SUPREME COURT OF QUEENSLAND

CITATION:	*Michail v Australian Alliance Insurance Company Ltd* [2014] QCA 138
PARTIES:	**RODNEY MICHAIL** (appellant) **v** **AUSTRALIAN ALLIANCE INSURANCE COMPANY LTD** ACN 006 471 709 (respondent)
FILE NO/S:	Appeal No 12151 of 2013 DC No 292 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	6 June 2014
DELIVERED AT:	Brisbane
HEARING DATE:	27 May 2014
JUDGES:	Margaret McMurdo P and Gotterson JA and Dalton J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Dismiss the appeal and order that the appellant pay the respondent's costs.**
CATCHWORDS:	INSURANCE – MOTOR VEHICLES – INSURANCE OF MOTOR VEHICLES FOR LOSS OR DAMAGE – DISCLOSURE AND MISREPRESENTATION – where the appellant claimed against his insurer, the respondent, for the total loss of his car – where it was common ground that the appellant had not disclosed his driving history to the respondent – where the respondent insurer contended that had the true position been disclosed to it, it would not have insured the risk at all – where the appellant contended that the judge below erred in finding that the insurer would not have insured the appellant – where the respondent had written guidelines as to whether or not it would accept various risks apparent in proposals it received – where the respondent at trial called the person who would likely have considered the appellant's proposal had full disclosure been made – where that person's evidence was that neither he nor those at a lower level in the respondent's hierarchy had discretion to accept the appellant's proposal – whether the judge below erred

EVIDENCE – BURDEN OF PROOF, PRESUMPTIONS, AND WEIGHT AND SUFFICIENCY OF EVIDENCE – GENERALLY – CREDIBILITY AND WEIGHT – PARTY'S FAILURE TO GIVE OR CALL EVIDENCE – where the appellant contends the judge below should have exercised caution in assessing the evidence adduced by the respondent in accordance with the principles in *Blatch v Archer* – where the appellant contended the respondent ought to have called the executive manager of the respondent – where the appellant contended the respondent ought to have provided a proper underwriting assessment of the risk which the appellant's proposal posed – whether the rule in *Blatch v Archer* applied

Insurance Contracts Act 1984 (Cth), s 28(3)

Australian Securities and Investments Commission v Hellicar (2012) 247 CLR 345; [2012] HCA 17, cited
Blatch v Archer (1774) 1 Cowp 63; 98 ER 969; [1774] EngR 2, cited
Jones v Dunkel (1959) 101 CLR 298; [1959] HCA 8, cited
Rossi v Westbrook [2013] QCA 102, cited

COUNSEL: S S Cooper QC, with A J Greinke, for the appellant
K Holyoak for the respondent

SOLICITORS: Morgan Conley for the appellant
Barry Nilsson for the respondent

[1] **MARGARET McMURDO P:** I agree with Dalton J's reasons for dismissing this appeal with costs and wish only to add the following observations.

[2] The appellant insured his Aston Martin car with the respondent's agent, Shannons Limited ("Shannons"), on 19 July 2010 for $250,000. The vehicle was damaged on 6 May 2011 and was a "total loss" under the insurance contract. The primary judge found that the appellant breached his duty of disclosure in completing the proposal for the policy as he did not disclose relevant aspects of his traffic history; Shannons would not have entered into the policy at all had there been proper disclosure so that the respondent's liability under s 28(3) *Insurance Contracts Act* 1984 (Cth) was reduced to zero. The only issue in this appeal was whether Shannons would have refused to insure the appellant had he made proper disclosure.

[3] A number of Shannons' employees at the relevant time, including Mr Paul Lang, the relevant Regional Manager, gave evidence as to how they and Shannons considered and determined insurance proposals from someone with a traffic history like the appellant's. All said they would have refused the proposal as an unacceptable risk under Shannons' National Underwriting Guidelines, had proper disclosure been made. Mr Lang's superior, the Executive Manager, Mr Julian Benton, was not called.

