whether or not she was told these things. It is plain that she acted upon the basis that the items, including the trophies, ultimately were to be insured for their market value as determined by the proposed valuation. In her dealings with AON Sydney, and as well as with the valuers, so far as the contemporaneous documents reveal, there was no reference to the costs of replacement by re-hunting, or some appraisal by the valuer of those costs rather than an assessment of market value. I therefore exclude the possibility that she well knew and intended that the insurance would cover the costs of replacement by re-hunting, but that she is now dishonestly denying that to have been the case. The remaining possibilities are that she was told nothing of this kind, or that she was told something along these lines but not in terms which could be reasonably understood as affecting the meaning of what was represented by the plaintiff in his letter and proposal, or that she was given a sufficient explanation which she simply misunderstood. I turn then to the

circumstances which make it likely or otherwise that these matters were sufficiently explained to her.

[59] First, had a request for such unusual insurance been made, it is unlikely that an experienced broker would not have recognised it as such. Ms Conway seemed to be an alert and intelligent person who was well experienced at the time of these events.

[60] Secondly, no document which was sent to AON by the plaintiff or Mr Hortle was in terms of seeking insurance for re-hunting costs, or referred to any amount as such a cost. Instead, the consistent references to values make the evidence of the plaintiff and Mr Hortle less probable.

[61] Thirdly, it seems highly unlikely that the plaintiff intended to insure each and every trophy in his collection for its replacement cost by re-hunting. The first reason for that is that some of the items were described by him as "irreplaceable". It was argued that this description meant that although an animal of that species could be hunted, one of that particular specification could not be. However, for at least some of these trophies, the plaintiff had noted that re-hunting was out of the question. For example, there is his reference to the Cape buffalo for which he had written the notation "can no longer hunt".[6] There is the "black Gnu" which he described in the list sent to AON as "nearing extinction ban on collection". Then of course there are the ivory tusks, (insured for nearly a third of the agreed value of his entire collection). According to his evidence, there are some African nations in which the hunting of elephants is still permitted, but it was common ground that the importation of ivory into Australia is permitted only with some specific exemption from the Commonwealth Government, and it was not suggested that there was any likelihood that it would be granted to the plaintiff. In all, his schedule of items described some eleven trophies as "irreplaceable", distinguishing them from some others which were described as "extreme record" or "very rare". If he believed that some items could not be replaced, whether by an animal of a lesser specification or at all, then it is difficult to see how the plaintiff believed that he was insuring at least those items for their re-hunting cost, or how he explained this to Ms Conway. His references to "irreplaceable" items or an item "nearing extinction ban on collection", to the reader of his list, such as Ms Conway, would be contrary to the notion that he was wanting to insure these items for their re-hunting cost.

[62] Fourthly, whilst the evidence shows that he calculated the re-hunting costs for some items, as I have already found[7] only 26 of his 42 insured trophies were described within the writing pad from which Mrs Anderson typed her A4 schedule. And of those 26, some were not the subject of a calculation of hunting costs. Accordingly, he has no record of his calculations or notes for hunting costs for about one half of the trophies. The fact that he has such notes for some but not all of the trophies tends to suggest that he was not putting forward these amounts to the insurer as hunting costs.

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6 See [10] in these reasons

7 At [9]

[63] Further, much of his collection was made up of other people's trophies, rather than animals which he had hunted. So he had not hunted[8] the moose, the giant eland, the rusa deer, the samba, the roe deer, the fallow deer, the sable, the leopard (full mount), the buffalo skull, the caribou (smaller mount), the fallow deer (No. 2), the goat, and the ivory tusks. Accepting that a trophy could have some special value to the hunter, it is more difficult to understand the special importance to the plaintiff of someone else's trophy. I cannot accept that the plaintiff wanted to insure against the cost of hunting a replacement for an item which he had been given by someone else.

[64] Why then did he calculate the re-hunting costs of some items? It is likely that he believed that these calculations would strengthen his case to be put to the valuer. It was to the valuer (Lawsons) that he sent any information of hunting costs. Accepting that he sent some separate document as Mr Grana recalls, and that it was effectively that which was typed by Mrs Anderson from Exhibit 2, he was submitting details of re-hunting costs which, in many cases, did not correspond with the insured amount but which were intended to provide some support for what he described in his letter to the valuer as the values of items.

