IMPUTATION OF AN INSURANCE AGENT'S KNOWLEDGE TO AN INSURER

(A) **INTRODUCTION**

The office of the Ombudsman for Long-term Insurance from time to time receives complaints from policyholders that they "have told the insurer's agent everything" but that the insurer nevertheless, on the ground of the insured's alleged misrepresentation or breach of warranty, refuses to meet their claims.

The following recent complaint is a typical example of the problem. Mr A has been appointed by an insurance company as its agent. A solicited Mrs B to apply to X for a life insurance policy incorporating disability cover. A filled in the proposal form. One of the questions in the proposal form was whether the proposer suffered from arthritis. Mrs B informed A that she did not have arthritis but that she suffered from lupus. The advice of A was that since the form did not specifically refer to lupus, it was not necessary to mention it and the symptoms occasioned by it. As a result of this advice several general questions in the proposal form were answered incorrectly. The proposer signed the form.

The proposal contained the usual warranties and also stated that "[The insurer] shall not be bound in any way by representations or undertakings made or given by any person save as contained in the contract issued."

The insurer was not informed that the proposer suffered from lupus. The lupus caused the insured to become disabled and she filed a claim. The insurer repudiated liability and pleaded non-disclosure and breach of warranty.

(B) **THE DOCTRINE OF CONSTRUCTIVE NOTICE**

In circumstances like those sketched above, the doctrine of constructive notice may come to the assistance of the insured. This doctrine consists of a set of rules dealing in general with the question when knowledge acquired by an agent may be imputed to his principal. It may crop up in a variety of circumstances, but the present analysis is limited to the question whether the knowledge of an insurance agent may be imputed to the insurer where the agent fills in an application form which is then signed by the intending insured. The reason why this type of

situation occurs so frequently in practice is that an insurance proposal is a rather technical matter requiring specialised knowledge to be properly completed. For this reason insurers prefer their agents to take care of this task.

Typical situations calling for imputation of knowledge are the following:

- Where there is no appropriate question in the application form relating to the material fact in issue but the client fully informs the agent who completes the form;
- Where there is an appropriate question in the application form which is wrongly answered but the agent filling in the form has been correctly informed and the client has no actual knowledge of the misrepresentation in the form;
- Where there is an appropriate question in the application form which is wrongly answered but the agent filling in the form reassured the insured that he would see to it that the correct information reaches the insurer.
- Where there is an appropriate question in the application form which is wrongly answered because the agent filling in the form interpreted the question wrongly and the insured having disclosed the true facts actually believed his interpretation.

The agent's failure to notify the insurer of the correct information may be due to an innocent or negligent oversight by him but it may also be that he did so on purpose knowing full well that this will be to the detriment of the insurer. In the latter instance a case of fraud may be made out. It is possible that the proposer may be party to such a fraud on the insurer.

For the purposes of this paper, the term "agent" is used to denote a mandatary (or even an employee) who is appointed by an insurer to do a certain task (such as canvassing for insurance business) and who may or may not have authority to conclude a juristic act (such as a contract) on behalf of his principal.[1] In a wide sense of the word the term "insurance agent" may include an insurance broker.[2] However, an insurance broker does not act on behalf of the insurer but on behalf of the insured. [3]

[1] In terms of the regulations under the Long-term Insurance Act (Act 52 of 1998) such a person is described as a "representative"—see reg. 3(1). See further Reinecke et al *General Principles of Insurance Law* (2002) par 463.
[2] Such a person is described in terms the Long-term Insurance Act 52 of 1998 as an "independent intermediary."
[3] See *Rabinowitz v Ned-Equity Ins* 1980 1 SA 403 (W) 407; *Lenaerts v JSN Motors (PTY) Ltd aa* 2001 4 SA 1100 (W) 1108 (short-term insurance). See also vol 12 LAWSA (2nd ed) par 470 et seq. The relationship between a broker and his client is regulated by a brokerage contract which is a contract of mandate.

