A paper delivered by the Ombudsman at the SwissRe Claims Forum at the Grand West Casino on 27 May 2004

Reasonableness and the Ombudsman's Claim Assessment

1. I am the last speaker on the list today, and rightly so. After all, the Ombudsman, for complainants, is the end of the line - or just about. I say "just about" because there is still the threat of an appeal. And today, by now, most of you qualify as complainants. And so the Ombudsman is also, for you, the end of the line. Or just about, because there is still the threat of a panel discussion after tea.

2. I must start with both a concession and a confession.

   The *concession* is that I am an old generation judge and it does not behove old generation judges to have ideas about new generation products.

   An elderly English judge, I think it was Lord Birkett, once said:

   A man is not old
   when his hair is grey,
   A man is not old
   when his teeth decay,
   But a man is ready
   for his last long sleep,
   When his mind makes appointments
   that his body can't keep.

3. The *confession* is that I am not sure, even after today's sustained and detailed indoctrination, that I fully comprehend and appreciate all the minutiae, all the intricacies, of the new generation products. I suspect that there may be others in the audience today with that same sinking feeling. After all, I am, at base, only a simple lawyer, not a smart insurance man, and you know what they say about lawyers: that 99% of them give the rest a bad name.

4. The office of the Ombudsman has had some complaints, not many, but some, about the new type of product, with the emphasis on functional impairments rather than occupational disability. Some of these cases are still current and it would be wrong for me, at this venue, to express any views on issues that may arise in our consideration thereof.

5. Moreover, it is the policy of our office not to dispense advice on the policies of our members. We may point out to an insurer, when we encounter such a problem, that a policy or a provision thereof, is poorly or ambiguously worded; and in so-called "bulk cases", where the same problem repeats itself over and over, we may express a view that is intended to resolve all future cases. But short of those situations, we are not disposed to commit ourselves in advance about a new or proposed policy or product.

6. There are at least three good reasons for this stance:

First, we are not regulators with a broad overview of the industry as a whole;

Secondly, our function is to resolve specific complaints. Our focus and hence our conspectus is a correspondingly narrower one – although it is true that we do sometimes see things out the corner of our eyes;

Thirdly, we are not adequately equipped, and lack the staff, to conduct full scale investigations into all the ramifications and implications of a new product;

Fourthly, and most importantly, we are sensitive not to compromise our impartiality should we, in future, be confronted with a specific problem on which we have, in the past, ventured to express an opinion.

7. Of course, the reality is that we are faced with a new kind of product and, from what we have learnt today, it is here to stay. For all the reasons I have mentioned, it would be premature for me to predict how we would react in future to problems arising in this context. For us, this is, as it is for many of you, new territory. As Don McKay from our office has said: “We will have to learn a new language”. And it may require a new mindset. Our approach will, however, remain the same, and perhaps this is as opportune a moment as any, to say something about our general approach to the resolution of disputes, within the context of the topic I have been given to speak on: “Reasonableness and the Ombudsman’s Claim Assessment”.

8. But first, a word about “Reasonableness”. Reasonableness imports the notion of objective fairness; as such, it constitutes, so to speak, the underwriting of the Ombudsman’s business. Fairness to *both* the parties. Reasonableness and fairness serve as the beacon by which we aspire to navigate.

   Sometimes, of course, it is easier said than done. It is like justice. You all know the saying “Justice must not only be done; it must be seen to be done”. Sometimes, it must be seen to be believed.

9. I would like to emphasis three factors in particular in describing our approach to problem solving. The first is: we are often faced with disputes of fact. The second is: we primarily apply principles of law. The third is: we also exercise what we call our equity jurisdiction.

10. First: how do we resolve disputes of fact? A dispute of fact, when it is one man’s word against another, will often arise in the context of misrepresentations made by an agent in selling a product to a prospective policyholder.

11. A complaint, coming before us, frequently starts out as dissatisfaction with poor policy performance. It then develops into an accusation that the insurance agent wrongly advised a complainant about product selection,

or that the estimated value was guaranteed, or that he failed to point out the attendant risk profile. The agent denies the accusation. He responds that the matter was extensively discussed and debated and the client made a fully informed judgment call. In that situation we take into account the inherent probabilities, based on all the documentation, statements, letters, contemporaneous exchanges and any other relevant considerations placed before us. And we decide according to the balance of probabilities.