[65] The plaintiff's letter of 20 April to AON and his letter of 23 May to Lawsons were drafted and typed by Mr Hortle, but read to and approved by the plaintiff. Some of what was said in those letters cannot be reconciled with the truth, even according to the plaintiff's evidence. First there was a reference to the items as "prepared to be on display in a private museum collection". The concept of a "private museum" could mean different things to different people, but the intended impression of this being a collection to be viewed by some person outside the plaintiff's family and social visitors to his house was strengthened by the reference in his letter of 20 April to the items being "on display", and by the words "please forgive any spelling errors our data base service is yet to be on line". This last phrase was explained by Mr Hortle, as not being an intended indication of some information or research facility to be provided by a museum, but instead as some comment upon the short comings of Mr Hortle's computer software. According to Mr Hortle, he inserted that sentence because there was no spell check facility upon his computer. I do not accept Mr Hortle's evidence in that respect as at all credible. As I see it, this letter was intended to represent that the collection to be insured was of such a quality that it was to be displayed in a facility which could be fairly described as a museum.

[66] Each of these letters refers to the items as having "been valued by different groups and bodies". The letter to Lawsons went further in its mention of "Referees in Valuations" and its list of purported referees. The cross-examination of the plaintiff revealed that not only did none of those "groups and bodies" value any of these items, but so far as re-hunting costs were concerned, only Safari Club International of that list of referees provided any information.[9] He suggested that one or more of the universities there listed provided him with information as to some of these animals such as their rarity or otherwise. I do not accept that evidence. I found it unconvincing in its generality. For example, in relation to James Cook University,

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8 As appears from his Answer to Interrogatories 1.1 where he lists the items which he had personally collected

9 Transcript 220

the plaintiff simply said "They gave information on the different countries in Africa and the specimens of animals in that area". He claims to have called this university and "asked them if there was any person in their departments that had information … on different groups and bodies of animals in different countries in Africa". He could not recall the name of any person in any of these universities to whom he spoke or the details of any information thereby obtained. On any view of his own evidence, there were no valuations by any "groups and bodies", even oral valuations, and none of the so called "Referees in Valuations", apart from Safari Club International, had provided him with any dollar figure.

[67] In his list of items which became attached to the policy, he described the leopard claw bracelet as "registered with museum" which he now concedes to be incorrect.[10] And he there describes the bear head as "in request from museums worldwide", which again is shown to be false.

[68] The evidence of Mr Hortle is of course less extensive and it does not suffer from the many difficulties in the plaintiff's evidence which I have so far described. However, I have already said that I find his evidence in relation to the "data base" in his draft of the letter of 20 April as unsatisfactory. So far as his version of what he told Ms Conway is concerned, it has the same difficulties in its tension with the terms of the letters which he drafted for the plaintiff's signature. Mr Hortle is a well educated and intelligent man, experienced in business affairs. It is difficult to understand how the letters he drafted make no reference to hunting costs, but refer only to values, if he had a clear understanding that the plaintiff wanted cover not for what the items were worth, but for their re-hunting costs. It is possible that at the time when he first spoke to Ms Conway, the plaintiff had said some things to him about the Safari Club International cover. Again, it is possible that he made some mention of that in his conversation with Ms Conway at the beginning of February 1999. However, it is another thing to conclude that he unambiguously conveyed to Ms Conway that the insurance which the plaintiff required was of that kind and that kind only.

[69] For the plaintiff there were submissions attacking Ms Conway as a reliable witness. It was argued that Ms Conway has a "proven uncertain recollection of the details of what the plaintiff stated in relation to the proposed agreed values". It would be artificial to expect any of these witnesses to recall precisely what was said. Her inability to recollect the so called "details" does not at all suggest that her evidence is unreliable. Then she was criticised for saying that she had not heard of Safari Club International until this trial, although its name appeared on the letter to Lawsons, which she eventually received on 19 July 1999. It is likely that she read that letter. It is not unlikely that several years later, when giving her evidence, she did not associate that name with what she had seen in the letter. After all, the letter would not have seemed at all remarkable at the time she received it; it confirmed what she had already been made to believe which was that some groups or bodies had given approximate values for the items. It is unnecessary to set out here further matters urged on behalf of the plaintiff as to Ms Conway's evidence. I have considered them as they are detailed in the plaintiff's written submissions. None of those matters presents any substantial basis for rejecting Ms Conway's evidence.

