NON-DISCLOSURE AND SOME RELATED PROBLEMS : Extracts from the presentation of Annemi Slabbert

INTRODUCTION

When I started working at this office, I was struck by the enormous number of claims that have been repudiated by insurers due to alleged non-disclosure of medical information by policyholders. In the majority of cases I was convinced that it was not intentional non-disclosure, but due to the legal principles that regulate non-disclosure, we have often not been able to assist the complainant.

The reason for this is that the bottom line is that by signing the application form the signatory accepts responsibility for the contents of the application form. Therefore, even when one is convinced that there was no intentional non-disclosure, not even the application of principles of equity can assist a policyholder. This is so, because to uphold a claim when there was material non-disclosure would seriously prejudice the insurer.

THE DEFENCE OF NON-DISCLOSURE

The defence of non-disclosure is based on the common-law, read together with section 59 of the Insurance Act (as amended). It is a form of misrepresentation by silence in circumstances where the law postulates a "duty to speak".

Common-law

Non-disclosure is related to the doctrine of good faith and in particular to the duty of an applicant to disclose correct and complete information about material facts affecting the risk. A failure to comply with this duty entitles the insurer to deny liability, because the insurer's consensus was obtained by improper means, ie. by withholding information which, if disclosed, would have caused the insurer not to enter into the contract in the first place (or at least not on the terms agreed to). The insurer's reliance on this defence is often contested on the ground that the information not disclosed were unrelated to the events giving rise to the claim. But because the insurer would probably not have entered into the contract if the non-disclosure did not take place, such a link is not required when the issue is whether the agreement can be avoided. For example, an insurer would be entitled to deny liability if it was not

disclosed that the insured suffered from a serious heart condition even if the insured claimed disability due to back problems.

The duty to disclose is often described as the following:

> "An insurance contract is one of the utmost good faith. A life assurer, in order to assess the risk, has to rely almost exclusively on information provided by the proposer applying for the insurance. Consequently the proposer is duty bound to voluntarily disclose all material information relevant to the risk that is to be underwritten. The strict requirement for full and honest disclosure is a fundamental principle of insurance. The law requires every policy holder to disclose every fact which … the insurer would consider to be material. A breach of this duty (however innocent) entitles the insurer to repudiate the policy and reject the claim."

The duty to disclose also extends to information that only arose or came to light **after** the application for insurance was made but **before** the contract was finally concluded.

Section 59

Section 59 of the Insurance Act states that an insurer is entitled to rely on a non-disclosure if the non-disclosure is such as to be likely to have materially affected the assessment of the risk under the policy concerned at the time of its issue or at the time of any variation thereof. It reads as follows:

> *(1) (a) Notwithstanding anything to the contrary contained in a long-term policy whether entered into before or after the commencement of this Act, but subject to subsection (2) –*
>
> *(i) the policy shall not be invalidated;*
>
> *(ii) the obligation of the long-term insurer thereunder shall not be excluded or limited; and*

(iii) the obligations of the policyholder shall not be increased, on account of any representation made to the insurer which is not true, or failure to disclose information, whether or not the representation or disclosure has been warranted to be true and correct, unless that representation or non-disclosure is such as to be likely to have materially affected the assessment of the risk under the policy concerned at the time of its issue or at the time of any variation thereof.

(b) *The representations or non-disclosure shall be regarded as material if a reasonable, prudent person would consider that the particular information constituting the representation or which was not disclosed, as the case may be, 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.*

THE TEST FOR MATERIALITY

The long and sometimes contrived arguments as to what constitutes materiality have now largely been resolved by the recognition of a test formulated in accordance with remarks passed in *Clifford vs Commercial Union Insurance Co of SA Ltd* 1998 (4) SA 150 (SCA). In our annual report of 1999 we stated the following:

> "The representations or non-disclosure shall be regarded as material if a reasonable, prudent person would consider that the particular information constituting the representation or which was not disclosed, as the case may be, 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."

The reasonable prudent person

The "reasonable prudent person" is an imaginary person whose disclosure is in issue, that is to say, the applicant for insurance. The test can be refined as follows:

(a) The reasonable prudent person is

- Neither the actual applicant nor the actual underwriter but
- an imaginary outsider standing in the shoes of the applicant
- with the knowledge and appreciation that a reasonable lay person would possess
- of the factors an underwriter would take into account in assessing the risk.

(b) The fact that a question in the proposal form was directed to the specific condition that was non-disclosed is one of the factors the reasonable prudent person would take into account. It is a matter of debate whether it is conclusive of the issue and I will touch on this aspect a little later on.

(c) The issue in every case will be whether the imaginary outsider with the understanding mentioned above should (1) not have made the mis-disclosure that was made; or (2) should have disclosed the information that was not disclosed.

