

The complaint

Mr C's complaint is about the refusal of a claim under his bicycle insurance policy with Red Sands Insurance Company (Europe) Limited.

What happened

I issued a provisional decision on this matter in March 2022, the main parts of which are copied below:

"In February 2020, while riding his bicycle, Mr C was involved in a collision with a moped. Mr C informed Red Sands of the incident the next day.

In April 2020, the third party's solicitor wrote to Mr C (although he says he never got this letter as it was addressed incorrectly) and Red Sands to allege that Mr C had been at fault for the accident and the moped (worth under £500) had been written off. The solicitors said the claimant was hiring a replacement vehicle under a credit hire facility and was going to seek recovery of those costs from him.

Red Sands says it wrote to Mr C numerous times to get more information from him about the accident from April 2020 onwards but he refused to provide the information required in order for it to defend the claim. Mr C didn't respond to these emails until 11 September 2020 by which point the hire vehicle claim was over £50,000 and a personal injury claim valued at £25,000 had also been made. Red Sands said its legal position has been prejudiced by Mr C's delay in replying (because it couldn't now get CCTV footage, witness' recollections might be affected, among other things) and so it will not cover the claim. It relies on a general policy condition to provide full instructions and cooperate and Mr C's common law duty to mitigate his losses and says it is legally entitled to avoid cover under the Insurance Act 2015.

Red Sands says that if Mr C had *"chosen to comply with the policy in time, all of those losses would have been contained, curtailed, managed or possibly terminated in their entirety through commercial resolution"*.

Mr C is very unhappy with this. He says he didn't get the initial letter from the third party solicitor, as it wasn't addressed correctly and he didn't think the communications from Red Sands were to do with a claim made by the third party but were follow ups to the notification of the incident he gave them. Mr C says Red Sands didn't make him aware how urgent a reply was and, once they did make this clear, he replied soon after.

One of our investigators looked into the matter. He recommended that it be upheld in part. He said Red Sands had been prejudiced because it couldn't defend the hire car charge claim due to Mr C's delay in providing the information it asked for but, as the personal injury claim had only been made in September 2020, and there was no delay in Mr C responding to Red Sands about this claim, it should cover the costs of defending this claim.

Red Sands accepted the Investigator's assessment. However, Mr C does not accept the assessment, so the matter has been passed to me.

What I've provisionally decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Mr C's policy includes cover for public liability, including the legal costs involved in defending any claim made against him, as follows:

"Public liability ...

We will pay up to the maximum Benefit Limit as note on the Schedule in respect of:

5.1.1.1 Compensation and the Claimant's costs and expenses and/or;

5.1.1.2 The legal cost and expenses of defending a claim made against You under this Section.

For claims made against You for death, accidental bodily injury, ...arising from one event ... happening during the period of Insurance and caused by You when riding any Bicycle..."

The policy also sets out some specific conditions to that section of cover:

"You must inform Us immediately of any impending prosecution, inquest or fatal inquiry or civil proceedings. You must send Us all correspondence and documentation you receive without replying to it".

And there are also general conditions to the cover, including that:

"You must always take reasonable steps to prevent and minimise any loss or damage. In the event of a claim under this policy, you must contact the Administrator within 30 days of the happening of a claim event. ...You must co-operate fully and truthfully with the Administrator and provide any information they may need."

So the policy does provide cover for the defence of a legal claim, such as is being made against Mr C. However, Red Sands says that Mr C breached the policy conditions set out above, which means it is entitled to refuse the claim.

Mr C did report the incident to Red Sands the day after it happened with full details, so there is no breach of that condition in my opinion.

Mr C didn't tell Red Sands of the impending civil case but he says that's because he didn't know about it. Mr C says he didn't receive the letter from the third party's solicitors dated 2 April 2020 notifying him of the claim against him for the cost of the third party's moped. I can see this letter [was] not addressed correctly and so I have no reason to doubt what he has said about this. Given this, I do not consider that Red Sands has established a breach of this condition either.