[4] The Guidelines stated as follows:

> "**Unacceptable Risk:**
>
> Where a risk is deemed to be '**unacceptable**' it must be declined unless it is referred to a staff member with Regional Manager and

> above underwriting authority. Policy messages should clearly reflect the outcome of the referral process."

[5] The primary judge found that there was no basis for drawing any inference that Mr Benton would have given evidence adverse to Mr Lang or the respondent's case.[1] Mr Lang gave evidence that he was the relevant Regional Manager with ultimate authority over the underwriter dealing with the appellant's proposal. His evidence was to the effect that had the appellant made full disclosure, the proposal could not have been approved as it revealed unacceptable risks under the Guidelines.[2] It was not put to him in cross-examination that such a proposal may have been referred to and approved by his superior, Mr Benton. In light of Mr Lang's unchallenged evidence, the principles discussed in *Blatch v Archer*[3] and *Jones v Dunkel*[4] did not require the judge to infer that Mr Benton would give evidence adverse to Mr Lang or to the respondent's case.

[6] The primary judge made the following findings:

> "Though the [appellant] has argued that Mr Lang had a discretion even for 'unacceptable' risks which fell within the Table in Section 18 dealing with driving offences, I do not take that to be the actual import of his evidence. … The mandatory nature of the non-acceptance of risks which fall within the category of 'unacceptable' risks - or at least with respect to any driving history - does not, on my understanding of the evidence, allow for discretionary application, despite the potentially equivocal wording in Section 17. But even if there was some residual discretion unappreciated by Mr Lang, given the materiality of Mr Michail's driving history as I have analysed below, I would find that the consistency which was striven for by Shannons would have justified an exercise of relevant discretion to refuse to accept the risk …
>
> … I find that Shannons (as agent) would not have entered into the contract of insurance with Mr Michail if he had disclosed in mid-July 2010 at least the six offences for which three demerit points were assigned, as well as the one earlier suspension … ."[5]

[7] Mr Lang's evidence as to why he would have refused a proposal from the appellant containing full and proper disclosure are set out in Dalton J's reasons. Mr Lang explained that he had a discretion to circumvent the Guidelines and accept such a proposal, but only where the appellant's traffic history did not directly impact on the risk insured. By way of example, he referred to "laid-up cover" for a stored car or a car being transported so that it was not to be driven by the driver with a traffic history deemed to be an unacceptable risk under the Guidelines. But he made clear that, while he had a discretion to accept a proposal deemed an unacceptable risk under the Guidelines, in the circumstances of this case that discretion did not arise and was not enlivened as the risk arising from the appellant's traffic history directly impacted on the risk to be insured under the policy.

[8] The appellant has failed to demonstrate that the primary judge erred in concluding on the basis of Mr Lang's evidence that, had the appellant made full and proper

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1 *Michail v Australian Alliance Insurance Co Ltd* [2013] QDC 284, [38].
2 T - 2-6 lines 19-29; T – 2-26 lines 20-45; T – 2-27 lines 1-10; T – 2-93 lines 1-14.
3 (1774) 1 Cowp 63; 98 ER 969.
4 (1959) 101 CLR 298.
5 *Michail v Australian Alliance Insurance Co Ltd* [2013] QDC 284, [91]-[92].

disclosure of his traffic history, Shannons would not have accepted the proposal and would not have insured the appellant at all.

[9] It follows that the appeal must be dismissed with costs.

[10] **GOTTERSON JA:** I agree with the orders proposed by Dalton J and with the reasons given by her Honour.

[11] **DALTON J:** This appeal concerns the appellant's claim on his insurer for the total loss of his car. The respondent insurer refused the claim on the basis that there had been a failure to disclose, or misrepresentation, made prior to the policy being entered into, and that the circumstances were such that had the true position been disclosed to the insurer, it would not have insured the risk at all – see s 28(3) of the *Insurance Contracts Act* 1984 (Cth).

[12] Before us, there was no dispute that the appellant had not disclosed his driving history to the insurer. There has never been any allegation that this was fraudulent.

[13] The main issue on appeal was whether the insurer had proved that it would not have insured the appellant, had true disclosure been made. It was said that the judge below erred in finding that the insurer would not have insured the appellant.

