



THE OMBUDSMAN

For Short-Term Insurance

THE OMBUDSMAN'S BRIEFCASE

Newsletter of The Ombudsman
for Short-Term Insurance



WHAT'S INSIDE?

Case Study: Promissary Warranty	PAGE 1 - 4
Case Study: Non-Public Road	PAGE 5 - 6
OSTI Cares: Mandela Day	PAGE 7
New staff members	PAGE 8
Consumer Tips	PAGE 9
What does the Ombudsman do?	PAGE 10

ADVICE FROM THE OMBUDSMAN: CASE STUDIES

Please note that each matter is dealt with on its own merits and no precedent is created by the findings in these matters. The case studies are intended to provide guidance and insight into the manner in which OSTI deals with complaints.



PROMISSORY WARRANTY

OAKHURST INSURANCE CO. LTD.

The issue for determination in this matter is whether the insurer, was entitled to reject a claim for the loss of Mrs. R's tennis bracelet on any one of the following four grounds set out in the insurer's letter of rejection:

- (i) late notification of the claim;
- (ii) the failure to take reasonable precautions and care to prevent or minimise the loss;
- (iii) the item not being in a safe; or

- (iv) the failure to have the condition of the jewellery checked and a valuation certificate obtained within 24 months.

Background facts

On 24 November 2016 Mrs. R wore her tennis bracelet to work. While at her desk, she realised that one of the links of the bracelet had broken and that the bracelet might easily fall off. Fearing that she might lose the bracelet, she removed it from her wrist, wrapped it in a tissue and placed it in her handbag.

During the course of that afternoon she had to go shopping for medication for one of her children. When she got home and opened her handbag she realised that the bracelet was missing.

Mrs. R contacted her broker on 8 December 2016 to inform him of the loss. On that same afternoon she received news that her grandmother, who lived in Durban, had passed away. As a result immediate plans to leave Johannesburg to attend the funeral in Durban had to be made. After the funeral the insured did not return to work but instead took her annual leave.

PROMISSARY WARRANTY

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Mrs. R only formally filed her claim on 29 December 2016 when she returned to work following her annual leave.

The insurer's version

In the insurer's first answer to the complaint, the insurer confirms that Mrs. R lodged a claim for her tennis bracelet on 29 December 2016. The bracelet was specified on the policy schedule, under the All Risks Section, for an amount of R119,990.

The insurer referred to an endorsement on the policy schedule, under the All Risks Section, which read as follows:

"It is hereby warranted that all jewellery must be secured in an approved safe when not being worn and loss to such jewellery must be consequent on forcible entry to such safe. It is a condition of the policy that jewellery must be checked every 24 months and that a current valuation certificate is provided at the time of loss."

The policy schedule also referred to:

"Your specific responsibilities - Provide us with jewellery certificates – for items valued above R5,000 Keep jewellery in a safe – when not in use or worn, above the value of R10,000."

The insurer also referred to a general condition in the policy

titled "Prevention of Loss" which read:

"You must take all reasonable precautions and all reasonable care to prevent or minimise loss, damage, death, injury, liability and accidents and may affect emergency repairs to your property to prevent further damage."

Under the heading "Claims Procedure" the insurer referred to the requirement that the policyholder needed to "notify us of your claim within 30 days after the event..." via the channels listed in the policy wording.

Relying on these extracts from the policy, the insurer sought to justify its rejection of the claim on each of the four grounds of rejection as follows below.

(i) Late notification of the claim

Under this heading, the insurer argued that it was entitled to reject the claim on the grounds that Mrs. R was late in notifying it of the claim and because the insured did not report the loss to the police.

The insurer argued that the late notification of the claim only allowed the insurer's assessor to interview Mrs. R on 11 January 2017 which was well over a month after the loss. The insurer

asserted that had the insurer or the police timeously been notified of the loss, appropriate resources could have been used to attempt to recover the lost item.

(ii) Failure to take reasonable precautions and care to prevent or minimize the loss

The insurer argued that the obligation placed on an insured "to prevent or minimize loss" has the effect of limiting the insurer's liability in the event of the insured not complying with this obligation.

The insurer was of the opinion that a reasonable person in the position of Mrs R would have acted differently and in so doing would have avoided the loss altogether. The insurer suggested that the insured should have placed her bracelet in the locked cabin / compartment of her vehicle and that, by placing it in her handbag, she increased the risk of losing the item. The insurer concluded that the insured's conduct was not only negligent but was also reckless.

