

FINAL DECISION	
complaint by:	Ms B
complaint about:	The insurer
complaint reference:	
date of decision:	March 2011

This final decision is issued by me, Caroline Mitchell, an ombudsman with the Financial Ombudsman Service. It sets out my conclusions on the dispute between Ms B and the insurer. Under the rules of the Financial Ombudsman Service, I am required to ask Ms B either to accept or to reject my conclusions, in writing, within 28 days.

I have considered all the available evidence and arguments from the outset, in order to decide what is fair and reasonable in the circumstances of this complaint.

summary of complaint

This complaint concerns the insurer's decision to decline Ms B's claim under her travel insurance policy for delay caused by the volcanic ash cloud, on the ground that there is no cover under the insurance policy terms for claims arising from a volcanic eruption.

background to complaint

I issued my provisional decision in this case on 13 December 2010.

In my provisional decision I set out the facts from which this complaint arises. Neither they nor the applicable policy terms are in dispute and I shall not set them out again except where relevant in the next section of this decision.

Briefly, the conclusion I provisionally reached was that the wind-borne ash cloud which caused the delay *did* constitute "poor weather conditions" within the policy and that it would not be fair and reasonable in all the circumstances for Ms B's claim for delay to be declined.

But I accepted that this decision might have significant consequences for the insurer and for the insurance industry as a whole, and I drew the attention of the insurer to the test-case procedure under our rules. This enables a financial business to ask an ombudsman to dismiss a complaint, so that it might be decided by a court, if the ombudsman is satisfied that it raises an important or novel point of law with important consequences – and the insurer gives an undertaking regarding the consumer's costs.

my findings

The insurer responded to my provisional decision by making representations regarding the test-case procedure and further submissions on the core issue of poor weather conditions. Ms B has given me her comments on the insurer's application under the test-case procedure provisions.

dismissal

I will deal first with the insurer's application that I should exercise my discretion to dismiss this complaint, so that it can be decided by a court.

The test-case procedure is contained in our rules at "DISP 3.3.5". It has been available to financial businesses ("the respondent" in the language of the rules) since 1 October 2005 but has yet to be used in practice. So I have given very careful consideration to its appropriateness in this case and to its practical application.

I have a discretion whether or not to exercise the power ("The ombudsman may dismiss ..."). I can only exercise that discretion in favour of dismissing if I am satisfied that the complaint (DISP 3.3.5(2)):

(a) raises an important or novel point of law, which has important consequences; *and*

(b) would more suitably be dealt with by a court as a test case.

So I must consider whether there is an important or novel point of law which has important consequences – and whether the complaint would more suitably be dealt with in court as a test case? If the answer to both the preceding questions is "yes", should I exercise my discretion to dismiss the complaint? I will look at each of the required elements here in turn.

Is this an important or novel point of law which has important consequences?

In my provisional decision I said that I was not aware of any legal ruling on whether atmospheric conditions like those involved in this case constitute "poor weather conditions" for the purposes of an insurance claim. The insurer had not and still has not drawn my attention to any such ruling.

Since I issued my provisional decision, there has been a decision in the County Court (which I refer to later). But decisions in the County Court, unlike those in the High Court, do not create legal precedent.

This remains in essence a matter of interpretation of the contract. The approach of the court is to look at the ordinary and natural meaning of the words. That is the approach adopted by the ombudsman. Where there is ambiguity in a standard-form contract, the court will interpret the term in the way that is less favourable to the party who supplied the wording. That is also the approach adopted by the ombudsman.

The ombudsman has for thirty years (since the creation of the Insurance Ombudsman Bureau in 1981) been interpreting consumer insurance contract-terms in accordance with the principles of the court. I am not persuaded that a novel or important point of law arises every time that it does so. Should a party consider that there are sufficient grounds, the remedy of judicial review is available.

I accepted in my provisional decision, and continue to accept, that my decision may have important consequences for this insurer. It may also have important consequences for the insurance industry as a whole and for its customers, though only in these unusual circumstances.

I am aware that some insurers made payments on an *ex gratia* basis. Other claims have quite reasonably been rejected (as have other complaints made to the ombudsman service) either because they are clearly not within the relevant policy terms or because a relevant exclusion applies.

