Before the Arbiter for Financial Services

Case No. 120/2017

ZR (the complainant)

vs

Bank of Valletta p.l.c. (C 2833) and

MAPFRE Middlesea p.l.c. (C5553)

(the service providers/bank/insurance company)

Sitting of the 12th March 2019

The Arbiter,

Having seen the complaint which states the following:

"The claimant feels badly let down by both the bank and the insurance companies, she not being aware of personal insurance provided under the travel insurance companies of BOV Platinum Card nor having been advised by of the same by BOV p.l.c.

The claimant considers she has been unfairly treated by insurers as they were informed shortly after the cards were discovered. She also feels BOV failed in their duty to disclose the insurance and issue preliminary notice to insurers when they were aware of the passing. All as further disclosed by my advisers letter 21 April included with (tab 3). As a matter of note my advisers advised all insurers with whom they dealt within 14 days of notification of the death.

It is also registered BOV referred to insurers before replying and concern might be raised of impartiality bearing in mind the substantial shareholding of BOV in MFR.

Payment of the benefit due of it is believed E270,280 is sought."

Bank of Valletta p.l.c. was declared contumacious by a preliminary decision of the Arbiter given on the 9 April 2018.[1] Therefore, their reply cannot be considered by the Arbiter but, as already stated in the preliminary decision on the default of the Bank, their contumacious state is not an admission of the complaint raised by the complainant against it. The complainant has to prove its case against the Bank.

In its reply, MAPFRE Middlesea p.l.c. (the insurance company) stated the following:

"RR was entitled to the BOV Travel Open Cover that is offered as a benefit to BOV Visa Premium cardholders upon which ZR is basing her claim.

The complainant's claim is being refused on the basis that the time within which the complainant ought to have instituted her claim had lapsed, henceforth is deemed to be prescribed. This time-barring is clearly stated within the policy conditions, namely General Condition 4 (Submission) and General Condition 10 (Notice) attached as DOC A.

Cardholders are notified regarding the benefits attached to the card, including the Travel Insurance Policy, as they are referred to the policy booklet containing the policy terms and conditions. The notification requirements are clearly indicated in the above-mentioned policy booklet.

ZR's claim that she was unaware of such benefits attached to her late husband's Visa Card is unfounded. It is the responsibility of the cardholder to inform eligible members of the Travel Insurance cover. Furthermore, since both RR and ZR were insurance handlers, there is a presumption of knowledge of insurance cover during their trip.

Furthermore, the Latin maxim of *ignorantia juris non excusat* may be applied to this case, as ignorance of the law, in this instance may be considered to be the insurance policy, by which parties are regulated, may not be claimed as an excuse for a late notification. If ignorance of the existence of a policy or ignorance of its terms and conditions may be claimed, such policy would lose its effect.

[1] *A Fol.* 127 *et seq*

The complainant was in clear breach of the policy conditions and her claim may therefore not be entertained.

Policy conditions are transcribed for a reason, and the thirty (30) day time-bar is not a frivolous attempt for insurance companies to reject a claim. Considering the case at hand, due to late notification, the insurance company was deprived from its right to request a toxicology report and other similar medical reports during an autopsy. Such tests and reports aid the insurance company in determining the eligibility of one's claim.

Henceforth…her claim may not be entertained…"

Having heard the evidence and seen the documents presented by the parties

Considers

The Arbiter shall '*determine and adjudge a complaint by reference to what, in his opinion, is fair, equitable and reasonable in the particular circumstances and substantive merits of the case'.*

The main issue in this case is the late notification of the claim submitted by the complainant. The insurance company makes it amply clear that it refuted the claim because it was filed later than the 30-day time-frame stipulated in the policy.[2]

The complainant justifies the late notification on the grounds that Bank of Valletta p.l.c., which offered the cover as a benefit for Visa Platinum Card holders, did not inform her of the existence of the policy and MAPFRE Middlesea p.l.c. acted unfairly when it rejected the claim on the basis of late notification.

It is within this context that the Arbiter has to decide the case.

General Observations

It is agreed by both parties that the Travel Insurance Open Cover was not issued to the complainant but to her late husband who enjoyed the benefits under the cover because he was a Visa Platinum Card holder with the bank. He did not enter into any form of negotiation with MAPFRE Middlesea p.l.c. and

[2] *A Fol.*28 *et seq*

did not buy the cover from it but was automatically covered because BOV p.l.c. had reached an arrangement with MAPFRE Middlesea p.l.c. to cover its Visa Card holders.

The Juridical Context

There are different schools of thought on the effect of a late notification of the policy.

