SUPREME COURT OF QUEENSLAND

CITATION:	*Syddall v National Mutual Life Association of Australasia Ltd* [2011] QSC 389
PARTIES:	**ERIC ALBERT SYDDALL** (plaintiff) **v** **NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LTD (ACN 004 020 437)** (defendant)
FILE NO:	BS 5170 of 2006
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	9 December 2011
DELIVERED AT:	Brisbane
HEARING DATE:	29, 30 November, 1, 2, 3, 6, 7, 8, 9, 10, 13, 14, 17 December 2010
JUDGE:	Daubney J
ORDERS:	**1. The plaintiff's claim is dismissed.** **2. I will hear the parties as to costs.**
CATCHWORDS:	INSURANCE – THE POLICY – OTHER MATTERS - where the plaintiff contends the defendant breached the terms of the policy - where the plaintiff seeks a wide range of relief - where the plaintiff contends the defendant repudiated the policy of insurance - where the plaintiff contends the defendant, by declining the claim, repudiated the contract of insurance - where the plaintiff submits the defendant had failed to act with utmost good faith - whether the plaintiff has established an entitlement to the indemnification he sought under the policy - whether the three elements for total disablement are present - whether the defendant is entitled to avoid the policy of insurance - whether the plaintiff has made misrepresentations - whether the plaintiff failed to comply with his duty of disclosure - whether the insurer would have entered into the policy - whether the plaintiff's claim was fraudulent *Insurance Contracts Act* 1984 (Cth), s 11, s 21, s 26, s 29,

s 31, s 56, s 84

Australian Associated Motor Insurers Ltd v Tiep Thi To (1999) 151 FLR 384, cited
Atton v National Mutual Life Association (2007) NSWSC 310, considered
Bottrell v National Mutual Life (2007) NSWSC 458, cited
du Boulay v Worrell & Ors [2009] QCA 63, cited
Green v AMP Life Ltd 13 ANZ Ins Cases 90-124, cited
Judd v Suncorp Insurance & Finance (1988) 5 ANZ Ins Cases 60-832, cited
Morais v Minister of Immigration (1995) 54 FCR 498, cited
Plasteel Windows Australia Pty Ltd v CE Heath Underwriting Agencies Pty Ltd (1999) 5 ANZ Ins Cases 60-926, cited
Robertson v Graham [2010] QSC 215, cited
Robertson v Hollings [2009] QCA 303, cited
Tyndall Life Insurance Co Ltd v Chisholm (2000) 11 ANZ Ins Cases 90-104, cited
To v AAMI Ltd (2001) 3 VR 279, cited
Zurich Australian Insurance Ltd v Contour Mobel Pty Ltd (1990) 6 ANZ Ins Cases 60-984, cited

COUNSEL: The plaintiff appeared on his own behalf
B O'Donnell QC with R Treston for the defendant

SOLICITORS: The plaintiff appeared on his own behalf
Cooper Grace Ward for the defendant

[1] As at January 2001, the plaintiff held an income protection insurance policy with Australian Casualty & Life ("ACL"). Pursuant to a scheme for the transfer of ACL's life insurance business, which was approved by the Federal Court of Australia on 29 November 2002, the defendant assumed all of the obligations of ACL under its income protection policies, including the policy held by the plaintiff.

[2] In January 2001, the plaintiff made a claim on the income protection policy as a consequence of an incident which had occurred in November 2000. According to the "Initial Claim Form" dated 16 January 2001 which the plaintiff signed and lodged with ACL, he was injured on 27 November 2000. He described the details of the occurrence of the injury:

> "I was carrying roofing materials around the property. It felt as though I had hurt my left shoulder but also had pain in the centre of my back."

[3] In the initial claim form, the plaintiff disclosed his attending doctor as "Dr B Lynam", said that his first treatment was on 5 January 2001, and that the treatments administered were "x-rays – manipulation – anti inflammatory drugs".

[4] In response to the question on the claim form as to what treatment he was currently having, the plaintiff responded "anti inflammatory drugs".

[5] The plaintiff affirmed in the claim form that the severity of his condition varied: "with continued movement, the condition worsens and leads to migraine headaches and pains across my left shoulder area".

[6] In response to the question "Can you perform any of your work duties?", the plaintiff answered "Yes". He then answered questions confirming that he had not worked at all since the incident on 27 November 2000.

[7] Question 1 on the claim form sought the plaintiff's personal details. The plaintiff described his occupation as "plumber". The succeeding questions and answers included the following:

> "2. OCCUPATIONAL DUTIES: WHAT WORK DO YOU ACTUALLY DO IN YOUR OCCUPATION?
> GENERAL PLUMBING – ROOFING
>
> 3. DO YOU USUALLY WORK FROM HOME? PLEASE PROVIDE DETAILS: HOME BASED – SELF EMPLOYED – (DO NOT HAVE A BUSINESS PREMISES)
>
> 5. WHAT DUTIES, APART FROM MANUAL LABOUR, DO YOU USUALLY PERFORM IN YOUR OCCUPATION:
> BOOK KEEPING –
>
> 11. GROSS MONTHLY EARNINGS: $4,000.
>
> 12. EMPLOYER'S FULL NAME AND ADDRESS: SELF EMPLOYED – 24 REILLY RD NAMBOUR
>
> 13. IF SELF EMPLOYED
> A. ARE YOU A SOLE TRADER? √
> B. NUMBER OF FULL TIME EMPLOYEES? SELF ONLY"

[8] On 22 January 2001, an ACL claims consultant wrote to the plaintiff acknowledging receipt of the claim form, stating that ACL had made an assessment of the plaintiff's claim and advising:

> "The medical evidence indicates that the condition for which you are claiming is osteoarthritis of the thoracic spine. As you know, sickness cover under your policy provides a lifetime benefit period. In the event that liability for your claim is admitted, benefits will be payable fortnightly in arrears from the end of the 30-day waiting period once all relevant information has been received and assessed.
>
> To assist us in further assessing your claim, we have written to Dr Brett Lynam. Upon receipt of this report, your claim will receive our further attention. Would you also kindly confirm in writing your occupational details. Please specifically advise the period you worked as a computer programmer and insurance agent and the approximate date on which you recommenced work as a plumber after ceasing work as a computer programmer. Please also advise whether you continue to work as an insurance agent and whether you are currently receiving any income from this occupation."

[9] On 22 January 2001, ACL wrote to Dr Lynam seeking further information, including a prognosis for recovery and return to full time work.

[10] On 25 January 2001, the plaintiff wrote to ACL, to the attention of Ms May Chung:

> "Dear May
>
> I have a policy with AC&L, No. 10462463 and have been told of a claim reference no. 785592. On the 27th November 2000 I hurt my back whilst picking up and carrying some goods. I thought at first that I had pulled a muscle in my back and that a good rest would solve the problem.
>
> After a week or so I was in a lot of pain and needed to see someone about it. There is a Dr M. Moeliker in Nambour who is a Chiropractor, through the treatment that I was given by Dr Moeliker I was able to gain a great deal of relief from the pain and migraines. As December passed I was still having a great deal of trouble and felt that I was not then able to work and needed to put in an application for some financial relief from the policy. I was told that I would need to get a certificate from a G.P. to put in with the claim.
>
> I have since seen Dr Boon and then in his absence, Dr Lynam here in Nambour but the treatment that I received there left me in a great deal of pain and with a stiff neck and increase in the frequency of migraine headaches which took about a week and a half to get back even close to the level it was prior to the doctors visit. I felt I was unable to go back to that doctor because of the pain that I was left in and my concern for perhaps even more serious problems with my back (the problem is in around the spine just between the shoulder blades). Even without the back pain – the migraines and associated visual problems are bad enough but then to add the back problems is more than I care for.
>
> When I spoke to AC&L last week I was told that I would need to be under the care of a G.P. and not just the Chiropractor. Accordingly I have found a different doctor but need to travel to Maroochydore to receive the treatment. I trust this is OK as the Dr Lynam had not indicated that he could do any more whereas the current doctor (Dr Colin Rigg B.Med.Sci.BM.BS) feels that we should have been doing Ultrasound and Heat treatment and wants me there each day then following on with the Chiropractic work and exercises to try and rehabilitate the back.
>
> My concern is now in the financial area as my stopping work at the end of November also means there is no longer any money coming in. Is my period out of work able to start form the end of November and then count December as the qualifying period. I am needing to outlay the money for the lounge as I desperately need the back and neck support ($4,500) as well as the Chiropractic work and the x-rays etc that Dr Moeliker wants.
>
> Thank you for your assistance"

[11] On 29 January 2001, the plaintiff wrote again to ACL, this time in response to ACL's letter of 22 January 2001. The plaintiff said in this letter:

> "Re: your letter of the 22nd Jan 2001, the questions as to the specific dates that I worked with the insurance work will be difficult to establish. I believe that period would have covered from early 1993 to mid 1993 and

was in association with 'Brad Davies Financial Services'. I believe his contact details to be:

> Bradley Davies
> 8 Woodroffe Terrace
> Little Mountain (Caloundra) Qld.
> Ph: 07 5448 2041 Mob: 0408 919 432

At that time I was starting to deal with computer databases and was to work with Brad keeping records and doing the insurance work in association with Brad & 'Brad Davies Financial Services'. Unfortunately I was not the 'sales person type' and was not able to continue with that.

The only qualification I have is my trade certificate for plumbing and gas-fitting which I commenced in 1973. My only option was to return to this line of work. In the matter of this claim I was doing a roof replacement (plumbing) for a customer at her house the job being completed on the 27th November 2000.

My hobby is Amateur Radio in which I have dealt with computers and associated electronic systems. I am self taught in a particular computer data base system called 'Paradox' which uses a system called 'ObjectPAL' which is 'object-based Paradox Application Language'. Unfortunately over the years I have not found a demand for this though my current thoughts are to try and advance in this area. I spoke to a counsellor who has suggested that if I am unable to continue with physically based work, my aptitude would lend itself to studying programming. As yet I have not taken the next step to enquire with a university to find out about positions for the next intake which will be mid year as I am not certain of 'where I'm at ...' and wanted to find something else other than 'osteoarthritis of the spine', it is a bit scary even if not life threatening.

Thanking you"

[12] On 30 January 2001, ACL sent a fax to the plaintiff asking for further information, including the contact details for Dr Moeliker and Dr Rigg and for income tax returns for the 1994, 1995 and 1996 financial years to support the plaintiff's monthly benefit claim.

[13] The plaintiff responded with a fax dated 30 January 2001, saying:

> "Re: your fax of the above, date, as I have already indicated to you, the questions as to the specific dates of work would be difficult to establish. I gave you the contact details for 'Brad Davies Financial Services', with whom I was working at that stage and through whom I took out the policy.
>
> Please find also enclosed the contact details for Dr Moeliker. None of the other doctors that I have visited have been able to give another finding as to the source of my problem.
>
> The letter you said was posted on the 22nd was post marked the 28th Jan so it is difficult to answer you questions if they are not sent to me.
>
> I feel that there has been a show of you wanting to avoid making payment on this policy and feel that all this is most unreasonable.

> You have been sending me requests of payments for all these years and I have made the payments promptly and if full including all the increases you have put forward in-spite of the policy being a fixed premium which attracted higher initial payments than the normal policy.
>
> At this point I am not at all impressed with your avoidance after having happily taken my premiums or my own situation as far as my health goes.
>
> You have taken my premiums, it is my understanding that what work I went into was not of concern and that my policy stayed fixed for what it is until I reach retiring age at which point it ceases to function.
>
> Please deal with this as quickly as possible."

[14] Dr Lynam responded to ACL's request for information with a report dated 30 January 2001, in which he said:

> "In response to your letter dated the 22nd January this year, received here on the 29th January this year, I provide the following report.
>
> This patient has consulted several Doctors of the surgery over the past twelve months. He first visited for his current problem on 5th January 2001 when he attended Dr Boon. Dr Boon's notes state that he had left-sided upper back pain which he had for some six weeks after carrying roofing material. His notes state that he was tender over the upper left thoracic facet joint. Dr Boon provided some heat to the area followed by some gentle mobilisation on the facet joint and provided a prescription for Celebrex (an anti-inflammatory) for the problem.
>
> I next consulted the patient on the 9th January 2001. My notes state that he was still tender and was experiencing pain of the lower trapezius muscle on the right and left, but more so on the right. He stated that he had received no real relief with manipulation and had seen a Chiropractor on one occasion who provided some relief but the problem was persisting. He felt he was unable to work at present because of his inability to lift. He stated that the cause of his problem was from approximately 50 trips carrying roof sheeting on his head with his arms held above his head over a distance of some 30 to 40 metres on a job site, some six weeks prior to the 5th January 2001. I arranged for Diagnostic Imaging in the form of a Chest X-Ray and a Thoracic Spine X-ray.
>
> I have included a copy of the report of this Thoracic Spine X-Ray, however it essentially says there is some minor degenerative changes in the lower thoracic spine.
>
> During his visit on January 10th 2001 I noted that he had two visits in early 2000, that was the 19th January and the 24th January, when he complained of inter-scapular pain and headaches. He was consulted on these occasions initially by Dr Nordland and subsequently Dr Herdy. He was treated at this time with some Analgesia in the form of Panadeine Forte.
>
> For this reason I suggested that he had an aggravation on this occasion of a pre-existing minor osteo-arthritis of his thoracic spine.
>
> My advice was that he attend a local Physiotherapist for treatment and return to self-employment as soon as he was able based on the findings and

> the treatment from the Physiotherapist. He was referred to Kim Dwyer at Blackall Terrace Physiotherapy. I have had no correspondence from the Physiotherapist as yet.
>
> I provided him with a completed Australian Casualty & Life Insurance Form stating that since he was a self-employed plumber and gas fitter that whilst this condition remained painful he would be unsuited to his usual duties. He would however certainly be suited to clerical type duties of a light, non-heavy lifting nature.
>
> The patient's history provides the date of initial disability, which was some five weeks prior to the 5th January 2001. He did not present here until the 5th January 2001 so we have no documentation prior to that.
>
> His prognosis based on the radiological evidence of only minor changes in his thoracic spine is that with appropriate physiotherapy and a mobilisation program along with home exercises he should be able to return to his usual duties at some time in the near future.
>
> As stated I have had no further correspondence from the Physiotherapist I referred him to nor have I had further consultations with the patient. As a result of that I am unable to comment on his current activity levels and on his current psycho-social situation.
>
> I have no further data to add however I believe this answers to the questions raised in your correspondence."

[15] On 5 February 2001, the plaintiff sent ACL a fax providing some information from his chiropractor, Dr Moeliker. On 7 February 2001, the plaintiff wrote several faxes to ACL in which he complained about its handling of his claim to date. In one of the faxes dated 7 February 2001, he said:

> "I am not making a claim for permanent disability. At this point now if I do not receive some ongoing treatment for rehabilitation, it may be a lot longer than a couple of months before I am without the problem and while I am suffering from this pain and the associated problems including migraine headaches, I am not able to do much about rebuilding my access to income. I would have also though that it would have been in your best interests to fund the physiotherapy to have it continue rather than to let the problem magnify itself and maybe become a more permanent problem, those also seem the thoughts of Dr Lynam."

[16] On 8 February 2001, the plaintiff, in response to queries from ACL concerning his employment history, sent ACL a fax stating:

> "May Chung
>
> Policy: 10462463 Claim: 785592
>
> With reference to the discussion with Lisa, I will contact:
>
> Raymond Kronk of Steelway Engineering
> Cnr Mark Road & Helen Street
> CALOUNDRA, QLD. 4551
> ph: 5491 2732 fax: 5491 8468

> I had been working as firstly an employee with the responsibilities of 'Office Administration' and latter as a subcontractor covering the same area as well as writing a 'Database System' for them on which they ran their business. I believe that this period as a contractor (self employed) was for 1992 & 1993. After that I was working both for myself in that area as well as for Brad Davies Financial Services doing 'Insurance Sales' and 'IT' associated work for Brad.
>
> I am not sure of the sequence of events that lead to the policy change in 1995, there was a lot of things happening. I thoughts are that in that period I was working with Brad and that there was a change made to the policy to change it from a monthly payment and to increase the rates to give it a fixed premium (+CPI)???
>
> At that point I should have been registered with AC&L as an agent, so if you need to question that you may need to talk to someone at AC&L!
>
> At this stage I won't bother about Brad Davies Financial Services P/L as I feel you can confirm through your own records of my being registered as an agent with AC&L. If you wish to speak to Brad Davies you have my permission for him to pass on any information he may have regarding my details.
>
> As soon as I get a response from Steelway Engineering I shall forward a copy to you.
>
> I have attached a list of some payments received from Steelway Engineering as a contractor (self employed person) to show at least some of the figures I had claimed to be earning. It has been extremely difficult to compile all the figure back through the bank so there may be other amounts that have not been associated with Steelway Engineering. I am sorry that I am not able to readily provide information as I have no paperwork back from 1998 and only some electronic records as the paper records were borrowed by another party to hide their share of my income."

[17] On 9 February 2001, the plaintiff sent a further fax to ACL enclosing a reference from Mr Kronk of Steelway Engineering, which stated:

> "TO WHOM IT MAY CONCERN
>
> Eric Syddall subcontracted to Steelway Engineering as Office Administrator for a number of years prior to 1995. While holding this office he performed various duties which included developing a Computer Database System for our own use. Although he has updated this program since, a lot of the basic concepts still exist today."

[18] On 9 February 2001, ACL wrote to the plaintiff enclosing a cheque for $1,934 representing total disability benefits for the period 4 February 2001 to 18 February 2001 and a progress claim form for completion and return by the plaintiff.

[19] On 13 February 2001, the plaintiff sent a facsimile letter to ACL in which he said:

> "Australian Casualty and Life
> G.P.O. Box 5339, Sydney NSW 2001
> ph: 1300 366 066 fax: 02 9223 9193 Policy: 10462463 Claim: 785592

Lisa Filachoni
Dear Lisa

I have received some correspondence from AC&L today referring to the incident date. I have been told that AC&L are not going to allow the payment of the benefit for the full period. I would like to ask you to reconsider this decision, as I explained to AC&L when asking about financial records etc, I do not have records that go back prior to 1997/8 when most of my belongings and paper records were taken. I was able to provide you with some information as to my source of income for the period from 1993 onwards only as I have some electronic records the other party was not aware of.

As I do not have copies of insurance policies and alike I was unable to determine just what was required. In this I was not able to correctly fulfil the 'quoted conditions' but feel that I have done my best to provide to you all the relevant information and find a solution to the problem where the doctors didn't. When I first asked AC&L about changing Doctors and seeing someone who could help me – I was told 'Sure – of course, there is no point making it worse' but even then there was no mention of 'Registered Medical Practitioner' to help me avert this situation.

My seeing the 'Registered Medical Practitioners' has only resulted in aggravation of the problem and I am now told, by their incorrect treatment, could have caused permanent nerve damage. The treatments prescribed by the 'Registered Medical practitioners' has so far not assisted in any way while each visit led only to more pain and less mobility, I have done my best whilst using my own resources to find out what the problem is and how to best solve it.

I am concerned that whilst I have reduced my resources I will be hindered from getting the treatment that has been helping me the most and this will prolong the problem unreasonably.

I realise that from the date of the incident on the 27 November to the 5th December 2000 I did not see anyone about the problem and would not expect you to consider that time be included in the qualifying period. At that point I thought I had only pulled muscles and that complete rest would have resolved it. It did not and I consider myself lucky I did not visit the 'Registered Medical practitioner' then in having seen their abilities in this area since. Four doctors (3 GP's 1 Specialist/Radiologist) have told me that there was no more they could do and that because of the site of the problem, I was going to be stuck with it.

Thank you for your time.

Eric Syddall"

[20] Ms Chung of ACL responded to the plaintiff with a fax dated 13 February 2001, saying:

"Dear Mr Syddall,

We refer to your query in regards to the date incurred or date we assessed the claim form.

> We have contacted Dr M Moeliker today to confirm the consultation dates. We have been advised that you initially saw him on 5/12/00 and again on 02/02/01, 05/02/01 and 08/02/01. As advised by the secretary Dr Moeliker is a chiropractor and not a registered medical practitioner. We would like to quote the following clause out of the policy for your reference on the basis that we have assessed your claim from the 05/01/01.
>
> *If the person insured is totally disabled – and can't work*
>
> 2. *If the person insured is totally disabled, we will pay you the monthly benefit. We pay you at the end of each month for which you are entitled to be paid. The person insured is totally disabled if, because of an injury or sickness, he or she is:*
>
>   - *unable to perform at least one of the duties of his or her occupation which is necessary to produce income*
>   - *not engaged in any occupation; and*
>   - *under the regular care and attendance of a registered medical practitioner. The registered medical practitioner cannot be you or your family member, business partner, employee or employer, nor can it be the person insured or his or her family member, business partner, employee or employer.*
>
> We will be also in contact with Steelway Engineering to have them clarify the exact date that you commence work with them and the nature of work performed.
>
> Should you have further enquiries, please do not hesitate to contact our office.
>
> Regards
>
> May Chung
> Claims Consultant"

[21] The plaintiff then lodged with ACL a progress claim form dated 4 March 2001. In the part of the form he completed, the plaintiff said, *inter alia*, that the disability which prevented him from returning to work was "back pain", and that his return to work was delayed because he had nerve damage in or around the spine. The progress claim form also contained an "attending doctor's statement" signed by Dr Lynam giving a diagnosis of "cervical spondylosis (mild) with referred pain". In describing any complication or conditions which may prolong the disability, Dr Lynam said "mild degenerative change in cervical spine may limit long term full mobility". Dr Lynam said that, since his last examination, the plaintiff had shown "gradual slow improvement", but confirmed that the plaintiff was still unable to work because of the condition.