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[10] Transcript 208

Her evidence is not inconsistent with that of any witness other than the plaintiff or Mr Hortle. There is no inconsistency between her evidence and Mr Storey's evidence, and in particular in relation to the album. Contrary to the plaintiff's written submissions, Mr Storey was not adamant that the album he received in 1999 contained the yellow post-it notes. He thought that the album in that form might have been the one that was given to him in 2000.

[70] Ms Conway also gave evidence that the plaintiff said to her words to the effect that the Queensland Museum and the University of Queensland had provided some "guide as to the value" without providing a written valuation. That evidence seems probable when considered with the plaintiff's letters and I accept it. She also recalled the plaintiff saying that he had been researching some items on the Internet and in that way he was "coming up with values". Again, that evidence appears credible, and consistent with some attempt by the plaintiff to persuade the insurer or its broker to cover in his proposed amounts without the need for a formal valuation, and I accept that evidence.

[71] The circumstances I have set out at paragraphs [59] to [70] above to my mind strongly indicate the improbability of Mr Hortle or the plaintiff making it clear that their references to "values" were in fact references to hunting costs. Whilst it is possible that some reference to hunting costs or perhaps even to Safari Club International was made at least by Mr Hortle in his initial conversation with Ms Conway in early February, I find that the discussions between Ms Conway and the plaintiff or between her and Mr Hortle, were such that they should not have caused Ms Conway to understand that the term "value" was being used in any sense other than market value. From that finding it follows that the defendant has established the representations which it alleges in relation to the hunting trophies, which are in essence, that the amounts proposed for the trophies had been the subject of some assessment of value, although unwritten and approximate in the sense of being "as a guide", and that the amounts against the trophies in the plaintiff's at least list accorded with some genuine belief by him as to their market value.

Falsity of representations

[72] In relation to the trophy items, the substantial contest has been as to the content of what was represented. There was no serious suggestion that if there were representations to the effect alleged by the defendant, that nevertheless they were true or honestly made and upon reasonable grounds.[11]

[73] The plaintiff had pleaded in his reply to AON's defence that "the plaintiff does assert that he approached numerous people on an informal basis, not to obtain formal valuations, but rather to obtain general details as to the likely values". He provided particulars of that allegation which are now Exhibit 8. In those particulars, he alleged that in relation to trophies sourced in North America, he approached a Mr Fejes. However, his evidence[12] was that any approach to Mr Fejes was *after* the commencement of these proceedings and, in any case, Mr Fejes is a tour operator

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11 Compare *Insurance Contracts Act* s 26

12 Transcript 168

and not a valuer. The particulars refer to a Mr Robinson but he is said to have advised as to the cost of hunts, not values. The particulars then refer to "a representative of Denaka Safaris". The plaintiff's evidence in this respect suggests that any information provided by this person was as to the cost of hunting. In the particulars he alleges that he spoke to a representative of Lilly Bank Safaris as to "the likely value of the taxidermied heads in the collection which were sourced in New Zealand". But his evidence was that he spoke to such a representative "from time to time over the years".[13] I do not accept that this was "any group or body" which provided him with a value corresponding with the amounts he put forward to the defendant. Not only is the evidence very general but the disparity between the true value and the represented value makes it unlikely that he had advice to that effect. His particulars then mention "Modern Taxidermy" as to "the likely values of the taxidermied heads in the collection which were sourced in New Zealand" as well as "the cost of taxidermy of animals for inclusion in replacement cost calculations". The plaintiff gave no evidence as to this source. Nor did he give evidence as to the next source referred to in his particulars which is "Customs".

[74] In summary he has advanced no case to the effect that any of his 42 trophy items, in which I include the ivory tusks, had been valued by anyone, formally or otherwise such as to result in a figure bearing any resemblance to the amounts he put forward to the insurer. His representation in the proposal that the items represented market value would have to be read with his letter of 20 April in which he said that those amounts were guides only. But in the same way, they would have to be understood as the amounts as valued by the so called groups or bodies, that is as amounts from some authoritative source. But according to the evidence, they were not anyone's estimate of value. And on the plaintiff's case that he was putting forward the amounts as replacement costs, and his evidence that he understood the conceptual difference between market value and re-hunting cost, they were not even his own opinion of the values.

[75] I conclude that the defendant has proved that the plaintiff made the alleged misrepresentations in relation to the trophies.