Where the insurer has been misled by a false answer to a question, it may rescind or cancel the contract on the ground of misrepresentation (whether *per commissionem* or *per omissionem*) or, in the alternative, breach of warranty, that is to say, breach of contract. This is where the doctrine of constructive knowledge slots in. If knowledge has been successfully imputed to a principal, it is usually said that the consequences are the same as those that would have obtained if the principal had actual knowledge. This means that the insured would be able to invoke estoppel or waiver as a defense where the insurer tries to rescind or cancel on the ground of misrepresentation or breach of warranty.[4]

South African insurance law, which includes the rules pertaining to the imputation of an agent's knowledge to an insurer, has been greatly influenced by English law.[5] Although the direct ties between our insurance law and English insurance law have been severed, English law on this topic remain relevant. For this reason it is advisable to have a look at the English law and literature.

(C) **ENGLISH LAW**

There is a considerable conflict of judicial opinion in the English case law on this topic. Three developmental stages may be distinguished as represented by the following cases.

The first case is *Bawden v London, Edinburgh and Glasgow Life Insurance Co.*[6] The proposer was illiterate and had lost the sight of one eye. He applied for accident insurance. The proposal was completed by the insurance company's agent in accordance with the answers dictated to him by the insured. The agent was described as the person deputed by the company to receive the proposal and to put it into shape. It contained a declaration that the insured was in good health and had no physical infirmity. It also contained the usual basis clause and was signed by the proposer. It was accepted that the agent knew about the insured's infirmity but that he had forgotten to relay the information to the insurer. The insured met with an accident and lost the sight of his other eye. The court decided that the insured was entitled to recover and that the breach of warranty was waived by the issue of the policy. Knowledge of the agent was therefore seen as the knowledge of the company.

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[4] Cf *National Employer Mutual General Insurance Ass v Gany* 1931 AD 187. See *MacGillivray on Insurance Law* (10th ed) par 18-25.
[5] See *General Principles of Insurance Law* par 24 *et seq.*

According to modern thinking this common sense description of an insurance agent's role is convincing and in accordance with the perceptions of the community at large.[7] Bawden's case was at one stage considered to be the leading authority in the present context.

Bawden did not, unfortunately, reign supreme for long. It was soon distinguished. Perhaps the main consideration that gave rise to the unease about *Bawden* is the notion that someone who has signed a document must bear the consequences thereof. Moreover, it was thought that if the proposer asked the agent to fill in the form, the agent must be seen as the agent of the proposer rather than of the insurer. This was precisely the attitude taken in the next important case, viz. *Newsholme Bros v Road Transport and General Insurance*[8]

That case related to the insurance of a motor bus. The proposal was signed by a partner of the insured but the answers were filled in by the agent. The duty of the agent was to canvass for insurances, to obtain duly completed proposals and to receive premiums but he had no authority to complete any proposal forms himself. The proposer gave the agent the correct answers but the agent incorrectly entered them on the proposal form. The answers were declared to be true and the insured accepted them as the basis of the contract. Moreover, the form contained a provision that knowledge acquired by the agent should not be deemed to be notice to the insurer. The court ruled that the agent's knowledge could not be imputed to the insurer.

In *Newsholm's* case *Bawden's* case was criticised though not directly overruled. The court distinguished *Bawden* on the basis that it did not apply where the agent completed the proposal form at the request of the proposer for in such a case the agent must be seen as the agent of the proposer. This is known as transferred agency: for the purpose of filling in the form the agent acts for the insured while for other purposes he acts as the agent of the insurer.

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[6] (1892) 2 QB 534.
[7] See Hodgin *Insurance* Law (2nd ed) 392. Cf also McGee *The Modern Law of Insurance* (2001) 6.21
[8] (1929) 2 KB 356.

