

THE COUNCIL FOR MEDICAL SCHEMES

APPEAL COMMITTEE

In the matter between:

PM

Appellant

and

DISCOVERY HEALTH MEDICAL SCHEME

Respondent

APPEAL RULING

1. As far back as the 18th century Lord Mansfield, sitting in the English courts and hearing the matter of *Carter v Boehm*, stated the following:

“The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only; the under-writer trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the under-writer into a belief that the circumstance does not exist, and to induce him to estimate the risque, as if it did not exist. The keeping back such circumstance is a fraud and therefore the policy is void. Although suppression should happen through mistake, without any fraudulent intent; yet still the under-writer is deceived, and the policy is void; because the risque run is really different from the risque understood and intended to be run, at the time of the agreement.”¹

¹ *Carter v Boehm* (1766) 3 BURR 1905

2. Lord Mansfield's somewhat antiquated expressions describe what has been accepted as a fundamental principle of insurance law, namely that there is a duty of utmost good faith upon an applicant for insurance to disclose material information.
3. The duty is summarised by Denis Davis, now a Judge of the High Court of South Africa, in the following terms:

“The insured must, therefore, disclose to the insurer, before the contract is concluded, every material circumstance which he knows. It has been held that a circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.”²

4. Contracts for health insurance, as offered by medical schemes to their members, are subject to the same duty of absolute good faith as applies to other insurance contracts. This is so despite the statutory regulation of the health insurance industry. It is given recognition in section 29(2)(e) of the Medical Schemes Act, 131 of 1998 (“the Act”), which allows for the cancellation or suspension of a member's membership of a medical scheme by reason of the non-disclosure of material information.
5. There is therefore no dispute over the right of a medical scheme to cancel, with retrospective effect, the membership of a member who is subsequently found to have failed to disclose material information at the time of his or her application for membership.

² D M Davis: *Gordon & Getz, the South Africa Law of Insurance, 4th Ed, p. 113*

6. Where disputes often arise, however, is in relation to the question of what information should be considered to be material. It is with that question, and specifically with the assessment of whether certain information not disclosed by the Appellant to the Respondent at the time of her application for membership was material, that this appeal is concerned.
7. The Appellant signed an application for membership of the Respondent on 8 December 2005. Her application was accepted and her membership of the Respondent commenced on 1 January 2006.
8. Certain features of the Respondent's membership application form, used generally, and as completed by the Appellant specifically, should be recorded.
9. At the head of the application form the Respondent states as follows:

“Please do not resign from your current medical scheme until you have received written notification of acceptance from the Scheme. Once you have received notification of your acceptance from the Scheme, please cancel your previous medical scheme membership, as it is illegal to belong to two medical schemes at the same time”
10. Also relevant to this appeal is Section J of the Respondent's application form which is headed *“Previous Medical Scheme Details”*. That section requires the applicant to provide details of any previous medical schemes to which the applicant has belonged, or of any previous medical schemes to which the applicant's spouse, partner, adult dependant or other dependants have belonged.
11. The Appellant left the whole of Section J of the application form blank.

12. Section K of the Respondent's application form is headed "*Your Medical Questionnaire*". A number of medical questions are asked in respect of the main applicant and any dependants to be covered. At the beginning of Section K the Respondent records that "*You are required by law to make a full and proper disclosure of any medical information*".
13. Question 14 under Section K refers to respiratory disorders. The examples given of such disorders are *asthma, emphysema, chronic bronchitis, shortness of breath, persistent cough, cystic fibrosis, chronic obstructive airways disease, any lung surgery, coughing up blood*. The Appellant checked the word "No" in question 14, thus representing that neither she, nor any of her dependants had suffered from any respiratory disorders.
14. On 24th July 2006 the Appellant applied for chronic illness benefits on behalf of one of her dependants, her daughter X.
15. On 7 August 2006 the Respondent wrote to the Appellant indicating that it was terminating her membership by reason of material non-disclosure, in that the Respondent "*has recently discovered that your dependant, X, has been diagnosed with or suffering from asthma, prior to the inception of your Discovery Health membership*".
16. On the same day the Appellant sent a letter to the Respondent, supported by a letter from her doctor, confirming an error in the doctor's records which had the

effect that X's asthma had been recorded as having been diagnosed in July 2005 instead of July 2006.