[22] ACL continued to make total disability benefit payments to the plaintiff while the matter was being investigated. In early April, the plaintiff was referred to Dr Peter Winstanley, orthopaedic surgeon, for examination at the request of ACL. Dr Winstanley provided a report dated 10 April 2001. I will refer to Dr Winstanley's report in further detail later in this judgment. It is sufficient for present purposes to note that in his report dated 10 April 2001, Dr Winstanley

considered that the plaintiff's clinical presentation was consistent with an aggravation of underlying degenerative change present within his cervical and thoracic spine area, that the cervical spine symptomology had improved but the plaintiff still had ongoing symptomology associated with the thoracic spine, and that at the date of the report the plaintiff's condition had not stabilised. Dr Winstanley's opinion at that time was that the plaintiff's condition was such that it would prevent him from performing his normal occupational activities as a general plumber. Dr Winstanley stated:

> "In my opinion, the patient would be unfit from obtaining heavier type work activity. The patient may be able to perform some lighter type activities, but this would depend on the nature of such condition. In my opinion, his condition is such that he would benefit from treatment of a muscle rehabilitation program and work hardening program. This could be performed through the Noosa Rehabilitation Program at the Noosa Hospital.
>
> In my opinion, following a muscle rehabilitation program, the patient should be able to return to his occupation. He should avoid heavier type activity. In the longer term, it would be best for this patient to return to lighter type activities which may require re-education and retraining to allow him to perform this activity. There is no indication at the time of review that the patient required further investigation, nor is he a surgical candidate. The patient did not have any inappropriate signs."

[23] ACL had Dr Lynam's and Dr Winstanley's reports reviewed by Dr Anthony Christie, occupational physician, who expressed the view that the plaintiff needed some physiotherapy. Dr Christie was of the view that the plaintiff should be fit to return to full duties in a month from the date of Dr Christie's review on 18 April 2001, and that the plaintiff would be fit for light duties at that time.

[24] On 3 May 2001, ACL wrote to the plaintiff in the following terms:

> "Dear Mr Syddall,
>
> **RE: INSURED NAME: Mr Eric Syddall**
> **POLICY NUMBER: 010462463**
> **CLAIM NUMBER: 785592**
>
> Thank you for attending the medical examination with Dr Winstanley on 9th April 2001.
>
> Both Dr Winstanley and Dr Lynam consider that you are fit to perform those duties of a computer programmer/database administrator. For this reason, we are denying your claim and wish to advise that no further benefits are payable on your claim.
>
> If you wish to discuss this matter further, please contact the writer on (02) 9367 2032.
>
> Yours sincerely
>
> May Chung
> **Claims Consultant – CLAIMS DEPARTMENT**"

[25] On 8 May 2001, the plaintiff sent a fax to ACL stating:

> "In response to your letter dated 3rd May 2001 referring to the medical examination, and the cessation of payments under my policy I feel that this is not a correct action for AC&L to be taking.
>
> At the time of taking out the policy I was not a 'Computer programmer/administrator', I was working as an insurance salesperson for (amongst others) AC&L which is reflected by me being noted as the agent on the policy.
>
> In my understanding I am at liberty to change my means of income at any point without an effect on my policy. You were notified earlier that I was no longer working with the administration area which was prior to December 1993 and that I had returned to 'plumbing' after finding that I was not able to adapt to the 'Insurance Salesperson Work'.
>
> Since 1994 I have been paying my premiums as a 'Plumber' and they have been accepted as such, when I had the accident on the 27th November 2000 I was working as a 'Plumber'.
>
> I request that you immediately resume my cover under this policy and in response to this matter I request that you sent your response to me via facsimile due to the incredible delays AC&L have already made in dealing with this matter."

[26] Further correspondence ensued between the plaintiff and ACL, including correspondence which led to the plaintiff referring his complaints against ACL to the Financial Industry Complaints Service.

[27] By the present proceeding, the plaintiff has sued the defendant seeking a wide range of relief on a multiplicity of bases against the defendant. On its face, the plaintiff's further amended statement of claim includes claims for:

(a) damages for breach of contract and/or breach of trust;

(b) damages for negligence;

(c) damages for breach of the policy of insurance;

(d) exemplary damages;

(e) loss or guarantee of being consistently insured;

(f) loss of policy death benefits;

(g) loss of enjoyment of life;

(h) damages on behalf of his wife and children;

(i) damages for loss of chattels, house, equity, property rental income and interest.

I will itemise the various heads of damages that he has claimed more particularly later in this judgment. I should observe, however, that by the end of the trial, the plaintiff seemed to be limiting his case to one of breach of contract, although continuing to allege that the defendant had acted towards him with a lack of good faith.

[28] The defendant denied that it had failed to act with utmost good faith. The cases advanced by the defendant were:

(a) that the defendant stopped paying the plaintiff benefits because the plaintiff was not totally disabled within the meaning of the insurance policy;

(b) the plaintiff made a number of misrepresentations to ACL prior to taking out his original income protection policy in 1993 and the income protection policy under which the claim was made in 1995, and that these misrepresentations were made fraudulently, entitling the defendant to avoid the income protection policy of insurance pursuant to s 29(2) of the *Insurance Contracts Act* 1984 (Cth) ("*ICA*").

[29] The plaintiff was legally represented when this proceeding was first instituted in 2006. For most of the interlocutory history of the proceeding, however, and for the entirety of the trial, the plaintiff represented himself. Considerable leeway was given to the plaintiff in his conduct of the trial. He was, for example, permitted to re-open his case on several occasions to lead further evidence in an attempt to minimise the impact of evidence adduced by the defendant which tended to undermine the plaintiff's credibility. At the end of the day, however, this case is to be decided on the admissible evidence which was adduced by the parties. The plaintiff, albeit self-represented, is in no different position from any other litigant before the Court, including the defendant. In that regard, it is of assistance to recall the observations of Muir JA in *du Boulay v Worrell & Ors*:[1]

> "[69] It may be that self-represented litigants should be afforded a degree of indulgence and given appropriate assistance. But if a self-represented person wishes to litigate, he or she is as much bound by the rules of Court as any other litigant. Those rules exist to facilitate efficient, fair and cost effective litigation. The Court's duty is to act impartially and ensure procedural fairness to all parties, not merely one party who may be disadvantaged through lack of legal representation. The other party to the litigation is entitled to protection from oppressive and vexatious conduct regardless of whether that conduct arises out of ignorance, mistake or malice."

[30] See also the observations of Keane JA in *Robertson v Hollings*[2] and White J in *Robertson v Graham*.[3]

The policy of insurance

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1 [2009] QCA 63.
2 [2009] QCA 303 at [11].
3 [2010] QSC 215 at [38].

[31] The appropriate starting point is to identify the policy of insurance which the plaintiff contends was breached by the defendant, and which the defendant says it is entitled to avoid.

[32] The plaintiff's relationship as an insured with ACL commenced in 1993 when he applied through an insurance agent, Mr Brad Davies, for an income protection policy.

[33] On 18 January 1993, the plaintiff completed and signed an application form for a "Premier Income Protector" policy with ACL. He applied for lifetime benefits for both accident and sickness, with a waiting period of 14 days. The monthly benefit sought was income protection of $1,600 per month. In Part 5 of the application form the plaintiff provided his "Occupation Details", and gave the following responses:

(a) That his principal occupation was "computer operator/programming";

(b) That he had been in that occupation for one year;

(c) That he had no specific qualifications;

(d) That he was self-employed;

(e) That the nature of the business was "data processing";

(f) That the specific duties of his occupation were "data processing";

(g) That he worked 43 hours per week;

(h) That his occupation did not involve manual work;

(i) That he was self employed;

(j) That he did not work at his place of residence;

(k) That he did not have a second occupation.

[34] In Part 6 of the application form, the plaintiff provided his "Earnings Details":

(a) In response to the question "What were your earnings from your principal occupation (net of business expenses but before tax) over the last 12 months?", the plaintiff answered "$26,000";

(b) In response to the question "What were your earnings in the full financial year prior to that period?", the plaintiff responded "$24,000".

[35] In Part 8 of the application form, the plaintiff was asked about his "Family History". The form asked: "Has any near relative had any hereditary disorders such as diabetes, mental illness, haemophilia, heart disease, Huntington's Chorea, polycystic kidney disease or died before age 60?". The plaintiff answered "Yes" and gave the following details:

"Father: died aged approx 60 years – lung cancer/smoking"

[36] Part 9 of the application form required the plaintiff to give personal health details. In response to the question asking details of his usual doctor, the plaintiff responded "No usual doctor". In response to a question asking the date and reason of his last consultation with any doctor, he responded:

"1989 – sprained ankle – clinic – Landsborough. No recurrent problems."

[37] Part 10 of the application form required the plaintiff to give details of his medical history. The form asked whether the plaintiff had ever had or been told that he had or received advice or treatment for a range of specified medical disorders. The plaintiff answered "No" to all of these, including a question as to whether he had received advice or treatment for "mental or nervous disorder (e.g. stress, depression), fainting, epilepsy, paralysis, brain disorder". The plaintiff also answered "No" to the question whether he had, within the last five years "had any medical examination, advice, treatment or been in hospital".

[38] ACL accepted the plaintiff's application, and issued policy no 289613, being a "Premier Income Protector" policy providing for monthly injury and sickness benefits of $1,600.

[39] The plaintiff renewed this policy in 1994.

[40] In June 1995, the plaintiff applied to ACL for an increase in his income protection policy. He completed and signed an application form for that purpose on 15 June 1995. By that time, the plaintiff had started working as an insurance agent. In the application form dated 15 June 1995, the plaintiff sought a Premier Income Protector policy with lifetime accident and sickness benefit periods, and a waiting period of 30 days, to provide personal income protection cover of $3,000 per month.

[41] In answer to question 12 on this application form, which required him to provide "Occupation details of person to be insured", the plaintiff said:

(a) His principal occupation was "computer programmer";

(b) He had been in that occupation for four years and his current business had been in operation for four years;

(c) He was self employed;

(d) The nature of his business was "computer/data base management";

(e) The specific duties of his occupation were described as "programming";

(f) He worked "40 +" hours per week;

(g) His occupation did not involve manual work;

(h) He worked at his place of residence, and the work he performed at home was described as "programming – outside work system analyst".

[42] The plaintiff also responded in the application form that he had a second occupation. He described the duties and details of earnings from the second occupation as:

> "Insurance agent. $3,000.00 per month to date started Dec 94".

[43] The application form also sought the plaintiff's income details. The questions asked, and answers provided by the plaintiff (printed below in bold) were as follows:

> "13 Income details of person to be insured
>
> A. What is the income earned by the person to be insured's own activity of his/her principal occupation over the last 12 months?
>
> *Income is what is earned by the person to be insured's own activity after deducting expenses necessarily incurred in earning that income but before tax.*
>
> **$48,000.00**
>
> B. What was your income (net of business expenses but before tax) in the full financial year prior to that period?
>
> **$32,000.00**
>
> C. If applying for Office Overhead/Business Expenses cover, what are your current monthly expenses?
>
> **$N/A.**
> *(Please also refer to Section 21, Office Overhead Questionnaire.)*"

[44] In response to questions concerning his insurance history, the plaintiff answered that the ACL income protection policy providing for a monthly benefit of $1,600 was to be replaced. He also gave details of a claim he had made in 1993.

[45] In response to questions about the plaintiff's family history, the plaintiff disclosed "Father – lung cancer (smoking) pneumonia".

[46] As with the previous application form, the plaintiff was also asked whether he had ever had or been told he had or received or treatment for a range of medical conditions. He answered all of these in the negative, including "mental or nervous disorder".

[47] On 15 June 1995, the plaintiff also signed an "Appointment of Agent" document, which he subsequently sent to ACL. This "Appointment of Agent" document stated:

> "We hereby notify that we have instructed Eric A Syddall to attend to our financial and investment portfolio. Details are as follows:
>
> Eric Syddall Financial Services
> 60 Flaxton Drive
> PO Box 141
> Mapleton Qld 4560

> Would you please ensure that all information, including client correspondence held by your company in relation to our policies or investments, are transferred or released to Mr Syddall.
>
> Specifically to policy 289613
>
> Yours faithfully
>
> [Signed by the plaintiff]"

[48] This "Appointment of Agent" document is date stamped as having been received by ACL on 27 June 1995.

[49] On 26 June 1995, under the letterhead of "Eric Syddall Financial Services", the plaintiff wrote to ACL as follows:

> "To Australian Casualty & Life
>
> Customer Service: New Business
>
> From: Eric Syddall 458984
>
> Please find enclosed 3 proposals for income protection, along with two cheques for the full amount of the years premiums on each of the proposals.
>
> 1. Peter Bailey, DOB 150958, $2,150.00 mth benefit, 14 Day wait, $1,005.19 premium) cheque
> 2. Ian Dalton, DOB 291057, $2,150.00 mth benefit, 14 Day wait, $1,179.30 premium) $2,184.40
> 3. Eric Syddall, DOB 010756, $3,000.00 mth benefit, 30 Day Wait, $990.52 premium) $990.52
>
> For any further information on these proposals please contact me, with any developments please keep me advised.
>
> Total of cheques $3,175.01
>
> Thanking you"

[50] The number 458984 was the plaintiff's ACL agent number.

[51] This letter was date stamped as having been received by ACL on 27 June 1995, and the application form signed by Mr Syddall on 15 June 1995 was similarly date stamped as having been received by ACL on 27 June 1995. It is clear that the application form that I have described at length above was sent to ACL under cover of the letter from the plaintiff dated 26 June 1995.

[52] Having received the plaintiff's application form, on 30 June 1995 ACL cancelled policy no 289613 and issued a new income protection policy to the plaintiff, being policy no 10410025.

[53] On the 1995 application form, the "intermediaries" (i.e. insurance agents) who were entitled to be paid commission in respect of the sale of this policy were shown as the plaintiff and Mr Davies. The new business split between them was nominated

on the application form to be 70 per cent for the plaintiff and 30 per cent for Mr Davies, and the plaintiff was to receive 100 per cent of the renewal commission.

[54] It appears that this nomination of Mr Davies to receive 30 per cent of the commission was an error. Mr Davies, in the course of his evidence before me, said that he had "absolutely no idea" as to why he would receive a split of that commission, because the plaintiff was his own agent at the time. It is clear enough from the contemporaneous documents that this error in the allocation of commission was picked up within ACL, and Mr Chris Harvey, who was then the Queensland manager of ACL, gave instructions for the situation to be rectified so that the plaintiff would receive all of the commission.

[55] On 8 August 1995, Mr Harvey sent a memo to the underwriting section of ACL stating:

> "10410025 – E Syddall
>
> This is agent's own policy & should show agency credit of 100% to A/n 458984 – E Syddall.
>
> In order to correct this agency dept have advised we will need to cfi policy 10410025 & issue a new policy with agent showing A/n 458984 100%.
>
> Can you please arrange for this to be done & ensure that it <u>does not</u> get entered as replacement business as this will create commission problems."

[56] Ms Debra Jeon, who was employed as a senior underwriter with ACL and then with the defendant until November 2004, gave evidence before me. Ms Jeon has not worked for the defendant for many years. In her evidence, Ms Jeon explained, by reference to contemporaneous records, that policy no 10410025 was keyed into ACL's computer system as a replacement business with the commission on the new business being split 70 per cent to the plaintiff and 30 per cent to Mr Davies. She referred to Mr Harvey's instruction for the plaintiff to receive 100 per cent of the commission, and said that because of computer restrictions at the time, when a policy was entered as a replacement it could not be changed once it had been entered as new business. The only way that Mr Harvey's request could be processed was to "cancel from inception" the policy that was in force as at 8 August 1995, i.e. policy no 10410025, and issue a new policy. She explained that this was the only way of overcoming the computer system restriction at the time, and was "purely to change the commission, the way the commission is paid". She referred to a "request for re-key by underwriting" document, which requested her to re-key policy no 10410025, and specified the "reason for re-key" as "reopen with agent E Syddall – 458984 100%".

[57] By reference to the file, Ms Jeon confirmed that policy no 10410025 was "cancelled from inception" for the purposes of amending the payment of commission, and that policy no 10462463 was issued in order to correctly allocate the commission to the plaintiff.

[58] The notion that the plaintiff was to receive 100 per cent of the commission in respect of the policy taken out in 1995 was confirmed in the plaintiff's original statement of his evidence in chief, in which he said:[4]

> "I applied to have my policy moved to my agency portfolio and for an increase in my insurance cover. The insurance increase was granted and a policy issued and in the same process 100 per cent of the commission was also allocated to me."

[59] In the course of the trial, after the defendant's underwriting witnesses had given evidence concerning the circumstances under which policy no 10462463 was issued in replacement of policy no 10410025, the plaintiff sought and was granted leave to reopen his case to give further evidence. His further evidence in chief was in the form of a statement in which he said:

> "2. The commission for policy 010410025 had already been set by AC&L about 4.7.1995 to 100%. With what I had learned as an agent with inter alia AC&L especially during June and July 1995 displeased me and I did not want to stay in the insurance business.
>
> 3. On about 8.8.1995 after discussion with and AC&L member, possibly Chris Harvey, there was to be a new policy issued:
>
> (a) As I was not to be paid ongoing commission for the new policy and was leaving insurance, it is my belief there was no need for the previous policy 010410025 to be cancelled for the purpose of defining agent's commissions but to create new business free of policy 010410025.
>
> (b) The effective life of the application form for policy 010410025 as an AC&L document had expired on the 21.7.1995 and could not be used to initiate a new policy applied for in August. I was therefore requested to complete a new application form for the proposed August 1995 policy.
>
> (c) I do not have a copy of the application form but neither do I have a copy of the actual policy. The policies existence is confirmed only by the defendant."

[60] Under cross-examination, the plaintiff continued to aver that he had signed a further application form in August 1995. His evidence on this, however, was at odds with numerous prior statements that he had made, including an affidavit made by him in this proceeding on 9 May 2007, in which he said:

> "10. When the [1995] policy was first implemented the agent information was incorrect and was placed under my name and Brad Davies. The commission split and that the policy was to be entered as a new policy and not as an upgraded policy was later corrected on or about 08.08.1995 by Chris Harvey for Underwriting with AC&L."

[61] The plaintiff's evidence on this point was quite unconvincing. In parts of his evidence under cross-examination he stated that he had a precise recollection of answers which he gave in the form which he says was lodged in August 1995. On

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[4] At paragraph 12.

the other hand, in the evidence in chief the plaintiff had given at the outset of the trial he had said "I only have a vague memory of what happened in 1995", and confirmed under cross-examination in relation to this further evidence that his memory was vague. Indeed, under cross-examination he went so far as to concede that, from disclosure of the underwriting file, he had drawn a conclusion that he must have filled out the supposed August 1995 application some time before 8 August 1995.

[62] The first allegation of the plaintiff having made an application in August 1995 occurred in his Amended Statement of claim dated 8 September 2008. In further and better particulars of that pleading, the plaintiff purported to give detail of exactly what answers he had given to questions in the August 1995 application and which questions he had left unanswered. His particulars stated that on the August 1995 application form he had:

(a) given his principal occupation as insurance sales and said that he had been in the occupation for six months, and that he had no second occupation;

(b) left all of the income and medical history questions blank;

(c) he had left the number of hours he was working blank;

(d) he left the question about whether his occupation involved manual work blank.

[63] The plaintiff's pleaded case shifted somewhat when, in the further and better particulars of his statement of claim which he provided on 9 September 2008, he asserted that there was an agreement, which was partly written and partly oral, between him and ACL that policy no 010410025 would be "cancelled from inception" and that:

> "The Plaintiff and AC&L entered into the agreement to Cancel from Inception policy number 010410025 as the Plaintiff decided to leave the insurance industry and cancel that policy, AC&L instead offered to Cancel from Inception policy number 010410025 and issue a new policy as New Business with no bindings on the earlier policies/applications if the Plaintiff continued the policy premiums. The purpose was not to appoint 100% premium renewal commissions as I was already entitled to that under policy number 010410025 and further I received no further commission payments from AC&L for the new policy."

[64] These further and better particulars by the plaintiff dated 9 September 2008 are also notable for his allegation that the date on which he ceased working as a computer programmer/database administrator was about December 1994 for others and about June 1995 for himself, and his assertion that:

> "The occupation or occupations of the Plaintiff as at early August 1995 was insurance agent whilst building computers was a hobby and in late August 1995 was plumber and building computers was still a hobby."

[65] There is, however, simply no evidence to support these contentions by the plaintiff. On the contrary, the contemporaneous documentation is completely consistent with the defendant's explanation as to the circumstances and reasons for the cancellation

of policy 010410025 and the issuing of policy 010462463. It is also consistent with the evidence previously given by the plaintiff on affidavit.

