CASE 12/2013 FINAL DETERMINATION

Background

The policy has a waiting period of 3 months after which the claim must be submitted within 4 weeks after that. The relevant clause is clause 2.3.1 which reads as follows:

> The claim may be submitted at any time during and up to 4 weeks after the expiry of the *Waiting Period,* failing which the right to claim will lapse.

'Waiting Period' is defined to mean:

> A continuous period of absence from the *Participating Employer's* usual place of business as specified in the *Policy Schedule*, due to injury or illness during which the *Insured Person* does not perform the material duties of his job. Such period will be calculated from the first day that the *Insured Person* is absent from work.

The complainant was diagnosed with TB and retroviral disease. Her employer accordingly afforded her sick leave of 4 months with effect from 1 July 2007 in order to receive the necessary treatment and on the understanding that she would return to work after that.

So the reason the complainant stopped working after 30 June 2007 was to receive treatment and not because she had been declared permanently disabled. Her prognosis at that stage was deemed to be 'fair'.

After the four month period, the complainant returned to work for the odd day here and there but due to an unexpected deterioration in her condition following treatment, she was for the most part absent from work.

It was on 22 July 2008 that her doctors finally declared her to be permanently disabled. The employer lodged the claim with Old Mutual on 1 August 2008.

Old Mutual's defense

Old Mutual repudiated the claim on the basis that the claim was lodged beyond the prescribed period. According to Old Mutual, since the complainant ceased working on 30 June 2007, the waiting period expired on 29 September 2007 and the claim should have been submitted four weeks after that. However Old Mutual only received the claim in August 2008.

However as required by our rules, we had to consider whether the circumstances of the case warranted the exercise of our equity jurisdiction.

In this regard, Old Mutual requested that we consider the following;

- The claim was submitted considerably late.

- The late submission of the claim was not attributable to any fault on the part of Old Mutual.

- The employer's explanation for the delay is not reasonable in that:

  - The employer was aware that the complainant was going on sick leave for 4 months with effect from 1 July 2007.

  - The employer was aware of and educated around the notification period as this had been explained to the employer in respect of other previous claims.

  - The employer's failure to submit the claim within the prescribed period constituted negligence on its part.

- The circumstances relating to the lateness of the complainant's claim are not unique and so if the notification clause were to be waived for this claim, then that would render the clause 'ineffectual' in all such cases.

- Old Mutual would be prejudiced in that:

> "The ... scheme has an annual premium income of R78 876.00 for disability income cover. The claims to premium ratio for this scheme is 769%, this means that Old Mutual has paid claims more than seven times the value of premiums received. It follows therefore that it is not reasonable for Old Mutual to pay an ex-gratia claim on a significantly loss making scheme.
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> The group contract are annually reviewable, therefore we only hold reserves for contractually valid claims. The date of disability for this claim was 30/06/2007. Old Mutual was therefore deprived of setting accurate rates for the following policy year. This scheme has subsequently terminated with Old Mutual on 03/08/2011. It follows that Old Mutual would be deprived of the opportunity to avoid further losses resulting from considering this claim ...
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> As any profits realised in any financial year are released to create value for shareholders, it is in the interest of the business as a whole that unnecessary losses are minimised as far as possible. If insurers are expected to pay contractually invalid claims for which no reserves have been held, this would mean that losses that would hardly be justifiable to shareholders."

- Applying equity would mean that the express provisions relating to the waiting period would be rendered *pro non scripto*.

Provisional Determination

After the case was discussed at a meeting of the adjudicators, a provisional ruling was issued, a summary of which is set out below:

- Regarding Old Mutual's contention that provisions relating to waiting period would be rendered *pro non scripto,* we agree that a clause in a policy requiring a claim to be lodged within a stipulated period is not 'manifestly unreasonable' or 'manifestly unfair'. Therefore reliance by an insurer on such a clause will, in principle, be enforced by this office.

