

# POLICYHOLDERS MAY STILL SECURE COVER DESPITE NON- DISCLOSURE

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Legal Briefings - By **Mark Darwin** and **Guy Narburgh**

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If a policyholder fails to disclose information they could reasonably be expected to know to be relevant to the risk for which they are seeking insurance, the insurer may reduce its liability in the claim to the extent it has been prejudiced by the non-disclosure.

But the onus is on the insurer to establish prejudice, and a recent case from the NSW Court of Appeal<sup>1</sup> underscores the practical difficulties for insurers doing so, opening the way for a policyholder to secure coverage regardless of the alleged non-disclosure.

## THE FACTS

Stealth Enterprises Pty Ltd t/as The Gentlemen's Club (**Stealth**) owned and operated a brothel in the ACT, and was owned by persons associated with the Comancheros motorcycle gang. Calliden Insurance Limited (**Calliden**) provided property damage and liability coverage for Stealth under an Adult Industry Insurance Policy. Calliden knew that Stealth was operating a brothel, but did not know that its owners for associated with the Comancheros.

The brothel was damaged by fire and a claim was lodged by Stealth. Calliden denied liability on the basis that Stealth had failed disclose that its owners associated with the Comancheros, and also that the brothel's registration under the Prostitution Act 1992 (ACT) had lapsed. Calliden argued that it would not have renewed the policy if Stealth had disclosed these two facts, and submitted that on that basis its liability on the claim should be reduced to nil.

## THE ISSUES

The primary issues for determination were:

1. whether a reasonable person in the circumstances of Stealth could be expected to know that its association with the Comancheros was relevant to Calliden's decision to renew the policy;
2. whether Calliden would have renewed the policy had this fact been disclosed.

## THE DECISION

The Court found that Calliden was liable to cover the claim.

First, the Court concluded that a reasonable insured in Stealth's position could not have been expected to know that the association to the Comancheros, without anything further, would be relevant to Calliden's decision to insure.

Distinguishing a mere suspicion that the information might have been relevant from knowledge on the part of a hypothetical reasonable person in the position of the insured, Meagher JA found that Stealth would have appreciated the risks flowing from their association with the Comancheros but equally would have recognised the co-extensive risks flowing from operating a brothel. Since Calliden was in the business of providing adult industry insurance and would therefore have been aware of the risks associated with a brothel, the Court considered Stealth did not have to volunteer the further information in the absence of any questions addressed to that subject. The renewal form completed by Stealth did not include a question asking about any links to organisations.

Another failing on the part of Calliden, identified by Sackville AJA, was the lack of evidence called in support of its contention that the policy would not have been renewed had the association with the Comancheros been disclosed. Oral testimony of an employee, unsupported by any contemporaneous objective evidence, such as underwriting guidelines, was not enough for Sackville AJA to accept Calliden's assertion that it would not have renewed.

Policyholders may therefore be emboldened if they find themselves in this position and their insurer is unable to produce underwriting guidelines to bolster declinatures of coverage based on assertions that the policy would not have been renewed had the full facts been disclosed.

## ENDNOTES

1. *Stealth Enterprises Pty Ltd t/as The Gentlemen's Club v Calliden Insurance Limited*

[2017] NSWCA 71 (5 April 2017).

## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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