[66] I do not accept the plaintiff's evidence that he has a precise recall of contents of an application form from August 1995. Given his concession as to the vagueness of his memory of the events of that year, it is not credible to suggest that he recalls the details of questions answered and not answered on a form which, even on his own evidence, he had not seen for 15 years. In the course of the cross-examination on his further evidence on this topic, the plaintiff was asked about a letter he had written to the defendant's solicitors on 29 June 2007 in which he made no mention of the alleged August application form, and the following evidence was given:

> "Mr Syddall, if you had completed an application in August 1995, that would have been a fine time to have raised it, wouldn't it? -- That is an awful long time ago and I am not experienced in this and my state of health is not quite 100 per cent. The drugs that I take just to be able to sit down here are enough to get me confused.
>
> You've complained of this before in this Court that the drugs that you take affect your memory, Mr Syddall; is that right? -- I have, yes.
>
> You have, in fact, told his Honour on the very first day that your memory of events in 1995 is vague. Do you remember that evidence? -- I remember hardly anything, that's correct."

[67] Despite this evidence, only a dozen or so questions later the plaintiff stoutly asserted that he had a precise recollection of his response to the question on the alleged August 1995 application even though he had not seen the form for 15 years and even though his memory was vague.

[68] This is one of the areas of evidence in which the plaintiff completely lacked credibility. Others will be mentioned below. Moreover, it is clear why the plaintiff advanced this story about there having been another application form in August 1995:

(a) to the extent that he did not answer questions on the supposed August 1995 application form, he could rely on s 21(3) of the *ICA*, which provides to the effect that if an insured fails to answer a question on a proposal form the insurer is deemed to have waived compliance with the matter. Importantly, in this regard, the plaintiff contended that he had left the answers to questions concerning his past income blank, and he would thereby have been able to claim relief from the duty to disclose in relation to those matters;

(b) similarly, his story about the new policy being written with "no bindings" would, if accepted, have relieved him from the consequences of misrepresentations he had previously made.

[69] The plaintiff's conduct in advancing this story about the August 1995 application form for these purposes only reinforces my findings as to his lack of credibility.

[70] After the plaintiff had given this further evidence, leave was given for the defendant to recall Ms Jeon. In her evidence, she confirmed that if there had been an application form completed by the plaintiff in August 1995, she would have

expected to have seen that application in the file which had been produced to the Court.

[71] I do not accept the plaintiff's version that he filled out and lodged a further application form in August 1995. It is, in my view, abundantly clear from the contemporaneous documentation that policy no 10462463 was issued in order to accommodate the request that the plaintiff be paid 100 per cent of the commission on that policy. I also accept that this policy was issued pursuant to the application form signed by the plaintiff on 15 June 1995. Moreover, I am quite satisfied, having had the opportunity to see and hear the plaintiff give evidence and form an opinion as to the credit-worthiness of the plaintiff, that the version of events advanced by the plaintiff in respect of the supposed August 1995 application form was evidence tailored by the plaintiff to seek to avoid the consequences of misrepresentations he had made in the June 1995 application form (details of which will be discussed later in this judgment).

[72] The terms of the income protection policy which the plaintiff held as at the time of his claim in January 2001 were not in issue. It was written as a "plain English" policy. Under the heading "B. CIRCUMSTANCES IN WHICH WE WILL PAY YOU", the policy relevantly provided:

> "If the person insured is totally disabled – and can't work
>
> If the person insured is totally disabled, we will pay you the monthly benefit. We pay you at the end of each month for which you are entitled to be paid. The person insured is totally disabled if, because of an injury or sickness, he or she is:
>
> - unable to perform at least one of the duties of his or her occupation which is necessary to produce income
> - not engaged in any occupation; and
> - under the regular care and attendance of a registered medical practitioner. The registered medical practitioner cannot be you or your family member, business partner, employee or employer, nor can it be the person insured or his or her family member, business partner, employee or employer."

[73] Under the sub-heading "When we stop paying", the policy provided, relevantly, that "We stop paying as soon as ... the person insured stops being totally disabled". The policy further provided:

> "The cause of total disablement
>
> We will decide whether the person insured's total disablement is caused by an injury or a sickness, based on medical evidence.
>
> 'Injury' means accidental bodily injury and 'sickness' means sickness or disease. However, if the person insured's total disablement does not start until 30 days after the date of an injury, we will treat the cause as a sickness."

[74] It is clear enough, as a matter of construction, that all three of the elements specified in the dot points under the definition of total disablement need to exist in order for a person to be "totally disabled" under this policy.

[75] In respect of the first element, the reference to the insured's "occupation which is necessary to produce income" is a reference to the person's occupation at the time of the making of the claim. This may not necessarily be the same occupation as the person was engaged in at the time the policy was taken out. In that regard, the term "occupation" in the context of the first element refers to the employment, trade or business in which the insured was habitually engaged and by which the insured earned their livelihood at the time of the incident.[5]

[76] The reference in the second element to "Not engaged in any occupation" is clearly not confined either to the occupation disclosed as the insured's occupation when the policy was taken out or indeed the insured's occupation at the time the claim was made.

[77] As to the third element, I respectfully agree with the observation of Gzell J in *Atton v National Mutual Life Association*:[6]

> "The phrase "under the regular care and attendance of a medical practitioner" connotes, in my view, more than one visit to a doctor. Regular care connotes repetitive medical assistance and regular attendance connotes a series of appointments."

[78] However, it is also clear that once any one or more of the three elements cease, then the insured ceases being "totally disabled". In the present case, the defendant argued that:

(a) in respect of the first element, the plaintiff's occupation at the time of the claim was not that of a "plumber" but was that of a computer consultant, and that the evidence did not support a claim that the plaintiff was unable to perform at least one of the duties of his occupation of computer consultant;

(b) the plaintiff had been engaged in "any occupation" since November 2000, i.e. computer work on a regular basis;

(c) the plaintiff has not demonstrated that he has been under the regular care and attendance of a registered medical practitioner since November 2000.

(d) The plaintiff's claim was made fraudulently, within the meaning of that term in s 56 of the *ICA*, and the defendant was entitled to refuse payment on the claim.

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5 *Bottrell v National Mutual Life* Association (2007) NSWSC 458 at [155]*; Morais v Minister of Immigration* (1995) 54 FCR 498 at 50.

6 (2007) NSWSC 310 at [24].

IS THE DEFENDANT ENTITLED TO AVOID THE POLICY?

[79] Before determining whether the defendant can resist the plaintiff's claims under the policy, it is appropriate to determine whether the defendant is entitled to avoid the policy. If it is, then that is the end of the plaintiff's case.

[80] It seems to me that, on the sequence of events which I have described, there was, strictly speaking, a new policy of insurance taken out by the plaintiff as a consequence of his 1995 application. An alternative view, however, may be that the 1995 application merely resulted in a variation of the policy which had been issued in 1993. It is, therefore, appropriate to examine the circumstances surrounding both the 1993 and 1995 applications.

[81] The defendant's contentions are that:

(a) in both his 1993 and 1995 application forms, the plaintiff made misrepresentations about his income, his occupation and his medical history;

(b) if the plaintiff had disclosed the truth, particularly in relation to his income and his occupation, neither the 1993 nor the 1995 proposals would have been accepted by the defendant;

(c) the plaintiff fraudulently failed to comply with his duty of disclosure in both 1993 and 1995;

(d) regardless of whether the policy in force as at the date of the claim was issued in 1993 or 1995, the defendant is entitled to avoid the contract of insurance which was in force as at January 2001, and there is no reason for the Court to disregard the avoidance.

[82] Section 21(1) of the *ICA* provides:

> "(1) Subject to this Act, an insured has a duty to disclose to the insurer, before the relevant contract of insurance is entered into, every matter that is known to the insured, being a matter that:
>
> (a) the insured knows to be a matter relevant to the decision of the insurer whether to accept the risk and, if so, on what terms; or
>
> (b) a reasonable person in the circumstances cold be expected to know to be a matter so relevant."

[83] The requirement under s 21(1)(b) extends to requiring disclosure of matters known to the insured which a reasonable person in the circumstances would know were relevant to the insurer, even if the insured did not know they were relevant.[7] Under the *ICA* (as it stood in 1995), the policy in question was a "continuous disability insurance contract", as that term was then defined in s 11(5) of the *ICA*, and was therefore a "contract of life insurance" under the then definition of that term in s 11(3). As at the time the policy was entered into, s 29 of the *ICA* provided:

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7 *Zurich Australian Insurance Ltd v Contour* (1990) 6 ANZ Ins Cases 60-984.

"29. (1) This section applies where the person who became the insured under a contract of life 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, but does not apply where –

(c) the insurer would have entered into the contract 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; or

(d) the failure or misrepresentation was in respect of the date of birth of one or more of the life insureds.

(2) If the failure was fraudulent or the misrepresentation was made fraudulently, the insurer may avoid the contract.

(3) If the insurer would not have been prepared to enter into a contract of life insurance with the insured on any terms if the duty of disclosure had been complied with or the misrepresentation had not been made, the insurer may within 3 years after the contract was entered into, avoid the contract.

(4) If the insurer has not avoided the contract, whether under sub-section (2) or (3) of otherwise, he may, by notice in writing given to the insured before the expiration of 3 years after the contract was entered into, vary the contract by substituting for the sum insured (including any bonuses) a sum that is not
SP less than the sum ascertained in accordance with the formula -----, where –
Q
S is the number of dollars that is equal to the sum insured (including any bonuses);
P is the number of dollars that is equal to the premium, or to the sum of the premium, that the insurer would have been likely to have charged if the duty of disclosure had been complied with or the misrepresentation had not been made.

(5) In the application of sub-section (4) in relation to a contract that provides for periodic payments, 'the sum insured' means each such payment (including any bonuses).

(6) A variation of a contract under sub-section (4) has effect from the time when the contract was entered into."

[84] In the present case, the defendant relies on s 29(2), and contends that it is entitled to avoid the contract of insurance (whether entered into in 1993 or 1995) because of fraudulent non-disclosure or fraudulent misrepresentation by the plaintiff. In the context of an insurance contract, a fraudulent misrepresentation is one which is false and which is made either knowingly, or without belief in its truth, or recklessly not

caring whether it be true or false and with the intention that it should be acted on by the insurer.[8]

Evidence about the plaintiff's income

[85] Before turning to consider whether the 1993 and 1995 application forms contained misrepresentations, it is convenient to review the evidence concerning the plaintiff's income. The most reliable source of evidence for this purpose is the tax returns lodged for the plaintiff and his family trust.

Year ended 30 June 1991

[86] The plaintiff's tax return for this year disclosed receipt of unemployment benefits totalling $4,621 and net non-primary production income of $1,319. His total taxable income was $108.

[87] On his tax return, the plaintiff listed his occupation as "plumber/gas fitter", although in evidence the plaintiff was equivocal about whether he was still working as a plumber at that time.

Year ended 30 June 1992

[88] The plaintiff's tax return for this year disclosed the receipt of unemployment benefits totalling $2,443 and a loss from his plumbing and gas fitting business of $6,599. His tax return also disclosed that he was paid gross income of $15,235 by Steelway Engineering. The "salary and wage occupation code" on this tax return recorded "plumber/gas fitter/computer ope", although in evidence the plaintiff said that in this year he was not plumbing because he "didn't have time to do plumbing when I was working for Steelway Engineering".

Year ended 30 June 1993

[89] The plaintiff's personal tax return for this financial year showed him receiving gross income of $14,412 from Steelway Engineering.

[90] This tax return also claimed a net non-primary production loss of $6,995. According to the tax return, the plaintiff was engaged in the business of "plumber and gas fitter" under the name "Eric Syddall", in which business he received income of $2,894 against which he deducted business expenses totalling $9,889, leading to a net loss for the year of $6,995. In evidence, the plaintiff denied that he had worked as a plumber during this year, said that these entries were carried over from the previous year, and said that the tax return, prepared by his tax agent, was inaccurate.

[91] In any event, the plaintiff's total taxable income for that year was disclosed as $4,578.

[92] It was during this financial year that the plaintiff's family trust (of which the plaintiff was trustee) was established. According to the 1993 tax return for the family trust, the main business activity of the trust was "program development". It disclosed gross business income of $5,301 and a net profit of $4,705. Under the

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8 *Tyndall Life Insurance Co Ltd v Chisholm* (2000) 11 ANZ Ins Cases 90-104; *Plasteel Windows Australia Pty Ltd v CE Heath Underwriting Agencies Pty Ltd* (1999) 5 ANZ Ins Cases 60-926.

business declaration, the business name of the trust estate's main business was listed as "Computer Business Systems". The statement of distribution records distributions from the trust to a number of beneficiaries, but nothing to the plaintiff.

Year ended 30 June 1994

[93] In the plaintiff's 1994 tax return, the only income recorded for this financial year was social security benefits totalling $2,068. The tax return did not record any occupation for the plaintiff, nor did it contain any entries concerning a business.

[94] The 1994 tax return for the family trust records business income of $61,350, but expenses (predominantly repairs and maintenance) of $63,892, yielding a net loss for the trust of $2,542. This tax return otherwise gave no detail as to the nature of the business conducted by the trust.

Year ended 30 June 1995

[95] The only income disclosed in the plaintiff's personal tax return for this year was social security benefits totalling $7,151. The tax return otherwise contained no information concerning the plaintiff's occupation.

[96] The family trust tax return for the 1995 year is almost blank. It discloses no income nor any business conducted by the trust.

Year ended 30 June 1996

[97] Again, the only income disclosed in the plaintiff's personal tax return for this year was income from social security benefits totalling $7,406. The return did not disclose any business or other income.

[98] The family trust return for this year is almost blank and discloses no income. The only information on it was a code number describing the "main business activity" of the trust. This code number was identified as being the code for "computer programming services". The plaintiff agreed in evidence that this code was applicable to the trust for that year.

Year ended 30 June 1997

[99] The only income disclosed on the plaintiff's personal tax return for this year was $7,404 in social security payments. No occupation was recorded.

[100] On the family trust tax return, gross income of $18,884 was declared with expenses of $23,082, yielding a loss of $4,238. The same business code was used on the tax return, i.e. that for computer programming services.

Year ended 30 June 1998

[101] The plaintiff's personal tax return for this year records his occupation as "farm hand". The only income disclosed was $8,692 in social security benefits and $685 from work as a farm hand.

[102] The family trust return for this year records the same business code, and discloses income of $11,718, with expenses of $18,647, yielding a loss of $6,931.

Year ended 30 June 1999

[103] The only income disclosed on the plaintiff's personal tax return was $8,391 in social security benefits. No occupation was noted.

[104] The family trust's tax returns for this year described its main business activity as "program development and plumbing". The return disclosed gross income of $37,314 and expenses of $54,181, yielding a loss of $16,867. This return also recorded the business name of the trust's main business as "Computer Business Systems". The business address of that business was recorded as the same as the plaintiff's residential address.

Year ended 30 June 2000

[105] Again, the only income disclosed on the plaintiff's personal tax return was $8,521 in social security benefits. No occupation was noted.

[106] On the family trust tax return, the main business activity was again recorded as "program development and plumbing". The gross income for this year was $41,092 with expenses of $42,511, yielding a loss of $1,419. The tax return also recorded the business name of "Computer Business Systems", operating from the same address as the plaintiff's residence.

Year ended 30 June 2001

[107] The plaintiff's personal tax return for this year revealed the plaintiff's home address as an address in Hong Kong. I observe here that it is the same address as that which appeared on a website for the business "AK Computers", which advertised itself as "specialized software – quality computers – tuition – service". The relevance of this will become apparent later.

[108] The only income disclosed on the plaintiff's personal tax return for this year was $5,771 in social security benefits.

[109] The family trust tax return for this year described the trust's main business activity as "computer consultancy services N.E.C.". The trust return showed gross income of $51,678 with expenses of $46,827, yielding a profit of $4,851. In this return, however, the business name of the trust's main business was disclosed as "AK Computers", but with its business address as the plaintiff's former Australian residence.

Year ended 30 June 2002

[110] The plaintiff's home address on his personal tax return for this year was again the Hong Kong address. The only income disclosed was $8,777 in social security benefits.

[111] In the family trust tax return, the main business activity was described as "computer consultancy services N.E.C.", and the business name was "AK Computers". This return showed gross income of $33,473 with expenses of $28,788, yielding a profit of $4,685.

Plaintiff's evidence on the tax returns

[112] When cross-examined on these tax returns, the plaintiff was patently unbelievable and evasive. When it suited him to adopt figures, he did so. For the most part, however, he sought to deny the accuracy of the figures and factual statements in the tax returns and, whilst grudgingly conceding that he was the source of information for the tax agent to prepare the returns, he went so far on several occasions as to deny having signed, or even sighted, the returns before copies were obtained by the defendant in the course of third party disclosure from the Australian Taxation Office in this proceeding. On several occasions, the plaintiff agreed to produce further documentation to demonstrate the inaccuracy of the tax returns, but he failed to do so.

[113] Having observed the demeanour of the plaintiff while being cross-examined, and having forming an adverse view as to his credibility as a witness, and also having regard to the facts that:

(a) the tax returns are the only contemporaneous written documents which provide a record of the plaintiff's earnings in his own name and the earnings under the family trust, and

(b) the earnings disclosed on the tax returns align with the contemporaneous records of social security payments, which were in evidence before me,

I accept the accuracy of the tax returns for the purposes of demonstrating the truth about the earnings of the plaintiff and his family trust during the financial years referred to above.

Completing the 1993 application form

[114] In his statement of evidence in chief, the plaintiff said (at para 9):

> "In about January 1993 an insurance agent (Brad Davies) came to my place of work and sold me insurance cover. I was working at Steelway Engineering at the time, was standing on the business side of the counter. My base wage when I started was $400 per week which is about $21,080 per year but I was regularly getting around $600 per week with overtime which is about $31,680 per year and on some occasions I received about $1,000. The AC&L insurance policy sale was transacted over the counter at work and I answered questions to the best of my ability given the situation and how good I was feeling with my new life. Stating my wages was not a quote from a group certificate but an estimate on the fly. As $600 a week is $31,680 per year and were wages not business profit with materials or other costs to be deducted I consider $26,000 a safe amount for the 1993 policy."

[115] Mr Davies gave quite a different version of events. In evidence before me, Mr Davies said:

(a) In 1993, Mr Davies and the plaintiff lived in the same estate at Little Mountain, and the plaintiff was a neighbour of one of Mr Davies' existing clients;

(b) The plaintiff contacted Mr Davies and asked for an idea of the cost of income protection insurance;

(c) Mr Davies subsequently went to the plaintiff's home to discuss options (Mr Davies thought they looked at both life insurance and disability insurance);

(d) Mr Davies left the documentation with the plaintiff for the plaintiff to read. The plaintiff did not want to complete everything that evening. Mr Davies left the documentation with the plaintiff, and came back either the next day or a few days later to collect it;

(e) Mr Davies was shown the 1993 application form signed by the plaintiff, and confirmed that it was his usual practice to make sure that the client filled out the form in their own handwriting. Mr Davies identified the only handwriting on the form that was his as his signature, phone number and notation of commission split;

(f) When asked whether the plaintiff had completed the application form when he returned to collect it, Mr Davies said:

> "Well, I think I picked it up, so it would have been completed, yes."

[116] Under cross-examination, this version of the circumstances of the completion of the 1993 application form was put to the plaintiff. Again, his evidence lacked credibility and he was evasive. It is sufficient to refer to the following passage of his evidence:

> "How you came to know Mr Davies? -- I came to know Mr Davies because he came to the Steelway Engineering office, just selling insurance. I didn't know Brad Davies before that.
>
> I suggest that it was through a mutual acquaintance, someone who was Mr Davies' nextdoor neighbour who knew you, and you contacted Mr Davies in order to arrange insurance cover? -- I don't know.
>
> And he visited you at your home? -- No.
>
> Then at Ridge Road, Little Mountain, and he discussed policy options with you. That's right, isn't it? -- I don't know. I don't believe so.
>
> Especially taking out a disability policy of insurance? -- I have no recollection of the knowledge of anyone that lived next to Mr Davies.
>
> Well, my question was discussing policy options with Davies at your home. Would you mind answering that question? -- I don't believe so. I believe we discussed that at Helen Street In Caloundra.
>
> You discussed the option of taking out disability insurance? -- On that occasion? At Steelway Engineering, I believe so, yes.
>
> And he left with you an AC&L application form? -- I don't remember.

> And you asked him a lot of questions about aspects of the insurance policies that might be available to you? -- I would imagine so.
>
> He returned to your home several days later and you had either partially completed the form or fully completed the form? -- No idea.
>
> To the extent it wasn't completed when he arrived, you completed it with him in his presence? -- Got no idea.
>
> But in your own handwriting? -- I've got no idea of the occasions."

[117] The plaintiff did, however, confirm that he decided how to answer each question on the form, saying:

> "Brad Davies wouldn't have had any information on my income, no."

[118] Having assessed this evidence, I find:

(a) The circumstances of the completion and signing of the 1993 application form was as described by Mr Davies;

(b) The plaintiff personally completed the information disclosed on the form;

(c) The application form was left with the plaintiff for him to complete at his leisure; it was not completed "on the fly" while standing at a counter at Steelway Engineering.

Representations on the 1993 application form

Representation concerning earnings

[119] On his 1993 application form, the plaintiff described his "principal occupation" as "computer operator/programming", and said he had been in this occupation for one year.

[120] In answer to the question "What were your earnings from your principal occupation (net of business expenses but before tax) over the last 12 months?", the plaintiff answered "$26,000".