17. On 22 August 2006 the Respondent again wrote to the Appellant and identified two further reasons for terminating the Appellant's membership with the Respondent. These were that the Appellant had belonged, for a period, to two medical schemes simultaneously; and that the Appellant had represented in her application for membership that she was not, at the time, a member of another medical scheme. The Respondent thus recorded that there were three reasons for the termination of the Appellant's membership, namely the non-disclosure of asthma; the dual membership; and the misrepresentation.
18. The Appellant challenged the termination of her membership without success at the Respondent's Dispute Committee. She therefore appeals to this Appeal Committee against the Respondent's decision.
19. The first of the Respondent's reasons for terminating the membership of the Appellant, namely the non-disclosure of X's asthma, may be disposed of on its facts. There is no evidence to contradict Dr Y's corrected correspondence to the effect that he had made no conclusive diagnosis of asthma in X's case until July 2006. If there had been no such diagnosis it could not have been expected of the Appellant to disclose that X suffered from asthma at the time that she applied for membership. The Respondent's reason for termination of membership was specific, it was the non-disclosure of asthma - not any other respiratory condition - that motivated its decision. In light of Dr. Y's

submissions the Appeal Committee finds that there was no basis to terminate the Appellant's membership because of the non-disclosure of X's asthma.

20. The second ground relied on by the Respondent, namely the dual membership of medical schemes, raises a legal issue. As has been seen above, the Respondent's membership application form cautions applicants for membership not to resign from their existing medical scheme until they have been accepted by the Respondent, and then to resign in order avoid dual membership.
21. The practical difficulty that arises where applicants for membership follow this advice is that most medical schemes require a notice period before the termination of membership. It is thus almost inevitable that a new member of the Respondent who has followed the Respondent's advice will experience a period in which he or she belongs to two medical schemes as a result of having been accepted by the Respondent but also having been required to give his or her existing medical scheme notice.
22. It is true that Section 28 of the Act prohibits a person from being a member of more than one medical scheme. It is interesting, however, that dual membership, whilst prohibited under the Act, is not listed as a basis for the cancellation or suspension of membership under Section 29(2). This latter section is peremptory and contains an exhaustive list of the grounds upon which such membership may lawfully be cancelled or suspended.
23. In the committee's view, Section 28 of the Act was intended to prevent dual

membership of medical schemes on an ongoing basis. It was not intended to penalise medical scheme members who, as suggested by the Respondent, prudently wait until they have been accepted by a new medical scheme before terminating their membership of the old. The Appeal Committee is of the view that the second ground of termination relied upon by the Respondent was therefore neither legitimate nor lawful.

24. No factual question arises with regard to the Respondent's third ground for cancellation. It is not disputed that the Appellant left Section J of the application form blank, and it cannot be disputed that she was aware that her spouse was a principal member of ZZ Medical Scheme and that she was a dependant thereunder. The question that remains to be answered concerns whether this non-disclosure on the part of the Appellant was material.
25. Rule 11.5 of the Respondent's rules provides as follows: *"The Board may exclude from benefits or terminate the membership of a member or dependant whom the Board finds guilty of abusing the benefits and privileges of the scheme by presenting false claims or making material misrepresentation or non-disclosure of factual information"*.
26. The Appeal Committee is of the view that in order to interpret Rule 11.5 in a manner that is consistent with the provisions of Section 29(2) of the Act, referred to above, the word "material" in the rule must be taken to apply both to the misrepresentation and the non-disclosure of factual information referred to thereafter. In other words, the rule is not, in the Committee's view, to be

interpreted so as to allow the board to terminate the membership of a member who has failed to disclose factual information that is not material.