(iii) Item not being worn or in a safe

The insurer argued that it was only liable, for the loss of jewellery when it was being worn or when it was in a safe. At all other times, the risk was transferred to Mrs. R.

PROMISSORY WARRANTY

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The insurer expanded on its initial argument under this heading and raised that the endorsement on the schedule requiring jewellery to be secured in a safe when not being worn, was a promissory warranty and absolute in nature. The insurer asserted that, as there was a breach of the warranty, there was no obligation on the insurer to accept liability for the loss. The insurer further raised its view that the warranty was absolute, as opposed to a relative warranty, and that, if Mrs. R was of the opinion that the warranty was unreasonable, this should have been discussed with the insurer prior to the inception of the policy and not at claims stage.

(iv) Failure to check jewellery and obtain a valuation certificate

The insurer did not advance any argument of how Mrs. R's non-compliance with this condition was material to the loss or how it was prejudiced by the non-compliance.

Mrs. R's version

Mrs. R stated that, as the item of jewellery was broken, she could not wear it and she could not put it in a safe as she was not at home. She could therefore not comply with the endorsement

whilst at work. She believed that the safest place for her to keep her bracelet was in her handbag. She further stated there was no locked compartment in her vehicle in which she could have placed her bracelet.

Although she submitted her claim on 29 December 2016, the investigator only set up a meeting with her on 11 January 2017, which was 13 days after she submitted the claim, said Mrs. R. She stated that any chance of the bracelet still being found, after she submitted her claim, would have long been lost whilst waiting for the investigator to contact her for an interview.

Mrs. R also advised that she did not know that the police had to be notified of the loss as the bracelet was not stolen but was lost.

OSTI's determination

OSTI rejected the insurer's reliance on all four of the reasons provided by it to substantiate its refusal to satisfy the claim. OSTI's response to each of the rejection reasons were dealt with in turn as follows:

(i) Late notification of the claim

It was not in dispute that Mrs. R notified her broker immediately

following the loss of the bracelet. The policy provided the channels through which an insured must notify the insurer following a loss. The policy clearly states, under the heading "Claims Procedure" that an insured must "notify [the insurer] of [a] claim within 30 days after the event, via the following channels: ... calling your broker." This is precisely what Mrs. R did on 8 December 2016, well within the 30 days.

Under the heading "Claims Procedure" for non-motor claims, a SAPS reference number is required for "theft from [the insured's] house, flat, holiday home or anywhere else" [our emphasis]. Lost items did not bear a requirement to provide a SAPS reference number.

Mrs. R had therefore properly complied with the notification policy provision. There was accordingly no merit in the insurer's rejection of the claim on this basis.

(ii) Failure to take reasonable precautions and care to prevent or minimize the loss

The purpose of this condition in insurance policies seeks to ensure that an insured will not refrain from taking precautions which he or she knows ought to be taken simply because he/she

PROMISSORY WARRANTY

OAKHURST INSURANCE CO. LTD.

is covered against loss by the policy (*see: Diplock LJ in Frazer v. BN Furman (Productions) Ltd (Miller Smith & Partners, third parties), [1967] 3 ALL ER 57 (CA) at 601.*)

In the case of *Santam Limited v. CC Designing CC 1999 (4) SA 199 (C)* the court held that to escape liability on the ground of such a condition, the insurer must show that the insured acted recklessly. In order to discharge this onus, the insurer must demonstrate that the insured recognised a danger, which she deliberately courted by failing to take measures which she knew were adequate to avert it. The insured must therefore have recognised that a danger existed and not cared whether or not it was averted.

In the matter under discussion, Mrs. R elected to remove the bracelet for fear that it would fall off if she continued to wear it. In the circumstances, by removing the bracelet, she attempted to avoid the loss. Had she continued to wear it, it may well have fallen off. Instead the insured took the precaution of wrapping the bracelet in a tissue and placing it in her handbag, which she would have taken with her when she left her office. She further advised that there was no lockable compartment in her vehicle to leave the bracelet in.

On the facts presented to OSTI by Mrs. R, it would appear that proper steps were taken to prevent the loss from occurring. In the given circumstances OSTI was of the opinion that Mrs. R did not act unreasonably or recklessly.

(iii) Failure to check jewellery and obtain a valuation certificate

With regards to Mrs. R's failure to comply with the condition that the jewellery be checked and a valuation certificate obtained within 24 months, Mrs. R stated that, at the time of the loss, the 24 months had only been exceeded by two months. The insurer had not provided proof of any actual prejudice as a result of Mrs. R's failure to comply with this provision of the policy. OSTI also did not agree that had both of these provisions been complied with that it may have prevented the loss from happening, as stated by the insurer. The insurer had, again, provided no evidence to substantiate this statement.