[121] In answer to the question "What were your earnings in the full financial year prior to that period?", the plaintiff answered "$24,000".

[122] This application form was signed by the plaintiff on 18 January 1993.

[123] The first question clearly directed attention to the period January 1992 – January 1993. An examination of the plaintiff's tax returns for the two financial years which that period straddles (i.e. the year ended 30 June 1992 and the year ended 30 June 1993) make it clear that the plaintiff's earnings over that 12 months period from his occupation of "computer operator – programming", which on his evidence he was only performing at that time for Steelway Engineering, was nothing like $26,000 for the 12 months prior to 18 January 1993. Even if one includes the income for the business of "program development" earned by the family trust during the 1993 financial year, the total of the income derived from Steelway Engineering over the two complete financial years was $34,948. It is simply not

credible that the plaintiff's income for the 12 months from January 1992 to January 1993 was $26,000 or anything like it.

[124] Even if, as the plaintiff seemed to suggest in certain parts of his evidence, he mistook the question as requiring him to give his earnings from his principal occupation over the financial year which preceded the form being completed, it is clear that his income from Steelway Engineering during the 1992 financial year was nothing like the $26,000 represented on the application form.

[125] The second question sought disclosure of the plaintiff's earnings for the financial year ended 30 June 1991. Details of the earnings disclosed on his tax return are set out above. They were nothing like the $24,000 which he represented on the application form.

[126] I conclude that the plaintiff made misrepresentations with respect to his income on the 1993 application form.

[127] I note that the plaintiff has disclosed deposit slips dating back only to 5 March 1993. Those deposit slips demonstrate that from March to December 1993 the plaintiff was receiving between $2,500 and $3,000 per month from Steelway Engineering. I infer from the amounts of income disclosed in the tax returns relevant to that period that these amounts were paid to, or accounted for in, the family trust. There is, however, no contemporaneous documentary evidence whatsoever to support the plaintiff's assertion that he was earning those sorts of amounts prior to January 1993. On the contrary, his tax returns tell a completely different story.

Representations concerning occupation

[128] In the 1993 application form, the plaintiff described his "principal occupation" as "computer operator – programming", and said that he had been in that occupation for one year. When asked the name and address of his employer, he wrote "self". He described the nature and specific duties of his occupation as "data processing". In answer to the question "Are you self employed?", the plaintiff answered "Yes".

[129] In answer to the question "Do you have a second occupation?", the plaintiff answered "No".

[130] According to his tax returns, however, the plaintiff was not self employed as at January 1993. He was a PAYE employee of Steelway Engineering in both the 1992 and 1993 financial years. His tax returns disclose the amount of tax deducted and recorded on the group certificates issued by Steelway Engineering for both of those years. His representation that he was a self employed computer operator – programmer was therefore false. But even if he was self-employed and working under some sort of sub-contract to Steelway Engineering, as was suggested in the evidence, that does not impact on the other representation. His representation that he did not have a second occupation was false. His tax returns for that period record his receipt of income from plumbing.

Representations as to his medical history

[131] The plaintiff ticked the response "No" in response to every question on the application form concerning his medical history, including a question whether he had ever had, or been told he had, or received advice or treatment for, *inter alia*,

mental or nervous disorder and a question whether he had been in hospital within the previous five years.

[132] Reference to the Nambour Hospital file, which was in evidence before me, shows that these representations were plainly false. In May 1990 the plaintiff had presented to the hospital reporting concerns that he might have psychiatric problems. On 16 May 1990 the plaintiff sought voluntary admission to the hospital under the *Mental Health Services Act*. The hospital notes taken on his admission on that occasion record that he was having difficulty accepting his recent marital separation, and sets out the history given by the plaintiff concerning recent litigation between him and his ex wife. The notes record, inter alia, that:

> "He has considered suicide briefly but has made no plans and says he would have done it by now if he were going to, however he would be in a high risk group."

The notes describe his dress as "dishevelled", that he presented with a "sad" mood, and that his affect was tearful. He was assessed as presenting a low suicide risk acutely but his progress was to be monitored. Without rehearsing all of the hospital notes, it is sufficient to note that the provisional diagnosis made was of "a situational crisis". This crisis was said to follow his marriage separation from his wife. The plaintiff was discharged on 18 May 1990.

[133] The plaintiff's version as to his admission to the Nambour Hospital on this occasion was as follows in his evidence in chief:

> "At one point I was without somewhere to live, I was trying to arrange accommodation at a caravan park but didn't have any money. Whilst at the court, a 'friend of the court' suggested I could go to the hospital at Nambour, tell them my situation, and whilst I was organising accommodation I would at least have a shower, bed and food. I did this, and during a short time quickly organised other accommodation."

[134] Further in his evidence, the plaintiff said that he was not told at that time that he had a mental illness or that there was anything in particular he should do. He said he was not referred to the hospital and received no counselling related to mental disorder. He further said that had this event come to mind, he would not have considered it in any way a risk to an insurer or that it could have been categorised as a mental disorder.

[135] The plaintiff was cross-examined at some length on the circumstances of his admission to the Nambour Hospital in 1990, and the accuracy of statements attributed to him in the medical records concerning his own state of mental health, his history, and the history of other members of his family. Again, the plaintiff was evasive in his evidence, frequently denying the accuracy of statements attributed to him when it was obvious that he was the only possible source of the information which had been recorded. The plaintiff argued, both under cross-examination and in his final submissions, that the level of stress from which he was suffering at the time he was admitted to the Nambour Hospital in 1990 was not sufficient to have it qualify as falling within the insurance industry guidelines for the definition of "depression".

[136] Despite all of that, however, and despite what the plaintiff may or may not have thought about the level of stress under which he was suffering at the time he admitted himself to the Nambour Hospital, the 1993 application form plainly asked the plaintiff whether he had, other than already stated, within the last five years "had any medical examination, advice, treatment or been in hospital?". The only prior medical condition that the plaintiff disclosed was attending at the Landsborough Clinic in 1989 with a sprained ankle. In answer to the question concerning any other medical examination, advice, treatment or hospital admission in the last five years, the plaintiff answered "No". This answer was clearly false. The plaintiff gave no credible explanation for having given that answer.

The application of s 26 of the *ICA* to the statements on the 1993 application form

[137] The defendant submits that, whilst not pleaded by the plaintiff, it is nevertheless necessary for me to consider the effect of s 26 in relation to the misrepresentations made by the plaintiff concerning his income, occupation and medical history. Section 26 of the *ICA* provides:

> "(1) Where a statement that was made by a person in connection with a proposed contract of insurance was in fact untrue but was made on the basis of a belief that the person held, being a belief that a reasonable person in the circumstances would have held, the statement shall not be taken to be a misrepresentation.
>
> (2) A statement that was made by a person in connection with a proposed contract of insurance shall not be taken to be a misrepresentation unless the person who made the statement knew, or a reasonable person in the circumstances could be expected to have known, that the statement would have been relevant to the decision of the insurer whether to accept the risk and, if so, on what terms.
>
> (3) This section extends to the provision of insurance cover in respect of:
>
> (a) a person who is seeking to become a member of a superannuation or retirement scheme; or
>
> (b) a person who is a holder, or is applying to become a holder, of an RSA."

[138] Dealing first with s 26(1), I do not consider, on the evidence to which I have referred, that a reasonable person in the circumstances of the plaintiff in January 1993 would have believed in the truth of the representations made by the plaintiff about his prior earnings, his occupation and his medical history. Indeed, on the basis of the evidence to which I have referred, I would say that a reasonable person in the circumstances of the plaintiff at that time would have seen his responses as positively untrue.

[139] As to s 26(2), it needs to be recalled that the cover which the plaintiff was seeking to obtain from ACL was an income protection policy, i.e. an insurance policy designed to provide financial protection to the insured in the event of the insured being unable to work, and thereby earn income, as a consequence of illness or accident. A reasonable person in the circumstances of the plaintiff in January 1993 would, in my opinion, certainly have been expected to know that, when considering a proposal to take on such a risk, statements by the proposer (in this case, the

plaintiff) as to his earnings, his occupation, and his medical history would be relevant to the decision whether or not to accept the risk.

[140] Section 26 does not avail the plaintiff in respect of the 1993 application form.

Would the insurer have entered into the 1993 policy?

[141] On the basis of the findings above, it is clear that the plaintiff both failed to comply with the duty of disclosure and made misrepresentations to ACL before the 1993 policy was issued.

[142] It is then relevant to consider whether the insurer would have issued the 1993 policy even if the plaintiff had not failed to comply with the duty of disclosure or had not made the misrepresentations – s 29(1)(c).

[143] The defendant led evidence on this issue from Ms Carolyn Forway, who worked for ACL as an underwriter. She is now a senior underwriter with another insurer, having ceased work with ACL in the mid-1990s. Whilst she quite understandably did not have an independent recollection of assessing the plaintiff's 1993 application, she was able, by reference to her handwriting and initials on the documentation, to confirm that she was the underwriter in ACL who assessed his application and made the decision to issue the policy. Ms Forway also identified that, for the purpose of giving her evidence, she had regard to other documents (which were in evidence before me), namely the 1992 ACL Rate Guide and the reinsurance manual containing guidelines for neurosis rating.

[144] Ms Forway identified that the plaintiff had applied for a "Premier Income Protector Policy", which she described as the premium product for white collar professionals and clerical workers. She noted that the plaintiff had described himself as a computer operator, which was an appropriate clerical occupation to fall in the "A1" category in the Rate Guide. She identified the relevance of answers given on the application form to length of time in occupation and income details. She said that ACL generally allowed self-employed people to take insurance after being self-employed for 12 months and, on the face of the form, the plaintiff met that requirement. She explained the requirement for a minimum of 12 months of self-employment on the basis of the risk of self-employment failing within the first 12 months of a person's own business. She explained the relevance of self-employment for underwriting purposes:

> "We need to make sure that they are actually in either a contract role, or they have actually got constant or steady income coming into the business to enable [the insurer] to insure that. So we need to find out who they are working for and where they are getting their work from."

[145] Ms Forway then explained the relevance of the income to this particular sort of policy. She referred to the guidelines and said:

> "We need to make sure that they meet the minimum requirement for the income and that they are earning a steady income over those two years."

[146] Ms Forway also explained that the monthly benefits which could be obtained under this policy could not exceed 75 per cent of the declared income, saying that "we've just got to make sure that they are earning that income to justify the monthly benefit".

[147] Ms Forway was referred to the plaintiff's disclosed earnings of $26,000 per annum, and described it as "average" and that it did not cause alarm bells to ring.

[148] Ms Forway identified a letter she had written on 27 January 1993 to the plaintiff referring to his proposal and asking him to advise the name and address of his current employer. The response, signed by the plaintiff and dated 29 January 1993 was "self/subcontract to Steelway Engineering".

[149] Ms Forway said that this information received from the plaintiff, in conjunction with the representations on the application form, were sufficient to satisfy her "because he's told us that he's subcontracting to an engineering company and he's been doing it for 12 months".

[150] Ms Forway was referred to the fact that the plaintiff had ticked "No" in response to the question concerning a second occupation. She explained the relevance of this:

> "If the client does have a second occupation we need to know the duties and details of his income for us to make sure – to see what his occupation is at the time. He may be working as a manual worker. He may be doing hours – larger hours which may be higher than – hours that are higher than his principal occupation, so he really may be another occupation rate and it could change the whole contract."

[151] She confirmed that a second occupation could affect the occupation rating applied to the proposal, and change the whole policy.

[152] Ms Forway also gave evidence of the importance to the underwriting decision of accuracy in details concerning the proposer's medical history.

[153] Ms Forway was then taken at some length through the factual inaccuracies in the plaintiff's 1993 application form, and was asked, in effect, what decisions would have been made if she had been provided with true information. Her evidence was that:

(a) if she had been informed of the plaintiff's second occupation as a plumber, he would have been rated for underwriting purposes as a plumber, because there was a higher risk of the client injuring himself as a consequence of it being a manual occupation. The Premier Income Protector Policy would not have been offered to the plaintiff if he had disclosed a second occupation of plumber;

(b) if the true income received from Steelway Engineering had been disclosed, it would have demonstrated to Ms Forway that the income level was below the minimum income that the client can earn for insurance. Moreover, if she had been informed of the plaintiff receiving social security benefits, this would have affected the underwriting decision because the insurer did not insure for unemployment benefits. Had she been aware of him receiving unemployment benefits, it would have "set alarm bells off":

> "Why is the client receiving unemployment benefits, when he told us he was a computer operator for the previous 12 months?"

(c) if Ms Forway had been told the truth about the plaintiff's earnings in the 1992 financial year, it would have had an affect on her underwriting decision – "I would like to know where that income is coming from and why there is a loss". She said that disclosure of the true information would have led to a chain of inquiry, including asking to see the plaintiff's tax returns and any profit and loss accounts. Disclosure of those accounts may have led to further assessment, e.g. by adding back non-cash expenses like depreciation, or taking account of income splitting with a spouse. At the least, the disclosure of the loss would have led to further inquiries. But in any event, if it had been disclosed to Ms Forway that the plaintiff's taxable income for the whole of the 1992 financial year was $9,269, she would not have offered cover because this did not meet ACL's minimum annual income requirement;

(d) in relation to the medical information provided by the plaintiff, Ms Forway was taken through the plaintiff's actual medical history and said that if she had been given that information she would have referred to the reinsurance guidelines in use at the time. She said she would have referred to the neurosis rating guidelines, and would have had to determine whether the plaintiff's condition (as disclosed in the medical evidence) was categorised as mild, moderate or severe. She said, by reference to the neurosis rating guide that because the plaintiff was an inpatient being treated, he would have been rated as "severe", and on that basis the plaintiff's proposal would have been declined.

[154] In short, the evidence of Ms Forway, which I accept, was that if the insurer had known the truth about each of the matters concerning the plaintiff's earnings, occupation and medical history, the policy would not have been issued in 1993. Having regard to the nature of the policy which was being sought, I find that ACL would not have entered into the 1993 policy even if the plaintiff had not failed to comply with his duty of disclosure or had not made the misrepresentations referred to above.

Was the plaintiff fraudulent in connection with the 1993 application?

[155] Later in this judgment, I record my reasons for finding, as I do, that the plaintiff has a demonstrable record of making whatever representations he considers necessary to achieve a particular purpose, regardless of the truth or falsity of those representations.

[156] The plaintiff's conduct in making the misrepresentations in the 1993 application form exemplify that finding.

[157] The misstatements as to his earnings were, as I have noted, demonstrably and completely untrue. It is simply not credible to suggest that these numbers were included inadvertently or by mistake. They were clearly stated to achieve an end, i.e. obtaining the benefit of the income protection policy.

[158] No credible explanation was given for the plaintiff's denial on the form of having a second occupation.

[159] The false representation as to his medical history also defies logical explanation. The omission of disclosure of the admission to a psychiatric unit in 1990 stands in

contrast to the fact that the plaintiff did disclose having suffered a sprained ankle in 1989.

[160] I find that the plaintiff made these misrepresentations deliberately for the purpose of procuring the insurance cover. He acted dishonestly, and the misrepresentations were fraudulent.

Completing the 1995 application form

[161] The June 1995 application sought a variation to the existing income protection cover by seeking an increase to the sum insured under the policy by increasing the monthly benefits from $1,600 to $3,000.

[162] In his evidence in chief, the plaintiff said:

> "By about June 1995 I was earning about $12,000 per month overall but had business expenses. I estimated a clear return for my personal effort to be about $50,000 per annum though in some months from the insurance sales and alike there were no great costs or outlays i.e.: June/July 1995 the $12,000 odd, had only about 10% in outlays therefore I felt $48,000 a well and truly safe figure. I based the previous year on $600 plus per week being about $32,000 with no deductions per se. ...
>
> In about 1994 I left employment of Steelway Engineering and worked instead as a subcontractor and was having some contact with the insurance agent. Brad suggested (in effect) that Prudential Insurance had programmers that were writing data bases and where earning around $90,000 or $100,000 per year. I was at that stage earning about $600 to $1,000 a week and working long hours so it sounded attractive. Involvement with Brad Davies lead me into the insurance area, but I was unable to break into the Prudential programming area. In about 1995 I had resolved that I would not be able to do programming in a commercial environment. I did not start to familiarise myself with AC&L product and development a business relationship with AC&L after I was considered as an agent for them, but did so in the lead up to being considered an agent.
>
> In taking up work as an agent with AC&L, I was not aware of an official agreement and was not aware it had even been officially ended. I received no paperwork to my memory of either event or that I would no longer be receiving commissions based on existing and current policies credited to my agent number as business that generated income for the defendant. In stating I was working with AC&L as an agent in about March 1995, it is not a fraudulent statement nor intended to give me gain of any sort. I only have a vague memory of what happened in 1995. I was not an employee of AC&L and did not have the benefit of documents such as group certificates.
>
> ...
>
> I applied to have my [income protection] policy moved to my agency portfolio and for an increase in my insurance cover. The insurance increase was granted and a policy issued and in the same process 100% of the commission was also allocated to me. In the meantime I was becoming aware of what was required by the policies and what different things meant in relation to insurance."

[163] This evidence sits ill with evidence which the plaintiff gave in an affidavit affirmed on 9 May 2007, in which he said:

> "9. On filling out the 1995 application form I was told that, as I had been working as an agent for only a few months, and even though programming was no longer my occupation and seemed unlikely that I would be able to return to it, I should put that down as my first occupation and in the second occupation list my current occupation and starting date. As the question of income related only to my own activity of my principal occupation (question 13) and I was not aware of the tax figures and as AC&L wanted me to have the policy immediately, and as my income was increasing quickly at that stage, and as it was from my activity and not concerned with Family Trust matters, the income was estimated. Like wise for the previous year, I had been earning over $3,000 a month ($36,000 year) and estimated about $4,000 in expenses and discounted the Family Trust effects."

[164] It is clear enough on the evidence, and indeed admitted on the pleadings, that at the time of completing the 1995 application form the plaintiff was working as an insurance agent for ACL and Prudential Insurance. His agency agreement with Prudential commenced in March 1995 and the agency agreement with ACL commencing in May 1995.

[165] It is also clear on the evidence that the plaintiff filled out the 1995 application form himself. In the course of his evidence, he initially suggested that Brad Davies had filled out the form, or written on one part of the form, but ultimately the plaintiff admitted to having filled out the form himself.

[166] I reject any suggestion by the plaintiff that he was denied the opportunity to refer to any records when completing the 1995 application form. As I have said, it is clear that he completed the form himself. He also obviously had sufficient opportunity to check the accuracy of the responses given on the form – so much is apparent from the fact that the form was signed and dated by him on 15 June 1995 but he did not actually send it to ACL until 26 June 1995.

Representations on the 1995 application form

Representations of income

[167] The plaintiff represented that the income earned from his "principal occupation" over the last 12 months (i.e. effectively for the financial year ended 30 June 1995) was $48,000.

[168] By reference to his tax returns, and even making allowance for the family trust, this representation was demonstrably false.

[169] In answer to the question as to his income in the prior full financial year (i.e. the financial year ended 30 June 1994), the plaintiff answered $32,000.

[170] Again, by reference to the tax returns of the plaintiff and his family trust, this representation was also demonstrably false.

[171] To the extent that further confirmation of the falsity of these representations is required, it is appropriate to refer, as the defendant did in submissions, to the

information provided by the plaintiff to the Department of Social Security when he was applying for benefits in the period prior to his completion of the 1995 application form. The evidence discloses:

(a) In an application form for benefits for the period 7 December 1994 to 20 December 1994, the plaintiff stated that:

- he did not do a full time job during this period;
- he did not do any part time or casual work during this period;
- neither he nor his partner received any other money during this period.

(b) He gave similar answers in an application he made for benefits for the period 21 December 1994 to 3 January 1995;

(c) On 9 May 1995, the plaintiff completed a social security claim form in which he said that he or his partner had received income, which he described as "income from family trust – amount being determined by accountant (currently). We may not receive any income for 94-95 year at this stage".

[172] It almost goes without saying that these responses that the plaintiff gave to Centrelink for the purposes of obtaining benefits stand in stark contrast to the representations he made to ACL in his 1995 application form.

[173] Further, the evidence[9] demonstrates that the entirety of the commissions received by the plaintiff for his work in insurance sales for the period May 1995 to October 1995 totalled only $5,062.11. The assertion that he had earned $3,000 per month since December 1994 as an insurance agent was simply untrue.

[174] In short, there is simply no evidence to support the assertions by the plaintiff as to the level of his alleged earnings at the time he completed the 1995 application form.

Representations as to occupation

[175] In the 1995 application form, the plaintiff identified his "principal occupation" as "computer programmer", contending that he was self-employed and that the nature of his business was "computer/database management". He said that he had a second occupation, and gave the following detail:

> "Insurance agent. $3,000 per month to date started Dec 94."

[176] The information given on the application form by the plaintiff is, however, difficult to reconcile with evidence given by the plaintiff in this proceeding. In an affidavit sworn on 9 May 2007, the plaintiff said:

> "On filling out the 1995 application form I was told that, as I had been working as an agent for only a few months and even though programming was no longer my occupation it seemed unlikely that I would be able to return to it, I should put that down as my first occupation and in the second occupation list my current occupation and starting date as a question of income related only to my own activity of my principal occupation (question 13) and I was not aware of the tax figures and as AC&L wanted me to have the policy immediately, and as my income was increasing

[9] Exhibit 9 – schedule of commission payments.