27. In essence, the Appellant's submission to the Appeal Committee concerning the materiality of this non-disclosure was that the non-disclosure was not material to the Respondent in that it would not have affected the terms upon which membership was offered the Appellant.
28. If anything, the Appellant submitted, her non-disclosure of her membership of another medical scheme could only have worked to her prejudice. This is because a waiting period may be imposed on new members of a medical scheme who have not belonged to another medical scheme immediately prior to joining. Disclosure of her membership of ZZ would have precluded the Respondent from imposing such a waiting period had it been inclined to do so. As it happened, the Respondent imposed no such waiting period.
29. In essence the Appellant's contentions amount to a submission that if the misrepresentation or non-disclosure of information would have, or did have, no effect on the particular terms upon which membership was offered to the Applicant, then such misrepresentation or non-disclosure should be found to be immaterial.
30. Unlike other insurance companies, South African medical schemes, regulated as they are by the Act, are not free to choose the parties with whom they wish to contract, or the terms upon which they are prepared to contract.

31. The Act provides for:
- 31.1. open enrolment in medical schemes (Section 29(3));
 - 31.2. restrictions on the terms and conditions applicable to admission of members and the determination of contributions (Section 29(1)(n));
 - 31.3. restrictions on the waiting periods that may be applied to new members (Section 29A);
 - 31.4. a prohibition on the exclusion of prescribed minimum benefits (Section 29(1)(o)); and
 - 31.5. various other restrictions on the operation of medical schemes.
32. It may be that these statutory injunctions often have the effect that a scheme may be compelled to admit a particular member and to provide that member with benefits regardless of what is disclosed by the member concerning conditions to which those benefits relate. By way of illustration, returning briefly to the first ground of refusal in this appeal, the argument would be that the failure to disclose asthma as an existing condition could not be considered to be material because asthma is a prescribed minimum benefit and even if the Respondent had known that the Appellants' daughter had asthma, it would nevertheless have been compelled to provide benefits for the treatment thereof.
33. However, it will be recalled that our courts have held that a circumstance is material if it would influence the insurer either in fixing the premium or in determining whether he will take the risk. The argument advanced by the

Appellant would be that the disclosure is not material because the scheme is obliged to take the risk and cannot adjust its premium in relation to any particular individual member accordingly.

34. This argument relies for its acceptance on a narrow approach to the issue of materiality. It assumes that factual information is only material if it is material to the contract between a specific member and a scheme.
35. The significance of the disclosure of factual information, however, may go beyond that individual relationship. Schemes determine their overall risk, and consequently the benefits that they can offer and the contributions that they must levy, on the basis of the collective data available to them, considering the profile of their members. Returning to the earlier example, this means that disclosure that a member has asthma, whilst it may not have the result that the scheme can refuse to provide benefits to that member, will allow the scheme to collect data as to how many of its members suffer from asthma, and consequently how much it can expect to expend in relation to asthma benefits.
36. The fact that it is compelled to provide these benefits to its members with asthma has the result that the materiality of this information is in fact increased, not decreased.
37. Returning to the facts of this appeal, and to Respondent's third ground of termination, had the Appellant revealed that she belonged to another medical scheme, the Respondent would have had the opportunity to investigate her

previous claims history. That claims history would have allowed the Respondent to establish the risk profile of the Appellant and her dependants, which is an essential component of enabling the Respondent to compile an overall risk profile of all of its members. It cannot, in these circumstances, be argued that the failure by the Appellant to complete the applicable section of the Respondent's application form was not material.

38. Nor can it be argued that the Appellant's failure to complete this section of the application form was not unreasonable in the circumstances. Section J of the Respondent's application form is not difficult to understand. The argument that the Appellant was misled thereby was not seriously pursued in the appeal hearing.
39. The argument that the Appellant should be excused because the form was completed on her behalf by a broker likewise has no validity. The Appellant did not provide this information to the broker, and thus cannot blame the broker for excluding it. The Appellant in particular, by virtue of her qualification as a lawyer, can have no excuse for not appreciating her responsibilities in this regard.
40. In the circumstances, and for the reasons outlined above, it is the Appeal Committee's view that the non-disclosure by the Appellant of her membership of another medical scheme was material in the circumstances, and that the cancellation by the Respondent of the Appellant's membership was therefore justified both in terms of Rule 11.5 of the Respondent's rules and in terms of

Section 29(2) of the Act.

41. The result of this conclusion is that the appeal must fail.

DATED at JOHANNESBURG this 30th day of MAY 2007

P R JAMMY

Member

For: Appeal Committee