To illustrate, I use the following examples:

Example 1 : The insured failed to disclose that he occasionally suffered from a common cold, had an ordinary headache or experienced backache. It is our opinion that the cold and headache need not be disclosed while the backache, arguably, should have been.

Example 2: The same facts as before. Assume that there were specific questions in a proposal form relating to colds, headaches and backaches. It is **arguable** that in that case, the questions are conclusive and that the reasonable person would be obliged to disclose all three symptoms, even if he or she thought that it was irrelevant to the assessment of the risk.

I say **arguable** because even in our office there are different viewpoints on this.

One viewpoint is that there is no difference for purposes of materiality between a failure to disclose information and a mis-disclosure of that information, ie. the wrong answering of a question. The test of the reasonable person must be applied in each case, as is clear from Section 59. Thus, if there is not a duty on an applicant to disclose a particular illness because it was not material (as in example 1), there is likewise no actionable misrepresentation if the applicant should wrongly answer a

question in the proposal form relating to this particular illness (as in example 2). It is argued that the test of the reasonable person must be applied in all cases and that an insurer cannot turn immaterial facts into material facts merely by asking a question or by entering into an agreement to this effect.

The other viewpoint is that an insurer is always entitled to rely on non-disclosure when an applicant incorrectly answered specific questions in the application form. One should furthermore distinguish in the case where there is a proposal form, between the situations where a particular condition is specified and where the proposal form merely asks a general question. It each case it is a matter of interpretation of the question whether the answer given was truly incorrect and constituted a material non-disclosure, and I foresee that we will debate this issue every time it occurs. Take the following example.

Example 3: A complainant applied for cover in April 1999. On the application form he answered "no" to all the health questions, including the question : "Do you suffer or have you ever suffered from any of the following: complaints or sicknesses of the skin, muscles, skeleton and joints, including spinal complaints, polio and any congenital disfigurement, etc?"

In 2000 he injured his back while loading a bakkie and he subsequently had back surgery (spinal fusion). His condition deteriorated and he submitted a claim for disability in 2003. At this point it was discovered that the complainant had visited his GP in November 1997, complaining of discomfort over the sacro-ileac area and coccyx. He was treated with Voltaren, Mobil and Stilpane and according to the

doctor no follow-up treatment was necessary and the condition cleared up within a few days.

The claim was repudiated and the insurer relied on non-disclosure. Only the 1997 incident was mentioned in the letter of repudiation, but it appeared from the GP's notes that the complainant had also visited him for a back complaint in 1992, when he was diagnosed with lumbago and treated with medication. Again the doctor states that the problem was not serious and cleared up within a matter of days.

Our office discussed this case since the issue of materiality was directly in point, ie. whether a reasonable and prudent applicant would have considered that the two incidents of minor back pain should have been disclosed to enable the insurer to form its own view as to the effect of the information on the assessment of the relevant risk. We considered that it would be helpful, even if not strictly speaking relevant, to find out what a re-assurer would make of this. It was not strictly speaking relevant because the test is not, as I said, the reasonable underwriter but the reasonable proposer. He said:

> "In terms of my extensive experience as an underwriting consultant…… in terms of what a good underwriter/claims consultant will apply when faced with potential non-disclosure at claims stage, is "what would the prudent reasonable man" consider disclosable? I believe it is clear in this case that with a single consultation with no sequelae at all, the average man on the street would not believe this to be something significant and requiring disclosure. At claims stage, with this past history exposed, I believe that given the triviality of the consultation, the reasonable man would not be expected to disclose such information."

Example 4: In May 2000 Mrs A arranges to see her gynaecologist on 1 August 2000 for her annual routine gynaecological check-up.

In June 2000 she applies for a life policy with company X including dread disease cover.

In July 2000 the policy is accepted and commences.

On 1 August 2000 Mrs A sees her gynaecologist; a PAP smear is routinely taken.

On 1 September 2000 she receives information that the smear indicated occasional atypical squamous cells.

1 October 2000 Mrs A starts bleeding. A hysterectomy is performed. Thereafter cervical cancer is diagnosed. In this case the view of the office was that the fact that she was about to see her gynaecologist for a routine check-up need not have been disclosed by her.

Furthermore, this office was of the opinion that one cannot be requested to disclose what one does not know or could not reasonably have been aware of.

Change of occupation

In some disability cases referred to our office insurers relied on the fact that the insured changed his or her occupation during the lifetime of the policy but failed to disclose this change of occupation to them. The insurers contended that such changes of occupation would affect the risk they undertook.