> quickly at that stage, and as it was for my activity in not concerning the family trust matters, income was estimate. Likewise for the previous year, I had been earning over $3,000 a month ($36,000 a year) and estimate about $4,000 in expenses and discounted the family trust effects."

[177] In any event, under cross-examination the plaintiff admitted that at the time of completing the 1995 application form, he was certainly not spending 40 hours plus per week as a computer programmer, and said:

> "When I filled out the application form in 1995 in June I was working with Forbes Chatham Insurance Brokers, I think they're called, and Brad Davies and going down to sales pitch seminars with Prudential Insurance and starting to do some work with AC&L policies."

[178] The plaintiff also affirmed answers that he had given to interrogatories to the effect that he had ceased computer programming in about December 1994.

[179] It is clear, on the evidence, that the plaintiff's representations concerning his principal occupation, and indeed concerning his second occupation, at the time he completed the June 1995 application form were false.

Representations as to medical history

[180] In the June 1995 application, the plaintiff was asked whether he had ever had, or been told he had, or received advice or treatment for, *inter alia*, mental or nervous disorder (e.g. stress, depression). He answered "No" to that question. On the basis of the evidence outlined at length above, that answer was also false.

The impact of s 26 of the *ICA*

[181] The defendant has requested that I make findings under s 26 of the *ICA* in respect of the misrepresentations contained in the plaintiff's 1995 application form.

[182] The misrepresentations as to income were so far from the truth, as disclosed in the contemporaneous financial information, that no reasonable person in the circumstances of the plaintiff at the time could have held a belief as to the truth of these statements. Similarly, a reasonable person in the circumstances of the plaintiff, particularly in light of the evidence that he had ceased working as a computer programmer, could not, in my opinion, have held a belief as to the truth of the representations made by the plaintiff concerning his occupation. Nor could a reasonable person in the circumstances of the plaintiff, knowing of their admission to hospital in 1990, have held a belief in the truth of the representations made by the plaintiff concerning his medical history. Section 26(1) does not assist the plaintiff.

[183] In respect of s 26(2) it is important to recall that, at the time the plaintiff made these representations, he was working as an insurance agent. It is, in my view, clear that a reasonable person in the plaintiff's circumstances at the time could have been expected to have known that the statements made by the plaintiff concerning his earnings, occupation and medical history would have been relevant to the insurer's decision whether to accept the risk relating to income protection.

[184] Accordingly, s 26 does not assist the plaintiff in relation to the misrepresentations contained in the 1995 application form.

Would the insurer have entered into the 1995 policy?

[185] As was the case when considering the circumstances in 1993, it is also necessary to consider whether the insurer would have issued the 1995 policy even if the plaintiff had not failed to comply with the duty of disclosure or had not made the misrepresentations which he made in the 1995 application form.

[186] The defendant led evidence from Ms Debra Jeon, a senior underwriter. She was employed by ACL (and later the defendant) from March 1993 until November 2004. Since December 2006, she has been employed in underwriting management positions with other insurers. Ms Jeon was the underwriter who approved the plaintiff's 1995 application.

[187] Ms Jeon was unable to recall specifically dealing with the plaintiff's application, but identified from the file that she was the underwriter who handled this application. She was able to give evidence as to her normal practice in dealing with such applications. She said that the existing underwriting file would have been retrieved from storage when she assessed the 1995 application. She said that it was her ordinary practice in June 1995 to look at the application. She would have noted that the plaintiff was applying for a premier income protector policy, for lifetime accident and lifetime sickness benefits with a 30 day waiting period, and was applying for a $3,000 monthly benefit with a seven per cent escalation.

[188] In relation to the occupation disclosed on the application form, Ms Jeon said that she would have noted the occupation listed as "computer programmer", and also noted that this was given a "AA" occupation category. By reference to the ACL rate book, she would have identified that this was the correct occupation rating for a computer programmer. She would have noted the second occupation disclosed as insurance agent, but said that an insurance agent was only rated as "AA" when they are qualified and well-established. I interpolate that, on any view of the evidence, at the time of the June 1995 application form the plaintiff was neither qualified nor well-established as an insurance agent.

[189] Ms Jeon said that if the plaintiff had represented that his only occupation as at June 1995 was as an insurance agent, and that he had been in that occupation for three or six months, she would have written to him to ask him for more information about his new occupation. She said that, as an underwriter, she was aware of the fact that a high percentage of new businesses fail within their first 12 months, and that this represents a risk for an insurer. She said that if no further information had been forthcoming, and that the information about the plaintiff's occupation was that he had been an insurance agent for three months or six months, Ms Jeon would have declined the increase for cover due to the occupation and history. She said that if the plaintiff had stated that his principal occupation was insurance agent, and he had been in that occupation for about six months, and his second occupation was computer programming, she would have looked at the matter differently, depending on what was disclosed.

[190] In relation to the plaintiff's income, Ms Jeon was referred to the true state of the plaintiff's income according to his tax returns and receipt of Centrelink benefits. Her evidence was as follows:

> "If you had known that in that year ended 30 June 1994 Mr Syddall's individual tax return demonstrated only Centrelink benefits of $2,068 and a

> loss to his family trust, and then for the financial year above that at paragraph A is the financial year ended 30 June 1995 that his tax return demonstrated Centrelink of 7151 and a blank family trust tax return, would you underwriting decision have been the same? -- No. No, it would not have. One of the guidelines that is indicated in the rate book is that the minimum annual income should be $16,000.
>
> Yes? -- And that's on page 235 under the heading 'Acceptable number of hours worked', and it's the second sentence that says, 'Also the minimum earnings must be $16,000 per annum.'
>
> Okay. So what would the underwriting decision have been, had the information contained on the sheet of paper that I've just handed up to the about the earnings in the 1994 and 1995 financial years – had that been disclosed on this application? -- We would have declined this application."

[191] Ms Jeon was also taken to the answers given by the plaintiff in relation to his medical history, and said that if the plaintiff had answered "Yes" and disclosed that he had been admitted to the psychiatric unit of the Nambour Hospital for three nights commencing 16 May 1990, she would have written to his doctor or the hospital to find out more about his psychiatric condition. She said that, on the basis that the client had signed a form allowing access to medical records, the hospital would usually supply a copy of its hospital notes. Ms Jeon was referred to the Nambour Hospital records relating to the plaintiff's admission in 1990, and said that she would have rated his depression as "severe" pursuant to the relevant reinsurer's guidelines. Her evidence was that this rating would have led to cover being declined.

[192] On the basis of Ms Jeon's evidence, which I accept, I find that if the insurer had known the truth about each of the matters which the plaintiff misrepresented to it, the insurer would not have accepted the 1995 proposal, and would not have extended the cover as sought in that application form.

Was the plaintiff fraudulent?

[193] The plaintiff's representations as to his earnings bore no relationship to the truth, as disclosed in the tax returns.

[194] Moreover, at the time he made these representations about his earnings to the defendant, the plaintiff was, and had since April 1994, been in receipt of social security benefits. On 9 May 1995 (only five weeks before he signed the 1995 application form) the plaintiff signed a "Job Search/Newstart/Youth Training Allowance" form in which he declared that he was unemployed.

[195] By the time he signed the 1995 application form, the plaintiff had started working and training in the insurance sales industry. I consider the most likely explanation for the plaintiff nominating his annual income as $48,000 was that he wanted to obtain cover for benefits of $3,000 per month ($36,000 per annum) and he knew that the insurer would not provide benefits beyond 75 per cent of annual income. Thus, to obtain insurance benefits of $3,000 per month, the plaintiff had to disclose annual income of $48,000.

[196] The plaintiff's misrepresentations about his income were, in my assessment, dishonestly made with a view to obtaining an increase in the level of insurance cover.

[197] I also find that the plaintiff's misrepresentations as to his occupation (including the patently false information about his earnings in his second occupation of insurance agent) were deliberately made in order to make the application look more attractive to the defendant and thereby enhance the prospect of obtaining the increase in insurance cover.

[198] The misrepresentation as to his medical history was, if not done deliberately, at the very least an answer which was indifferent to the truth.

[199] Accordingly, I find that the misrepresentations in the 1995 application form were made fraudulently.

Conclusion on avoidance

[200] It follows from the findings above that the defendant was entitled to avoid the contract of insurance with the plaintiff as a consequence of the plaintiff's fraudulent failure to comply with the duty of disclosure and the fraudulent misrepresentations in respect of both the 1993 and 1995 applications.

[201] Section 31 of the *ICA* provides:

> "(1) In any proceedings by the insured in respect of a contract of insurance that has been avoided on the ground of fraudulent failure to comply with the duty of disclosure or fraudulent misrepresentation, the court may, if it would be harsh and unfair not to do so, but subject to this section, disregard the avoidance and, if it does so, shall allow the insured to recover the whole, or such part as the court thinks just and equitable in the circumstances, of the amount that would have been payable if the contract had not been avoided.
>
> (2) The power conferred by subsection (1) may be exercised only where the court is of the opinion that, in respect of the loss that is the subject of the proceedings before the court, the insurer has not been prejudiced by the failure or misrepresentation or, if the insurer has been so prejudiced, the prejudice is minimal or insignificant.
>
> (3) In exercising the power conferred by subsection (1), the court:
>
> (a) shall have regard to the need to deter fraudulent conduct in relation to insurance; and
>
> (b) shall weight the extent of the culpability of the insured in the fraudulent conduct against the magnitude of the loss that would be suffered by the insured if the avoidance were not disregarded;
>
> But may also have regard to any other relevant matter.
>
> (4) The power conferred by subsection (1) applies only in relation to the loss that is the subject of the proceedings before the court, and any disregard by the court of the avoidance does not otherwise operate to reinstate the contract."

[202] This section confers a discretion to disregard the avoidance "if it would be harsh and unfair not to do so". The discretion may, however, only be exercised if I am of the opinion that, in respect of the loss which is the subject of the proceedings before the Court, the defendant has not been prejudiced by the failure or misrepresentation, or if such prejudice is minimal or insignificant. I do not consider this to be the case at all. On the contrary, it is clear, for the reasons described above, that the policies of insurance would never have been entered into if the plaintiff had told the truth. In those circumstances, it cannot be said that any prejudice by the failure or misrepresentation would be minimal or non-existent.

[203] Accordingly, I do not consider this an appropriate case in which to disregard the defendant's entitlement to avoid the policy pursuant to which the plaintiff makes claim.

[204] On the basis that the defendant is, therefore, entitled to avoid the policy pursuant to which the plaintiff makes claim, the plaintiff's claim should be dismissed.

THE CLAIM BY THE PLAINTIFF UNDER THE POLICY

[205] In the event that I am incorrect in holding that the defendant was and is entitled to avoid the policy under which the plaintiff has made claim, it is necessary to turn to consider whether the plaintiff has established an entitlement to the indemnification he sought under the policy.

[206] It will be recalled that the plaintiff's entitlement to be paid the monthly benefits under the policy required that all three of the elements for total disablement be present, namely:

(a) that he was unable to perform at least one of the duties of his occupation which was necessary to produce income;

(b) that he was not engaged in any occupation; and

(c) that he was under the regular care and attendance of a registered medical practitioner.

[207] In order to see whether these elements were satisfied in the present case, it is necessary to make some findings in relation to the plaintiff's occupation and in relation to his level of disability and the impact of that disability on his capacity to engage in any occupation.

The plaintiff's occupation

[208] In the claim form signed by the plaintiff on 16 January 2001, he asserted that his occupation was "plumber" and that his occupational duties were "general plumbing – roofing".

[209] This was simply incorrect.

[210] In his evidence in chief, the plaintiff said:

> "Through 1998 and 2000 I wanted to complete my studies for my builders business and continue to work and pay for my studies, feed myself, etc. Around September 2000 I had taken on my new business of building

> maintenance using my existing plumbing skills and connections with a goal to achieve domestic and commercial building registration. I had estimated that I could do at least one major job on my own each month as well as undertake organisational tasks for other jobs and that on each completed job I should net about $8,000. I was content to start in this light and felt once licensed I could take on more complex projects and hire staff. Because of bad weather in October 2000 I could not safely remove the house roof. I could not leave the job untouched due to water damage already occurring from the poor state of the existing roof and the intended work was an occupied dwelling. I made some temporary silicone based repairs on the broken roof tiles which stopped the leaks and allowed the inside to be renovated while I waited for the weather to clear favourably. ... Because of the delay I wanted help to finish it quickly once the weather did clear, otherwise I would have been working alone as I had done with renovations or other roofing in the past. To that end two friends of mine, Bill Scurry and Geophery Makin, came to the job to assist in removing the roof tiles, replace rotten timber and place the new roof sheeting.
>
> On the 27.11.2000 whilst completing a roof restoration I suffered a disability thinking I had dislocated my shoulder, the onset of the pain was instant, not gradual."

[211] The plaintiff adduced no evidence whatsoever to support his contention that he had established a business of building maintenance. As the analysis of the tax returns for both the plaintiff and the family trust show, there was no evidence on his tax returns of the plaintiff deriving any income from such plumbing or building activities prior to the incident in November 2000. The business engaged in by the family trust was disclosed as computer related, and had nothing to do with plumbing or building.

[212] It is true that in the first semester of 2000, the plaintiff completed a number of TAFE subjects in the "Certificate IV in Business (Administration)" course at the Cooloola Sunshine Institute of TAFE. Ms Chester, a senior assessment officer at the Queensland Building Services Authority with experience in assessing the licensing qualifications for persons seeking licences to perform building work, gave evidence and confirmed that the managerial course undertaken by the plaintiff at TAFE was not an approved managerial course for the purpose of obtaining a builder's licence, but was an administration course. Ms Chester said that she was absolutely satisfied that the course that the plaintiff had undertaken was not one which was capable of being approved as a managerial course by the QBSA. Under cross-examination, it emerged that the plaintiff had previously completed two of the 14 modules formerly contained in the course of study required to obtain builder's registration, but there was no evidence of him otherwise having completed any subjects or further study for that purpose.

[213] In sharp contrast to the lack of evidence concerning the plaintiff's engagement in the occupation of "plumber", there was an overwhelming preponderance of evidence which demonstrated that both before and after the incident in 2000, the plaintiff was engaged in the business of computer programming and servicing. The income from his efforts in that regard was predominantly channelled through the family trust. The plaintiff's repeated position was that his involvement in computers was really little more than a "hobby". The evidence paints quite a different picture.

[214] For example, in his evidence in chief the plaintiff said that he "maintained amateur radio and by association computers as my hobby" and:

(a) said that from mid-1995 he only maintained the database program for Steelway Engineering, did not consider his transactions with Mr Kronk as ongoing business but an extension of his hobby;

(b) referred to a "point of sale" program which he had written between 1990 and 1995 and had sold to a number of stores. The plaintiff referred to there being "only a couple of shops" using the software by about 1998-2000, and sought to portray the owners of those shops as personal friends and that, in effect, he was doing those friends a favour by continuing to service the software.

[215] In fact, as can be seen from the list of deposits made to the family trust account between 1995 and December 2000,[10] more than 90 customers paid for the provision of computer related services during that period.

[216] Under cross-examination, the plaintiff refused to accept that he was carrying on his computer business after November 2000, but did concede that in relation to the business "AK Computers", the business name existed, invoices were written, moneys were paid and services were provided "in a sense". In fact, many of the customers to whom the plaintiff had provided computer services prior to 2000 remained customers after 2000. Further, the plaintiff continued, after November 2000, to be an authorised reseller for Source Technology. Mr Duncan of that computer hardware seller reviewed the invoices relating to equipment supplied by Source Technology to AK Computers, and expressed the view that AK Computers was a "technically competent" reseller of high-end computers. The pattern of purchases also demonstrated that, by and large, AK Computers was building computer systems itself. The plaintiff contended in his evidence that the computers and equipment that he was buying from Source Technology after November 2000 was for his personal use. This is simply implausible. Over a period of two years after November 2000, eight high-end computers were purchased from Source Technology. This is during a time when the plaintiff was supposedly unemployed and incapable of working. The notion that, during that period, the plaintiff would require eight such computers for his own personal use is simply incredible.

[217] The defendant called a number of witnesses who had been computer business customers of the plaintiff both before and after 2000.

[218] Mr Phillip Hulme purchased a "Bright Eyes" business at Kawana in May 2000. This business had a particular software program installed and Mr Hulme was referred to the plaintiff to have it fixed. Mr Hulme recalled the plaintiff physically attending at the Kawana store to work on the computer in mid-2000. He referred to a number of occasions when he had to call the plaintiff to his store to fix computer problems. He also gave evidence of the plaintiff providing computer services to him when Mr Hulme purchased a Sunglass Works store in September 2002. He purchased hardware from the plaintiff and the software installed on the computer. He identified in banking records deposits made by him to the plaintiff's credit. There were a number of deposits in 2000 and in 2002. He also recalled having to

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[10] Exhibit 1, document 199A.

consult with the plaintiff after September 2002 when there was a major problem with the software and the plaintiff had to write a "patch" to fix the software.

[219] Mrs Diane Marriner was the owner of a "Bright Eyes" store at Mooloolaba Wharf from 1995. She and her husband subsequently purchased another Bright Eyes store on the esplanade at Mooloolaba. She said that when the first store was purchased, it had a computer program operating on its computer system. It was not in issue that this program had been installed by the plaintiff for the previous owner. When Mrs Marriner and her husband acquired the Mooloolaba Esplanade store they used the same computer program.

[220] Mrs Marriner said that the plaintiff had provided computer program maintenance services to her since 1995. Often this was simply done by way of telephone calls, during which the plaintiff would explain how to fix a particular problem. She also gave evidence of him attending personally at the stores, but said that it was "very rare that I would have to call him in". Her evidence was that he was paid a maintenance fee of $220 a year, per store. Mrs Marriner said that she did not know that the plaintiff was moving to Hong Kong in 2002, and only found out after he had moved. She also confirmed that even after he went to Hong Kong, she continued to contact him when she had problems with the computer program and required maintenance, and continued to pay the annual maintenance fee to the plaintiff.

[221] Mrs Meryl Cook gave evidence. She is a director and the administration manager of BR & NE Cook Pty Ltd, which operates the business Cook's Refrigerated Transport. She identified a schedule of computer-related payments from her business to AK Computers during the period 2000 – 2002.[11] She identified items on the schedule of payments as relating to the purchase of a computer in August 2000 and subsequent purchases of peripheral equipment.

[222] The plaintiff called Mr Kronk, who formerly owned the business Steelway Engineering. He said that he initially employed the plaintiff as a production manager in his workshop. The plaintiff was "the one to make sure things got done on time". He said that in the beginning, the plaintiff did not have any computer service role in Steelway Engineering. His evidence was that the plaintiff was initially employed on a salary, but "some period after that then he went onto a subcontract basis". Mr Kronk had not kept any of the wage or other financial records relating to his business, and his recollection of dates was hazy. Mr Kronk described when the plaintiff left his work at Steelway Engineering (Mr Kronk thought it was 1993), but said that he had an ongoing business relationship with the plaintiff:

> "Eric continued to do database work for us as it was requested of him and supplying computers, printers, setting them up, that type of work."

[223] Mr Kronk identified schedules setting out payments which had been made by Steelway Engineering for the provision of computer-related services by the plaintiff. In particular, he identified an accounting document which showed payments made by Steelway Engineering either to the plaintiff or to AK Computers over the period from 19 July 1999 through to 7 February 2007.

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[11] Exhibit 17.

[224] Mr Kronk gave evidence of particular items of work that the plaintiff performed for Steelway Engineering. He referred to the plaintiff being paid about $4,500 in 1999 to rewrite Steelway Engineering's computer program in preparation for the year 2000. A further payment of $4,000 in the middle of 2000 was thought by Mr Kronk to be further payment to finish off that job. He identified further payments of $3,500 on 15 March 2004 for a software upgrade and another payment of $1,000 on 11 May 2004 also for a software upgrade.

[225] Mr Kronk described communicating with the plaintiff after the plaintiff had gone to Hong Kong and said that when he needed work done by the plaintiff he would send the plaintiff an email, the plaintiff would respond with a quote, the plaintiff would then perform the work and would then send the work back over the internet. He said "We would pay the bill in due course".

[226] Mr Kronk described the necessity to purchase the "key" relating to the computer program which the plaintiff had installed and maintained when it came time for Mr Kronk to sell the business. He said that neither he nor Steelway Engineering made payments to the plaintiff that were not for computer-related services. He gave evidence about discussions he had with the plaintiff before the plaintiff went to Hong Kong about Mr Kronk's ongoing needs in terms of being able to operate his computer program. Mr Kronk also gave evidence to the effect that invoices were rendered by the plaintiff under the name "AK Computers" but the business under which the plaintiff operated changed its name to "ESP".

[227] He was asked whether he had ever noticed the plaintiff having any physical disability, to which he responded "Not really".

[228] The individual and collective effect of the evidence of these witnesses completely dispels the plaintiff's assertion that his involvement in computers was nothing more than a "hobby".

[229] Moreover, it emerged in evidence that the invoice for the purchase by Mr Kronk of the source code relating to the software which Mr Kronk required in order to sell his business was rendered in the name of the plaintiff's wife. The compelling inference is that this was done in order to hide the fact that the plaintiff was being paid a significant amount of money for the effective sale of that computer program.