(iv) Item not being worn or in a safe

With regards to the insurer's argument that the requirement, that the item either be worn or kept in a safe when not being worn for it to be covered, is a promissory/absolute warranty,

which renders the failure by Mrs. R to comply a strict breach of the policy entitling the insurer to reject the claim, OSTI referred to the case of *Farnham v. Royal Insurance Co Ltd (1976) 2 Lloyds Rep 437 at 441*, where the court, in essence, held that the insurer only accepted the risk provided the warranty was fulfilled.

As the non-fulfilment of the warranty by Mrs. R, for whatever reason, in the matter before OSTI, was material to the loss, the insurer was within its rights to decline liability for the insured's loss.

The risk of loss or damage to the insured item only transferred to the insurer when the item was either worn or in a safe. When the item is neither worn nor in a safe, the risk of loss or damage remains with the insured.

Conclusion

In the circumstances, OSTI upheld the rejection of the claim on the basis of only the non-compliance by the insured of the promissory/absolute warranty.



NON-PUBLIC ROAD

RMB STRUCTURED INSURANCE

Ms. Z submitted a claim to her insurer following a motor vehicle accident. The accident occurred whilst Ms. Z was driving in her residential complex. Ms. Z's claim was rejected on the basis that she was driving on a non-public road and therefore did not enjoy cover under the policy for the loss. In support of its rejection, the insurer relied on the following provisions of the policy

(1) "Motor vehicle accident" means the unintended collision of one motor vehicle with another motor vehicle, a stationary object or person, resulting in damage to the vehicle and which occurs on a public road as defined in the National Road Traffic Act, 1996 (as amended).

(2) "Special Provisions" f. The maximum repair contribution available at the time of a claim will be reduced by 50% where the motor vehicle accident or loss takes place on a road that is not cemented or tarred. No benefits shall apply whilst the vehicle is being driven where there is no formally registered road."



Unhappy with the rejection, Ms. Z approached OSTI for assistance. Ms. Z contends that at sales stage she was not informed that she would not be covered for accidents which occurred on non-public roads. She contended further that there were road traffic signs within the complex and that all road regulations applied within the complex. She contended that these roads were therefore recognised as public roads.

In its response to the complaint the insurer contended that the salient features of the policy were brought to Ms. Z's attention at sales stage. The policy documents were also sent to

Ms. Z and she was given a 44 day "cooling off" period within which to review the documents and make further enquiries if necessary. In the absence of any further enquiries or cancellation by Ms. Z within the "cooling off" period, the policy inceptioned after the first successful debit order on 26 September 2014.

The insurer contended further that the complex where Ms. Z resided had public access control. Members of the public were not permitted to enter without permission from the person residing in the complex who they wish to visit. Thus, according to the insurer, the incident occurred

NON-PUBLIC ROAD

RMB STRUCTURED INSURANCE

on a non-public road and there was no cover under the policy.

Osti's Recommendation

Under the policy the insurer was obliged to make a contribution towards the repairs of the vehicle following a *"motor vehicle accident which occurs on a public road as defined in the National Road Traffic Act 1996 [as amended]"*

The National Road Traffic Act defines a public road as *"any road, street, throughfare or any other place (whether a throughfare or not) which is commonly used by the public or any section thereof or to which the public or any section thereof has the right of access..."* (our emphasis).

The words *"or any section thereof"* in this instance would include this section/category/class of the public that live within the complex. Thus the road on which the accident occurred would be considered to be a public road in terms of the National Road Traffic Act notwithstanding that there is no right of general entry and that permission is required in order to enter the complex.

Ms. Z's claim therefore fell within the ambit of the policy.

The policy exclusion relied on by the insurer states that *"No*

benefits shall apply whilst the vehicle is being driven where there is no formally registered road" (our emphasis).

The insurer had not provided any evidence to satisfy its reliance on this exclusion but merely relied on its previous argument that the road is a non-public road. As the insurer bore the onus of justifying reliance on the exclusion it was required to provide evidence showing that the road was not a formally registered one. As it failed to do this, it was not entitled to rely on the exclusion. In any event, and even if the insurer had discharged its onus, OSTI was of the view that it would still not be in a position to justify a finding in favour of the insurer based on the insurers failure to draw Ms. Z's attention at sales stage to the specific exclusion on which it sought to rely.

