MATTERS OF INTEREST

THE GANAS/MOMENTUM CASE

In November 2018 after a newspaper article about this matter there was a public outcry. What can be best described as a "frenzy" ensued in social media and other forms of media. The case, which had been determined in our office, concerned the repudiation of a policy on the ground of non-disclosure of material information at application stage. Mr Ganas had not disclosed certain information in an application form for insurance cover. He died as a result of criminals shooting him in the presence of his family. We upheld Momentum's right to repudiate the policy and decline the death claim. The public's criticism centred on the fact that the cause of the claim was not connected to the non-disclosed information.

Following the mounting public pressure Momentum made a decision to pay the claim based on a change in practice. The insurer undertook to pay claims where the deceased was a victim of violence, despite the fact that there had been non-disclosure of information at application stage which would entitle it to decline the claim.

When questioned in the media about the matter we emphasised the following:

1 The office sympathises with Ms Ganas and for her sake we are pleased with the resolution of her claim.

2 In our final determination we applied the law to the facts, as we established them. We also applied our equity/fairness jurisdiction in considering whether the insurer would have issued a policy, had it known all the facts.

3 The burden of proof of the facts is on the insurer.

4 The causal connection is between the non-disclosure and the conclusion of the contract and not between the non-disclosure and the claim event, for instance, death. We believe that we correctly applied the law, namely that an insurer is entitled to repudiate a claim on the ground of non-disclosure because it was misled as to the nature or extent of the risk and thus the conclusion of the contract.

5 An applicant for a life insurance policy must give all material information in the application form. This is a fundamental principle which is founded on an insurer's legal right to be informed of all the material facts in order to enable it to properly assess the risk involved in an application.

6 The test for materiality was prescribed in section 59 of the Long-term Insurance Act, 52 of 1998. Information is regarded as material if a reasonable, prudent person would consider that it should have been correctly disclosed to the insurer so that the insurer could form its own view as to the effect of such information on the assessment of the relevant risk.

7 This office investigates and determines the issue of materiality and is not bound by the views of the parties on that score.

8 In the exercise of its equity jurisdiction, this office is a strong proponent of the view that, in the event of a non-fraudulent misrepresentation, the policy should be "reconstructed" to what it would have been if there had not been a non-disclosure. This view is implemented according to the "Didcott principle", named after the late Judge Didcott.

9 Insurers agree to the application of the Didcott principle. Sometimes it happens that an insurer agrees to consider the application of the Didcott principle, but argues or produces evidence that the policy in question cannot be reconstructed because, if the insurer had known the truth, the policy would not have been issued at all. Momentum made this argument in the Ganas case. We accepted this argument after obtaining an independent reinsurer's opinion on the underwriting criteria Momentum had applied in this case.

10 The legislature should reconsider the current non-disclosure legislation. If it is of the view that an insurer can only escape liability on the ground of a non-disclosure if there is a causal connection between the non-disclosure and the insured event, it is a matter for the legislature to deal with. Until that happens, this office applies the law as it stands, with due regard to our equity jurisdiction, which enjoins us "to have due regard to considerations of equity" (Rule 1.2.4) and to ensure that "subscribing members act with fairness and with due regard to both the letter and the spirit of the contract between the parties" (Rule 1.2.7). The legislature should, at the very least, give consideration to the introduction of the Didcott principle into legislation.

11 Our office will not allow an insurer to "shut its eyes to the light" or to adopt a supine attitude towards information in an application form which should alert the insurer to make its own enquiries. Such inaction on the part of an insurer may be interpreted as a waiver by it of its entitlement to the information.

12 The message we gave to prospective applicants was:

- Give full information in the application form.
- Rather disclose more than only the information required in the application form.
- If you do not understand a question, make enquiries or say in your answer that you do not understand the question.
- If you are not certain of your answer, make enquiries or say in your answer that you are not certain thereof.
- Once the contract has commenced the duty of disclosure ends and any new circumstance arising thereafter which affects the insurer's risk is for its account and does not have to be disclosed by the insured. However, the duration of the duty of disclosure can be contractually extended and modified. For instance, an insured may be bound to disclose to the insurer any change in his/her occupation or the commencement of his/her engagement in hazardous pursuits, even if these occur after the commencement of cover.

There is no question that the publicity and public outcry gave the industry and the authorities cause for thought. It is a positive outcome if the way of doing business is questioned because that is an opportunity for reflection and, possibly, for improvement.