Red Sands also says Mr C failed to *"take reasonable steps to prevent and minimise any loss or damage"* by not responding to it about the claim. It also says Mr C had a general legal duty to mitigate his losses, in addition to the policy terms. It says Mr C's failure to do these things has prejudiced its position, in that it has affected its ability to successfully defend the claim against Mr C.

Red Sands wrote to Mr C to get instructions and further information about the claim on 20

and 22 April 2020, 5 and 20 May 2020 and 1 June and 9 July 2020. It also says it called Mr C on 9 March and 29 April 2020.

Mr C says that he thought these communications were all just asking him to get in touch with a completed form and sketch of the accident and he didn't realise a claim had been made against him, or the importance of getting in touch until the letter of September 2020.

Red Sands correctly points out that just because it was not significant in Mr C's mind, [that] does not release him from his common law duty to mitigate his losses and from the breach of a condition precedent.

Mr C did not respond to these emails or phone calls with the information requested of him and so I agree that there was a breach of this policy condition. However, I am not persuaded that this means it was fair or reasonable in all the circumstances of the case to refuse all cover for this claim. Red Sands has set out the relevant law in some detail in response to this complaint but, as it is aware, my remit is to consider all the circumstances of the complaint and reach a determination of what I consider the fair and reasonable outcome should be, having regard for the law. Red Sands also had obligations to provide Mr C with clear information and treat him fairly.

Red Sands' emails did not set out the claim being made against Mr C and there were no time limits set for his response. There was mention in a couple of the emails that it may not be able to meet the claim, if he did not respond but it was not until the letter of September 2020 that it provided Mr C with more information about the claim made against him and the possibility that it would not meet the claim if he did not respond within a certain time.

The first time limit Red Sands provided was in [an] email dated 3 September 2020, which said that if he did not provide the information requested within 10 days then it would repudiate cover. Mr C did respond on 11 September 2020 and Red Sands then asked him for further information, including if there was a police report. It then wrote to Mr C on 30 October 2020 to say it was refusing cover.

Red Sands was aware of the value of the claim against Mr C, the value of the moped and the potential hire charges, and all the information it relied on to repudiate cover on 30 October 2020. I do not consider it fair to have indicated to Mr C that the claim would still be covered in September 2020 (and allow the hire charges to continue accruing between then and 30 October 2020) before repudiating it at the end of October 2020.

In my opinion, Red Sands should also have made the position clearer than it did in its communications with Mr C and the potential risks of him not responding, given the potential impact the decision would have on him. I think something so important that might mean taking away cover for a significant legal claim meant Red Sands needed to provide clear and fair information to Mr C; after all he would not necessarily know how a claim like this would work but Red Sands does.

I am also not sure Red Sands has established it was prejudiced by Mr C's breach of this policy condition. It has provided a long list of potential areas of prejudice but I am not satisfied they have been made out.

The main issue with delay in relation to a legal claim, as it has pointed out, is in relation to the gathering of relevant evidence, such as CCTV footage and witness evidence. However, it seems to me possible that by April 2020 any relevant CCTV footage would have been unavailable anyway. I cannot see any evidence this was explored. Mr C also provided the name of a witness but there is no suggestion that Red Sands contacted him before deciding to refuse cover.

I also note that Red Sands has said that if it had received the information from Mr C earlier than it did, it would have settled the value of the moped, on a without prejudice basis, even though Mr C said he was not at fault for the accident. The reason it gives for this is that the cost of this would be less than our case fee. There is no explanation why it did not do so anyway, given it was aware of the hire charges accruing and the relatively low value of the moped. Given that it says it would have settled the claim for the moped anyway, as it would not have been worth challenging, I am not persuaded it has established its position has been altered, as the information Mr C provided about the accident doesn't seem to have been the determining factor in that.

In addition to all of this, I am also mindful that Red Sands agreed to cover defence of the personal injury claim that the third party's solicitor intimated. However, both heads of claim (vehicle damage and personal injury) will require the third party to establish that Mr C was at fault for the accident (or at partly at fault), which will turn on exactly the same evidence, e.g. the CCTV, witness statement etc. It seems illogical therefore that Red Sands accepts it has not been prejudiced to the extent it cannot reasonably defend the personal injury claim, which will rely on the same evidence that Red Sands said would now be compromised because Mr C hadn't responded earlier.