12. Let us assume, for instance, that the complainant is adamant that he and the insurance agent had orally agreed that the predicted maturity value was guaranteed. The agent denies it. The policy itself is silent. The policy, on maturity, does not reach the estimated target. So there is a dispute of fact. The complaint comes before us. What do we do?

13. We apply, as I said, the standard of proof in civil matters: that is to say, proof on a balance of probabilities. The standard of proof in criminal matters is different. It is proof beyond a reasonable doubt. Since it is the complainant who alleges that this was part of the agreement and since this is a vital element in his cause of action, he must prove the proposition on which he purports to rely.

14. It is all a matter of degree. We look at all the evidence, direct and circumstantial and we then have to do a balancing exercise. Let me

illustrate. **[Slide 1]**. The proposition is: "the quoted value was guaranteed." Is it proved?

Ad 1: *Positive certainty.*

The agent, when confronted, retracts his denial and admits the agreement.

Ad 2: *Beyond a reasonable doubt***.**

The complainant produces a contemporaneous document signed by the agent or a video recording of their conversation in which the agreement is recorded, as he alleged.

Ad 3: *Probable***.**

This means on a balance of probabilities: more likely than not. For instance: other similar policies routinely contain such a guarantee; or there is prior correspondence in which reference is made to a possible guarantee; or the complainant produces contemporaneous notes showing that the issue was extensively discussed; or the agent cannot remember what was said and cannot really deny the conversation. The permutations are endless.

Ad 4: *Equipoise*

This is the situation where the proposition can be equally true or not true. Everything is exactly poised. Or there is no evidence at all. One simply cannot say where the probabilities lie. It is in this situation that the onus, in particular, is often the sword that cuts the Gordian knot.

Ad 5: *Improbable*

Such a guarantee would simply not make any business sense for the insurer and the agent knew it. The company, as a matter of policy, never issues guarantees and there was no incentive for the agent to give such an undertaking on behalf of the company.

Ad 6: *Highly improbable*

There were three other people present at the conversation, all of them impartial or even partial to the complainant, and all of them deny the disputed conversation.

Ad 7: *Negative certainty*

The particular agent only started working for the company a month after the alleged event or the complainant, when pressed, eventually admits that no undertaking was ever given.

15. We would require, for positive proof, anything above 4. We do not insist on 1 or 2. 4-7 is irrelevant. So, we see that legal proof is not concerned with true or false but with likely or unlikely. It is essentially the difference between "possible" and "probable".

    Let me quote an example. This is a barrister cross-examining a district surgeon.

Barrister: “Doctor, before you performed the autopsy, did you check for a pulse?”

Doctor: “No.”

Barrister: “Did you check the blood pressure?”

Doctor: “No.”

Barrister: “Did you check for breathing?”

Doctor: “No.”

Barrister: “So, then, it is possible that the patient was alive when you began the autopsy?”

Doctor: “No.”

Barrister: “How can you be so sure, doctor?”

Doctor: “Because his brain was sitting on my desk in a jar.”

Barrister: “But is it possible that the patient could nevertheless still have been alive?”

Doctor: “I suppose it is possible he could have been alive and practising law somewhere.”

The standard of proof of a balance of probabilities is, at best, a rough and ready measuring stick, which is by no means infallible. The legal process does not always reveal the truth, the whole truth and nothing but the truth. It sometimes reveals only a simulation of the truth. When one paints with a broad brush, details are lost.

16. The second point I wish to make is that once we have established the facts, we seek to apply established principles of law. Reasonableness underpins legal principles; and when a principle crystallises it develops into a fixed and set rule of law. But when crystallisation takes place, fluidity or flexibility is sometimes lost. And when that happens, where the application of an established rule of law, produces a result which is patently unfair (mostly to the complainant), the Office of the Ombudsman will consider invoking its equity jurisdiction, which it assumed for itself by agreement with the Industry.

17. And that is the third point I mentioned: our equity jurisdiction. But it must be said that the office would exercise it only sparingly, and only in exceptional circumstances. Even so, our equity jurisdiction does give us room to manoeuvre and it remains a powerful and compelling tool to persuade parties to a sensible and reasonable solution by negotiation, which, after all, is the justification for the very existence of the office.

18. How is this general approach applied in a particular case? I don't propose to speak about any particular product. For the reasons mentioned earlier, it would be invidious for me to attempt to do so. What I would like to do is to conjure up for you a hypothetical complainant, and his hypothetical complaint against a hypothetical company. I want to make it perfectly clear that I am not referring to any actual product or any actual company that does business in new generation products. My profile is pure exaggerated fiction – for purposes of illustration only. Any

resemblance to any particular product or any company will be purely coincidental, as they say.