I understand that the arrangements made between businesses in the insurance market (reinsurance contracts) may also to some degree turn on the interpretation of “poor weather conditions” in these circumstances. Such contracts between insurance businesses are outside the scope of the ombudsman service. Nothing I decide here has any direct bearing on the proper interpretation of reinsurance contracts, nor is it my intention that it should do so.

I also agree, as the insurer argues, that there may well be public interest in the outcome of this dispute. That, of course, is true for many disputes the ombudsman is required to handle. But it does not seem to me that this particular case requires a decision by a court, rather than by an ombudsman, just because there may be a public interest in its outcome. Ombudsmen are very experienced in considering consumer matters of interest to the public.

The insurer says that “*a further important issue arises as to what can be construed as ‘good industry practice’ which requires clarification for this and other future cases.*” It is not, however, argued that this is itself an important or novel point of law. The rules allow an ombudsman who is considering what is fair and reasonable in all the circumstances of a case to take into account, where appropriate, what s/he considers to have been good industry practice at the relevant time.

I am not wholly satisfied that this matter *does* raise a novel or important point of law. But even if I were, I should *in addition* need to be satisfied that the complaint would more suitably be dealt with as a test case by a court.

The test case procedure

The insurer made the following representations:

It is respectfully submitted that this complaint should be dismissed so that the court may consider it as a test case for the following reasons:

(a) The central issue in the complaint is whether on the basis of ordinary rules of contractual construction delay caused by the volcanic ash plume was caused by “poor weather conditions” under Section F of the policy. This is an important point of law which the court should decide after hearing full legal submissions from both the insurer and the complainant. This point of law is central to the outcome of the dispute;

(b) The complaint has extremely significant consequences for the business given the number of policyholders with similar potential claims is believed to be approximately [several thousand] (xx of whom have at the time of writing contacted the ombudsman service) with the associated financial exposure as well as the impact on the company’s reputation;

(c) Given that an ombudsman's final decision would in practical terms bind the business in all other similar cases, it is conservatively estimated that the company would have to pay in the region of £xx million of claims. This is an extremely significant sum given it would be in excess of around xx% of normal annual average claims expenditure;

(d) The complaint is also of very considerable importance to the travel insurance sector generally not least in the light of thousands of other claims (it appearing common ground that the ash plume disrupted 10 million passenger journeys). As such it is estimated that travel insurance sector as a whole would be faced with paying tens of million of pounds of claims;

(e) In addition the issue of insurance claims following the volcanic ash plume received almost unprecedented media coverage with the issue of the extent of travel insurance coverage highlighted as a major issue in many forums. There is therefore a considerable public interest in this issue which should be ventilated in a public forum such as a court;

(f) It would appear that the issue of "consumer expectation" was treated by the ombudsman service as a central one in the complaint. This raises important issues in respect of the primacy of contractual terms. Related to this, the decision would appear to suggest that an insurer has to specifically list and exclude all events that are not covered by the policy. This would clearly have major implications for the drafting and presentation of travel insurance policies;

(g) In addition it would seem that the ombudsman service placed considerable weight on the allegation that other consumers' claims have been met by their insurers. Leaving aside the fact that there has been no evidence provided as to the number of such claims no consideration appears to have been given to the basis of any such payments (understood by the business to be purely on a commercial ex gratia basis). In any event a further important issue arises as to what can be construed as "good industry practice" which requires clarification for this and other future cases;

(h) It is clear that a court considering the issues involved could deal with them effectively deal (sic) by way of an application for a declaration of non-liability. The issues are relatively narrow and easily dealt with by the court.

In my provisional decision I said that I was conscious that Ms B had been waiting patiently for this matter to be resolved – and that she would be disappointed by further delay and possibly inconvenienced by any court action.

After receiving the insurer's submission about the test-case procedure, I remained concerned about the likely impact of this on the consumer, Ms B. She had the option of going to court available to her at the outset. Instead, she came to the ombudsman service which is an informal alternative to the court and is free to the consumer. I imagined she would have little appetite to involve herself in court proceedings and expose herself to costs.