Having taken everything into account, I therefore consider that it was not fair or reasonable to refuse this claim and Red Sands should now proceed with it.

Mr C has told the Investigator that he has not heard anything further from the third party or Red Sands about the legal claim and so it is not clear if this has been abandoned. I would ask Red Sands to confirm if it has received any further communication from the third party in response to this provisional decision.

Mr C has also told us how stressful this matter has been and I can understand that the threat of legal proceedings and a potential settlement against him when he had cover that should have assisted him would have been a cause of significant worry. I therefore consider that some further compensation is warranted over and above the claim being dealt with. I also bear in mind however, that this could have been avoided if Mr C had responded sooner. Having taken this all into account, I consider the sum of £100 to be appropriate.

My provisional decision

I intend to uphold this complaint against Red Sands Insurance Company (Europe) Limited and require it to meet the claim for legal expenses and public liability (subject to any other remaining terms of the policy); and pay £100 compensation."

Responses to my provisional decision

I invited both parties to respond to my provisional decision with any further information or arguments they want considered.

Mr C has confirmed he accepts my provisional decision and has not added anything further.

Red Sands does not accept my provisional decision. It has made a number of further submissions, which I have summarised below:

- I suggest that it had an obligation to assist Mr C understand his obligations beyond what is stated in the policy terms. It follows that I consider insurers have an "*extra-contractual*" responsibility to prompt a policyholder's co-operation. "*That imputation is not within the remit of FOS and is not fair.*"

- It went to exceptional effort to get Mr C's cooperation. It called Mr C on 27 Feb 2020, 9 March 2020 and 29 March 2020 and emailed him on 22 April 2020, 5 and 20 May 2020, 1 June 2020 and 9 and 16 July 2020. Mr C refused to respond to any of these communications, preventing an assessment on liability until after hugely inflated costs had already been incurred by the third party claimant.
- The hire vehicle costs were accumulated during the period in which Mr C refused to respond. He alone is responsible for the consequences of his refusal to co-operate.
- It was Mr C who provided insurance details to the claimant and he did not ask for the claimant's insurance details in return, so he clearly communicated acceptance of legal responsibility for the accident, which he then ignored for six months.
- Throughout this period Mr C was *"fully cognisant of: (i) his own participation in the RTA, (ii) his tacit acceptance of fault shortly after the index incident; and (iii) the existence and development of that claim via our repeated and progressively insistent correspondence."*
- Mr C has subsequently sought to distance himself from the knowledge he possessed of this developing claim, and my provisional decision would permit him to divest himself of the burden of his insurance contract.
- I have *"outlined informational deficiencies"* in its correspondence by suggesting it failed to provide time limits for Mr C to respond. It asks me to explain the provision of such legal obligations I am seeking to impose on it.
- I have erred in law by asserting that it has *"any statutory, regulatory, or common law duty to guide a policyholder during the information gathering stage of a claims handling process. Indeed, guiding a policyholder in a third-party liability claim would remove the core neutrality of that evidence gathering and quite concerningly, become something else."*
- Its legal obligation as directed by the relevant legislation and the Financial Conduct Authority Handbook is only to respond to a third party claim. It would then determine its position and will look to the policyholder as stipulated in the insurance contract. It is here that Mr C's fundamental breach resides - in failing to honour a contractual obligation he owed to it before financial prejudice had occurred.
- It is therefore not a matter of non-compliance to which I can apply an assessment of equitable fairness but rather, a matter of fundamental breach by the policyholder.
- I've suggested it is also responsible for any failure to properly notify by the third party.
- Mr C denies receipt of the third party correspondence, suggesting that the letter was incorrectly addressed to him. But the address it has used is identical to that used by the claimant's solicitors.
- Of further concern is the assertion that it agreed to cover defence of the personal injury claim in August 2020. It did not confirm indemnity due to his policy breach and it has not conceded either indemnity or liability to the third party's legal representation.
- Whether it defends the claim or it is made to pay the third party, the costs of doing so exceed the original value of the claim against Mr C. The prejudice to it will be crystallised once it is made to meet these expenses. My Final Decision will confirm that prejudice.
- It remains clear that but for Mr C's non-response, it would have been in a position to deploy any number of cost containment options. His refusal to co-operate prevented it from doing so during that initial cost development. The prejudice therefore wholly speaks for itself, and it is quite concerning that we do not observe that.
- The very notion of an Ombudsman sitting on appeal over their own previous decision is also concerning. So if I am not minded to change my decision, it asks that I recuse myself of this appeal and invite another Ombudsman to undertake a fresh assessment of the matter in the interest of due process and fair procedure.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Complaint process

