IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

Case Number: FOC666/06-07/GP (3)

In the matter between:-

MARIO ANGELUCCI **Complainant**

and

ALEXANDER FORBES ADMINISTRATION

& INSURANCE SERVICES (A Division of

Alexander Forbes Management Services (Pty) Ltd) Respondent

DETERMINATION IN TERMS OF SECTION 28(1) OF THE FINANCIAL AND INTERMEDIARY SERVICES ACT NO. 37 OF 2002 ('FAIS ACT')

Parties

[1] The Complainant is **MARIO ANGELUCCI**, a businessman of 13A, Florence Avenue, BEDFORDVIEW, GAUTENG, 2007.

[2] The Respondent is **ALEXANDER FORBES ADMINISTRATION and INSURANCE SERVICES** (A division of Alexander Forbes Management

Services (Pty) Ltd) an Authorised Financial Services Provider of Alexander Forbes House, 189, Clark Street, BROOKLYN, PRETORIA, 0181.

The Background

[3] The complainant obtained short term indemnity insurance for the contents of his house (the premises) for, *inter alia,* theft and burglary - through the intermediation of the respondent. The insurance is underwritten by co-insurers Mutual & Federal Insurance Company Ltd (37.5%), Santam Limited (37.5%), SA Eagle Insurance Company Ltd (12.5%) and Alexander Forbes Insurance Company Ltd (12.5%). The inception date of the policy was 6th July 2001 and the policy was renewed annually thereafter.

[4] Sometime between 14:00 and 19:15 on 19th February, 2006, a burglary took place at the premises. The complainant says he suffered a loss of R355 000.00. The respondent says the adjusted amount of the claim is R249 615.08. At the time of the burglary, the complainant and his wife were overseas and the premises was in the care of complainant's father who lives in a cottage on the property. Complainant's teenage son and daughter also lived in the house. On the day in question his daughter was not at home. Complainant's father dropped off his grandson with some friends and thereafter went to the Italian club for the afternoon. When he returned in the evening, he found that the house had been burgled.

[5] A claim was duly submitted by complainant and the insurers accepted a claim for R55 000.00 under the All Risks section of the policy. The insurers repudiated the balance. The reason for repudiating the balance was that the complainant had breached the Burglar Alarm warranty clause of the policy. However, the insurers made an additional offer - *ex gratia* – of R50 000.00. This offer was rejected by the complainant.

[6] The complainant accepts that the insurers were entitled to repudiate the balance of the claim. He, however, blames the respondent as his broker for not having advised him that he could have elected not to have the burglar alarm warranty (or 'condition' as its referred to in the policy schedule) by paying a higher premium. He says in his complaint to this Office:

> 'My policy was subjected to a Burglar Alarm Warranty. I was not given the choice to have the warranty deleted which choice was available at very little extra premium and no need for additional security measures!!! (all stated in policy) *sic* If I had been given the option available I would have exercised the option and enjoyed the wider cover. My claim would have been paid in full.'

He says removal of the warranty would have cost him an additional premium of R60.00 per month but he would still have saved R290.00 per month because the alarm monitoring company charged him R350.00 monthly.

The relief sought by Complainant

[7] Complainant is of the view that the respondent should compensate him in the sum of R355 000.00 for his loss.

Investigation by this Office

[8] Investigation by this Office revealed that, as stated above, the inception date of the policy was 6th July 2001. At first blush it would seem that the matter is beyond the jurisdiction of this Office, as the financial service was rendered prior to the 30th September 2004. (The respondent has not raised jurisdiction as an issue but I mention this for reasons that will become apparent later in this determination.) The policy was, however, subject to renewal annually and in fact was renewed continually until the claim arose in February 2006. It is common cause that the policy is still in force, but with one difference; the insurers have removed the element of choice. Thus there is no longer a choice as to whether the insured would like to have the burglar alarm warranty clause in the policy. It has since become compulsory. The complainant has accepted it.

[9] The so-called Burglar Alarm Condition applicable to the Household Contents section in the policy states:

> 'Where a burglar alarm discount is stated in the schedule for a residence the alarm shall be kept in a proper working order and activated whenever the residence is left unoccupied or unattended.' (My emphasis.)