The first, and oldest, rule applies a strict contractual approach; delayed notice is considered a breach of the insurance contract and the insurer is excused from performance as the non-beaching party.

Another approach rests on the reasonableness of the delay and whether the delay could be justified. This approach is fact based and the adjudicator is tasked with considering the particular circumstances of the case and on the test of the prudent reasonable person, rules whether delayed notification could be justified. In that case, the insurance company cannot avoid the claim but is entitled to damages.

The Arbiter has to decide the issue according to what, in his opinion, is fair, equitable and reasonable in the particular circumstances and substantial merits of the case.[3]

The insurance company argues that the case should be decided strictly on the wording of the policy and especially on the notification clause because '*pacta sunt servanda'*.

However, the legislator has tasked the Arbiter to treat a case on its **"*particular circumstances*"**[4] and decide the complaint on *"what is fair, equitable and* ***reasonable****"* in those circumstances.[5]

In a recent decision the Court of Appeal[6] declared that the wording "*fair, equitable and reasonable in the particular circumstances of the case*" gives the Arbiter a *"wide margin of appreciation".*

[3] CAP. 555, Art. 19(3)(b)
[4] CAP. 555, Art. 19(3)(b)
[5] *Ibid.*
[6] *Carmel Bartolo et vs Crystal Finance Investments Ltd.,* 5/11/2018

Moreover, the concept of *pacta sunt servanda* should be considered in its true perspective and not used haphazardly as a concept that forgives all our sins irrespective of their character and gravity.

As has been pointed out by the Court of Appeal,[7] the concept is based on the assumption that the parties were free to negotiate and agree the terms of the agreement. The Court added that even in the pre-contractual stage, the element of good faith by the parties is significant and the parties are duty bound to inform each other about each cause that limits the efficacy of the contract or its avoidance by either party.

For this reason, the Court of Appeal[8] concludes that the efficacy of the *strict interpretation* of principle of *pacta sunt servanda* in consumer-related contracts, is qualified because the legislator has enacted special laws for the protection of the consumer. In consumer-related contracts, the adjudicator should not overlook the fact that when a retail client is involved, there could be a weaker party especially when the contract is one of adhesion where the consumer did not have the opportunity to negotiate the terms of the contract.

In the context of insurance contracts it has also been argued that:

"True freedom of contract only exits where the contract manifests two ingredients: the freedom to enter into the contract and the freedom to influence the terms of that contract.

In truth, the average insured possesses none of the latter type of freedom and very little of the former."[9]

Moreover, the concept of equity which the Arbiter has to consider in his deliberations has been described by the Court of Appeal[10] in the following terms:

"Il-kuncett tal-ekwità jaspira ruhu ghar-regola tal-gudizzju li ghalkemm mhix miktuba, tikkonsenti, b'riferiment ghall-kaz konkret, ghas-soluzzjoni tal-kontroversja b'mod aktar konformi ghall-karatteristici specifici tal-fatti …

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[7] *Raymond u Redenta Camilleri vs Touring Mediterraneo Ltd.,* 6/10/2010
[8] *Ibid.*
[9] Trakman, *Adhesion Contracts and the Law of Insurance,*
p 23, 24
[10] Rita Bihiga vs Adrian Busuttil, 05/07/2006

Gudizzju dan li jimplika valutazzjoni specifika, libera u elastika li tikkonsenti lill-gudikatur li jiddevja mir-rigur tas-summum jus in relazzjoni ghall-elementi partikolari tal-kaz. Jikkonsegwi illi dan hu zvinkolat mill-osservanza rigoruza ta' certi normi ta' dritt u ghaldaqstant hu jista' jirrikorri ghall-principju ta' dik il-prudenza u tal-opportunità li tidher hekk ekwa fil-kuxjenza tieghu ghas-soluzzjoni tal-kontroversja…."

This authoritative decision is in line with the provisions of Chapter 555 of the Laws of Malta which stipulate that the Arbiter has to decide the case by reference to what *in his opinion is fair, equitable and reasonable in the particular circumstances of the case.*

The fair and reasonable treatment of claims by an insurance company stems from its obligation of *uberrima fides* or *utmost good faith*. This principle lies at the heart of all insurance contracts and, whereas the insured has a serious obligation of disclosure of material facts which might determine the decision by the insurance company to offer or refuse the cover, or ask for a higher premium, the insurance company has the duty to honour the claims in a reasonable and fair manner.

The "Reasonable" Approach

The old approach to the problem of late notification of the claim rests on the presumption that the insurance has suffered a prejudice in being informed about the incident outside the term established in the policy.

However, a more just and reasonable approach is one based on the reasonableness or otherwise of the delay.