[14] The appeal ought to be dismissed. The primary judge delivered a careful judgment in which he assessed all the evidence as to what the insurance company would have done had proper disclosure been made. He concluded that in accordance with the guidelines used by the company, the risk of insuring the appellant's car was unacceptable, and there was no discretion, on the facts of this case, to insure the car outside those guidelines. Had proper disclosure been made the respondent would not have accepted the risk. It would have had no liability when regard is had to s 28(3) of the Act. That finding is well supported by the evidence.

[15] It was conceded by the appellant that the respondent's witness, Mr Lang, was the person who would likely have considered the appellant's proposal had full disclosure been made. He was the regional manager in charge of the relevant geographical area. The primary judge thought that Mr Lang was an honest and reliable witness. He said:

> "[39] … I accept that he was a person who gave his evidence openly – even if some clarification had to be sought on certain issues because of a confusion of understanding of some questions put to him – and without guile. I accept that he readily acknowledged what he could not answer and was adamant about those matters that his true recollection permitted him to be.
>
> [40] Accordingly, I accept that he was an accurate historian and that he gave his evidence in a forthright and believable way, particularly concerning aspects of the non-acceptance by AAI of any relevant insurance policy in mid-July 2010 ..."

[16] The insurance company had written guidelines as to whether or not it would accept various risks apparent in proposals it received. Matters which might commonly be disclosed were categorised as either "referable" risks or "unacceptable" risks. For

example, if a proposal disclosed that a driver had on one occasion lost their licence, the guidelines provided that the risk was referable. This meant the proposal was to be referred to a higher level in the insurance company hierarchy. If a proposer had more than one loss of licence however, the risk was categorised as unacceptable.

[17] In the appellant's case, proper disclosure would have revealed two referable risks both relating to driving history – one suspension and one accumulation of traffic infringements. In such cases the guidelines provided:

> "Where a risk involves two or more **referable** in the Driving Offences and/or Accidents or Claims categories (eg a licence suspension and 4 to 8 traffic infringements), is deemed to be unacceptable." (emphasis and grammar in the original).

[18] Mr Lang's evidence-in-chief as to the effect of these two referable risks which are both in the "driving offences" section of the guidelines was as follows:

- "Can you assist the court in explaining the difference between referable and unacceptable risks?--- In the case of a referable risk, these can be actually dealt with by underwriters of less experience, so gold level. Unacceptable basically means that the risk is of such that it is unacceptable full stop. It doesn't matter who it's referred to, it's not an acceptable position for Shannons to adopt. Referable risks could be scenarios where one aspect of the risk is not as desirable as it might be, but on balance other things outweigh that and it might become acceptable or it may not. But there's some area of grey with a referable risk that doesn't exist with an unacceptable risk." – t 2-10.

- "Where we have two or more referable driving offences, that constitutes an unacceptable risk to us. So if there were a combination of suspensions or driving under the influence referable instances with driver histories or accidents, then that would become an unacceptable risk.

  If I give you an example, are you able to comment to whether that would fall within an unacceptable risk or referable risk?--- Mmm.

  If a person had only one loss of licence, but had more than four traffic infringements and that person was over 25 years of age, how does that fall within that table?--- That would constitute an unacceptable risk, the two of those combined.

  …

  You mentioned unacceptable in strong terms before, is there any discretion which an MEU has if the risk is unacceptable?--- No, there isn't. In fact, on page 46 of those guidelines, at the very bottom of the page, unacceptable risk is defined as: where a risk is deemed to be unacceptable, it must be declined and policy messages should clearly reflect the outcome of this process." – tt 2-11-12.

[19] I pause to note that MEU stands for motoring enthusiast underwriter, and that a motoring enthusiast underwriter was someone at a lower level in the insurance company hierarchy than was Mr Lang. The significance of that last point is that in the passage immediately extracted Mr Lang was not saying he had no discretion in the circumstances described, but that someone lower in the hierarchy, an MEU, did not.