The nature of an occupation can of course affect the risk. That being so, it is vital that the correct details regarding an occupation be disclosed in an application form and that any change therein after the completion of the application form but before the final conclusion of the contract be likewise disclosed. Thereafter a change of occupation (eg. from postman to policeman) need only be disclosed if the contract so provides.

When receiving complaints of this nature, our office would not as a matter of course agree that a cancellation of the contract is the only option available. We are aware of the fact that different occupations are rated differently. We accordingly sometimes engage the insurer with the suggestion that it should reconsider amending the terms of the contract as though the correct information regarding the new occupation had been disclosed. Although insurers are inclined to argue that it cannot be determined *ex post facto* whether the proposer would have accepted the higher rates, cases of this nature serve as examples how the office can intercede in persuading the parties to settle a case. Whether we would pursue such a course will always depend on the circumstances of the case.

Inadequate underwriting

Insurers sometimes repudiated claims for alleged non-disclosure, when, indeed, it was more a case of shoddy underwriting. In the authoritative work "MacGillivray on Insurance Law", 10th edition, at page 446 it is stated:

> "the insured must perform his duty of disclosure properly by making a fair presentation of the risk proposed for insurance. If the insurers thereby receive information from the insured or his agent which, taken on its own will in conjunction with other facts known to them or which they are presumed to know, would naturally prompt the reasonable careful insurer to make further enquiries, then, if they omit to make the appropriate check or enquiry, assuming it can be done simply, they will be held to have waived disclosure of the material fact which that enquiry would necessarily have revealed."

In The Law of Insurance Contracts by Clarke, 4th edition, par 23-13 a dictum is quoted that it "is not necessary to disclose minutely every material fact; assuming that there is a material fact which he is bound to disclose, the rule is satisfied if he discloses sufficient to call the attention of the underwriters, in such a manner that they can see that if they require further information they ought to ask for it."

This aspect is even more explicitly stated by MacGillivray, 7th edition, at page 279:

> "Assuming that there is a material fact apt to be disclosed the rule is satisfied if the assured discloses sufficient to call the attention of the insurers in such manner that they can see that if they require further information they ought to ask for it. So, if reasonably sufficient information has been placed before them, they cannot take advantage of failure to follow it up. If they shut their eyes to the light, it is their own fault."

We applied this in the following case:

Example 5: In June 1997 the complainant applied for a policy with disability benefits. On the application form he answered "yes" to the question: "Ly u of het u ooit aan 'n aandoening van die volgende gely: senuwee- of geestesmoeilikheid (byvoorbeeld stuipe, depressie, angs of spanningstoestande, aanhoudende hoofpyne, floutes, epilepsie of verlamming?" On the application form the complainant gave more details regarding this positive answer and informed the insurer that he suffered from depression during January 1995 due to a divorce. He mentioned that he used Prozac for three months and that he was treated by a doctor at a clinic. He stated that he recovered completely and that he experienced no setbacks and did not have to use any medication. The insurer then requested a report from the treating doctor who reported that the complainant was treated for an Adjustment Disorder with a depressed mood related to the disintegration of his marriage. He also mentioned that the complainant responded favourable to individual psychotherapy and was of the opinion at that time that he had a favourable prognosis.

The insurer accepted the application for insurance and the policy was issued.

The complainant then became disabled due to acute post traumatic stress disorder and instituted a claim. At claim stage the insurer ascertained that the complainant suffered from depression, insomnia, mood swings and rage since 1992, that he was seen on an out-patient basis for psychotherapy, that he received medication for insomnia in December 1996, that he nearly committed suicide during 1995/1996, that he was booked into a clinic for six weeks and that he was treated with Rohypnol, Ativan and Prozac during 1994.

The insurer relied on material non-disclosure to repudiate the claim and rescind the policy, stating that the complainant's condition was more serious than was indicated on the proposal form and that it was work-related. They maintained that from the information on the proposal form it was also not clear that the complainant had actually been hospitalised for his condition and stated that they were led to believe that the complainant only consulted the clinic on an out-patient basis.

Our office came to the conclusion, after some debate, that this was not a true case of non-disclosure. After all, the insured did allude to his condition. He had disclosed that he suffered from depression, that he received medication for three months and that he was treated in the clinic concerned. It was not clear to us why the insurer laboured under the impression that the complainant was only treated on an out-patient basis; it was certainly not the complainant who led them so to believe.

The insurer also purported to rely on the fact that the medical report obtained from the treating doctor at application stage was not comprehensive. In fact it was the insurer who instructed the doctor to provide information regarding the proposer and if he failed to provide them with the comprehensive report they sought, the failure to do so could not be attributed to the complainant. It was our opinion that the complainant provided the insurer with sufficient information to place them on their guard and to cause them to ask further questions in order to properly assess the risk.