Red Sands is very unhappy about my provisional decision and the "*notion that I sit in appeal*" over my previous decision and has asked I recuse myself from the case and another ombudsman review it.

I appreciate Red Sands is disappointed with my provisional decision, especially given that the Investigator reached a different decision on the outcome of this complaint. However, we operate a two-tier process and as Mr C did not accept the Investigator's recommendation, he was entitled to ask for an Ombudsman's decision. As I did not agree with the Investigator's recommendation, I issued a provisional decision in order to give both parties the chance to respond to my reasons for doing so. The next stage in our process is for me to consider those responses and reconsider all the available evidence and reach my final decision on the complaint. It is only an Ombudsman's decision that is binding and is the final stage of our process and parties are not entitled to request a different Ombudsman consider their complaint.

Notification of claim from third party

Mr C says he did not receive the letter from the third party's solicitor and therefore did not know there was a legal claim being made against him. Red Sands doesn't accept this as it says the letter was sent to the same address it has used for Mr C. I have looked at the correspondence. The letter from the solicitors was addressed to the correct property and road but Mr C lives in a flat and the solicitor's letter didn't have the flat identifier on it, whereas I can see Red Sands file has the full address, including the individual property identifier. The letter from the solicitors was therefore misaddressed.

We are not a court of law and we do not have the power to take evidence on oath; we are an informal dispute resolution service. I have to consider the evidence available to me and, where there is a dispute, reach a conclusion as to what is most likely to have happened. In this case, Mr C says he did not receive this letter and the letter was misaddressed. Given this, it seems to me likely he did not receive it.

I am not imposing any responsibility for this on Red Sands, as it claims. It is simply part of the relevant circumstances of the case that I am required to consider. I am satisfied that Mr C didn't receive that letter, and given that, I think it was feasible he didn't realise the urgency and importance of providing further information Red Sands and didn't breach the policy condition requiring him to notify Red Sands of a civil claim against him.

Fair and reasonable

Red Sands says that there was such a fundamental breach of contract by Mr C that it is not appropriate to assess it in terms of fairness. I disagree.

Red Sands was contracted to indemnify Mr C for his liability, including the legal costs of defending the claim made against him. My remit is to determine what I think the fair and reasonable outcome of this complaint is, having taken account of all the circumstances, including the relevant law, industry practice, industry guidelines and regulations.

Communications from Red Sands

Red Sands says I have sought to impose on it legal obligations that do not exist, including a legal duty to guide Mr C in the information gathering stage of the claims process, which is beyond its contractual obligations under the policy and would mean there was no independent assessment of the claim and/or liability.

Again, I do not agree. What I set out in my provisional decision was that Red Sands had an overriding duty to treat Mr C fairly and to provide clear fair information to him at all times.¹ And in the context of this claim, I think this means that its communications with him could have been clearer.

Red Sands did contact Mr C several times but most of the communications, simply asked Mr C to contact it when he had a chance. There was reference to a claim from the third party and that Red Sands needed information from Mr C to defend it on his behalf. But there was no reference to the value of the claim, hire charges being accrued, or the potential consequences of not responding. It also didn't set out the usual claim process, or how it would propose to deal with claims such as this, such as the potential options of defending it entirely or settling without prejudice.

I do not consider that it would be an onerous or unfair expectation on Red Sands to have provided such information in the circumstances, or that it would mean it could not properly assess any decision to either defend a third party claim or concede it. In my opinion, providing this information would have been fulfilling its requirements under the Principles for Businesses and been fair and reasonable.

