CASE 13/2013: LATE SUBMISSION OF GROUP SCHEME FUNERAL BENEFIT CLAIM

Policy providing submission by nominee of claim within six months from date of death; late submission due to personal circumstances and policy unknown to nominee; insurer unable to show specific prejudice if claim admitted; exercise of equity jurisdiction

Background

On the death of an insured the insurer must be notified within a period of six months of the date on which the claim arose. The relevant clause is clause 10.1. which reads as follows:

> "10.1 On the death of the Principal Insured
> 10.1.1 The beneficiary nominated must notify the Insurer within six months of the occurrence of a claim."

The principal insured ("the deceased"), who was insured under a group assistance policy issued by Guardrisk Life Limited ("Guardrisk") to the employer, passed away on 27 November 2011. The claim was submitted by the surviving spouse, the sole nominated beneficiary of the principal insured, on 22 November 2012. The primary reason provided for the late notification was that the spouse was unaware of the existence of the group life policy.

The beneficiary explained that the following factors contributed to the late submission:

- Shortly after the death the beneficiary reported the estate to the Master of the High Court, to obtain the Letter of Authority to deal with the estate.
- In December 2011, the beneficiary was involved in a car accident, in which his mother passed away and he was hospitalised.
- In March 2012 the bank, being the bondholder of fixed property, informed him that as the value of the estate exceeded R125 000 he would have to obtain a Letter of Executorship instead from the Master. The beneficiary appointed attorneys, who then commenced communication with the Master on 15 March 2012.
- Months later (the exact date is unknown, but this was possibly in late October or early November 2012), the beneficiary again perused the deceased's documents and came upon a letter in which it was shown that the deceased was covered in terms of the group life policy through her employer.
- The deceased had used her work contact details for correspondence from the insurer and therefore the beneficiary would not necessarily have had access to these prior to going through his late wife's documents after her death.
- He submitted the letter to the executor, who confirmed that it commenced communication with the employer on 12 November 2013 to ascertain information of the policy and on 22 November 2012 the claim was submitted to Guardrisk, almost one year after the date of death and six months outside the prescribed notification period.

Guardrisk repudiated the claim on the basis that the claim was lodged outside the prescribed period.

Provisional determination

The insurer's explanation of the potential prejudice it would suffer by admitting a late claim did not clearly set out the nature and the extent of the prejudice. The insurer's call for consistency in determinations of this kind was noted, as well as its reiteration that the contractual terms of the policy must be adhered to. At an adjudicators' meeting held on 8 May 2013 the meeting was of the view that if this office was precluded from exercising its equity jurisdiction on the basis that the insurer's repudiation of a claim was in accordance with the provisions of the policy, the office would be precluded from exercising equity in just about every case. The purpose of the equity jurisdiction is to enable the office to depart from the express terms of the contract when strict adherence thereto will result in hardship or unreasonableness, given the circumstances of the case. In consideration of the insurer's response and the reasons for the late submission, this office exercised its equity jurisdiction in favour of the complainant and issued a provisional determination on 8 May 2013.

Guardrisk's response to the provisional determination

The insurer's defence included the following:

(a) With reference to this office's Practice Note on Late Submissions the insurer pointed out that the starting position is that a clause that a claim should be submitted within a certain period of time is not objectionable in itself and should be enforced; in this instance the clause is clear and upfront and as contracted between the parties to the agreement.
(b) A policyholder is not entitled to the benefit if the policy conditions are not met and if there is no benefit, there is no discretion as to whether the benefit is payable or not.
(c) The only exception is that if the circumstances are such that fairness to *both* parties require this office to exercise its equity jurisdiction.
(d) The claim cannot be said to have been a "fraction" late; Guardrisk stated that "nearly six months expressed as a fraction of the six months notice period would be 100% late".
(e) The complainant had access to an executor, whom he consulted from at least April 2012, yet the executor only submitted the claim in November 2012 and therefore did not timeously make enquiries about policies that may exist.
(f) A feasible explanation for the delay is not provided and extenuating circumstances (such as coma, illness or other serious circumstances) do not exist for the condonation of the late submission; it is just too easy to state that the complainant was not aware of the policy.
(g) The complainant nor his attorneys have provided a date on which he became aware of the policy.
(h) The insurer cannot be blamed for the insured having elected her work address to receive correspondence; it duly followed her instructions.
(i) The "laxness" of the complainant as opposed to no wrongdoing attributable to the insurer, and the fairness to the insurer must be weighed up by this office; the complainant has not made out a case that he was not to be blamed for the delay in prosecuting the claim.
(j) The insurer is a business and it needs to take business-like decisions on the construction of policies with compliance to actuarial valuation requirements and a part of this is maintaining reserves and with cognisance of claims that fall outsides the six month period, which also affects the pricing of the product.
(k) It was the view of the insurer that it would be unfair to it if it were required to consider a claim which it has declined in accordance with the express provisions of the policy, and that the complainant had not made out a case to give this office sufficient grounds to exercise its equity jurisdiction.