[230] According to the business name registration documents in evidence before me, the business name "AK Computers" was first registered on 24 October 1997. The business of AK Computers was said to have commenced on 24 December 1992. The nature of the business was disclosed as "software computers". The business name was cancelled on 24 February 2003. This business name was registered at all times in the name of the plaintiff, and the address from which the business was recorded as carrying on business was the plaintiff's residential address. AK Computers advertised in the Yellow Pages from 1998 through until 2004, and in the White Pages from 1998 through until 2002. Between 2000 and 2003, AK Computers had a website advertising itself as "specialised software – quality computers – tuition – service". As noted above, that website listed the address of AK Computers as the plaintiff's Hong Kong address. The evidence revealed that the AK Computer business charged and received yearly licence fees for customers to use its services. When the plaintiff moved to Hong Kong, he contacted AK Computers' customers to continue to offer his services while overseas.

[231] Between 2003 and 2004, the plaintiff maintained a website for another business called "ESPdb Database Software Development". This website advertised "stand alone – local area network – intranet HTML – web server – custom database applications", and certain specific computer applications including "point of sale systems".

[232] There were other publicly available documents which indicated the nature of the plaintiff's occupation after 2000:

(a) The plaintiff posted his resume on the www.prestwood.com website some time after he moved to Hong Kong in August 2000. In this resume he said:

> "Am self-employed, looking to obtain part time or full time work. I live in Hong Kong, am happy to act as agent."

(b) His summary of experience included:

> "I have been developing business management, relational database systems for the retail and manufacturing industry since 1993."

(c) He listed his "work history" as:

> "1993 – Current: I have been developing business management, relational database systems for the retail and manufacturing industry."

(d) As recently as November 2007, the plaintiff joined the www.ittoolbox.com website and posted his profile, listing his company as "ESP Database" and his role as "IT professional – development, development/software engineering".

[233] To the extent that there are financial records available, it is notable that the family trust tax returns for the years ended 30 June 2000, 30 June 2001 and 30 June 2002 record relatively significant amounts of gross income, and that in each case the nature of the business conducted on behalf of the trust is recorded as being related to computer services. The amount of income in the family trust in this period attributable to the plaintiff's wife's earnings was minimal, and the only other source of this income, on the evidence, was the computer business conducted by the plaintiff.

[234] I have already stated my conclusion that as at November 2000, the plaintiff's "occupation" was not that of a "plumber". On the evidence to which I have referred, I find that both before and after the November 2000 incident, the employment, trade or business in which the plaintiff was habitually engaged and by which he earned his livelihood was his engagement in the computer business, to which there were several aspects including programming and computer supply or re-supply, and that the income earned by the plaintiff in performance of that occupation was largely, if not wholly, directed through his family trust.

The nature and degree of the plaintiff's disability

[235] The plaintiff sought to portray himself as having been comprehensively disabled as a consequence of the incident in November 2000. In his evidence in chief, the plaintiff described his medical condition as follows:

> "40. My medical condition:

(a) From the time of disability I was no longer able to ride a push bike. I can't lean forward and put weight on my shoulders, I can't hold my head in a craned position. Something that my daughters and I loved to do together was gone. I also can't go trail riding (motor bike) which was a sport I loved to do;

(b) My daughters and I could no longer go sailing or canoeing as sitting largely unsupported and using my shoulders for propulsion energy causes long lasting pain;

(c) My wife and I cannot have a proper physical relationship;

(d) I generally cannot pick up our little boys;

(e) I have trouble walking for more than short distances and with a very limited mobility it is difficult to control body weight and health;

(f) I can't travel for long periods in a car as rocking (travel motion) aggravate the condition. If we travel to visit my daughter it is through country and main roads such as the 4 lane highway between Caboolture and Nambour, but I can only do this while my wife is in the car. If my pain level is in anyway elevated or I'm on high levels of narcotics then I am at times unable to travel at all. At times we have been trapped in places for several hours waiting for my pain levels to subside so I can travel again and sometimes I have been moved by ambulance;

(g) While my mind is active and I don't consider myself normally mentally numbed (except when on high doses of narcotics) and I can physically move my neck around as there is no fusion in the neck and no broken bones nor anything else to physically stop movement and I mentally want to move and be active. The movement grinds on the joints and pinches nerves sometimes with instant results, sometimes the results developing cumulatively over hours, the pain builds to a great level which regardless of the speed of build up can then last days, weeks or months causing cervical and radiated pain and inter scapular headaches. The headaches can include blurred vision and tingling in my arms and fingers and if they persist will lead to long periods of nausea. I am unable to do simple tasks such as washing dishes as standing with my head down (like looking down at a computer keyboard – as I cannot touch type) quickly causes much pain;

(h) My lumber pain is similar, I can go for some time with minimal pain or for example I bent down on one occasion to pick up a plastic toy, weighing probably about 100 grams, our boys had left on the grass twisting my body a bit to one side as I bent over and suffered great pain instantly which restricted me to a wheelchair for about six months. As I am unable to propel myself due to my shoulder and neck problems I am unable to use crutches or walking frame, my wife and sons provided for much of my movement or I simply don't move;

(i) The thoracic pain simply feels like stabbing pain or tearing of varying levels depending on the type and duration of activity;

(j) I have a small level of ongoing pain in my right elbow and a weakness or tendency to increased pain there as a residual effect of an olecranon bursa excision;

(k) To help control pain levels I take drugs. These have limited pain killing effect and if I am not careful with neck movement especially, movement leads to pain that is just not manageable whilst conscious;

(l) The drugs I currently take are:

  (i) Durogesic 12 (Fentanyl – opioid narcotic analgesic) 12mcg/hr. 20mcg/hr patches send my into fits of vomiting and/or dry retching but at least then I do not get constipation;
  (ii) Tramadol (opioid narcotic analgesic) 200mg twice daily (400mg maximum non-fatal daily does);
  (iii) Panamax. I have built up an allergy to Codeine and cannot take many Codeine similar drugs;
  (iv) Panadol Osteo;
  (v) Movicol 13.8g laxative.

(m) The drugs themselves cause their own problems such as inability to; drive, think clearly, be social, be alert, use power tools, complete documentation, becoming lethargic and alike. It also causes loss of functionality within the family group, irritability and constipation that can lead to massive bleeding and pain. Taking laxatives to control the constipation can lead to unplanned bowl movements as it is difficult to distinguish between wind and other passings;

(n) My sleep is drastically affected by the aforesaid. When I lay on a bed, if on my left side I need a thicker pillow, on my right a thinner pillow and if on my back I cannot have any pillow at all as it pushes my chin down. If I fall asleep and roll to my back and still have a pillow, it leads to elevated pain which in itself is also tiring and further deprives me of sleep. Drugs also slow down my system and make it harder to expend energy, sometimes in a state of near sleep for days, which in turn make it harder to sleep;

(o) With each of the spinal conditions I have exacerbated pain on instances of jarring, the cervical and lumbar more so than thoracic. Travelling, running walking, falling, coughing and sneezing are all events that cause sudden pain. These aggravations have a cumulative effect and once the pain is elevated it is easier to affect the pain and the longer it lasts. There are strategies that I have adapted over the years to attempt to avoid paint in the respective areas, but in general this means not moving which is anti social and degenerative to the body. For example; sneezing if a difficult thing to control but if I consider I will sneeze several times I find the best circumvent

> action to pain is to lay flat on my face on a bed to limit body reflexes and movement.
>
> (p) Not only did my working life conclude medically, but so did most of my non-working life which I believe both have been exacerbated by a stigma resulting from the defendant declaring me to be totally fit to return to work supposedly by unanimous medical opinion compounded by reliance n the public health system which in effect is eight or ten years behind or otherwise nonexistent."

[236] I had the opportunity to observe the way in which the plaintiff presented himself when giving evidence and otherwise during the course of the trial. Over the course of several years prior to the trial, the matter had been regularly reviewed by me on the Supervised Case List, and I also had the opportunity to observe the manner of the plaintiff's presentation during those numerous reviews. The plaintiff invariably appeared in Court wearing a stiff surgical collar, often required a special chair in which to sit, walked hesitantly, and displayed significantly restricted range of neck, back and upper limb motion. In short, he presented himself before the Court as a person who was significantly incapacitated.

[237] In the course of the trial, however, a vastly different picture of the plaintiff's physical capacities emerged both from surveillance video evidence which the defendant had obtained and from the plaintiff's own photographs.

[238] The surveillance video evidence of the plaintiff was as follows:

- 13 May 2008 – this video showed the plaintiff sitting for about half an hour in a shop, nursing a child on his lap, while speaking with the shop assistant. The plaintiff was not wearing a neck brace. He nursed the small child for the entire time, including bouncing the child up and down on his knee, and holding the child with one arm while the plaintiff attended to business with the shop assistant. He exhibited absolutely no restriction in his neck, back or arm movements, and at one point was vigorously bouncing the small child on his lap. The plaintiff did not demonstrate any sign of pain or discomfort.

- 20 August 2008 – this was a long video (more than an hour) of the plaintiff playing with his family in a swimming pool. At one point, the video shows the plaintiff sliding down a slippery slide into the pool head first while balancing a child on his back. When he emerged from the water, he shook his head vigorously from side to side. The plaintiff did not exhibit any signs of discomfort or restriction in movement at any time during this video.

- 25 August 2008 – this was further footage of the plaintiff playing in the swimming pool with his family.

- 3 September 2008 – this video showed the plaintiff loading bags onto the check-in counter at the Hong Kong airport. There was a trolley load of bags, a significant number of which were large suitcases. At one point in the video, the plaintiff is seen picking up a child and putting the child on his shoulders and then lifting his arms up to balance the child. The plaintiff did all of these activities without any sign of discomfort or disability.

- 3 December 2008 – this was a video of the plaintiff leaning into his car and then getting into the car and driving away. Again, there was no sign of any restriction in the plaintiff's movements.

- 5 December 2008 – this video has some significance, because it shows the plaintiff leaving the Courts complex after having attended a Supervised Case List review in this matter. He is seen walking across the Queen Victoria Bridge towards the Cultural Centre, dragging a bag, and with no apparent restriction in movement. He is then seen walking through the South Bank Gardens, walking freely and dragging the bag. The plaintiff walks a considerable length along the South Bank area. He is seen to meet up with his wife and children in the vicinity of the swimming area at South Bank. By this stage, he has discarded the stiff collar, and nurses a young child on his knee. There seems to be no restriction in his movements. He is seen for a significant time sitting, moving his neck freely, reaching and manipulating objects. Again, for some considerable time he is seen nursing a child on his lap. The video then shows the plaintiff pushing a stroller containing two young children through the South Bank Parklands, with his wife dragging the small suitcase. The plaintiff is seen to move freely, including bending over to attend to the children in the stroller. The plaintiff and his family are then seen to go to the museum or library at South Bank. There is about 10 minutes of video of the plaintiff sitting in the café in that complex, moving freely including sitting back with his hands over and behind his head and also leaning forward, with his neck flexed forward, while checking his mobile phone.

- 11 February 2009 – this was also a significant video, showing another occasion on which the plaintiff attended for a Supervised Case List review of his matter. This video shows the plaintiff going into the Court complex wearing a neck brace and pulling a briefcase on wheels. He appears to be walking hesitantly. At 5.05 pm he is shown coming out of the Court. At the front of the Court complex he puts on a backpack without any apparent difficulty. He is then seen walking up George Street. His gait was unrestricted. The video shows him walking through the Roma Street train station and then in a car park. He walks to a station wagon, loads his bags in the back of the care without difficulty, looks around, takes off his neck brace and throws it into the car, gets into the car and then drives away.

- 28 October 2009 – this is video of the plaintiff on a train travelling to Brisbane on a day on which he is to appear for a Supervised Case List review. The video shows that at 8.56 am, the plaintiff leaned forward and took his neck brace out of his backpack. At 8.57 am he put the neck brace on, and at 9.00 am he got off the train wearing the neck brace.

[239] Evidence was also given by a surveillance agent, Mr Deslandes, who observed the plaintiff and his family at Brisbane airport after arriving on the flight from Hong Kong. Mr Deslandes said that he saw the plaintiff moving freely and without restriction, and moving numerous heavy bags around on the airport trolley without assistance. Mr Deslandes also observed the plaintiff loading luggage into the back of a station wagon. The plaintiff then drove his family to a fast food restaurant at Morayfield where, amongst other things, he saw the plaintiff pick up a child and place the child on his shoulders and walk up and down. Mr Deslandes gave

evidence of his observations of the plaintiff driving the car through very wet conditions from the airport to Morayfield.

[240] Another surveillance operative, Mr Keith Mearns, gave evidence about his observations of the plaintiff on 29 October 2009, from 6.00 am. He observed the plaintiff leaving his home as a passenger in a white station wagon. The plaintiff was wearing a shirt but was not wearing a surgical collar. He had a specific recollection of the plaintiff not wearing the surgical collar because "that was the crux of what we were particularly keeping an eye on".

[241] This evidence as a whole served to completely undermine the plaintiff's credit-worthiness and credibility so far as his complaints about his physical condition were concerned. The simple fact of the matter is that the plaintiff had nothing like the physical restrictions of which he complained in his statement of evidence. That the plaintiff was over-reaching in his evidence is also apparent from his assertion as to the necessity for him to be wheelchair-bound as a consequence of the incident. The evidence discloses that the plaintiff did use a wheelchair for a period of time, but that was as a consequence of a knee operation, and had nothing to do with his supposed back condition.

[242] In addition to the video evidence to which I have referred, there were a large number of photographs obtained from the plaintiff's family website demonstrating the plaintiff carrying out a wide range of activities over a number of years, including:

(a) sitting at, and bending over, a computer;

(b) carrying a child on his shoulders;

(c) travelling in Sydney in May 2009 (the plaintiff appears in a wheelchair with a notation that he was recovering from a knee operation);

(d) digging;

(e) holding and playing with his children;

(f) driving a tractor;

(g) using a drill press;

(h) using power tools.

[243] As I have said, my own observation and assessment is that the plaintiff's assertions as to the nature and extent of his physical impediment are simply false.

[244] It is appropriate, however, to test that assessment against the medical evidence.

Dr Winstanley

[245] Dr Peter Winstanley, orthopaedic surgeon, first saw the plaintiff on 9 April 2001. In a report dated 10 April 2001, he said that the plaintiff had presented with a history of having sustained injuries to his cervical and thoracic spine area while working as a plumber on 27 November 2000. The plaintiff reported to him that he

was a right-handed plumber and had been for some 20-odd years. On examination, the plaintiff stood without specific deformity of the cervical or thoracic spine area, had tenderness to palpation at the base of the cervical spine and also in the mid-cervical area, some restriction in rotation within his thoracic spine and a free range of motion within his cervical spine. Neurological examination of the plaintiff's upper limb showed a non-dermatomal loss of sensation present on the ulnar border of the left upper limb, but the plaintiff had intact reflexes and no evidence of muscle wastage. The doctor reported on x-rays of the plaintiff's cervical spine, which showed some mild degenerative disc disease present within the mid-cervical area. The thoracic spine showed some mild degenerative change. Dr Winstanley said:

> "Clinically, this patient's clinical presentation would be consistent with an aggravation of underlying degenerative change present within his cervical and thoracic spine area. His cervical spine symptomatology has improved, but he still have ongoing symptomatology associated with his thoracic spine. In my opinion, his condition is such that it has not stabilised.
>
> In my opinion, this patient's condition is such that it would prevent him from performing his normal occupational activities as a general plumber.
>
> In my opinion, the patient would be unfit from obtaining heavier type work activity. The patient may be able to perform some lighter type activities, but this would depend on the nature of such condition. In my opinion, his condition is such that he would benefit from treatment of a muscle rehabilitation program and work-hardening program. This could be performed through the Noosa Rehabilitation Program at the Noosa Hospital.
>
> In my opinion, following a muscle rehabilitation program, the patient should be able to return to his occupation. He should avoid heavier type activity. In the longer term, it would be best for this patient to return to lighter-type activities which may require re-education and retraining to allow him to perform this activity. There is no indication at the time of review that the patient required further investigation, nor is he a surgical candidate. The patient did not have any inappropriate signs."

[246] Dr Winstanley supplied a further report dated 23 January 2009, in which he was asked to express an opinion as to whether the plaintiff was able to perform the duties of a computer hardware salesperson in 2001. The occupational duties to which Dr Winstanley was referred were:

(a) analysing system requirements;

(b) purchasing computer parts;

(c) assembling computers;

(d) delivering, installing and initiating computers along with associated documentation;

(e) installation of computer and associated hardware and accessories;

(f) driving between jobs and suppliers;

(g) purchasing and receiving hardware;

(h) lifting equipment;

(i) delivering equipment;

(j) cabling or installation in confined spaces;

(k) training on and maintenance of equipment requiring the lifting of such equipment;

(l) fitting of networks;

(m) keyboard work related to financial records.

[247] Dr Winstanley said that his understanding was that the plaintiff was involved in domestic-type computer situations and said:

> "In this situation, I would be of the opinion that Mr Syddall would be able to perform his work activities associated with his computer business as listed above, numbers (a) to (m) associated with the symptomatology he would have had within his cervical spine relating to a work related incident which occurred on 27 November 2000."

[248] Dr Winstanley gave evidence before me, by which time he had seen the surveillance videos to which I have referred above. He was also referred to reports by Dr English and Dr Gray (to which I will refer below) in which they gave quite a different description of the plaintiff's presentation to that observed by Dr Winstanley. Dr Winstanley said that when he saw the plaintiff, the plaintiff had "some restriction associated with motion but nothing you would not expect for a person of his age and past history of activity". Dr Winstanley expressed the opinion that the range of movement seen on the surveillance videos was inconsistent with the description of the presentation of the plaintiff to each of Dr Gray and Dr English. Dr Winstanley referred particularly to the observation of the plaintiff lifting a child up and placing it on his shoulders.

[249] Dr Winstanley also said that, having regard to the extent of degeneration shown in the cervical and lumbar spine in the x-rays that he saw, he would have expected the plaintiff to have suffered from some discomfort from time to time "but pain from degenerative change within the neck within the lower back is quite common within the normal population".

[250] Dr Winstanley said that, based on all of the material that he had seen, including the reports of Dr English and Dr Gray and the surveillance evidence, the plaintiff would be able to perform light work activities associated with being a database administrator, programmer or computer hardware salesman.

Dr English

[251] The plaintiff was seen for a medico-legal examination on 22 November 2007 by Dr Hugh English, orthopaedic surgeon. Dr English provided a report dated

23 November 2007, in which he recorded the plaintiff's description of his current symptoms:

> "He describes ongoing severe pain in the neck felt predominantly in the left trapezius intermittently radiating into the right trapezius and into both upper limbs. The pain varies between 4 and 9 out of 10. It is made worse by activities such as walking, looking down and vibrations while sitting or driving in a car. It is relieved by rest. He describes sometimes staying still for up to three to four weeks to control the pain. He still drives and was able to drive down from Nambour in a borrowed car. He drives with pillows on his lap wearing a hard collar. He finds it is easier if he rests his elbows on the pillows whilst driving. Initially he described severe pain following the event. After two years the pain gradually got better. He feels it has become worse again over the last 18 months. He reports ongoing pain across both shoulders, left worse than right, radiating down both arms into the inner arm of the right upper limb and the ulnar three fingers. No numbness or weakness is noted. Migraine and headache is associated with pain when severe. He feels symptoms are gradually worsening."

[252] In the course of describing his occupational history, the plaintiff told Dr English that the plaintiff felt that it was too hard for the plaintiff to lift his arms to be able to work at a computer for long, that the plaintiff was able to type for short periods but could not look down or type for more than about 20 minutes, and that he could not walk for more than 15 or 20 minutes secondary to pain in the neck.

[253] The plaintiff presented to Dr English wearing a hard surgical collar. Dr English said:

> "He walked slowly and cautiously. He took the collar off during the interview and examination. He appears withdrawn. On formal examination, he is tender to light palpation over his posterior cervical spine. Vertex compression results in some increased discomfort. Coughing and sneezing also produce increased discomfort. He demonstrates a forward flexion of zero, extension of 10 degrees, left rotation of 15 degrees, right rotation of 15 degrees, left bend 10 degrees and right bend of 10 degrees. There is a full range of motion of both upper limbs and normal motor and sensory function of both upper limbs. During the history he demonstrates greater range of motion than during formal examination."

[254] Dr English expressed the opinion that the plaintiff had some degenerative osteoarthritis affecting his cervical and thoracic region of mild to moderate severity. He said the plaintiff reported ongoing severe pain within the neck and both shoulders which the plaintiff associated "with repetitively carrying sheets of steel, roofing material, on a job site in 2000".

[255] Insofar as the plaintiff's occupation was that of a plumber, Dr English said:

> "Based upon the minor degenerative change I would regard Mr Syddall as fit to return to his previous duties as a plumber in the short term. However, based upon his symptomatic presentation he appears unfit to work as a plumber. I would agree with Dr Keys and Dr Winstanley that his symptoms are unduly prolonged and disproportionate to the clinical and radiological findings."

[256] In relation to an occupation as a computer hardware salesman, Dr English expressed the opinion that the plaintiff was fit to work in that occupation.