[20] When taken to the specific facts which ought to have been disclosed by the appellant Mr Lang said this in his evidence-in-chief:

> "… Mr Lang, it's agreed that that is the traffic history – the driver traffic history of Mr McHale [sic] in the five years preceding 14 July 2010. Could you peruse that document, please. Is that a driving history which is an acceptable driving history, within the Shannon's underwriting guidelines, as they stood in July 2010?--- No. It is not.
>
> In what ways is it – is it unacceptable?--- There are more than one suspensions applied to the licence. And there are 10 driver infringements applied to the licence.
>
> …
>
> If there had only been one driving suspension, but the traffic infringements otherwise remains as appears in the agreed document, how would that operate with respect to the Shannons underwriting guidelines imposed?--- It's still – it's still unacceptable.
>
> And why is that?--- Because it exceeds eight infringements in the five year period.
>
> If there had been less than eight traffic infringements but one licence suspension how would that operate with respect to the Shannons underwriting guidelines?--- Well, that would refer to the asterisks notes at the bottom where a risk involves two or more referrable driving offences which would be the case you described – it's deemed to be unacceptable.
>
> If that driving history had been made known to an MEU such as Mr Tucci on 14 July 2010 what would Mr Tucci had been required to do in accordance with his training in the underwriting guidelines?--- Decline the risk.
>
> If the matter had for some reason been referred to you on that account, that is, on account of driving history, and this driving history in the agreed document had been made known to you, what decision would you have made?--- I would have declined the risk.
>
> In accordance with the underwriting guidelines is there any room for discretion on the part of an MEU such as Mr Tucci to have permitted this driving history to – sorry, I withdraw that. In accordance with the underwriting guidelines as they stood in July 2010 of Shannons, was there any room for discretion on the part of Mr Tucci to have permitted the issue of a quote if this driving history had been made known to him?--- No, none.
>
> If – I'll start again. Could an MEU such as Mr Tucci have agreed to issue a quote on any terms at all if that driving history had been made known to him in accordance with the underwriting guidelines?--- No, he could not of." – tt 2-70-71.

[21] Lastly in evidence-in-chief Mr Lang gave this evidence:

> "Are questions about traffic history of a prospective insured in the preceding five years relevant to the decision of Shannons whether to accept the risk of that prospective insured or not?--- Yes, they are, very.
>
> In what way are they very relevant?--- Because they go to giving us some insight into the driving performance of the customer, whether they're having less or more or the same number of offences over a period of time, and particularly useful for us in collating information about accidents and its – their relationship with speeding fines or driving infringements generally.
>
> Mr Lang, is there any capacity to accept a new customer who has an unacceptable driving history in according to the underwriting guidelines and issue a policy nonetheless?--- No, there is not.
>
> Are there any circumstances where a customer with a driving history which is unacceptable according to the underwriting guidelines is nonetheless given a policy by Shannons?--- No, there is not.
>
> In the context of a quote for new business by a customer, if a decision had to be made about whether or not to issue a policy, in July 2010 who would that decision maker had been?--- That would be me.
>
> All right. Did Mr McHale [sic] fall into any category in which you had any discretion to give him a policy?--- No, he didn't.
>
> And why is that?--- Because clearly the driving history and the suspensions are unacceptable." – tt 2-71-72.

[22] It was accepted by the respondent that it bore the onus of proof in relation to the s 28(3) issue. That is the respondent accepted that it bore the burden of proving that it would have had no exposure under the policy had true disclosure been made. At the end of Mr Lang's evidence-in-chief it appeared that that burden had been discharged. Under the guidelines an MEU would have been compelled to reject the proposal and would have had no discretion to accept it. Had the matter been referred to someone more senior, that would likely have been Mr Lang. He had no discretion in the circumstances of this particular case to circumvent the guidelines and insure the risk.