Final determination

Potentially there are a number of relevant factors and competing interests to consider. The matter was again submitted to an adjudicators' meeting on 17 July 2013 and the meeting confirmed that the exercise of its equity jurisdiction in this matter was justified. With regard to the points which Guardrisk had raised, the meeting was of the view that whilst they may point to prejudice generally, Guardrisk had not demonstrated that there would be any specific prejudice to it if this specific claim was assessed.

Experience has shown that contractual terms which are not in principle unfair or unreasonable or contrary to public policy can in given circumstances, result in an injustice to one of the parties to the contract. It would be an unsatisfactory state of affairs if the office was powerless, no matter what the circumstances of the case, to prevent what it considers an injustice. It is in these exceptional cases that the office's equity jurisdiction comes into play.

The aim of equity is to do justice to the parties in a case characterised by a unique set of facts unlikely to be repeated in the same or in a similar way. So an equity decision is by its very nature not susceptible of being applied in an indefinite number of cases, but is simply a solution in a single case on its particular facts. Equity only becomes relevant if a *legal* resolution gives rise to an unfair result. Equity would otherwise be irrelevant and unnecessary.

As stated in the Practice Note on Late Submissions, our office agrees that a clause in a policy requiring a claim to be lodged within a stipulated period is not *per se* unreasonable or unfair and reliance by an insurer on such a clause will, in principle, be enforced by this office. The enquiry is whether taking into account all relevant factors, fairness dictates that we should exercise our equity jurisdiction by departing from the express terms of the contract in order to prevent an unjust hardship.

Relevant factors may include the degree of lateness, the explanation for the delay, whether the delay was due to the fault of the claimant or another party and whether the insurer would be significantly prejudiced if it were required to consider the claim beyond the prescribed period. These factors are elastic and complimentary. So for example a significant delay in lodging the claim may be shored up by a very compelling explanation for the delay and *vice versa*.

The reason that we look at the degree of lateness is because the longer the delay, the more difficult it may be for an insurer to properly examine the circumstances surrounding the claim. So this is one of the ways in which the insurer's interests are afforded consideration. Similarly, it is also the insurer's interests which are being considered when we look at whether or not the claim would have had any effect on the premium rate. This is not unfair to a life assured because his or her competing interests are also given their due consideration.

In any event, if our office was precluded from exercising its equity jurisdiction on the basis that the insurer's repudiation of the claim was in accordance with the express provisions of the policy, we would be precluded from exercising equity in just about every case. This is because, as explained, the very purpose of our equity jurisdiction is to enable us to depart from the express terms of the contract when they result in an injustice.

In view of the above, the meeting concluded that Guardrisk had failed to show cause why the exercise of our equity jurisdiction in favour of the complainant, on the basis set out in the provisional determination, is not warranted or justified in the circumstances of this case. More particularly, the meeting took into account the

prejudice to Guardrisk, but was of the view that it could not be the overriding factor and such was in any event outweighed by the unjust suffering/distress which the complainant would bear if the terms of the contract were applied strictly.

In addition to the above, which covers primarily the exercise of our equity jurisdiction, the meeting's view was that the fact that the complainant had lost his wife, been in a car accident, after her death, was hospitalised and in which accident his mother passed away, contributed to him not timeously searching for documents. Initially, he was under the impression that it was not necessary to appoint an executor, until he was later advised that given the estate's worth more than R125 000, one had to be appointed. It would seem that the executor had asked him if he knew of any policies that were to pay out, but he was not aware of the Guardrisk one as the insured had used her work address for the insurer's mail. The meeting's view was, given these factors, six months out of time, was not an inordinately long period.

The examples provided in the Practice Note on Late Submission are intended to be no more than general guidelines and one should rather ask what is reasonable in the circumstances.

Further, an opinion was raised that the insurer should consider making provision in its actuarial calculations for the possibility that late submissions could be accepted either as a result of the exercise by this office's of its equity jurisdiction or another eventuality justifying, for instance, an *ex gratia* payment.

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