That is borne out by what she said, after considering the insurer's application for the test case procedure which I sent to her. She said:

I have two points I would like the ombudsman to consider before it makes its recommendation to the insurer.

1. The ombudsman has already indicated an initial recommendation in our favour.

2. The insurer has already been defeated in a case in county court which is essentially identical to ours ie Is the ash cloud weather? They made a payment in this case with no appeal.

It would seem to me this is just another reason to delay paying out what I understand totals a large sum of money to everyone in our situation. Whilst I can understand their situation, they are neglecting their duty. We paid our premium to this company who now need to fulfil their side of our insurance agreement.

The County Court case to which Ms B refers was reported in the press and was in fact against a different company, albeit one whose policy was underwritten by this insurer. The judge there did conclude, I understand, that the ash cloud constituted poor weather conditions under the terms of a policy similar to this. Ms B clearly does not indicate any enthusiasm for following this matter to court.

The insurer explained in its representations that it felt the issues could be dealt with by way of an application to the court for a “declaration of non-liability”. The DISP rules are silent on the procedure to be used. And it was not clear to me what this would actually mean for the consumer. So I asked the insurer how it envisaged that this procedure would work in practice.

The insurer explained that the proposed procedure was selected in order “*to obtain an authoritative decision as soon as is practical in a cost effective manner*”. The procedure was “*chosen due to its general, non-adversarial nature*”. The insurer envisaged that the application would be brought in the Commercial Court division of the High Court “*whose judges have extensive experience in insurance policy interpretation*”.

I am grateful to the insurer for this explanation. It seems to me that the insurer is seeking a ruling to settle issues wider than those that directly impact on policyholders. I am conscious that there is a wide range of parties who could have an interest in a declaration by the Commercial Court about the application and interpretation of “poor weather conditions” to this and other contracts. No doubt there might be a dispute about how their interests could be protected in this process.

In any event, the insurer is, in effect, expecting Ms B to bear the burden (other than the cost burden) of being the counterparty to significantly complex proceedings – championing issues that have ramifications well beyond her own case. It does not appear to me that this is a burden that Ms B should bear.

Should I exercise my discretion to dismiss the complaint?

Having carefully considered the representations of the parties and the circumstances, I do not consider that I should exercise the discretion to dismiss this case.

Instead, I propose to go on to decide the merits of the case. In deciding the case, I am not purporting to make a general legal ruling. I am deciding what is, in my opinion, fair and reasonable in the circumstances of this case.

the complaint

Doubtless, Ms B agrees with the view I expressed on the merits of this case in my provisional decision. The insurer believes it is wrong and has made further submissions.

For the sake of clarity, I reproduce here what I said in my provisional decision about my reasons for deciding that the ash cloud *did* constitute poor weather conditions within the terms of the policy:

I am not aware of any legal ruling on whether atmospheric conditions like those involved in this case constitute “poor weather conditions” for the purposes of an insurance claim, and the insurer has not drawn my attention to any such ruling.

But I am required to take account of the law. So in the absence of a legal ruling on this point, I must have regard to the general approach of the courts to interpreting a contract. In essence I must look at the ordinary and natural meaning of the words within the policy.

In reaching his initial assessment that the conditions here could be termed poor weather, the adjudicator took as his starting point the Chambers Dictionary definition of weather which is “the atmospheric conditions in any area at any time, with regard to sun, cloud, temperature, wind and rain etc”.

The insurer has sent me representations based, I gather, on legal advice that it has received. These address particular aspects in an attempt to persuade me that the adjudicator was wrong in concluding that wind-borne volcanic ash constituted an atmospheric condition and could therefore be considered to be “poor weather conditions”.

The insurer also says that, in the absence of a legal definition, “weather” is commonly understood to relate to atmospheric conditions relating specifically to heat, wind and water precipitation in its various forms. Various other dictionary definitions are put forward by the insurer to define weather in similar terms and it is argued that “etc” in the context of the Chambers Dictionary definition quoted above must relate to other forms of precipitation and “cannot” refer to a different matter such as a wind-borne plume of volcanic ash. Similarly, it is argued, a cloud in the context of weather can only mean a “cloud” of water precipitation.