Consequences of the misrepresentations

[76] The defendant's position is then governed by s 28(3) of the *Insurance Contracts Act* 1984. Section 28 provides as follows:

> "**28 General Insurance**
>
> (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; or
> (b) made a misrepresentation to the insurer before the contract was entered into;

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> 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 made the misrepresentation before the contract was entered into.
>
> (2) If the failure was fraudulent or the misrepresentation was made fraudulently, the insurer may avoid the contract.
>
> (3) If the insurer is not entitled to avoid the contract or, being entitled to avoid the contract (whether under subsection (2) or otherwise) has not done so, the liability of the insurer in respect of a claim is reduced to the amount that would place the insurer in a position in which the insurer would have been if the failure had not occurred or the misrepresentation had not been made."

[77] The defendant's case is that it is entitled to reduce its liability to nil. Its case is that had the misrepresentations not been made, it would not have insured at all.

[78] In *Advance (NSW) Insurance Agencies Pty Ltd v Matthews* (1989) 166 CLR 606, Deane J at 622 said that as the starting point of s 28(3) is the existence of a policy, the subsection could not have the effect of reducing an insurer's liability to nil. Those remarks, which were in o*biter*, are inconsistent with a series of decisions in State Supreme Courts, including the Queensland Court of Appeal: see *Orb Holdings Pty Ltd v Lombard Insurance Company (Australia) Ltd* [1995] Qd R 51 at 52, 58; *CIC Insurance Limited v Midaz Pty Ltd* (1998) 10 ANZ Insurance Cases 61-394 at 74,185.

[79] The decision making as to business such as this involves the matter being referred by AON Australia to AON London and in turn to the insurer. AON was acting under a binder but I accept that in practice in this context the decision to offer cover, whether interim or otherwise, would have been made by the insurer. Evidence was given by Ms Conway and Ms Rebecca Clark, formerly Rebecca Jones, from AON as to what AON's response would have been to a request for this insurance absent the relevant representations. It is unnecessary to discuss their evidence in any detail. It is sufficient to say that it is not certain that AON would have declined the business: the request might still have gone to the insurer for consideration. Evidence was given by Mr Bowie, an insurer at the office of the defendant insurer in London. In 1999 he was the manager of the Fine Arts Department of the defendant. He was not involved with this policy, but in the hierarchy of his department in 1999, matters of any complexity were referred to him.

[80] A number of hypotheses were put to him for his consideration of what the insurer's response would have been. One was that the insurer was told that the so called values of the trophies were not by reference to market value but were estimated re-hunting costs. In that event, he said: "We might just continue to talk about underwriting the risk but we would have asked that the insurance be on a market value" adding that the insurer would not have agreed to insure the cost of re-

hunting.[14] He also said that this would have been the response of either of the then underwriters involved with this policy. He thought that their rejection of such a policy would have been so certain that it would not have been referred to him for a decision. He was also asked for the likely response to a proposal which gave a list of figures for the items, but which were not suggested to be the market values of the items, to which he said that the defendant would not have been prepared to underwrite that risk at all: "We would have to establish what the market value was. No, I don't think we would have done anything at that point." He was also asked "If you had known that the figures put forward by the insured had no independent support, would you have been prepared to issue the policy even on a temporary basis whilst awaiting a valuation?" to which he answered "Yes, I would but as long as I was clear that the – that was done on a market value basis, yes." As I understood his evidence, in the insurer's view there would be an important difference between a case where an insured put forward these amounts as representing market value, and one in which amounts were put forward which were not suggested to be market value. The effect of his evidence is that the insurer would not underwrite the risk in the latter case although it might do so on a temporary basis whilst awaiting an independent valuation in the former case. The situation as actually presented to the insurer in 1999 was effectively the former case. It seems to me to be likely that this insurer would have refused to underwrite in amounts which were not suggested to be market values even on a temporary or interim basis. The terms of this insurer's proposal form and the policy itself showed the nexus between market value and the agreed insured amount. This was not meant to be a wager but an insurance contract, providing an indemnity against loss. It is likely that the insurer would have proceeded only on the basis that the proposed insured amounts were put forward as representing the likely loss. Nor do I see any reason to reject Mr Bowie's evidence that the defendant would not have insured on a hunting trip cost basis. Overall, there was no effective challenge to his evidence and I accept it.