The *Newsholme* case is widely regarded as the leading case on the present topic. Since the decision in this case, it was clearly more difficult to succeed with a plea of imputed knowledge. This decision is lamented by some British writers.[9]

The third decision is *Stone v Reliance Mutual Insurance Society Ltd.*[10] In this case *Bawden* was interpreted and applied. It was a case of fire insurance. An inspector was sent to the insured with a view to reviving the insurance. The inspector had authority to complete proposal forms. He did not record that the insured had an earlier claim or that his policy had lapsed although he was aware of these facts. The proposal form contained a clause that "….insofar as this proposal is not written by me the person who has written same has done so by my instructions and as my agent for that purpose." The insured signed the form. The insurer was prevented from cancelling the policy. The agent's knowledge was imputed to the insurer.

The distinction between *Newsholme* on the one hand and *Bawden* and *Stone* on the other hand, must be taken to lie in the fact that the agent in *Newsholme* had no authority to complete the proposal form while in the other two cases he did possess that authority.[11] Where an agent did possess such authority, he has on occasion been said to be an agent "to know" and such an agent's knowledge is considered to be imputable to his principal.[12]

(D) **SOME LAW REFORM INITIATIVES**

In its report of 1957 the British Law Reform Committee recommended:

"that any person who solicits or negotiates a contract of insurance shall be deemed, for the purpose of the formation of the contract, to be the agent of the insurers, and that the knowledge of such a person shall be deemed to be knowledge of insurers."

The English legislature did not implement this recommendation but English writers maintain that there is an urgent need for legislative reform.[13]

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[9] See Clarke *The Law of Insurance Contracts* 10-2; Hodgin *Insurance Law* 394.
[10] 1972 1 Lloyd's Rep 469
[11] See Hodgin *Insurance* Law 395 and *MacGillivray on Insurance* par 18-42 *et seq.* Clarke *The Law of Insurance Contracts* 10-2 sees the matter in a slightly different light.
[12] See *MacGillivray on Insurance Law* par 18-42; Houseman & Davies *Law of Life Insurance* (12ed) 3.9 – 3.12.
[13] See Hodgin 395.

In Australia, New Zealand and Canada legislative changes have been introduced which resulted in the agent being treated as the agent of the insurer. This opened the door for the imputation of the agent's knowledge to his principal.[14]

(E) **SOUTH AFRICAN LAW: PRINCIPLES**

South African law acknowledges a general doctrine of constructive notice.[15] This doctrine was first formulated in *Town Council of Barberton v Ocean Accident and Guarantee Corp Ltd.*[16] The requirements for imputing the knowledge of an agent to a principal are generally speaking twofold. First, the agent must have acquired the knowledge in the course of his mandate. Secondly, there must be a duty on the agent to communicate the acquired information to his principal. The existence of such a duty depends on the scope of the agent's mandate and the importance of the information to his principal.

The doctrine of constructive notice applies to all types of intermediaries and not only persons authorised to enter into contracts on behalf of a principal.

(F) **SOUTH AFRICAN LAW: CASE LAW**

There is not really a leading case on the present topic in South African law. Although quite a few old cases do deal with this matter, it is not always easy to infer their *rationes decidendi* and to reconcile all of them. What material there is, appears to be somewhat outdated and out of tune with modern thinking.

In some old cases knowledge on the part of the agent was treated as a defense to an insurer's reliance on misrepresentation or breach of warranty.[17] The more recent tendency is to deny such a defense.[18] This is exemplified by the decision of the Appellate Division in *National Employer Mutual General Insurance Ass. v Gany.*[19] The Court adopted the reasoning applied in the *Newsholme* case but a more plausible explanation could be that constructive knowledge

[14] Hodgin 394-396.
[15] Cf *Stannic v Samib Underwriting Managers (Pty) Ltd* [2003] 3 ALL SA 257 (SCA).
[16] 1945 TPD 306 311. See further *General Principles of Insurance Law*, par 501.
[17] See *General Principles of Insurance Law* par 502.
[18] See *General Principles of Insurance Law* par 503.
[19] 1931 AD 187.

was excluded on the ground that the insurer was defrauded by the agent and the proposer acting in concert to do so.

In spite of *Gany* the Court in *Yorkshire and Co v Ismail* [20] thought it possible to allow imputation of knowledge if an agent acted as the insurer's agent in completing the form.