19. Now I want you to visualise an imaginary complainant. Call him Joe. **[Slide 2]** Joe was, say, an old-fashioned short-hand writer by profession. His claim against company X for the loss of his big toe was declined. He complained to the Ombudsman and Don McKay wrote back and said, in a short terse letter, in his best Afrikaans: "Jou voet!!" Joe was thoroughly disenchanted with company X. And with the Ombudsman. He now reads in the newspaper of a wonderful new product being marketed by company Y.

20. In the glossy advertising material, the headline, in capital letters state: **[Slide 3]**. It is on TV and on radio, there is even a little ditty or jingle. But in the small print of the advertisement, it says: "All assurances to be deemed contract compliant" – whatever that means.

21. Joe consults an agent of company Y, Mr A. Mr A tells him that the new product, firstly, is cheaper than his old product because the premiums are lower and secondly, that Joe will get at the very least the same cover as with his current traditional policy with company X. Joe also consults his broker, Mr B and Mr B tells him exactly the same as Mr A: "This will cost you a lot less and might give you even more".

22. So Joe makes application to company Y and when the application is accepted he surrenders his old policy with X, at some financial disadvantage to himself, and in due course he is issued with a new document by company Y, consisting of a hefty booklet with the emphasis on functional impairment rather than on occupational disability, about which we heard so much today. The policy is carefully worded and liability is carefully circumscribed. There is no mention of a guarantee anywhere in the document.

23. Of course Joe does not read the policy but he regularly pays the premiums and when, a few years later, he is involved in a nasty accident and loses four fingers of his right hand, he institutes a claim against company Y.

    Now, under the old policy with company X he might have had a handsome claim since he would no longer be able to perform his profession as a right-handed short hand writer, unless, of course, the claim was declined on the basis that he now has a far better short hand than before.

24. As far as his claim under the new policy is concerned, a huge dispute develops. He maintains that under the appropriate policy provision he believed that he would receive a 100% pay out whereas the company's medical team, on the other hand, assesses his claim at, say, 50%.

Assume that the sum he would then get is far less than he would have received under his old policy. It is even less than the premiums he had paid to Y to date. He complains to the Ombudsman. He maintains that he is entitled to the full 100% or at the very least to the cancellation of the contract and a refund of all his premiums with interest.

25. How would our office deal with the issue? What will our approach be?

Assuming, again, that the complaint is as complex as the policy document issued to him, we would have to consider a whole range of separate issues raised by Joe during the course of the extensive correspondence exchanged between him and the office, on the one hand, and the office and the insurer, on the other.

26. The first issue is whether there is a valid contract?

Joe says no: it was unethical and unconscionable of Y to confront an ordinary member of public, like himself, with a policy document that is as complex and incomprehensible as the one that was issued to him. Secondly, if not unconscionable, it was so incomprehensible as to be void for vagueness. Thirdly, if not void for vagueness, it is void because it leaves it to the insurance company, Y, itself, to decide whether, and to what extent, a claim will be met. Lastly, if it is none of the foregoing, it is nevertheless void for lack of consensus because he, Joe, never intended to enter into a contract which restricts the insurer's liability in a manner

he never fully appreciated. Consequently Joe wants, at the very least, a refund of his premiums.

[Unconscionability Slide 4]

27. It is highly unlikely that the Ombudsman's office would find in favour of Joe on the first ground. A contract will be illegal and unenforceable if its conclusion or implementation or purpose is against the law or good morals or public policy. For example, a gambling debt is not in law enforceable. But, unfortunately, there is no principle of law rendering a contract void simply because it is bulky and contains closely worded clauses or technical criteria which the layman would have difficulty in understanding. Provided the criteria for liability are described in the contract itself, so that external objective standards are introduced, the contract will stand, however difficult it may be to apply its terms. That, then, becomes a matter not of validity but of interpretation. There are a number of technical rules for interpreting technical terms in a contract. One of them is that, in interpreting technical terms, evidence is permissible to explain them.

28. **Uncertainty [Slide 5]**

A contract will be unenforceable if it is left to one contracting party (here the insurer) to decide for itself whether it will be liable to meet any claim by the complainant. There is no sale if the contract leaves it entirely to the seller to decide the price; so too, there is no contract of insurance if

it is left entirely to the whim of the insurer whether, and if so, how much, it will pay out. The question is whether this is such a case – whether it is left entirely to the insurer's medical team to decide whether any payment, or what payment, is to be made in terms of the policy. I shall return to this point later in another context.