[81] Absent representations to the effect of those established by the defendant, this insurer would have been presented with a request for cover of a collection where some items, being those other than trophies, were put forward in amounts as the represented market value, whereas the trophy items would have been put forward simply as amounts for which insurance was sought but which might not even approximate their market values. In that event, I find that the defendant would not have insured the collection at all. There is a prospect that the defendant's response at first would have been to require a valuation, but there was then no prospect of a valuation being given in sums even approximating these amounts and a valuation, if the plaintiff had then prepared to provide one, would have demonstrated the large disparity between the amounts put forward and the market values. As Mr Bowie explained, there is a prospect that absent the representations as to values of the trophies, the defendant might have offered to insure those items not the subject of the misrepresentation, (the collection other than the trophies). But in that event, there is no realistic prospect that the plaintiff would have taken the matter further. He was concerned to insure the trophies. There was no reason why the other items had not been insured under his house contents policy, yet he had chosen not to. There is no realistic possibility that he would have insured them although unable to

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insure the trophies which constituted the majority in number and value of his so called collection.

[82] I conclude that had the misrepresentations not been made, the defendant would not have insured at all.

[83] It follows that the defendant has proved its misrepresentation case, and its entitlement to refuse to pay any of the sum claimed in consequence of those misrepresentations. The defendant concedes that if it succeeds on this basis, that it should refund the premium of $3,740.

Non disclosure

[84] This makes it unnecessary to consider the alternative non disclosure case. But as I have remarked already, the non disclosure case adds nothing to the misrepresentation case. If the plaintiff was intending to insure for the replacement by hunting of these items, it follows from my findings that he did not disclose that intention or that the amounts put forward were not values but estimates of hunting costs. On the facts of his case, the non disclosure case follows from the misrepresentation case. In the same way, the consequence of that non disclosure was that the insurer proceeded to insure the risk whereas, as Mr Bowie said, it would have declined to do so had it known that insurance for hunting costs was required.

Was there a loss?

[85] What I have said so far is enough to dispose of the plaintiff's claim, but in case the matter goes further, and because the plaintiff's right to return of the premium is affected by whether indemnity can be refused on this basis, I shall set out my findings as to this issue.

[86] The allegation that the items were stolen is not admitted. In the facts of this case, it is curious that the matter was left at the level of a non admission. This is because there are but two realistic possibilities. One is that the items were stolen. The other is that they were not, and the plaintiff knew that and has made a fraudulent claim. On the second day of the trial, counsel for the defendant agreed that there was no hypothesis consistent with the goods not being stolen but inconsistent with fraud by the plaintiff.

[87] The defendant has the support of authority to the effect that an insurer pleading a mere non admission in this context can ask for the plaintiff's evidence to be rejected on the basis that it is at least as likely that the insured event did not occur (and there has been a fraudulent claim) than it is that the event did occur, see e.g. *Palamisto General Enterprises S/A v Ocean Marine Insurance Co Ltd* [1972] 2 QB 625 (CA) and *Simon v NRMA Insurance Ltd* (Unreported, Supreme Court of New South Wales, Court of Appeal, 22 October 1991). These authorities would permit a defendant making a simple non admission to go as far as submitting that the

plaintiff's case is not more probable than the alternative of the plaintiff's fraud, but not to go the one step further of asking for a finding of fraud. At all the times the onus of proof on this issue is upon the plaintiff. But there is a different question involved as to what must be pleaded by a defendant who wishes to ultimately advance such a case. However, care must be taken in the application of such authorities in the context of the requirements as to pleadings under the *Uniform Civil Procedure Rules*. Relevantly there have been two important changes from the former rules of this court. Firstly, the previous rule[15] in relation to the pleading of fraud, provided that when it was material to allege fraud, it was sufficient to allege the same as a fact without setting out the circumstances from which it is to be inferred. Now *UCPR* r 150 not only requires fraud to be specifically pleaded, but also any fact from which fraud is to be inferred. Secondly, according to r 166 a non admission may now be pleaded only if the party has made reasonable enquiries to find out whether the allegation is true or untrue, and the party remains uncertain as to the truth or falsity of the allegation. A party's non admission must be accompanied by a direct explanation for the party's belief that the allegation cannot be admitted: r 166(4). In a case such as this, at least by the time of the trial, the requirements of r 166 would not have been satisfied by a bare non admission accompanied only by a statement that the defendant remains uncertain on the matter. In my view, where the only logical alternative is fraud, the rules require the defendant to state the facts suggestive of fraud as the basis of its non admission, although there is no positive allegation of fraud.