- The only exception is if the circumstances of the case are such that fairness to both parties requires that the office should exercise its equity jurisdiction in favour of the complainant.

- Old Mutual states that the employer was aware of the notification period (and has submitted two previous claims within the prescribed period) and that therefore the employer's explanation for the delay is not reasonable.

- However it is not the employer's contention that it was not aware of the notification period. The employer explains that prior to the lodgement of the claim the complainant was not considered disabled and was in fact expected to make a full recovery and return to work. In our view, this is a good reason explaining the delay in lodging the claim.

- Old Mutual also contends that '*if the late submission clause is to be waived for this claim, then it would render this clause ineffectual in all such cases*'. However, we exercise our equity jurisdiction on a case by case basis and are not bound by previous decisions. Therefore if Old Mutual was required to consider this claim, it does not follow that it would be prevented from relying on the late submission clause in every other case.

- We have in other cases upheld an insurer's reliance on a late submission clause to repudiate a claim where the circumstances of the case did not in our view warrant the exercise of our equity jurisdiction in favour of the complainant.

- With regards to the other points which Old Mutual has raised, we were of the view that whilst they may point to prejudice generally, Old Mutual had not demonstrated that there would be any specific prejudice to it if this specific claim were assessed.

- In addition to the above, the meeting also took *inter alia* the following considerations into account:

    - The date of disability is by no means certain. The reason the complainant stopped working on 30 June 2007 was so that she could receive treatment to enable her to recover and return to work.

    - The complainant's services were officially terminated on 25 July 2008 and her employer lodged the claim on 1 August 2008, some 7 days later. There was accordingly no delay in lodging the claim once medical confirmation of disablement had been received.

    - The evidence shows that some time in 2008 the complainant's condition deteriorated and she began experiencing more debilitating symptoms. It appears that it was this deterioration that ultimately gave rise to the claim.

    - The prospects of success on the merits are good.

Old Mutual's response to the provisional determination

In response to the provisional determination Old Mutual made the following submissions:

- The Ombudsman must have due regard to the terms of the policy and deviate therefrom only if their strict application will operate harshly against the complainant.

- The enquiry whether a strict application of the terms of the policy will operate harshly against a policyholder is akin to the enquiry into the constitutionality of contractual terms.

- Contractual terms are subject to constitutional challenge if they are contrary to public policy. Similarly a strict application of the terms of the policy should be deemed to operate harshly against a policyholder only if such offends public policy.

- Clause 2.3.1 is clear and unambiguous and it has not been shown that its application will offend public policy. Therefore there are no equity considerations to justify deviation therefrom.

- Equity does not demand that the provisions of the contract should not apply simply because the employer's expectations that the complainant would recover and return to work did not materialise.

- If a subjective expectation on the part of an employer (that the employee concerned is likely to recover and return to work) is to be regarded as a good reason for the late submission of a claim, then to the extent that employers could always give this as a reason for the late submission, clause 2.3.1 would be of no force or effect.

- It would be unfair to Old Mutual if it were required to consider a claim which it has declined in accordance with the express provisions of the policy.

- Old Mutual has difficulty understanding why, if equity is warranted in this case, it would not also not be warranted in all cases where the employer submitted the claim late because it believed that the employee concerned would recover.

- Old Mutual also has difficulty in understanding how it should deal with late claims in future as it is not feasible to refer all such cases to the Ombudsman's office before making a decision.

- Being compelled to pay a claim which is not contractually valid is *per se* prejudicial to an insurer and given that the five year claims experience of this employer indicates a significant loss and that the scheme was discontinued with Old Mutual with effect from 1 September 2012, Old Mutual will have suffered even a greater underwriting loss.

- Is it fair to a life assured who is not at fault to distinguish between a claim that has been submitted one month late by the employer and a claim that has been submitted 8 months late by the employer?

- Is it fair to a life assured who is not at fault to distinguish between a claim which, if submitted timeously, would have been taken into account and a claim that would not have been taken into account for the purposes of setting the premium rate on the policy review date?