This approach is based on a careful analysis of the particular facts of the case and establishes whether the insured had good reason for the delay.

The Arbiter has to examine whether the delayed notification by the complainant is reasonable and justified.

The complainant pleads that she did not know of the existence of the policy and discovered its existence six months after her husband's death:

"Everyone knew my husband at BOV and they were very sorry for his loss. When the body of my husband was taken back to the UK, after some six

months later, my husband's friend told me that we were supposed to be covered by the Visa Card and I said if I knew, life would have been much so easier."[11]

The Arbiter sympathises with the complainant for the difficult circumstances she faced prior to and after her husband's passing away. However, he has to deal with the case in a fair and impartial manner.

A. Bank of Valletta p.l.c.

The complainant laments that she did not know about her husband's cover and the Bank should have informed her about it. However, XX, a witness brought forward by the insurance company, stated on oath that she had met the complainant on the 22 August 2016, and it was during that meeting that the complainant informed her that her husband had passed away. She was only asked by the complainant about the procedure to transfer RR's portfolio to his legal heirs.

The Arbiter notes that XX was in no way involved in the issuing of the Platinum Card which carried with it the travel insurance cover. So, XX was in no way obliged to discuss the insurance cover provided as a benefit to Platinum Card holders because she was only involved in the transfer procedure of the portfolio.

Moreover, since she did not know by that time who were the legal heirs, she could not discuss RR's portfolio due to bank's secrecy.

The complainant argues that the Bank did not inform her about the existence of the cover. However, it has resulted that it was RR who was the recipient of the Platinum Card and the complainant did not produce any evidence to show that RR was not informed about the insurance cover at the time he obtained the Platinum Card.

The application form[12] shows that RR obtained the BOV Platinum Card in 2008, and, therefore, he had been in possession of the insurance cover for 8 years. It is highly improbable that he did not know that he and his spouse were covered under the benefits of the card considering the fact that he

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[11] *A Fol.* 139
[12] *A Fol.* 172

had been an insurance consultant.[13] Document RD1[14] reveals that at least since June 2014, the Bank had informed its clients of the travel insurance cover as a benefit to Platinum Card holders.

Consequently, the Arbiter cannot uphold the complainant's claim that BOV did not make her aware of the existence of the policy which had, in fact, been issued to her husband.

B. MAPFRE Middlesea p.l.c.

The complainant submits that the insurance company acted unfairly in her regard because it did not honour the claim due to late notification.

The Arbiter, applying the test of reasonableness to the notification delay, has to examine whether the complainant's argument that she did not know about the existence of the policy is **reasonable and probable in the particular circumstances of the case.**

The Arbiter is not morally convinced that the complainant was not aware of the existence of the policy for the following reasons:

As has already been observed, RR had been in possession of his Platinum Card since December 2008, and it is highly improbable that since both RR and his wife had worked as insurance consultants[15] they had never discussed their travel insurance cover over such a long period of time.

Moreover, the complainant states that other insurers were advised in real time by her advisors. It is unlikely that these advisors were not aware of the existence of a travel insurance cover under a Platinum Card.

The Arbiter also considers that the insurance company was informed about the death of the complainant's husband six months after his death which, in the opinion of the Arbiter, is not a reasonable period of time when considering that the policy had established a period of 30 days for the notification of a claim.

[13] *A Fol.* 7
[14] *A Fol.* 174
[15] *A Fol.* 7

The fact that the complainant and her husband were insurance consultants is also a material fact because they are presumed to have had the knowledge of the insurance cover during their trip.

For the above-stated reasons, the Arbiter cannot conclude that the complaint is fair, equitable and reasonable in the particular circumstances of the case.

However, the Arbiter understands the great difficulties the complainant had to endure and the summary refusal of the claim. She could have been treated by the insurance company in a more sympathetic way even if they were going to refuse the claim.

Because of these particular and special circumstances, as a good gesture and merely on a recommendation basis, the Arbiter recommends to the insurance company to pay the funeral expenses of RR; specifically the cost of the funeral. This recommendation is non-binding on the insurance company but the Arbiter feels that such a gesture would at least compensate for the fact that the insurance company summarily dismissed the claim without discussing the issue with the complainant.

The Arbiter is of the opinion that when claims are to be justifiably refused, the insurance company should ensure that it deals with its customers in a friendly and co-operative manner and explain in detail the reasons for the refusal of the claim and show more solidarity with customers who face difficult spells in their lives.

Due to the particular circumstances of this case, each party is to bear its costs of the proceedings.

Dr Reno Borg
Arbiter for Financial Services