[88] In the present case, a statement of the facts explaining the non admission was added to the defence only on the third day of the trial, although without objection. By then it was clear, at least from what counsel for the defendant had said in argument, that the defendant would be ultimately suggesting that a fraudulent claim was at least as probable as a loss by these goods having been stolen. In that way, the plaintiff was on notice of a fraud case of some kind. The matters then pleaded to support the non admission included the allegations of misrepresentation and non disclosure. Still, they were not elevated to allegations of fraudulent misrepresentation or fraudulent non disclosure. The defendant also pleaded the facts that the items were insured for amounts far in excess of their true value, they were allegedly stolen only shortly after the policy issued, none of the items had been recovered and nothing was taken from the house which was not insured under this policy.

[89] Ultimately the defendant addressed me on the basis that I should make findings of fraud, and that I should find that the misrepresentations preceding the policy were fraudulent. This took the defendant's case past the boundaries of that which it could conduct on the basis of its non admission. I then refused an application made in the course of addresses to amend the defence to expressly plead fraud. Ultimately then, the defendant has pleaded facts to explain its non admission, and has complied with the requirements of the pleading rules. On the basis of authorities such as those I have cited, it is open to the defendant to argue that the plaintiff has not proved that the goods were stolen, although the only real alternative is the plaintiff's fraud.

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15 Order 22, r 22

[90] I shall then consider this issue bearing in mind the possibility of a fraudulent claim, but not on the basis that the policy was procured by fraudulent misrepresentation or non disclosure.

[91] Apart from the plaintiff's evidence on this issue, there is the evidence of Mrs Anderson and what she observed when she returned to the house late on that Sunday afternoon, as well as some photographs showing damage to a sliding door. There is also the evidence of the security or lack of security at this house. It was not protected by any alarm system and the various locks do not appear to have presented any substantial obstacle. There is insignificant support from any other evidence for the plaintiff's account.

[92] I find the plaintiff's evidence on this matter to be unpersuasive. My difficulty in accepting his evidence as to this matter comes mainly from the shortcomings of his evidence in other respects which I have already discussed. I have mentioned the inconsistencies between his different accounts of what happened to his dogs. I find it impossible to reconcile his version given at the trial in relation to the dogs with that which he gave to an investigator in October 1999, or with Mrs Anderson's evidence. The matter of what went wrong with the protection to be offered by the dogs is important because they represented the only substantial obstacle to a thief.

[93] As at August 1999, the plaintiff must have known that he had insured his trophies for amounts which were unlikely to be supported by an independent valuation. For the time being, he had successfully procured insurance for the very amounts which he had put forward. He had no belief that his amounts did represent market value. He must have expected that a valuation was imminent which would substantially reduce the value of his insurance. In those circumstances, the items were worth more to him as stolen goods than if he retained them or sold them. There was a real incentive to have them appear to be lost. The weekend in question was the last weekend in August, and the plaintiff had been told the Rushtons valuation would be available in September.

[94] The other circumstances pleaded by the defendant, apart from the misrepresentation and non disclosure, are ones which considered with the matters I have just mentioned, present at least a serious possibility that these goods were not stolen. I must then compare that against the plaintiff's evidence in assessing whether I feel persuaded to accept the plaintiff's evidence.

[95] I am not persuaded that the plaintiff's evidence is true and that these goods were stolen. It is sufficient to say that I find the plaintiff's version no more probable than the alternative possibility that he made it appear that they were stolen. I conclude that the plaintiff has failed to prove a loss of any insured item.

Conclusion

[96] The plaintiff's claim for indemnity must be dismissed. If the defence was only upon the basis of misrepresentation and the operation of s 28(3), the defendant

concedes that it would have to repay the premium. However, as the plaintiff has failed to prove that the goods were stolen, his case fails also upon this ground and it is unnecessary for the defendant to rely upon s 28(3). The contract of insurance has not been avoided by the defendant. Accordingly the defendant is entitled to refuse indemnity without repaying the premium.

[97] The plaintiff's claim against the first defendant has been discontinued. There will be judgment for the second defendant against the plaintiff. I shall hear the parties, including the first defendant, as to costs.