TURKSLEGAL Q&A

"Innocent" non-disclosure and misrepresentation

In this edition of TurksLegal Q&A, we complete our series about non-disclosure and misrepresentation and respond to the following series of client questions about so called "innocent" non-disclosure.

Q *How is innocent non-disclosure defined? Is it "innocent" non-disclosure if an insured provides incorrect information because they misinterpreted the question?*

Is the insurer bound by a policy it issued to an insured who mistakenly thought that the condition they suffered was not one that was asked about in the application?

A There isn't actually a definition of "innocent" non-disclosure in the *Insurance Contracts Act 1984* (the "ICA"). Non–disclosure is failing to tell the insurer information the insured knows that they are legally obliged to disclose in connection with an application for cover. Misrepresentation is actually telling the insurer something that is in fact false.

Often they go together. If the insured supplies an incorrect answer to a question, they will generally also be failing in their legal duty to disclose the correct answer as well. Both non-disclosure and misrepresentation can be fraudulent or innocent.

There are sections in the ICA that describe what an applicant for insurance must disclose when they apply for cover or renew a policy[i] and set out what the legal duty of disclosure is. Where the failure to comply with the duty of disclosure is coupled with a deceitful state of mind, in other words, the information was withheld on purpose, or the insured acted recklessly and didn't care if the information they provided was true or not, the non-disclosure is fraudulent.

What is described as "innocent" non-disclosure is basically a failure to provide information that is required by the duty of disclosure but which occurs where the insured's state of mind isn't fraudulent. "Innocent" misrepresentation has a corresponding meaning in the context of an insured actually providing answers that are incorrect.

Information that was provided in error because the insured genuinely misinterpreted a question in good faith will never be fraudulent, because the insured did not have a deceitful state of mind at the time. But is this still a breach of the duty of disclosure and is it still a misrepresentation?

The ICA deals with this in a couple of ways. Firstly, it says that if a question is ambiguous, and it was reasonable to think it had a particular meaning, and if the insured thought that was what the question meant, the resulting answer isn't a misrepresentation, even it wasn't what the insurer was really asking[ii].

What insurers need to take away here is that they should never ask a potentially ambiguous question as the insured may not be held accountable if the insured reasonably interpreted the question in a way the insurer didn't anticipate.

That deals with the misrepresentation aspect. The second way the ICA deals with this issue is in the context of the duty of disclosure. That duty is only to disclose information that the insured knows and also knows to be relevant to how the insurer will deal with the application.

If the insurer's question was open to misinterpretation, then a court is unlikely to come to the conclusion that the insured would have been put on notice that the information the insurer was really seeking was relevant to its assessment.

So if a question is reasonably open to being misinterpreted and an insured provides incorrect information because they did misinterpret the question, this will not be a breach of the duty of disclosure or be a misrepresentation.

The questioner has also asked about "an insured who mistakenly thought that the condition they suffered was not one that was asked about in the application". The ICA also deals with this situation and provides that a statement that was made by an insured in response to a question in an application that;

> "*was in fact untrue but was made on the basis of a belief that the person held, being a belief that a reasonable person in the circumstances would have held, the statement shall not be taken to be a misrepresentation.*"[iii]

In other words, an answer that was reasonably given in response to a question in the belief it was in fact true, is not a misrepresentation.

Insurers need to know about these provisions and should be mindful of them when they are designing the questions that are asked in application documents.

However, these provisions also need to be kept in mind by people in the claims area, because not every missing or incorrect answer will be a non-disclosure or misrepresentation that will entitle the insurer to a remedy under the ICA.

[i]Sections 21, 21A, and 21B

[ii]Section 23

[iii]Section 26(2)