No exceptions to this wording are endorsed on the policy.

[10] When it became apparent that the matter was not capable of resolution between the parties, this Office asked the respondent to comment on the complaint. A detailed response was furnished. It is worth stating the respondent's view in some detail.

10.1 The product sold to the complainant was a so-called 'Envoy' policy designed specifically for high net worth individuals. It has certain unique features not available to an ordinary person. Each client at this level has a dedicated 'Envoy' that attends to all aspects of his insurance. A Ms. Leane Blom was complainant's dedicated 'Envoy' when the policy was renewed for the period in which the claim arose.

10.2 Respondent says that one feature of the policy is a discounting of premiums for risk undertaken by the client, be it for high excess structures, 'disappearing deductibles', limited cover or warranties.

10.3 Respondent further says that complainant 'chose options (including the burglar alarm warranty) to limit the premiums due...when the policy was purchased in 2001. The policy has not changed since then except for the usual such as increase of values etc.' In other words the same terms and conditions prevailed at the time of the loss as they did in 2001.

The Issues

[11] Two issues arise in this matter. Firstly that the burglar alarm warranty was not valid and secondly that the warranty was never discussed by the respondent with complainant as a result of which he was not aware that he had the choice of opting out of the burglar warranty clause by paying a higher premium.

Determination and Reasons Therefore

[12] The first issue was determined by the Ombudsman for Short Term Insurance, who adjudicated the matter in favour of the insurer. He found, correctly in my view that the warranty did indeed apply. I therefore need not consider that aspect any further.

[13] It is clear from the documentation supplied to this office – indeed it is common cause – that complainant was aware of the alarm warranty. What is in issue, however, is whether respondent discussed it with him and more pertinently, whether he was made aware of the fact that he had a choice to opt out of the warranty by paying a higher premium.

[14] Respondent says the various ramifications of the policy were discussed with complainant when he purchased the policy in July, 2001. This was during the

period when this Office had no jurisdiction as it was prior to 30th September, 2004.

[15] Complainant is of the view that after the General Code of Conduct for Financial Services Providers (the Code) was promulgated in terms of the FAIS Act, respondent failed to comply with it and the Act. His representative, Mr Ogle of Fivas Ogle & Associates (Pty) Ltd referred this Office to the following alleged transgressions by respondent:

15.1 Section 16(1) of the Act which provides that a code of conduct must be drafted to ensure that clients are enabled to make informed decisions. (The Code has come into effect and does provide for this requirement in section 3(1) (a) (iv). What complainant seems to be saying, through his representative, is that the respondent did not explain that complainant had the choice to have the alarm warranty or not.

15.2 The requirement for a financial services provider (FSP) to perform a financial needs analysis in terms of section 8 of the Code.

15.3 Respondent should have kept a proper record of advice in terms of section 9 of the Code.

15.4 The respondent failed to act with due skill, care and diligence as provided for in section 2 of the Code. (The section actually also includes the requirements of honesty and fairness.)

I will deal with each of these issues in turn.

[16] The policy was in force for almost five years when the burglary took place. The material terms and conditions remained the same and any decision would have been informed by what would have been explained to complainant at the time the policy was incepted in 2001. The complainant, in my view, would have been aware of the alarm warranty from date of inception of the policy. The policy schedule states:

'DISCOUNTS:

'Electric alarm Discount	Yes (**Burglar Alarm Condition applies) (emphasis in original)**
Armed response Discount	Yes
Electric Fence Discount	Yes
Security Discount	No'

[17] As mentioned in [9] above the alarm condition applicable to the Household Contents section in the policy states:

'Where a burglar alarm discount is stated in the schedule for a residence the alarm shall be kept in a proper working order and activated whenever the residence is left unoccupied or unattended (my emphasis.).'