[257] Dr English was called to give evidence before me. By then, he had seen the surveillance videos. He described the appearance of the plaintiff in the videos as being "markedly different" from the way in which the plaintiff presented for examination in November 2007:

> "In the DVDs there was no evidence or expression of pain, and he demonstrated a very good range of motion of his neck and his upper limbs and lifting children and moving suitcases and activities that, at the time of my assessment, it was implied that he was unable to do."

[258] Dr English further noted that on the videos there was evidence "of basically a full range of motion".

[259] He expressed the view that, radiologically, there was evidence of some minor degenerative process affecting the plaintiff's neck which "might cause occasional aches and discomfort, but not a major restriction in lifestyle or activity".

[260] Dr English was asked about the event which gave rise to the injury in November 2000 and was asked for how long the doctor would have expected the aggravation of the pre-existing underlying degenerative process to have lasted. He said "A matter of days or weeks".

[261] Dr English expressed the opinion that, having seen the DVDs, there were no occupational duties which the plaintiff was unable to perform. He also reaffirmed an opinion that there was no need for the plaintiff to wear a stiff neck brace.

Dr Angus Gray

[262] On 14 May 2009, the plaintiff was examined by Dr Angus Gray, orthopaedic surgeon. Dr Gray provided a report dated 28 May 2009. In the report, Dr Gray recorded the complaints listed by the plaintiff in connection with his neck, arm, thoracic back, low back and left leg, recording that as a result of these symptoms the plaintiff has not been able to work since the time of the injury. The plaintiff said that various pains interfered with his ability to do many things. In respect of the plaintiff's report as to his capabilities, Dr Gray recorded the plaintiff reporting that he was independent in his activities of daily living, that he found some self-care activities such as hair washing and dressing difficult, that he could not drive a car, that he could only do simple activities around the house, and that he was unable to do repetitive bending or twisting activities or chores such as vacuuming.

[263] On examination, Dr Gray noted that the plaintiff's neck had a normal profile but extremely restricted range of movement. The plaintiff was unable to flex at all, extension was to only 10 degrees, lateral rotation to the right was to 15 degrees and to only five degrees on the left. Lateral bend to the right was 15 degrees and the left was 10 degrees. All of these movements were accompanied by pain. On palpation, the plaintiff was tender over the low cervical spine and adjacent paravertical muscles. The plaintiff's thoracolumbar spine had a normal profile but restricted range of movement, which the doctor described in detail. The upper limbs showed full painless range of movement, but patchy changes of sensation in the forearms

which did not follow dermatomal pattern. Muscle power was normal. The plaintiff had slightly increased biceps and triceps jerk on the right side.

[264] Dr Gray reviewed x-rays and CT reports from 2008 and 2009, and expressed the following diagnosis and opinion in his report:

> "Mr Syddall has a fairly complex presentation, but his injury on 27 November 2000 seems to be the beginnings of his trouble. He describes a lifting injury which led to pain in his left shoulder and that a few days later he developed a progressive left sided neck pain. In my opinion his shoulder pain was referred from his neck. The subsequent neck pain and worsening of symptoms with neck manipulation support the hypothesis that he suffered a neck injury at the time. Investigations show that he has established spondylosis in the cervical spine, particularly on the left hand side with narrowing of the lower cervical foramen."

[265] Dr Gray then responded to a number of specific questions which had been put to him, including one relating to "Pars defect", to which he said:

> "It is a condition that develops in childhood. It is never present at birth. However, 5% of six year olds have Pars defects. They are essentially stress fractures of the lumbar spine. They are usually asymptomatic. 6% of adults have these stress fractures. They are rarely a cause of symptoms in patients over the age of 40."

[266] In answer to a question as to whether x-rays, as opposed to CT or MRI scans, are likely to reveal a Pars defect, Dr Gray said:

> "The Pars defect at L5 is in the lumbar spine not the cervical. In any case x-rays may not always detect the Pars defect. This is also the case with bony narrowing of the cervical lateral canals (foramen). CT and MRI are better modalities to detect these conditions as they look at the spine in three dimensions."

[267] In response to a question as to the age at which he would expect the onset of chrystalised tissue around the spine, Dr Gray said:

> "It is difficult to be certain, but ankylosing spondylitis will generally begin to manifest in early adult years. Another related condition (DISH) presents in patients over the age of 60 and is more common in men than women. It is my view that the calcification of the paraspinal ligaments is not related to your original injury."

[268] Dr Gray expressed the following further opinions in his report:

(a) The calcification of the soft tissues around the spine and the Pars defect are long-standing and unrelated to the plaintiff's injury or subsequent treatment; it was possible that traction may have irritated the plaintiff's cervical spondylosis;

(b) The plaintiff's neck and upper limb pain was secondary to his cervical spondylosis; the calcification within the thoracic spine associated with spondylosis could be contributing to his thoracic back pain, but in painful spinal conditions it is not uncommon to find other areas of the spine painful due to alterations in posture and muscle spasm;

(c) The plaintiff's cervical spondylosis and associated narrowing of foramen, particularly on the left, are likely to give rise to his neck pain and intermittent arm symptoms. The L5 spondylosis is usually not a source of chronic pain, particularly once individuals are over the age of about 40. The calcification within the soft tissues of the thoracic spine could cause some discomfort but commonly they cause an asymptomatic stiffness;

(d) It would be reasonable to assume that the plaintiff had underlying cervical spondylosis at the time of his injury but it was asymptomatic. The lifting injury in November 2000 aggravated the previously asymptomatic spondylosis and that aggravation is now permanent;

(e) The plaintiff's back conditions are age-related and will not in themselves improve, although there is potential for the symptoms to improve;

(f) The plaintiff would not be able to perform the duties required to be a self-employed plumber;

(g) The plaintiff would have significant restriction in carrying out computer-related activities. He may be able to do simple office based tasks for short periods of time, would not be able to lift equipment or do the necessary travel and deliveries associated with that job.

[269] Dr Gray's opinion had been obtained by the plaintiff himself; it was not obtained at the request of the defendant. The questions answered in Dr Gray's report were those posed by the plaintiff.

[270] Dr Gray gave evidence before me by telephone link. By the time he gave evidence, he had seen the surveillance videos to which I have referred above. He confirmed that, when conducting an examination for the purposes of a medico-legal report, the doctor is "heavily reliant" on what the patient shows:

> "When you're doing one of these examinations its always – people can change their range of movement when they're observed and so I've always got an eye to how they're reacting when they're unobserved and whether they could – whether their unobserved neck range of movement is as much as you'd see under formal examination because sometimes there is a discrepancy."

[271] It is appropriate to set out the full passage of Dr Gray's evidence concerning his opinion after having seen the video surveillance evidence:

> "Would you agree that on the DVDs he shows a full range of movement in his neck and upper body? -- I would. He – I looked very carefully at what his neck range of movement was and it's always a bit hard to tell whether full range of movement is achieved, but he certainly with lateral rotation, so looking right and left, it was at least 50 per cent of normal or maximum range, and I was quite satisfied that his flexion and extension was of normal range and more importantly without obvious discomfort.
>
> Yes. I was going to say that. No signs of grimacing or pain or anything of that kind? -- No.

> And you saw in the shop in Hong Kong he had the ability to hold the child infant in his arms with his arms out in front of him for quite an extended period -----? -- Yes.
>
> ----- without any apparent discomfort or pain? -- Yes.
>
> And the – his ability to move and do things with his arms, put his arms above his head, lift a child above his head and so on, would suggest that the arthritic changes in his neck are not causing him significant pain or discomfort? -- They certainly didn't appear to be at the time of those videos.
>
> No. So, if his true symptoms are – sorry, if his true physical condition is as per the videos -----? -- Yes.
>
> ----- would you accept that the – that is consistent with the radiological evidence and consistent with the age-related arthritic degenerative changes in his neck not causing him major symptoms? -- That's right. You really can't tell from an x-ray or an MR or CT what – what level of disability or symptoms someone may have. You can surmise, but you've got to correlate it with what you see clinically, and looking at those videos I would say he appeared to be a man who was not troubled by neck or back problems.
>
> Thank you. Would you agree that on his presentation on the videos, even taking into account the radiological evidence, he is fit to work? -- I would – I would agree with that. Depending on the job, of course, but he seemed to be fit.
>
> Well, firstly let's take computers. He's had a history of working in computers, selling computers, programming, fixing computers, those sorts of activities. You'd accept he's fit to do all of that? -- It would seem – I'm not a computer expert, but it would seem to me he would be fit for an office based or light manual job.
>
> All right. He also has qualifications as a plumber. Would you accept that he would be fit to work as a plumber? -- Certainly the evidence that I saw on the video he seemed to be without – without – he seemed to be functioning without difficulty, so I would think that I could see no particular reason why he couldn't work as a plumber based on what I saw on the video.
>
> Thank you. One last thing. Would you also agree with me that judging him by reference to the videos, the symptoms as he presented to you in May last year were simply not believable? -- Well, there is certainly a variance and it was what I saw on those videos and one could argue that it's maybe medication based or he was having a good day or a bad day as the case may be, but there's certainly a variance there, that's correct."

Other medical evidence

[272] The plaintiff called evidence from Professor Matt Brown, rheumatologist. He had been consulted by the plaintiff and, having reviewed the plaintiff's x-rays, offered a tentative opinion in a report dated 13 October 2009:

> "Whilst not absolutely typical, your most likely diagnosis is a condition called Diffuse Idiopathic Skeletal Hyperostosis (DISH). This is actually a relatively common condition, but it is usually mild, and it is uncommon to develop such significant changes as you do."

[273] In evidence before me, Professor Brown's view as to this diagnosis became even more tentative. He confirmed that it was correct to say from his examination of the plaintiff, from the radiological tests and from the blood tests conducted, that the plaintiff did not have any signs of DISH in his cervical spine at all. He also agreed that any reported lack of movement in the cervical spine must be related to something other than DISH.

[274] The plaintiff also called Dr Samuel Dominey to give evidence. Dr Dominey is a general practitioner, who had provided a letter dated 28 July 2010. Dr Dominey had signed a number of medical certificates to enable the plaintiff to obtain Centrelink and housing benefits, and had also provided a report dated 28 July 2010. In that report, Dr Dominey confirmed that the plaintiff had first been seen in Dr Dominey's practice by Dr Jones in November 2009 and first seen by Dr Dominey in February 2010. In Dr Dominey's report he said:

> "He remains in chronic pain from his back which has severely limited his function. He has seen specialists regarding this and has a copy of their reports. He has a diagnosis of DISH ... he has co-operated fully in care provided by the surgery and gets partial relief from Norspan analgesic patches.
>
> He remains unable to work due to his disabilities and reports pain at rest and with sitting/standing for more than about 20 minutes. His sleep is severely impaired due to pain and he is often left tired. Any physical recreational activities are severely limited and it has impacted on his family life, made worse by financial difficulties and insecurities. He is currently receiving psychological support/therapy by Mr Steve Bristone under a GP mental health care plan to help develop further coping strategies. He obviously feels low and frustrated at times. This is a recognised common consequence of chronic pain.
>
> Mr Syddall is not able to use power tools or work in his previous profession as a plumber. He also finds driving difficult due to pain and the effects of his narcotic analgesia which can cause confusion. He needs to rely on his wife to drive making full time self-employed work difficult."

[275] When cross-examined, Dr Dominey confirmed that he had relied on being given an accurate history by the plaintiff as to how the plaintiff's condition was affecting him on a day to day basis. Dr Dominey conceded that the x-ray and CT evidence showed the plaintiff only suffering minor degenerative change in the neck, but nevertheless said that these minor changes would explain the plaintiff's inability to flex forward. He conceded that the plaintiff had never presented to him wearing a surgical collar nor in a wheelchair. In respect of the impact on the plaintiff's capacity to flex, extend and rotate, Dr Dominey thought that the severity of the signs could fluctuate with some days worse than others. He confirmed that the notations in his report about the extent of the plaintiff's disabilities, including his inability to work, were all matters reported to him by the plaintiff. Dr Dominey also conceded that he did not have the expertise to assess evidence for the purposes of expressing an opinion to the Court as to the plaintiff's capacity to work. He did,

quite properly, concede that because of the closeness of his relationship with the plaintiff, and having lived through the plaintiff's experience over some months, the doctor would find it difficult to "move his mindset" to an opinion other than that which he had been told by the plaintiff.

[276] Dr Dominey did, however, concede that the plaintiff might well have the ability to do a more sedentary job than plumbing.

[277] The plaintiff also called Mr Steven Brimstone, consultant psychologist, to give evidence. Mr Brimstone had provided a report dated 18 August 2010. To the extent that the report related a history of the symptoms and disabilities from which the plaintiff suffered, Mr Brimstone confirmed that he relied on the accuracy of the information given to him by the plaintiff for the purposes of making his psychological assessments. So, for example, the statement of "history" set out in Mr Brimstone's report was derived from information given to him by the plaintiff. To the extent that it was stated in Mr Brimstone's report that the plaintiff, at the time of assessment by Mr Brimstone in August 2010, was "currently unable to work", this was also confirmed by Mr Brimstone to have been something he was told by the plaintiff.

[278] Mr Brimstone's evidence does not assist in an assessment of the plaintiff's disabilities.

[279] It is also relevant at this point to mention that the plaintiff's wife, Susan Syddall, gave evidence. Her evidence in chief was given by way of a statement in which she described the effect of the plaintiff's physical disabilities on the plaintiff and the family life. She describes a range of physical activities which the plaintiff is unable to do, saying that there "is very little that Eric can do around the home without causing him aggravated pain". She said that at time the plaintiff "has had to rely on using a wheelchair". She described the stress which the family has suffered as a consequence of the plaintiff's disability and his involvement in the present Court action. Mrs Syddall described the family's living situation, and the fact that she took up a job in Hong Kong in July 2002. She said that the medication that the plaintiff takes impacts on the family life and said that the plaintiff's "physical limitations affect what we are able to do as a family".

[280] Mrs Syddall's evidence was completely supportive of the plaintiff's position, and sought to reinforce the proposition that the plaintiff was extensively disabled and unable to work, and that he and the family had endured much stress as a consequence of the fact that the defendant had not paid the monthly benefits under the policy.

[281] Mrs Syddall was cross-examined at some length, particularly to elicit the apparent differences between the way in which the plaintiff appeared to present in the family photographs which Mrs Syddall had posted on the family website and the assertion that he was so extensively disabled. She sought to explain numerous examples of photographs showing the plaintiff engaging in physical activities in terms of them being singular occurrences or occasions when the plaintiff was posing for the photo to be taken. Mrs Syddall was also cross-examined on the plaintiff's use of a wheelchair, and the photograph notation which indicated that when using the wheelchair he was recovering from a knee operation. She said that he also needed the wheelchair because he found it difficult to get around, and that they had taken a

wheelchair from Brisbane to Sydney for the particular purpose of assisting the plaintiff to get around Sydney. She said he uses a wheelchair "at times if he is in too much pain", but then said that he is "not confined to a wheelchair by any stretch of the imagination".

[282] Mrs Syddall was also cross-examined on the observations of the plaintiff in the video surveillance footage. She said that he often takes the neck brace off after he has been in Court, and that he wears the neck brace "on and off throughout the days depending on how he is feeling". She defended the video of the plaintiff playing in the swimming pool with his children, saying in effect that this was an isolated occurrence during the years in which they had lived in that complex in Hong Kong.

[283] Mrs Syddall confirmed that she did not have any skills in computer program development or computer troubleshooting. The extent of her involvement in the work carried out by the business "AK Computers" was as a typist. She had never done any computer programming work for any of the customers to whom the plaintiff had provided computer services.

[284] Mrs Syddall was cross-examined on the fact that the invoice for the sale of the computer software to Mr Kronk's business had been issued in her name. She said that she could not give a reason for that having been done, but said it was nevertheless a joint decision of her and the plaintiff to issue the invoice in her name. In re-examination, Mrs Syddall said that she thought that it was done this way because she was the one earning the income and it was to "keep everything easy and simple".

[285] Mrs Syddall's evidence is clearly supportive of the position advocated by her husband so far as the extent of his disability is concerned. It sits ill, however, with the surveillance evidence and the opinions of the specialist medical practitioners. Having had the opportunity to observe Mrs Syddall give evidence, I am inclined to significantly discount the weight that I put on her evidence so far as it goes to the question of the nature and extent of the plaintiff's disabilities.

Conclusion on the medical and other evidence

[286] The preponderance of the medical evidence, particularly that of the medical specialists who saw the video surveillance evidence, supports my own assessment of the degree of the plaintiff's disability. I find that the plaintiff does not have anything like the level of physical disability which he has sought to portray in this case. At worst, in November 2000 he suffered an aggravation of some mild pre-existing degeneration to the cervical and thoracic spine. This aggravation would have settled within a short period of time, measured at most in weeks.

The three elements necessary for the payment of benefits

[287] On the basis of my assessment of the evidence set out above, my findings in relation to the elements which would have entitled the plaintiff to claim for monthly benefits can be stated briefly.

[288] In respect of the first element, the plaintiff's occupation as at November 2000 was not that of "plumber". His occupation was that of a computer programmer/operator. The nature and extent of the disability suffered by the plaintiff in the incident in

November 2000 did not render the plaintiff unable to perform at least one of the duties of the occupation of computer programmer/operator.

[289] As to the second element, the plaintiff was engaged, both before and after the incident in November 2000, in the occupation of computer programmer/operator.

[290] In respect of the third element, it was admitted on the pleadings that the plaintiff was under regular medical care until 11 March 2002. There was also the evidence of Dr Dominey about medical care from late 2009. Otherwise, the plaintiff did not adduce any evidence to prove that he has been "under the regular care and attendance of a registered medical practitioner" since the incident in November 2000.

[291] The plaintiff was not entitled to make claim under the policy. At the very worst, he ceased being totally disabled shortly after the incident in November 2000, and the defendant would in any event have been entitled to stop paying benefits to him.

Was the plaintiff's claim fraudulent?

[292] Section 56 of the *ICA* provides:

> "**Fraudulent claims**
>
> (1) Where a claim under a contract of insurance, or a claim made under this Act against an insurer by a person who is not the insured under a contract of insurance, is made fraudulently, the insurer may not avoid the contract but may refuse payment of the claim.
>
> (2) In any proceedings in relation to such a claim, the court may, if only a minimal or insignificant part of the claim is made fraudulently and non-payment of the remainder of the claim would be harsh and unfair, order the insurer to pay, in relation to the claim, such amount (if any) as is just and equitable in the circumstances.
>
> (3) In exercising the power conferred by subsection (2), the court shall have regard to the need to deter fraudulent conduct in relation to insurance but may also have regard to any other relevant matter."

[293] In the present case, the defendant contends that the claim by the plaintiff was entirely fraudulent and that, even if not entitled to avoid the policy, the defendant was entitled to refuse payment of the claim.

[294] In *Australian Associated Motor Insurers Ltd v Tiep Thi To*,[12] Mandie J considered a case in which an insured made a claim on her motor vehicle policy stating that the car had been stolen from her driveway, knowing however that the car had been damaged while it was being driven by her son without her consent. She made this statement in the mistaken belief that she would have been unable to claim in the true factual situation. The insurer was ordered by a magistrate to pay on the claim. An appeal by the insurer to Mandie J was allowed. In the course of judgment, his Honour said (at [16]):

> "If a person knowingly makes false statements believing that they have an invalid claim in order to mislead the insurer into believing that they have a

[12] (1999) 151 FLR 384.

> valid claim, it seems to me not to matter whether in fact the claim is valid or invalid. The claim is made dishonestly and hence fraudulently within the meaning of [s 56 of] the Act."

[295] An appeal against the judgment of Mandie J was dismissed. In *To v AAMI Ltd*,[13] Buchanan JA, with whom Charles and Callaway JJA relevantly agreed, outlined the common law remedies available to an insurer in respect of fraudulent claims, and said at [17]:

> "In my opinion the changes to the common law position effected by s 56 are only to limit the insurer's remedy in the event of fraud to the denial of the fraudulent claim rather than avoidance of the policy and to enable the Court to order payment where only a minimal or insignificant part of the claim is fraudulent and it would be harsh and unfair not to pay the remainder. Otherwise the legal position remains unaltered: an insurer need not pay a fraudulent claim, whether or not there is an underlying loss which is covered by the policy. There was a moral or public policy dimension to the common law principle, which is preserved in s 56. While s 56 is remedial, and is to be construed beneficially, its effect cannot be pushed beyond the meaning of the words in the section."

[296] An assessment of whether the plaintiff was fraudulent in making this claim necessarily involves a consideration of his credit. It will be apparent from my findings above that I have formed an adverse view as to his credit. In addition to the matters to which I have referred, the defendant urged me to have regard to a variety of matters which it submitted would compel a conclusion as to the plaintiff's dishonesty. It is sufficient, however, if I refer to only to the following.

[297] On 14 December 1992, the plaintiff completed a credit application form for the purpose of opening a credit account with a plumbing supply firm, North Coast Plumbing. On that form, the plaintiff said that:

(a) he traded as "EA Syddall";

(b) the nature of his business activity was "plumbing gas fitting roofing";

(c) he had commenced this business on 1 July 1992.

[298] That was only two months before he lodged the application form with ACL in which he said that his principal occupation was "computer operator/programming", that he had been in that principal occupation for one year, and that he did not have a second occupation.