It is further argued that the mere fact that a substance is in the atmosphere does not mean that it is to be regarded as a question of weather – one of the examples quoted is that of a flock of birds. And it is stated that the Meteorological Office does not regard the wind-borne ash cloud from the Icelandic volcano as being an issue relating to weather.

I must determine the ordinary and natural meaning of “poor weather conditions” and I am conscious that I am dealing here with a retail travel policy. The atmospheric conditions that led to cancellation of Ms B’s flight arose, in layman’s terms, from a combination of volcanic material and wind. Ms B, and many other complainants to the ombudsman service, told us that

they believed that these unusual conditions were an example of poor weather. That does not strike me as an unreasonable belief.

The insurer says that risk to travel caused by volcanic eruptions is not a new phenomenon. This is in reference to the eruption of Mt St Helens in 1980 and the damage caused to an aircraft flying through a cloud of volcanic dust. The insurer states that the omission to cover this as an insured peril since 1980 is deliberate. Volcanic eruption is not, I have already accepted, an insured peril. But it was always open to the insurer to put the matter beyond doubt, given that they knew such situations could arise, albeit rarely, by excluding altogether claims arising from volcanic ash.

If weather as an atmospheric condition can, as appears to be accepted, include "cloud", must that cloud itself only be one of water precipitation? Quite clearly the ash formed clouds. And these were clouds which were as a matter of fact recorded and tracked by the Meteorological Office. It is my view that "poor weather", within its ordinary and natural meaning, would include an ash cloud borne on the wind. A flock of birds, as referred to above, which are capable of independent movement, would not, however, constitute poor weather.

It is a general principle of English courts that an ambiguous contractual term must be given the interpretation that is less favourable to the party who supplied the wording, which was the insurer in this case. So although I consider that "poor weather" encompasses ash on the wind, if there is any ambiguity about it, this principle will apply.

The insurer contends that "Outside the context of an insurance claim, no ordinary person would ever refer to the eruption of the Icelandic volcano and the dust plume as having given rise to a weather event". It is suggested that were they to do so, many more policyholders would have pursued claims. I am not sure that follows (many claims were in fact met by other insurers - albeit described as goodwill settlements to avoid setting a precedent). But in any event, we have seen a number of complaints from "ordinary" members of the public where that is exactly what they said, as indeed did Ms B.

Despite the many thousands of people affected by these atmospheric conditions, and the consequent claims made by many of them under travel insurance policies with numerous insurers, the Financial Ombudsman Service has received relatively few cases on this issue relating to a limited number of insurers – most of the complaints are against just three insurers.

I am not in a position to know the percentage of claims that were settled by other insurers – but even if this were not the majority of claims, I am of the view that it would still represent good industry practice by insurers assisting their customers who suffered loss from an almost unprecedented event and through no fault of their own. I must, of course, under the DISP rules, have regard to what was, in my opinion, good industry practice at the relevant time, if that is appropriate. In these unusual circumstances, I am of the view that it is appropriate to have such regard.

The insurer has referred me to the submissions it made originally in respect of the meaning of weather – and I addressed these in my provisional decision.

It has made further submissions which I reproduce here:

In addition, being deliberately concise and focusing on the understanding of a layperson, we would make the following additional points:

- (1) *At the time of the Volcanic Ash event the material weather consisted of:*
- No discernible ground level wind, bright sunshine and clear blue skies,*
 - Circulation of air in the upper atmosphere which did not cause discernible movement of air at ground level,*
 - A dissipating and invisible plume of particles in the upper atmosphere.*

Using the ordinary and natural meaning of words none of the above conditions constituted “poor weather”. Again while there was a visible plume of ash issuing from a volcano in Iceland this had no effect on the weather.

- (2) *The weather at the time would have been described by any layperson as “pleasant”, “nice”, or indeed “lovely” but certainly not “poor”. Again using the ordinary and natural meaning of words it is neither fair nor reasonable to make a finding against the insurer on the basis we provide cover for “poor weather” when the weather was plainly no such thing.*

- (3) *Similarly when one is considering apparatus or devices to measure the “weather” such as a weather station or weather balloon used by the Meteorological Office and other international weather agencies it is common understanding that the factors to be assessed are **temperature, barometric pressure and humidity** (their emphasis) – not ash particles.*

Once more we believe in lay person’s terms this clearly highlights that the ash was not a cloud and more particularly not ‘poor weather’.

