

- *Rescission, divisibility and the refund of premiums.*

1. The Issues

Where a composite contract provides for different benefits (e.g. life, dread disease and disability) and the mis- or non-disclosure relates to only the one aspect and not the other, rescission of part of that contract would depend on the severability of the different sections of the contract. Some insurers are more accommodating than others to consent to a partial rescission. In other cases the office is obliged to make a ruling. The questions in each instance is whether the insurer is entitled to rescind the entire transaction or whether it is restricted to rescinding only the part affected by the misrepresentation.

2. The concept of divisibility according to general principles of the law of contract

The concept of divisibility is germane to the general principles of the law of contract but it has not yet been fully considered in the context of the law of insurance.

The divisibility of a composite contract depends in the final analysis on the intention of the parties viz. whether the parties intended their agreement as a composition of different parts (i.e. separate contracts) or whether they intended it as an indivisible whole or single unit (Bob's Shoe Centre v Heneways Freight Services (Pty) Ltd 1995 (2) SA 421 (A); van der Merwe et al Contract: General Principles, 2nd ed 287 et seq).

A prerequisite for the divisibility of a contract into separate contracts is that the performances of both parties must be divisible (Bob's Shoe Centre v Heneways Freight Services (Pty) Ltd, supra 429I). The test whether a performance is divisible is dependent on the nature of the performance as well as the intention of the parties (Bob's Shoe Centre v Heneways Freight Services (Pty) Ltd supra 429F). An obligation to deliver two horses is by nature divisible but the parties may have intended the two horses to function as a carriage pair, or a series of law reports, consisting of a number of separate volumes may be sold as a set even though priced at so much per volume.

Apart from the requirement that the respective performances must be divisible, it must in the case of a reciprocal contract also be possible to relate each divided part of the performance to a corresponding part of the counter-performance (cf Du Plooy v Sasol Bedryf (Edms) Bpk 1988 1 SA 438 (A) 453E, Bob's Shoe Centre v Heneways Freight Services (Pty) Ltd, supra 430). Thus a performance in money is always divisible but where it is, for instance, payable in consideration for the delivery of two cars, it must also be shown what amount has been allocated to each different part of the seller's performance.

The final test for the divisibility of a contract is whether the parties would have entered into separate contracts in respect of each distinct part of the performance (see Collen v Rietfontein Engineering Works 1948 (1) SA 413 (A) 435). The Court also remarked that "...separate prices create a strong presumption that the contract is divisible."

Where parties have concluded several contracts albeit in the same breath, so to speak, and perhaps even in the same document, each contract stands on its own feet unless special circumstances exist. Thus if one of these contracts is for instance illegal, the other does not share its fate (see Du Plooy v Sasol Bedryf (Edms) Bpk 1988 (1) SA 438 (A)). In this case the contract was regarded as divisible and part of it was held valid and part invalid for want of compliance with formalities prescribed by law.) The same reasoning applies to the case where only one of different contracts has been induced by misrepresentation: only the affected contract may be rescinded.

3. Insurance Legislation

In terms of the previous Insurance Act (Act 27 of 1943, section 36) it was not possible for a Long-term insurer to issue a separate policy covering disability, dread disease or accidental death. Any such benefit could only be incorporated into a life policy.

Under the present Long-term Insurance Act (Act 52 of 1998) no such restriction exists. A long-term insurer may therefore issue separate policies in respect of, for instance, disability or accidental death.

The latter Act came into operation on 1 January 1999

4. General Practice in the insurance industry

It would appear that in the past many long-term insurers have more or less ignored the possibility that an insurance contract induced by misrepresentation could thus be capable of partition. Such composite policies were therefore consistently rescinded in their entirety.

On the other hand, some insurers, including the larger ones, have indeed acknowledged the divisibility of a life policy containing disability, accident and dread disease cover at separate premiums. This practice was already in force before the promulgation of the current Long-term Insurance Act.

5. Application of the general rules on divisibility to insurance contracts

The principles relating to divisibility have not yet been considered in full in the context of insurance. In Sachs v Western Insurance Association 1907 TH 257 and Lewis Ltd v Norwich Union Fire Insurance Co Ltd 1916 AD 509 519 it was contended that the respective (short-term) policies contained several contracts and that a breach of warranty in one should not affect the claim in issue in the other. In both cases the Court decided that the contention was not supported by the facts but it is clear from the tenor of the judgments that had the finding been different, the insurer would not have been allowed to cancel the contract not affected by the breach.

There is, it is suggested, no insurmountable obstacle in the way of applying the general rules on divisibility to contracts of insurance. To this

one caveat must be noted. As regards long-term insurance contracts entered into before the Long-term Insurance Act came into operation, the policy could be divided into life, accidental death, disability and dread disease cover. The reason is that, as the law stood before 1 January 1999, cover against accidental death and disability could not exist independently of a life policy.

6. The Test

In deciding whether a long-term insurance contract is or is not divisible, the intention of the parties remains paramount. To determine the intention the sub-tests referred to above can be invoked. So, for example, as regards dread disease cover under new generation policies, such cover could be interlocked with life cover if the dread disease benefit is paid in lieu of the life benefit. That would clearly exclude divisibility of the dread disease cover from the life cover.

The argument has sometimes been advanced in insurance circles that divisibility should not be countenanced where an insured made a misrepresentation, particularly if it was fraudulent, because this would expose the insurer to a claimant who cannot be trusted. In Schoeman v Constantia Insurance Company Ltd 2003 (6) SA 313 (SCA) the insured brought a claim under a short-term insurance contract. The claim was to the knowledge of the insured an inflated claim. The Court nevertheless ruled that the insured's post-contractual dishonesty did not prevent her from claiming the loss she in fact suffered.

This case does not put an end to the argument. It could well be that if a pre-contractual misrepresentation came to light before the conclusion of the composite transaction, the insurer would not have been prepared to enter into any contract at all. This view should serve as the point of departure. Moreover, the dishonesty committed by the insured may be so severe as to justify the rescission of the entire transaction. It will all depend on the circumstances of each case.

7. Conclusion

This office applies the normal rules on divisibility of contracts to long-term insurance contracts in disputes falling under its jurisdiction. If a long-term insurance contract is divisible into what is in effect separate contracts, the insurer would be entitled to rescind only that segment of the contractual documents which had in fact been induced by the misrepresentation. This is not only good law but also equitable to all the parties concerned.

8. Another approach

Where a long-term insurance contract with multiple benefits is found to be an indivisible single contract but it can be established that the parties would, in the absence of the misrepresentation, have entered into a contract without the particular benefit affected by the misrepresentation, consideration should be given to the application of a principle mooted in Pillay v SA National Life Assurance Co Ltd 1991 (1) SA 363 (D). This

means that the policy may not be rescinded in toto but an adjustment may have to be made either to the premium or to the insured's benefits. This principle has to a limited extent been recognised in the industry. Consequently, it may well be arguable that an insured should be allowed to claim on the contract as it would have been had he not committed the misrepresentation in question. The office has yet to apply this approach.

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