[299] The plaintiff attempted to explain away the contents of the 1992 credit application form on the basis, in effect, that he was only opening the account to enable him to obtain supplies to use in his own home renovations. That explanation rang hollow.

[300] But in any event, the fact of the matter is that in November 1992, when he was seeking to get a benefit in the form of a credit account, the plaintiff gave one version of his occupational details, and only two months later, when seeking to obtain the benefit of insurance coverage, the plaintiff gave a completely different version.

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[13] (2001) 3 VR 279.

[301] In 1999, the plaintiff sought an early payout of his superannuation benefits, which were being held and managed by Prudential Superannuation, on the basis of financial hardship. He provided a statutory declaration dated 16 April 1999 stating that the cause of his financial hardship was "unemployment". Part of the superannuation moneys were paid to the plaintiff, but a balance was retained by the superannuation fund. On 12 November 1999, the plaintiff wrote to the superannuation fund stating:

> "I wish to terminate my superannuation policy with you and roll it over into another fund. Please find enclosed the policy document.
>
> The name of the fund to which it will be transferred is 'The Sheldrick Superannuation Fund'."

[302] On 21 July 2000, the plaintiff wrote to the relevant officer in the superannuation fund complaining about a lack of action. Amongst other things, he said to the superannuation fund that his employer was "the Sheldrick Superannuation Fund (Mr Raymond Sheldrick)".

[303] On 26 July 2000, Mr Sheldrick sent to the superannuation fund a compliance letter signed by Mr Sheldrick and Mrs Christine Sheldrick, certifying that the Sheldrick Superannuation Fund was an approved superannuation fund and that "Mr Eric Syddall has been in our employ since 10.06.1999".

[304] There is no record of the plaintiff ever having been employed by the Sheldricks between 10 June 1999 and 26 July 2000. Indeed, the plaintiff ultimately conceded in evidence that he was never employed by Mr Sheldrick. The inconsistency between his assertion to the superannuation fund and the representation made by the plaintiff in the claim on the insurer in this case is apparent. It is also inconsistent with the plaintiff's ongoing receipt of unemployment benefits during that period.

[305] In his evidence in chief before me, the plaintiff asserted (in para 9) that "by about June 1995 I was earning about 12,000 per month overall but had business expenses". That proposition was so far from the truth, as disclosed in his tax returns, as to be ludicrous.

[306] In a similar vein, in his evidence in chief the plaintiff said (at para 28) that he "did not receive any income from being engaged in business activities after 27.11.2000 other than receiving outstanding monies from work completed to that time". This evidence might be literally true, but it is equally clear that the family trust, of which the plaintiff was the trustee, continued after 2000 to receive payment for computer services performed by the plaintiff, including under the business name "AK Computers".

[307] These examples fortify the adverse view I have formed as to the plaintiff's credibility, and lead me to conclude further that the plaintiff has a demonstrable record of making whatever representations he considers necessary to achieve a particular purpose, regardless of the truth or falsity of those representations.

[308] When the plaintiff lodged his claim in January 2001, he must have known that his occupation was not that of a plumber and that he did not have gross monthly earnings of $4,000 per month. The further information he gave (in his letter of 29 January 2001) to the insurer that his involvement in computers was nothing more

than a hobby was also information that he must have known to be false. His ongoing assertion of disability to the extent he sought to portray it was also something he must have known to be false.

[309] I conclude that this claim was made and pursued dishonestly, and therefore fraudulently, by the plaintiff, and the defendant was and is entitled to refuse to pay on the claim.

THE PLAINTIFF'S CLAIMS IN THIS PROCEEDING

[310] It follows from the findings made above that the plaintiff's contention that the defendant breached the terms of the policy fail because either the defendant was and is entitled to avoid the policy or the defendant was and is entitled not to pay on this claim.

[311] There are, however, two matters raised on the plaintiff's pleadings and in his arguments that should be addressed.

[312] The first comprises contentions by the plaintiff that the defendant repudiated the policy of insurance. The contention is two-fold. In his further amended statement of claim, the plaintiff alleged:

> "84. The insurer/defendant by refusing to pay rehabilitation benefit made on a presumptive future medical opinion made an anticipatory repudiation in an effort to avoid escalated rehabilitation and other related benefits.
>
> 85. The insurer/defendant by refusing to pay benefit at all, made a total repudiation in an effort to avoid an escalated lifetime benefit payment with or without rehabilitation and other benefits, and has continued to refuse to properly reassess the claim in the ensuing years."

[313] In his outline of submissions at the conclusion of the trial, the plaintiff asserted:

> "Repudiation of contract by the defendant started on about the 12.3.2001 and was compounded several times up to about 3.5.2001 to present a fraudulent and reckless basis on which to deny the claim;"

[314] The plaintiff contended, in effect, that he had accepted the repudiation and rescinded the policy on about 11 September 2006.

[315] The plaintiff elaborated in his submissions on this allegation of repudiation:

> "77. About April 2001 the insurer subject to a claim on a contract of insurance declined to pay rehabilitation benefits to the plaintiff when he was contractually entitled to it. Subject to the continuation of the contract the plaintiff would further have been entitled to be paid under the contract for rehabilitation expenses. This was an anticipatory breach of the contract by the defendant to avoid totally the financial exposure relying on an upcoming medical review and not the current diagnosed medical condition of the plaintiff. It was also a repudiatory breach of contract and an act not in the utmost good faith." (citations omitted)

[316] The only entitlement of the plaintiff to be paid "rehabilitation benefits" under the policy of insurance was found in cl 8 of the policy which provided:

> "8. If the person insured is totally disabled for at least the length of the waiting period and is rehabilitating him or herself:
>
> - in a government program recognised by, or sponsored by a Federal or State government, we will pay you a benefit;
>
> - in any way approved by us in writing, we will pay you money towards his or her expenses.
>
> Each of these things is discussed in more detail below.
>
> *The benefit we pay*
>
> We will pay you half your monthly benefit for each month the person insured is totally disabled and participates in a rehabilitation program recognised or sponsored by a State or Federal government. This benefit is extra to any other benefit we pay you. We will only pay if we agree in writing to pay before the person insured enters the program.
>
> The benefit accrues from the day the person insured starts the program after the waiting period. We pay you at the end of each month for which you are entitled to be paid. The amount we pay you is not affected by anything the person insured earns.
>
> We will pay for up to 12 months, until the person insured stops being totally disabled, or the person insured leaves the program, whichever happens first.
>
> *The expenses we pay*
>
> If the person insured is totally disabled for at least the length of the waiting period, you can ask us to pay the person insured's costs of rehabilitating him or herself. These costs include buying goods – for example, equipment. The most we will pay is an amount equal to 6 payments of your monthly benefit. We will only pay an amount for costs which we have approved in writing before you or the person insured incurs them and which a registered medical practitioner says, in writing, the person insured needs to spend as part of his or her rehabilitation.
>
> The registered medical practitioner cannot be you or your family member, business partner, employee or employer, not can it be the person insured or his of her family member, business partner, employee or employer."

[317] There is no evidence of the plaintiff having been involved in a government rehabilitation program, or asking the defendant to agree to him entering such a program. He therefore had no entitlements under the first dot point in cl 8.

[318] Nor is there evidence of the plaintiff asked for approval of expenses pursuant to the second dot point in cl 8.

[319] In short, the defendant was under no obligation to pay the sort of "rehabilitation benefit" on which the plaintiff relies to found his allegation of repudiation. That disposes of that argument.

[320] The plaintiff's second contention is, in effect, that by declining the claim the defendant repudiated the contract of insurance. It is to be recalled, as is apparent from the history of the correspondence and investigations which I have outlined at length above, that the defendant took several months to investigate the claim, including by obtaining independent medical advice. During that time, the defendant paid the plaintiff benefits pending its decision to accept or reject the claim. Nothing in the defendant's conduct in the course of its investigation indicated an intention not to be bound by the terms of the policy of insurance. On the contrary, its conduct in paying benefits while the claim was being investigated indicated a prima facie intention of observing the terms of the income protection insurance policy.

[321] On 3 May 2001, the defendant declined the claim. I respectfully adopt the pithy observation by Campbell J in *Green v AMP Life Ltd*[14] that "[t]he mere fact that an insurer denies a claim for indemnity under a policy is not in itself enough to amount to a repudiation of a contract of insurance".

[322] This was a case in which the plaintiff claimed to be indemnified under the policy, and the defendant denied its liability to indemnify the plaintiff by relying on the terms of the policy. The plaintiff had, on 13 February 2001, been reminded of the definition of total disability under the policy which gave rise to an entitlement to claim benefits. By the terms of the letter of 3 May 2001, the defendant was clearly relying on the terms of the policy to support its denial of his claim, contending, on the basis of medical evidence, that the plaintiff was fit to perform the duties of a computer programmer/database administrator.[15]

[323] In my view, the plaintiff did not establish any basis for contending that the defendant had repudiated the contract of insurance.

[324] The second matter raised by the plaintiff in his pleadings and in his final submissions was an allegation that the defendant had failed to act with utmost good faith. This was pleaded in paragraph 83 of the amended statement of claim, under the heading "Fraud, misrepresentation" as follows:

> "83. The insurer/defendant did not accurately report the medical opinions of the plaintiff's attending medical practitioner and insurer/defendant's elected medical practitioner to improperly cease benefit payments and resume premium receipt as no such opinions were available to the insure/defendant on or before 03.05.2001 in order to avoid prolonged financial exposure."

[325] This allegation was further articulated in his closing submissions:

> "75. From about 12.3.2001 the defendant conspired to deny Dr Winstanley of material facts relating to the diagnosis of the plaintiff's cervical spondylosis in an attempt to pervert the opinion of the medical practitioner and deny the plaintiff of a large amount of money via a

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14 13 ANZ Ins Cases 90-124 at [151].

15 See, for comparison, *Judd v Suncorp Insurance & Finance* (1988) 5 ANZ Ins. Cases 60-832 at 75,191.

> Commonwealth Statutory Fund and a premeditated basis for the assessment panel to deny the plaintiff's claim number 785592.
>
> 76. From about 18.4.2001 the defendant conspired to deny Dr Christie ob material facts relating to the diagnosis of cervical spondylosis in this matter in a claim or potential claim to pervert the opinion of the medical practitioner and deny the plaintiff of a large amount of money via a Commonwealth Statutory Fund as per elsewhere herein.
>
> ...
>
> 78. On about the 3.5.2011 the insurer further repudiated the contract and acted in bad faith or alternatively not in the utmost good faith by failing to present all relevant medical information to the assessment panel with the result the assessment panel could not have properly assessed the plaintiff's medical condition and denied the claim. The denial of the claim was based on fraudulent misrepresentation or concealment of medical opinion and was not avoidance of the contract." (citations omitted)

[326] The plaintiff repeated these assertions in his oral submissions.[16] The onus was on the plaintiff to prove these serious allegations. He did not lead any evidence whatsoever to support any of the findings which would be necessary in order to reach the conclusions for which he contends. When cross-examining Ms Chung, the plaintiff put to her that the defendant had an intention to deny the claim and the reason that Dr Lynam's reports were concealed from the assessment panel was to cause the claim to be denied. Ms Chung flatly denied that contention.[17]

[327] There was no evidence that Dr Winstanley had not seen Dr Lynam's report. But even if he had, it would have made no difference to Dr Winstanley's approach to examining the plaintiff and making his own diagnosis[18] and in any event, the diagnosis reached by Dr Winstanley after examining the plaintiff was completely consistent with that which had previously been expressed by Dr Lynam.

[328] There is no evidence to demonstrate that the defendant "conspired to conceal evidence" or otherwise acted improperly with respect to the obtaining of independent medical reports in the matter. The plaintiff has failed to prove that the defendant failed to observe its duty to act with utmost good faith.

DAMAGES

[329] As noted previously, the plaintiff claimed a wide range of relief. In his amended statement of claim, the plaintiff made the following claims:

> "132. The plaintiff claims the following relief:
>
> (a) Liquidated/contractual damages of Four Million, Nine Hundred and Fifty Four Thousand, Four Hundred and Fifty Six dollars ($4,954,456) plus interest of $241,781 dollars (total $5,196,238) for benefit payments under the contract of insurance for the period from April 2001 to January 2038

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16 See, for example, Transcript 13-64 ll 48-54.

17 Transcript 10-37 ll 28-38.

18 See evidence of Dr Winstanley at Transcript 10-40 ll 5-20.

(plaintiff's age 81.69 or as permitted by law) including all contractual benefits due in that period;

(i) Exemplary damages 5 times the aforesaid figure and or relative jail terms and the court recommend ASIC pursue criminal charges against the insurer and or its parent company/companies under the Corporations Act 2001 (Cth), Insurance Contracts Act 1984 (Cth) and or Criminal Code Act 1995 (Cth).

...

(c) Such further compensatory orders as the court sees fit based on Paragraphs 105 to 119 herein and otherwise pursuant to UCPR r. 156 grants general relief or relief for those losses, impositions or traumas dur to the defendant's fraudulent and or bad faith acts pursuant to Part II of the *Insurance Contracts Act 1984* (Cth) as amended:

(i) Aggravated physical suffering to plaintiff $5,196,238;
(ii) Loss of peace of mind and enjoyment of life to plaintiff $5,196,238;
(iii) Loss of goods and chattels when forced to leave and sell his house $36,500;
(iv) Loss of equity in house $311,319;
(v) Property rental income July 2002 – present at $300 per week;
(vi) Interest as prescribed by law and contract;

(d) Costs on an equitable basis or nominal damages to plaintiff for stress and associated losses by self representation during an aggravated prolonged attack and continued denial by defendant $250,000;

(e) The defendant declares that the plaintiff is entitled to have claimed on the policy and indemnifies to plaintiff to be able to apply for insurance without default;

(f) Because the plaintiff would have remained insured for other events, the defendant pay for in total and in advance a guaranteed renewable insurance policy with an insurer that is not related to or affiliated with the defendant, on behalf of the plaintiff until the plaintiff's death with a life time benefit for injury and sickness and 7% annual escalation option and death benefits and any other benefit of the Policy all to the same level as the original policy would have been at the time of settlement with no exclusions except the plaintiff's current disability or in the alternative pay to the plaintiff the policy benefits that would fall due between the plaintiff's age 81.69 and age of 95 increased with all options of the Policy in effect and death benefit cover. The additional benefits such as inter alia: death, nursing, accommodation, travel and spousal income are still valid during benefit payment (clause 1 of the Policy). The court order that the parent company or any company that takes over the responsibility of the Policy, on the demise of the defendant, continue such policy:

...

(k) Interest thereon for items not already included and/or further interest calculated on any outstanding balances.

133. Special, general and exemplary damages:

...

(b) Special and/or general and/or exemplary damages be awarded to the plaintiff's family to compensate for impecuniosity and or humiliation and or loss of enjoyment of life (loss of financial security and conversely financial suffering) imposed on his family:

(i) Spouse Susan Syddall, as someone living with the person insured as his or her spouse on a domestic basis in good faith; $5,196,238;
(ii) Son Daniel Syddall $2,598,119;
(iii) Son David Syddall $1,558,871;
(iv) Daughter Amanda Syddall $1,000,000;
(v) Daughter Katie Syddall $1,000,000;
(vi) Nominal damages to spouse direct benefits denied related to the attendance and care of the insured and loss of her own income in the event of physical disability $250,000;
(vii) Loss of income benefit to spouse $2,000;
(viii) Interest on item (vii) herein and on any late payments.

(c) Exemplary damages be awarded because of the inadequacy of the statutory scheme to provide a remedy for the kinds of damage inflicted by a deliberate disregard of their obligations under the contract;

(d) Exemplary damages be awarded having regard to the nature of the relationship between an insurer and insured with the aspects of dependence and vulnerability in a time of need and disability and imposed impecuniosity;

(e) Exemplary damages be awarded in keeping with the financial responsibility of the defendant and its parent company to dissuade improper use of its fiscal/fiduciary position/power and or the court system to avoid financial exposure;

(f) Exemplary damages be awarded in keeping with the financial responsibility and stature of the defendant and its parent company to dissuade repeated breaches by this insurer and other insurers.

134. In accordance with the ever increasing age of death of the Australian male the plaintiff requests as a further exemplary measure the lifetime benefits be recalculated to age 95 or as the court sees fit.

> 135. The plaintiff requests that exemplary damages against the defendant, a corporate body, be awarded at five times the rate for a natural person and be based on the entire claim.
>
> 136. The plaintiff requests as an exemplary measure and to avoid unforseen losses for the plaintiff, no future depreciation of the claim be granted to the defendant.
>
> 137. Due to the protracted period covered by this claim (May 2001 to present) no one interest percentage or simple amount is able to be stated. All interest rates expressed herein is the annual interest rate on the total unpaid amount for the month period based on Commonwealth Government 10 Year Bonds averaged from prior 10 years plus 3% to the date of settlement pursuant to s.57 *Insurance Contracts Act 1984* (Cth) which applies to the exclusion of any other law."

[330] In the body of his statement of claim, the plaintiff had alleged:

- that he had been "deprived of the policy benefits including its psychological security" (para 109);

- that he "suffered damages caused by the insurer/defendant's breaches and attempts to totally avoid the legitimate policy benefit of a rehabilitation program and costs" (para 110);

- that he "suffered damages caused by the defendant/insurer's breaches and attempts to avoid totally a lifetime claim or at least reduce the policy claim where Australian males are living past age 100 to a lower age of <u>about</u> 80 by advantage of other calculation guidelines that are different to the contract of insurance" (para 111);

- that the plaintiff "suffered damages caused by the insurer/defendant's attempts to avoid the claim based on the imposition of further conditions" (para 112);

- that the defendant "humiliated the plaintiff and caused emotional trauma" in connection with the FICS claim (paras 113 and 114);

- that the plaintiff and his family "through imposed impecuniosity suffered and continues to suffer emotional trauma and many other financial and lifestyle losses in addition to contractual losses" (para 115);

- that the plaintiff "has suffered loss of the guarantee of being consistently insured no matter what the insured's health" (para 116);

- that the plaintiff "has suffered a loss of policy death benefits" (para 117);

- that the plaintiff "suffered a loss of enjoyment of life" (para 118);

- that the plaintiff "suffered emotional trauma through the insurer/defendant acting in bad faith" (para 119);

- that there should be an award of exemplary damages and that "relief to the plaintiff should be recalculated instead of a low short term average CPI figure to the full 7% of the Escalation Option as future economical conditions may substantially exceed this cap as in 1986 to 1989 when they exceeded 8%" (para 121);

- that due to the defendant's conduct "the plaintiff has been removed from and is unable to re-enter the housing market causing inter alia emotional trauma" and has "suffered inequity by the loss of property ownership which would not have occurred had the contract been honoured" (para 126);

- that the plaintiff "has suffered the loss of ability to receive rental income from or about 16.10.2003" (para 127);

- that the plaintiff lost other assets, such as a motor vehicle, tools of trade, office equipment, sailing and other boats, trailers, household furniture and other (para 128);

- the plaintiff suffered loss of regular dental and other health care (para 129).

[331] In his outline of submissions at the conclusion of the trial, the plaintiff submitted:

> "96. The plaintiff suffered the loss of a calculable contracted financial loss including inter alia:
>
> (a) Monthly benefit;
>
> (b) Rehabilitation expenses;
>
> (c) Rehabilitation costs;
>
> (d) Premium refunds; and
>
> (e) otherwise as per the statement of claim.
>
> 97. The plaintiff suffered the loss of incalculable contracted loss including inter alia:
>
> (a) Appropriate medical intervention;
>
> (b) Non-insurability due to impecuniosity and the defendant's aggravated persistence on inter alia the plaintiff's fraudulent acts (not indemnify, prevents other insurance by reputation or impecuniosity);
>
> (c) Loss of financial security being a provision of the contract of insurance;
>
> (d) Loss of each family member's financial security being a provision of the contract of insurance;
>
> (e) The plaintiff suffered the reverse of financial security;

(f) The plaintiff's family members were deprived of the benefit of the contract of insurance and suffered the reverse of financial security and each lost the respective roll of the plaintiff to them as husband/father; and

(g) otherwise as per the statement of claim and reply."

[332] To the extent that the plaintiff's claim for relief related to lost benefits, the plaintiff led no evidence to support his claim in respect of the assessment of the benefits payable or to support the case he sought to advance in respect of the calculation of those benefits. Nor was any evidence called to establish the present day value of any entitlement to benefits in the future.

[333] Otherwise, many of the heads of damage sought to be recovered by the plaintiff (for example, damages for emotional trauma to himself and other members of the family) are simply not recoverable as a matter of law, and the plaintiff could not point me to any authority in the course of oral submissions to support these claims. In any event, no evidence was led in support of those claims, nor was any evidence led in support of the plaintiff's claim for exemplary damages. I note in passing that the plaintiff himself conceded in his written submissions that many of these damages were "incalculable". I infer from that that the plaintiff intended to convey that he was unable to calculate them. Nor am I.

[334] Otherwise, the plaintiff did not lead any evidence to support the losses claimed. There was, for example, no evidence to support his claim of loss of competitiveness in the housing market, nor was there evidence to support the claims made concerning loss of property.

[335] In short, an assessment of the damages which the plaintiff would have recovered had he succeeded in his claim is not possible on the state of the evidence presented by the plaintiff in this case.

Conclusion

[336] The plaintiff's claim is dismissed.

[337] I will hear the parties as to costs.