Final Determination

Old Mutual contends that the terms of the contract should only be deviated from if they would operate harshly against the complainant and that the test in this regard is whether those terms offend public policy.

This presupposes that only contractual terms that offend public policy can operate harshly against a complainant. However experience has shown that, contractual terms which are not in principle unfair or unreasonable or contrary to public policy can in given circumstances also result in an unjust hardship.

To the extent that an unjust hardship is contrary to justice, it would be an unsatisfactory state of affairs if we were powerless, no matter what the circumstances of the case, to prevent such an injustice. It is in these exceptional cases that our 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 as Old Mutual suggests but is simply a solution in a single case on its particular facts.

It appears that Old Mutual has conflated or confused the circumstances in which contractual terms may be challenged on constitutional grounds and the circumstances in which we will consider exercising our equity jurisdiction.

Where a term of a contract is unconstitutional or *contra bonos mores*, it will not be enforced, not because of equity considerations but because of the application of the law itself. Equity only becomes relevant if a *legal* resolution gives rise to an unfair result. Equity would otherwise be irrelevant and unnecessary.

Whilst in both instances, the express terms of the contract may be departed from, in the case of our equity jurisdiction, the constitutionality of the contractual term in question is not necessarily (and invariably is not) at issue and there are, depending on the facts of the case, potentially a number of relevant factors and competing interests to consider.

In the case of a constitutional challenge however whether or not a particular contractual term is in conflict with constitutional values is the primary issue and the nature and scope of the enquiry is entirely different.

In the present case the late submission clause is not the subject of a constitutional challenge. As stated in the provisional determination, 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. Therefore the enquiry is not whether the late submission clause offends public policy.

Rather 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*.

Old Mutual states that equity does not demand that the provisions of the contract should not apply simply because the employer's expectations that the complainant would return to work did not materialise. However this is not the only factor we have considered but just one of a number of factors. In so far as in our view the employer's expectations were not unreasonable and explain, in part, why the employer did not submit the claim earlier, we are satisfied that such is relevant to the overall enquiry.

Regarding Old Mutual's contention that the employer's explanation for the delay would render clause 2.3.1 of no force or effect, we do not agree. It is in the context of the facts of *this* particular case that we are satisfied that the employer's explanation is reasonable.

Those unique facts are that the complainant went on sick leave to receive treatment for Tuberculosis which is generally regarded as a curable disease. HIV is also no longer viewed as a terminal illness but rather as a chronic disease. The complainant's doctors were also confident that she would recover and return to work. She was given sick leave, not to confirm whether or not she was permanently disabled, but in order to be treated for the purpose of recovery.

If for example the complainant had stopped working because she had been diagnosed with a terminal illness and her life expectancy was only a few months, in *that* context, we would probably not construe the same explanation for the delay as reasonable.

Old Mutual asks the question whether it is fair to a life assured to be successful in one case because the claim was submitted just one month late by the employer but unsuccessful in another case because the claim was submitted 8 months late by the employer because in neither case is the life assured at fault.

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.

Old Mutual has also questioned the fairness to it if it were required to consider a claim which it has declined in accordance with the express provisions of the policy. However fairness must be exercised in relation to *both* parties, not just one of the parties. This necessarily entails

weighing up the *competing* interests of the parties and determining how best to *balance* the equities.

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 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 unjust hardship.

Regarding the feasibility of having to refer all future claims to the Ombudsman's office before making a decision, we wish to point out that we have previously made determinations against Old Mutual in respect of a claim which has been submitted out of time. Old Mutual has in the interim been able to operate without having to refer all claims to us.

By its own admission Old Mutual does on occasion pay claims which are submitted out of time and will no doubt continue to do so for reasons they consider appropriate.

In view of the above, the meeting concluded that Old Mutual 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 Old Mutual but was of the view that it could not be the overriding factor and such was in any event outweighed by the unjust hardship which the complainant would suffer if the terms of the contract were applied strictly.

This is our final determination.

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