[18] The complainant is regarded as a high net worth individual and is a businessman. For three of the four options there is a discount given but not for the fourth item. The inescapable conclusion is that he availed himself of discounts on premiums for the first three items but not for the fourth one. More pertinently, because he elected to take a discount on premium for the first item, the policy schedule states that the '**Burglar Alarm Condition applies'**. If he did not want the condition to apply he should not have availed himself of the discount. In my view a reasonable person in the position of the complainant would have understood that he was given a choice - opt for the warranty and get a discount otherwise no discount applies. To say that he did not know he had a choice is in my view disingenuous. Nothing prevented the complainant – if the wording was not clear to him (I do not think it is unclear) - from asking respondent whether he had a choice (bearing in mind that the policy came into effect before the FAIS Act came into force). Instead, he continued renewing the policy yearly on the same terms and conditions. In fact, after he lodged the claim the insurers removed the choice and made it compulsory for the complainant to accept the alarm warranty. He has accepted it.

[19] Complainant says he would have saved some R290.00 per month in premiums (see [6] above) had he known he had a choice. The discount related specifically to the condition attached to it. It was not the case that if he did not accept the condition the requirement for an alarm would have fallen away. If he had had no alarm, I have no doubt that his premises would have been assessed as a higher risk and he would have been charged a higher

premium. The discount applied only if an alarm was installed which was in working order and activated whenever the house was unoccupied. The submission can therefore not be sustained. To hold otherwise would be to strain the meaning of the relevant provisions of the policy.

[20] The complaint that no financial needs analysis was done is not in the initial complaint. It seems to be an afterthought and emphasised by complainant's representative. In any event, the complaint is not that he was sold a product he did not need; he clearly wanted the product. Apart from the fact that the Code was not in force in 2001 when the product was sold to the complainant it was a specially designed product and it is not disputed that it was much cheaper. There is, therefore no merit in this ground of complaint.

[21] I turn then to the next alleged transgression of the Code – the requirement that an FSP keep a record of advice. This became obligatory when the Code came into force after 30th September, 2004. Respondent says its representative, Leane Blom, met with complainant at the latter's office on 25th August, 2005, when the policy was discussed and it resulted in various amendments being made to it. Respondent provided a copy of an email dated 26 August 2005 from Blom to complainant in this regard.

[22] Respondent says one of the items raised during the meeting was the burglar alarm warranty. Complainant's immediate response was that it should remain

as his house was never unoccupied because his father lived there. No other record of advice has been provided by respondent except for the aforesaid email. The email does not mention what the complainant is alleged to have said. However, it has not been disputed by complainant. Failure to keep a proper record of advice is a transgression of section 9 of the Code since it came into force. However, it does not automatically lead to a finding adverse to the respondent. It is but one tile in the mosaic that forms the whole picture. In the case before me there is sufficient other evidence to come to the finding that I make in this determination. An important factor, in my view, is that this policy commenced prior to the Act coming into force and has remained in substantially the same form ever since.

[23] The fourth ground, namely, that respondent acted without the requisite skill, care and diligence can in my view not be sustained given all the facts mentioned above.

[24] One further aspect raised by the respondent is that a letter dated 15 June 2004 (titled ‘Reminder to keep your burglar alarm fully activated and in working order’) purportedly sent by the respondent to all its clients, never reached him. In my view this is irrelevant. Complainant was at all times aware of the alarm condition. The letter was merely a reminder that the respondent took upon itself to send to its clients. It was under no obligation to do so. Complainant says nowhere in the letter does it deal with the question of choice. That is indeed so but nor does the respondent suggest that.

[25] It was also contended on behalf of complainant that the terms of the alarm condition were impossible to comply with. Apart from it being a contractual issue (already dealt with by the Ombudsman for Short Term Insurance) complainant, for the reasons stated earlier, knew he could have chosen not to avail himself of the discount on premium. He would then have had the 'wider cover', as he put it. It is also contrary to the fact that he said the premises were never unoccupied as his father lived there, he had a domestic worker on the premises and his two children also occupied the main building.

[26] I therefore conclude that the complainant's complaint falls to be dismissed.

I make the following order:

The complaint is dismissed.

The respondent is ordered to pay the case fee of R1000.00.

DATED AT PRETORIA ON THIS THE 14th DAY OF DECEMBER 2007

_____

CHARLES PILLAI
OMBUD FOR FINANCIAL SERVICES PROVIDERS