(G) **SA LEGISLATION**

The provisions of the Long-term Insurance Act[21] may also be of importance in the present context. Section 56 of the act lays down that:

"A provision of an agreement, the purport of which is that –

(a) a long term insurer is exempted from liability for the actions, omissions or representations of a person acting on its behalf in relation to a long-term policy;

(b) the person who has entered into the long-term policy declares or admits that a person who acted on behalf of the long-term insurer in connection with an offer of that person to do so, or with the negotiations preceding the entering into it, was in fact appointed to act on behalf of the first-mentioned person;

shall be void."

Section 56(a) appears to be reasonably clear but the scope of section 56(b) requires clarification. Does it cover a clause[22] which provides that if the agent fills in the proposal form, he will cease to be the agent of the insurer and will be regarded as the agent of the insured? To what extent does this section protect the insured?

(H) **CONCLUSION: WHEN MAY AN AGENT'S KNOWLEDGE BE IMPUTED TO HIS PRINCIPAL?**

The situation where the insurance agent fills in the proposal for insurance has long been the rule rather than the exception. In most cases this works well but occasionally things go wrong. It is suggested that where insurers reap the benefits of this practice they should also bear some responsibility. Unfortunately the present state of the law on this topic is rather uncertain and in need of reform.

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[20] 1957 1 SA 353 (T).

[21] 52 of 1998.

[22] such as the one in e.g. the *Stone* case. See note 9.

Where an agent is instructed by an insurer to canvass for insurance proposals, it is submitted that in many if not all cases his mandate will include the duty to bring the proposal into shape. In fact it would appear that it is the practice of insurers to require their agents to complete the forms. The reason for this that the insurer has a substantial interest in the completeness and accuracy of the information to be collected. This means that if the agent completes the form, he must be regarded as the agent of the insurer if not in form then in substance. It is in this spirit that section 56 of the Long-term Insurance Act needs to be interpreted. Where an agent is not instructed but permitted by an insurer to complete proposal forms, ostensible mandate may come into play

The practice of insurers to require their agents to complete the proposal form, also applies where an insured employs an insurance broker. Although such a broker must in principle be regarded as the agent of the insured, he should in these circumstances be treated as the agent of the insurer for the specific purpose of filling in the application form.

Applying the general principles relating to imputation of knowledge, the knowledge of an agent or broker who fills in the proposal form on behalf of the insurer should be imputed to his principal if he received the information in the scope of his mandate and there rested a duty on him to convey such knowledge to his principal.[23] In this context the decisive question is whether the agent's mandate included the duty to give[24] and to receive information relating to the proposed insurance. Presumably these two functions go hand in hand although the one or the other may be accentuated in given circumstances.[25] It must, in other words, be determined whether the agent has been appointed as the insurer's messenger for the purpose of giving and receiving information concerning the proposed insurance. It is suggested that an agent who has been instructed to put the proposal into proper form, *prima facie* has a duty to convey collected information to the insurer. If this were in fact the position, information received would be received within the scope of the agent's mandate.

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[23] In spite of the legal impediments our Office has been able to mediate, on the grounds of the general principles regarding imputation of knowledge, some settlements in favour of insured.

[24] It is hardly thinkable that an agent may be instructed to canvass for insurance business without empowering him to explain the product. Where the agent has been authorised to make representations, his principal could incur delictual liability for misrepresentations made by the agent, cf *Ravenne Plantations Ltd v Estate Abrey* 1928 AD 143. See Van der Merwe *et al Contract General Principles* (2nd ed) 237 *et seq.*

[25] Thus the Policy Protection Rules emphasise the agent's duty to inform the proponent of the benefits attached to the policy and the premium to be paid.

Whether an agent is bound to impart his acquired knowledge depends on the materiality of such information for his principal. However, imputation of knowledge cannot take place where the proposer was fraudulent. If only the agent was fraudulent, it is not immediately clear how the position of the insured would be affected.