29. **Consensus [Slide 6]**

Joe claims that he never read the contract and, even if he did so, that he would not have understood it; consequently he was not bound because he never agreed to its terms. There again, it is unlikely that Joe will succeed. A written contract you must enter into with your eyes open. An oral contract you must enter into with your lips sealed. If you don't express yourself clearly, you only have yourself to blame if you are misunderstood by the other party.

The law does not allow one to escape a contract simply because you allege that you did not fully understand its terms or consequences. By signing the application form for a contract, the terms of which you could examine in advance, you create the impression that you understand and bind yourself to those terms and you will be held to that impression at the insistence of the other contracting party.

Marketing Material Slides 3 & 7

30. The next issue is whether Joe can proceed against company Y on the basis of its misleading marketing material. Mere puffery is not actionable

in law. The law allows a degree of empty bragging about a product. But if the marketing material contains factual representations that can be shown, firstly, to be false and, secondly, to have induced Joe to subscribe to the contract, there is a remedy: it is rescission i.e. cancellation of the contract. From rescission follows mutual restitution which, as far as Joe is concerned, means a refund of his premiums. The issue, then, would invariably be whether the marketing material contained factual misrepresentations and whether it misled Joe into entering into the contract. In our example the answer will probably be yes, not only for the false statement of a guarantee but also for the cunningly concealed disclaimer. Joe would thus be entitled to cancel, and reclaim his premiums.

31. In appropriate cases the office would, (in the case of misleading marketing material which did induce an insured to enter into a contract), oblige the insurer, at the option of the insured, to make good his misrepresentation. But in the circumstances of the postulated case, it is unlikely that this will be such a situation, since the office would be hesitant to make out what would in effect amount to an entirely new contract for Joe, to which company Y had never agreed, and which, in the circumstances, would not be fair.

Misrepresentation by Insurance Agent [Slide 8]

32. The same would be the situation in respect of the misrepresentation made by Mr A, company Y's insurance agent. Company Y must assume responsibility for the misrepresentations of its agent. But again the remedy would in such a case be rescission with a consequent refund of premiums. In the absence of a guarantee, company Y would not be obliged to make the representation true i.e. to pay Joe out as if the claim had been advanced under the old surrendered contract with company X, instead of under the new contract with company Y.

33. As to the misrepresentation of the independent broker, Joe may have a claim for damages against the latter but only if he can prove fault in the sense of a deliberate or negligent misrepresentation made by the broker against him. Contrary to recent apprehensions, company Y will not be held liable by our office for misrepresentations made by an independent broker.

Interpretation [Slide 9]

34. The final issue is how the contract is to be interpreted.

    It stands to reason that the normal rules relating to the interpretation of contracts generally would apply to Joe's contract in particular. Such as the *contra proferentem* rule. That simply means, as you all probably know, that where there is ambiguity the interpretation will be against the insurer who was responsible for drawing up the contract. But that rule

does not arise in the instant case nor do many of the other rules of interpretation, such as the rules relating to the interpretation of technical terms.

35. But there is one aspect on which I'd like to focus. The feature of Joe's contract that stands out is the emphasis on functional impairment rather than occupational disability. Joe's contract differs from the conventional product in this respect. In the conventional product, when a complainant comes to this office there are *two* distinct aspects to consider:

    A legal aspect (involving the interpretation of the relevant contractual criteria for liability) and a medical aspect (involving its application to the facts of the case).

36. It is possible to approach such matters on this dualistic basis for the very reason that there is an contractual scale or standard which is introduced in the disability definition and against which impairment can be measured. That norm or criterion is "job loss". If, say, a taxi driver by profession is injured in a motorcar accident and becomes a paraplegic who is unable, thereafter, to drive a car, but he happens to discover a hitherto unknown talent to dictate what proves to be best-selling thrillers which makes him a fortune, the question whether he is disabled for purposes of a claim on his policy will depend on an interpretation of the exact wording of the relevant clause. In such a case the medical aspect

will not be an issue but the legal one will be central to the solution of the problem.