I cannot tell whether the weather was “pleasant” across the whole of the affected part of Europe and the North Atlantic during the period of the flight disruption. And weather that was judged “nice” in one context might nevertheless be adverse in another (for example, dry and sunny conditions resulting in drought). I note that the insurer continues to refer to “poor weather” whereas the policy refers to “poor weather conditions”.

Many of those consumers who were affected by this event believe that this was a cloud of ash. I do not consider that it is stretching the ordinary meaning of the words to interpret the cloud of ash moved by the wind as an example of a poor weather condition. The insurer will be aware of what their customers who have complained to them about this policy wording and this event have said. I doubt that consumers considering the cover afforded by their retail travel policy would concern themselves with barometric pressure, humidity and temperature.

I am satisfied that Ms B was adversely affected by a wind-borne ash cloud and that it would be fair and reasonable in the circumstances to treat this as “poor weather conditions” for the purposes of her consumer policy.

The insurer has raised two other issues which I shall address.

First, the insurer says:

“It would appear that the issue of ‘consumer expectation’ was treated by the Financial Ombudsman Service as a central one in the complaint. This raises

important issues in respect of the primacy of contractual terms. Related to this, the decision would appear to suggest that an insurer has to specifically list and exclude all events that are not covered by the policy. This would clearly have major implications for the drafting and presentation of travel insurance policies.”

I would not necessarily disagree with the last sentence here – but this was not a central issue in my provisional decision. I thought, and think, that consumers who are delayed by atmospheric conditions which they believe to be poor weather conditions would not unreasonably expect this to be covered by the consumer travel-policy they have taken out for unexpected eventualities outside their control.

And I would not expect *all* potential events to be specifically listed as exclusions – that would clearly be unreasonable. But here the insurer has told me that the risk to travel caused by volcanic eruption has been known since Mt St Helens erupted in 1980. This dispute would not have occurred had they excluded a known risk, which they could easily have done.

Finally, the insurer says that I seem to have placed great weight on the allegation that other consumers’ claims have been met by their insurers. They say that no evidence has been provided as to the number of such claims – nor does consideration appear to have been given to the basis of any such payments.

In fact, I acknowledged that I was not in a position to know the percentage of claims that were settled by other insurers. I still am not. But I do know that some insurers settled claims. This was widely reported in the press at the time. That they were settled on an *ex gratia* basis (doubtless so as not to set precedent) makes no difference to my mind when considering whether this was good industry practice. I can add that a number of claims have also been settled following the referral of complaints to the ombudsman service without the need for a formal, binding final decision.

And, as a last point, the insurer did initially argue that an exclusion applied to Ms B’s claim in any event. About this I said:

I note the wide effect that the insurer seeks to read into the general exclusion on page 9 of the policy – that the claim arose because of “the ... airline ... not being able or not being willing to carry out any part of their obligation.” I have already commented on the approach to interpretation that would be taken by the courts – that words should be given their ordinary and natural meaning.

I find it difficult to accept that the parties intended this exclusion to be interpreted so widely as to go beyond default by an airline and override the specific cover provided by the policy. Using the insurer’s argument would exclude, for example, any failure of public transport due to uncontested poor weather conditions (such as a hurricane) because the transport provider would not be “able” to provide transport.

No further representations have been made in respect of this and I remain of the view that the claim is not caught by the exclusion.

I thank the parties for their patience while this has been under consideration.

my decision

I do not dismiss this complaint under the test-case procedure contained in the DISP rules.

As regards the merits of the complaint, my opinion is that, in all the circumstances:

- it would be fair and reasonable for the insurer to treat the wind-borne ash cloud as poor weather conditions under Ms B's travel policy;
- it would not be fair and reasonable for the insurer to decline Ms B's claim;
- Ms B's claim should succeed and the insurer should pay the benefit available under her policy *plus* interest (at 8% per year simple).

Caroline Mitchell
ombudsman