Returning to the example quoted at the beginning of this paper, the first question is whether the proposer acted in good faith. Bad faith enters the picture where the proposer was aware of the untruthfulness and had foreseen that this could harm the insurer. If the policyholder, for instance, tells the agent that he suffers from cancer and the agent advises him not to disclose that fact for fear that the insurance would then never be issued to him, the policyholder would clearly have no answer if the insurer should afterwards rely on the non-disclosure of his disease. So too, where the policyholder, albeit on the advice of the agent, completes the application form in respects which he knows perfectly well to be misleading or untrue and to the detriment of the insurer. On the other hand, if the insured provides the correct information to the agent who fills in the incorrect answer and the proposer signs the proposal without knowing of the incorrect answers in the proposal form, the good faith of the proposer does not come under suspicion.

If the proposer was indeed in good faith, the next, and crucial, question is whether the agent had been instructed (expressly or tacitly) to receive information on behalf of the insurer. This is a question of fact. If he had such instruction or authority, the agent's knowledge could be imputed to the insurer because it was clearly material for the insurer to be apprised of the information in question. Consequently the insurer would be precluded from relying on misrepresentation or breach of warranty in an effort to cancel the contract. The clause that the insurer shall not be bound by "representations or undertakings made by any person" is rendered ineffective by sec 56 of the Long-term Insurance Act.

(I) **IMPUTATION OF KNOWLEDGE AND RECTIFICATION OF A POLICY**

A variant of the problem of imputation of knowledge, also a recent case, is the following:

The Agent, A, negotiates with B with a view, say, to induce him to take out an endowment policy with Company X. At B's request A agrees that the commission charges will only be

2% (instead of the usual 2,75%) and will only be charged in respect of actual contributions and not “up-front” in respect of the entire term of the policy.

These provisions are not, however, recorded in the proposal form or the policy that is issued. On the contrary, both documents make it plain that X’s “normal charges” will apply and that the investment amount shall be the balance after deduction of “the policy fee or other benefits and administration charges”.

Assuming, for the sake of argument, that the circumstances are such:

- That A had no authority to enter into contractual arrangements on behalf of X; and
- that A’s knowledge, on the grounds outlined earlier in this paper, would in law be imputable to X,

will B, in those circumstances, be permitted, as a matter of law, to have the contract documents rectified to bring them in line with what A and B had actually agreed?

Unlike the situation discussed earlier, the issue is not whether X will be permitted to *cancel* a policy but whether B will be permitted to *enforce* it in accordance with the terms agreed to between him and the agent.

The issue, oddly enough, does not appear to have ever arisen in the case law, either in England or South Africa.

The answer may well depend on a further question, viz whether the circumstances were such that a reasonable person in B’s position would have had cause to believe that A had authority to agree to the disputed terms on behalf of X. If so, that would be a case of ostensible authority and in those circumstances it would seem to follow that B would not be denied the further redress, if it is necessary for him to obtain such an order, of rectification of the relevant documentation. But that would be a case of agency not imputation.

In the absence of actual or ostensible authority, and even if a case could otherwise be made out for imputation of knowledge along the lines suggested earlier, it is to be doubted whether new contractual terms can be foisted on a principal through the medium of rectification.

Rectification postulates actual consensus not reflected in the document concerned. Rectification of the proposal form and the policy would thus require the formulation of new terms in substitution of what is contained in the current documents. The only basis upon which the documents could be rectified would be if the agent's intention is imputed to his principal. The issue, therefore, is to determine whether the doctrine of imputation can be stretched to a point where it can support a claim for rectification, contrary to the actual intention of the principal. This approach would involve an amalgam of two distinct legal doctrines; imputation of an agent's knowledge to a principal and rectification of a document to bring it in line with the actual intention of the agent but not the principal. On this basis the agent's intention would be ascribed to the principal by way of a double fiction. The first fiction is that the principal intended what the agent intended. The second fiction is that both the principal and the other party therefore knew that the written document did not reflect what they truly had in mind and that it should be rectified accordingly.

Although the point must be regarded as an open one, the propositions on which it rests must be regarded as highly suspect. It would not be a case of imputation of knowledge but of imputation of intention.

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