[23] The matter was taken up with the witness tentatively in cross-examination:

> "And you'll also see the words there, 'referrable/unacceptable risks' and underneath that, 'reinsured risks'. Isn't that indicating that, if there was something that was an unacceptable risk within these guidelines, that's something that only you had the authority, as well as the executive manager, to deal with, in 2010?--- What it's actually referring to is, if the underwriter, at whatever level, believes that there are extenuating circumstances from what on the surface appears to be an unacceptable risk, or referrable, but unacceptable, then they may refer it to me.
>
> Because you have the authority, don't you, to approve something which would otherwise fall as an unacceptable risk, in relation to these guidelines?--- Or not approve it.

> That's right. But its something- - -?--- Within certain constraints, and there are some things that I can't approve, whether I like it or not.
>
> Yes. And therefore, if they fall – otherwise fall on the face of the guidelines, into the unacceptable risk category, it can only be dealt with, and approved by you, or the person who sits above you?--- That's correct. Yes." – t 2-93.

[24] This passage establishes that Mr Lang had a discretion in relation to some things but not others. The cross-examination does not attempt to deal with the respondent's evidence that he had no discretion in the circumstances relevant to the appellant. Counsel for the appellant returned to the topic at the very end of the day's hearing:

> "If you were dealing with – and you've said before you could approve unacceptable risks. The fact that someone has had their license [sic] lost because of an accumulation of points is something that you could take into account in looking at their overall risk for offering insurance?--- I think we referred to, by way of answering that question, we referred to page 4, the last bullet point there, when we were talking about referrable above it. The last bullet point says, and it is the case, 'where a risk is deemed to be unacceptable, it must- - -' underlined – '- - - be declined and policy messages should clearly define the reason for the declinature'.
>
> And you said earlier in evidence - - -?--- My discretion doesn't extend to everything.
>
> And you said earlier in your evidence that exceptional circumstances may be shown to you as a person of authority to deal with unacceptable risks. That's what your evidence was?--- It's potentially not all unacceptable risks.
>
> No, I don't say – I'm not saying you do it all the time, I'm just saying within the hierarchy of these rules that's your role, isn't it?--- Yes.
>
> Right. Your Honour, I'm about to move onto a different topic. I also notice the time." – t 2-98.

[25] Immediately following this, and before the primary judge adjourned for the day, there was this exchange:

> "HIS HONOUR: Yes, indeed. I just – just before we leave, I just want some clarification on that. What things would you regard as unacceptable that you had no discretion in and what things would you regard as unacceptable that you – in 2010 – that you believe you had some discretion in?
>
> MR GREINKE: Your Honour, it's – I don't wish to object to your Honour's question unnecessarily but it does reach into the next – my next topic.
>
> HIS HONOUR: Okay.
>
> MR GREINKE: And I don't want to - - -

HIS HONOUR: But I don't wish to impose on that.

MR GREINKE: Thank you, your Honour.

HIS HONOUR: I'll leave it. If I don't get a satisfactory answer tomorrow we'll return to it." – tt 2-98-99.

[26] In the event counsel for the respondent did not return to that topic and otherwise finished his cross-examination. At the conclusion of re-examination there was this passage in the transcript below:

"HIS HONOUR: Yes, and there was one question that I - - -

MR HOLYOAK: Yes, I was going to say, your Honour - - -

HIS HONOUR: - - - foreshadowed last night that no one has addressed - - -

MR HOLYOAK: Your Honour, I can't raise it if it wasn't raised. That's why I mentioned it.

HIS HONOUR: Well, I need to have an answer and I'll give you both a chance then to answer any follow-up questions about it. You gave evidence, Mr Lang, about your discretion, and you also gave evidence about that that discretion may apply even where there are unacceptable risks. Now, I didn't quite follow fully what you meant by that. Could you explain that to me in a bit more detail?--- Certainly. There are particular risks that we underwrite from time to time which may not be impacted by an unacceptable performance or history within the guidelines. For example, your Honour, we provide a product called laid-up cover which is typically, for example, for a race car – an unregisterable race car. It's a comprehensive insurance product, except that it does not allow for any cover for the particular car if it's been used its own power. It cannot be driven. It cannot be driven. It's not insured if it's driven, but for storage and transportation purposes on a trailer or the like, it is insured. The owner's driving history in those circumstances is of less import. It doesn't directly impact on the risk we're being asked to consider.