This is an unusual term in an insurance policy and as such, more should have been done to bring it to the insured's attention.

The insurer had not demonstrated that it had complied with the Policyholder Protection Rules in relation to disclosures. Rule 4.3.(i) of the Policyholder Protector Rules requires the insurer to furnish the policyholder with certain particulars, prior to entering into a policy which information must be confirmed

in writing, within a period of 30 days. Information to be provided to the policyholder includes a reasonable and general explanation of the principles of the relevant contract and information reasonably expected to enable the policyholder to make an informed decision. More particularly, in terms of Rule 4.3.(i) the policyholder should be furnished with *"concise details of any special terms and conditions, exclusions, waiting periods, loadings, penalties, excesses, restrictions or circumstances in which benefits will not be provided."*

It is not sufficient to merely to refer to the terms and conditions contained in the policy documents sent to the insured after the contract has been concluded. There must be full and proper compliance with the Policyholder Protection Rules prior to the contract being concluded and which will then enable the insured to exercise an informed choice as to whether or not she/he wishes to agree to the terms offered by the Insurer.

In the circumstances, OSTI recommended that the insurer pay the claim, which it agreed to do.

OSTI CARES: MANDELA DAY

In the spirit of Mandela Day, OSTI donated children's chairs to the Elton John Masibambisane Centre for Orphaned and Vulnerable Children.

This centre provides preschool care and a safe after school environment for children in Eldorado Park and neighbouring informal settlements. OSTI further donated jumbo boxes of nappies and fleece blankets to the Othandweni Family Care Centre

which is home to 90 orphaned children in Soweto.

In keeping with the spirit of Mandela Day, OSTI staff donated fleece blankets and a puppy collar to the Community Led Animal Welfare (CLAW).



OSTI WELCOMES NEW STAFF MEMBERS

In this quarter of the year, OSTI welcomed the following new members of staff:

Abri has an LLB degree which he obtained from Pretoria University. He was admitted as an attorney. Abri started working in the short-term insurance industry in 1996 whilst he was still a student. After he completed his articles of clerkship in 2002, Abri returned to the industry where he worked for 14 years, gaining experience in recoveries, fire investigations, legal and compliance.



Abri Venter
Assistant Ombudsman

He loves spending time with his wife and daughter doing outdoor activities.

Lora completed her Baccalaureus Procuratoris (BProc) degree at the University of Pretoria in 2000, and was admitted as an attorney of the High Court of South Africa in 2005.



Lora Bezri
Assistant Ombudsman

She has a background in the short-term insurance industry, spanning 13 years, having worked in both the legal and customer relations departments.

Lora enjoys tranquil, scenic holidays.



Regina Chindomu
Assistant Ombudsman

Regina has an LLB honours degree from the University of Pretoria and has completed her CSSA international qualifying board exams (chartered secretaries South Africa).

Upon completing her LLB degree Regina joined a law firm where she completed her articles of clerkship. Thereafter, Regina joined the insurance industry prior to joining OSTI.

When Regina is not working, she loves reading and dancing.

CONSUMER TIPS

CONSUMER TIPS

1. Using your car for business? Make sure that your insurer knows this. Avoid claims rejections.
2. Don't get caught in the hail this summer. If the sky looks dark and dangerous, park your car under cover and wait it out.
3. The rainy season is upon us. Avoid skidding on wet roads. Check the tread on your tyres regularly.
4. Started your Xmas shopping? Insure those new gifts. Keep your slips & send your insurer the required information to avoid heartache at claims stage.

WHAT DOES THE OMBUDSMAN DO?

How we can assist you if you have a complaint with your short-term insurer

The Ombudsman for Short-Term Insurance (OSTI) resolves disputes between insurers and consumers. We are an independent organisation appointed to serve the interests of the insuring public and the short-term insurance industry. Our mission is to resolve

short-term insurance complaints fairly, efficiently and impartially. We offer a free service to consumers whose claims have been rejected or partially accepted by their insurer. We apply the law and principles of fairness and equity.

WHAT TO DO IF YOU HAVE A COMPLAINT?

Before contacting our Office, we would advise you to complain to your insurance company first. It is best to complain in writing. Make sure that you keep copies of all correspondence between you and your insurer.

If you are not happy with your insurer's decision you can complete our complaint form and send it back to us either by post, fax or email.



If you would like to lodge a complaint or require assistance, please contact our Office by calling

011 726 8900 or 0860 726 890
or download our complaint form via our website at

www.osti.co.za, click on lodge a complaint and then click on steps to follow.

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