37. With the new type of product there is the additional difficulty that the contractual factor, in determining a scale of functional impairment, is less apparent than before. The legal requirement is, as it were, embedded or wrapped up in the medical norm. Because there is no external yardstick (i.e. occupational disability) and because functional impairment can, on that approach, only be pinpointed by reference to a medical assessment, in which there is always an element of discretionary fluidity, the two colours, legal and medical, otherwise distinct, tend to run into each other. This renders a claim even more difficult to assess. Most disability cases, even the conventional ones, are difficult to resolve; the new product even more so. And the reason may well be, as I suggested, that, unlike the ordinary disability case, there are not two distinct and diverse components to be considered, a legal and a medical one, but essentially a single composite one, with the emphasis squarely on the medical assessment. In that sense the medical requirement informs and determines the legal one.

38. Now, there are three aspects to consider in this respect:

    (a) how does it affect the validity of such a contract?

    (b) may the insurer refer to outside agencies such as, for instance, the AMA Guide in assessing physical impairment?

(c) how do we, as an office, go about resolving a dispute about the medical assessment of Joe's complaint? Who is to say that his impairment is 50%, as company Y suggests, and not 100%, as Joe maintains?

39. Why does the question of validity come on to the screen at all? Because it is a broad principle of law, as I mentioned earlier, that a contract between two parties will not be enforceable if the liability of the one party is entirely dependent on his own whim. Joe, in our hypothetical case, may argue that his claim to be paid out on the policy is entirely dependent on the medical assessment of his injury by company Y's medical assessors. Is this point a good one? I don't think so. Why not? Because the medical assessors do not have an unfettered or arbitrary discretion to determine company Y's liability vis-à-vis Joe: they are tied to the objective standards and limitations stipulated in the contract.

40. That is why I said earlier that whenever there are external objective criteria it is not so much an issue of validity but of interpretation. Do they apply the criteria correctly? Joe can of course argue, and we, as an office, would have to decide, whether company Y was properly applying its own contractual standards, but that is a different issue.

41. The second aspect that arises in this connection is this: is it permissible for the medical team to apply criteria laid down by an outside agency, such as, for instance, the American Medical Association Guide,

for determining impairment? If the policy document expressly refers to it as a determining criterion, the Guide becomes incorporated into the contract by reference – in which case the contract document becomes an even more extensive and complex one. If the contract document does not refer to the Guide, then the issue may be whether this is a generally recognised part of any physician's medical know-how for assessing and measuring medical impairment. As such it would be relevant, not as part of the contract, but as part of the physician's know-how and expertise in determining the requisite degree of impairment. It would thus not become a contractual standard but simply an aid for a doctor to express an opinion on the available medical material.

42. The third aspect is a practical one: the emphasis in such a case, is squarely on the medical aspect. Since we in the office are not medical experts, we will be obliged, even more so than otherwise, to refer such matters, whenever there is a dispute, to our own panel of medical advisers. Of course, inasmuch as the "medical decision" thus becomes the overriding one, one is simply shifting the solution to the problem from the shoulder of the insurer's own medical team to that of our own advisers. In both instances the claimant is not examined by the medical adviser concerned who is invited to express an opinion on the medical information submitted by the claimant or elicited from the doctor treating him.

43. The difficulty may be, in days to come, for us to find a panel of advisers who will be equipped to advise the office in the truly difficult case. They will have to be people well versed in the complexities of the product and the concepts, medical and otherwise, described therein. Where there is broad agreement between the insurer's medical team and our own advisers there will, of course, be no problem. But where there is disagreement, the office will be faced with the difficulty that, duly advised, it will have to make the final decision. When that happens the office, like a court of law, must make a decision as best it can, based on the onus and its own assessment of the contradictory opinions expressed on both sides of the line of dispute.

44. The ultimate decision is therefore that of the office. It will hopefully be a reasoned and a reasonable one. It may, for all one knows, not be the correct one, if viewed by a hypothetical third panel of medical experts. But it will have the merit of being fair and, subject to the possibility of an appeal, final. Of course fairness is a relative concept. Whenever a dispute is determined one way or the other the losing party may not regard the conclusion as fair and square. But it will be final. One of our functions, perhaps our main one, is for us, rather than a court of law, to bring closure to a dispute. Provided both parties to a dispute are convinced of:

    (i) our impartiality;

(ii) our rationality i.e. that we can show that we have honestly applied our minds to the submissions of both sides to the problem and that our reasons are clear and credible,

parties will generally accept the decision, even if they are not necessarily happy with its outcome.

45. And that, I suppose, is as much as we can hope for: that parties, who come to us, will not be disillusioned. And if, at the end of it all, they are unhappy there is, as I said earlier, always an appeal. But you know what they say about appeals: it is simply putting the dice into the box for another throw.

PMN
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