All right. And that is the kind of thing that you say that you to have a discretion in - - -?--- Yes.

- - - even though otherwise the answers would deem it unacceptable?- - - Correct, yes." – t 3-21.

[27] Counsel for the respondent asked the following questions arising out of the primary judge's question:

"MR GREINKE: In the evidence that you gave – well, you've just answered to his Honour that you can deal with circumstances that fall outside the guidelines as part of your role, and as I understood your evidence yesterday, that's part of your authority level within the firm; you would agree with that, don't you?--- Yes.

> Yes. And that your reason for saying that Mr Michail would not have been given insurance is because, as I understood your evidence yesterday, that he was an unacceptable risk as defined by the guidelines – or deemed by the guidelines, yes?--- That's correct.
>
> And you would agree with me that therefore the basis by which you would have refused him does not take into account in any respect the authority and the discretion that you have within your authority level, does it?--- I saw no reason to exercise any discretion in that case.
>
> Perhaps you can answer my question, which was your grounds for why you say Mr Michail would not have been given insurance do not take no account your discretion or your authority, did they?--- No." – t 3-22.

[28] Counsel for the respondent insurer re-examined to the following effect:

> "MR HOLYOAK: Mr Lang, do the circumstances of Mr Michail's driving history, as you know have in evidence before the court, fall into any category where you in fact have a discretion?--- No, they don't.
>
> And why is that?--- Because they are quite clearly in excess of the acceptable.
>
> …
>
> MR HOLYOAK: My question was why is that that you did not? Your answer was that you had no discretion, as I recall my question?--- Mmm.
>
> My next question was why is that?--- Because of the absolute numbers, more than eight infringements, in the last five years.
>
> Does your authority or discretion, as it's been referred to, extend therefore to circumstances such as Mr Michail's?--- No, I don't believe so because that driving history directly impacts on the risk that we're being presented with." – tt 3-22-23.

[29] In my view Mr Lang's evidence was consistent throughout no matter who examined him. His evidence was that by reason of the written guidelines, those working at a lower level in the insurance company's hierarchy had no discretion to accept the appellant's proposal because of his driving history. The matter could have been referred up the hierarchy. Had it been, it would have been referred to him in all likelihood. Had he received a referral in this way he would not have had a discretion to accept the proposal, and even if he had such a discretion he would not have exercised it. The illustration he gave in answer to the question asked by the primary judge at t 3-21 illustrates that a discretion might have existed if the matters which resulted in the risk being deemed unacceptable under the guidelines would in fact not impact on the risk which was being proposed. As the very last part of the passage of re-examination extracted shows, these matters directly impacted on risk proposed by the appellant.

[30] There was a subsidiary point as to whether or not the primary judge had exercised proper caution in assessing the respondent's evidence in accordance with the

principles in *Blatch v Archer*.[6] The appellant criticised the insurance company's failure to call the executive manager of the respondent (the person to whom Mr Lang reported) and in failing to provide "any proper underwriting assessment" of the risk which the appellant's proposal posed.

[31] In my view there is nothing in this point. Mr Lang gave direct evidence as to the guidelines; the authority of the MEUs working under him in the hierarchy, and evidence of what he would have done had the matter been referred to him. His evidence was that had it been referred to someone in the respondent company, it was likely that it would have been referred to him. His evidence was direct evidence. The respondent company's case did not depend on inference. There is no room for the operation of the rule which is discussed in *Australian Securities and Investments Commission v Hellicar*[7] and *Rossi v Westbrook*.[8] As part of Mr Lang's evidence he explained, more than adequately in my view, the reasons which lay behind the guidelines; any discretion to step outside the guidelines, and the reasons why the facts relating to the appellant's proposal did not merit stepping outside the guidelines. There was no call for the respondent to provide any further underwriting evidence.

[32] I would dismiss the appeal and order that the appellant pay the respondent's costs.

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6 (1774) 1 Cowp 63; 98 ER 969.
7 (2012) 247 CLR 345.
8 [2013] QCA 102 [33]-[34].