Personal injury claim

Red Sands denies it conceded the personal injury cover. In my provisional decision I set out that Red Sands had conceded to the Investigator that it would cover the personal injury claim in response to the Investigator's recommendation: "*we have reviewed the points made and agree to your recommendation to look to cover ... [Mr C] for the Personal Injury claim subject to ... assessing the claim in line with the remaining policy terms.*" It did therefore confirm acceptance of this part of the claim.

I remain of the opinion that liability for both heads of claim (vehicle damage and personal injury) would turn on exactly the same evidence that Red Sands has said was compromised because Mr C didn't respond earlier, and that it would be difficult at best to defend the personal injury claim without also defending the vehicle damage claim. Confirming cover for one and not the other seems illogical and casts doubt on the arguments about prejudice due to the evidence relating to liability for the accident.

¹ Financial Conduct Authority Handbook, Principles for Businesses

Has Red Sands been prejudiced?

In addition to the requirements on Red Sands to act fairly and reasonably generally, it is also required to establish that it has been prejudiced by any breach of condition it seeks to rely on to refuse a claim.

Red Sands says it is beyond doubt it has been prejudiced by Mr C's delay in responding to it and that financial prejudice will crystallise when and if it is compelled to pay the third party, or it chooses instead to challenge the claim.

Insurers should not unreasonably reject a claim by relying on technical breaches of condition that are not materially connected with the circumstances of the claim. In other words, insurers need to show prejudice as a result of the breach of condition in order to reject the claim. The breach has to be material to the loss – not material to other considerations (such as underwriting prejudice and so on, which Red Sands has also raised). This has long been our approach and is also ratified in legislation and the Financial Conduct Authority rules.

So I have to consider if Red Sands's position would have been any different if Mr C had responded sooner than he did. Red Sands has suggested that it is obvious it has been prejudiced because the loss being claimed by the third party was increasing during this period. However in order to establish prejudice, I think Red Sands has to establish that it would have acted differently between April and September 2020 if Mr C had responded to it in that time.

One of the reasons Red Sands says it was prejudiced is because evidence to help defend the claim might not be available any more due to the passage of time. The accident happened in February 2020 and the notification of claim from the third party was made in April 2020. And as mentioned in my provisional decision, Mr C provided details of a witness and there is no evidence he was contacted or that his evidence would have been any different in September 2020 than it would have been earlier. There's no evidence that any evidence would have been available between April and September 2020 that wasn't available after this date.

Red Sands also says that "*range of 'without prejudice' choices available to us, as insurers, are now not only redundant but have been extinguished*" due to the delay by Mr C. So it was prevented from minimising its liability.

However it has also said that if Mr C had responded sooner – and even though he denies liability for the accident – "*we would have immediately disposed of the claim for ... [around £470], on a without prejudice basis, as the merit of doing so would have outweighed the FOS case fee in the event of any escalated complaint.*"

So Red Sands has confirmed that whatever Mr C might have had to say about the accident before September 2020 would not have made any difference and even if he had not agreed to it settling the claim for the moped, it would have done so anyway.

There has been no explanation why Red Sands did not do so anyway, given it was aware of the hire charges accruing and the relatively low value of the moped from April 2020. Given that it says it would have settled the claim for the moped anyway, as it would not have been worth challenging, I am not persuaded it has established its position has been altered, as the

information Mr C provided about the accident doesn't seem to have been the determining factor in whether to settle the claim with the third party.

It is difficult to accept therefore that the sole reason Red Sands did not respond commercially to the third party claim, and make a without prejudice offer to settle the cost of the moped, was due to Mr C not getting back to it before September 2020. The without prejudice options it refers to were available to Red Sands throughout. Of course, the fact it did not respond to the claim resulted in the hire charges increasing but, for the reasons given, I am not persuaded that this was solely due to delay by Mr C.

Given all of the above, I remain of the opinion that it was not fair or reasonable to refuse this claim and Red Sands should now proceed with it and that it should pay Mr C £100 compensation for the trouble caused to him.

My final decision

I uphold this complaint against Red Sands Insurance Company (Europe) Limited and require it to meet the claim (subject to any other remaining terms of the policy); and pay Mr C £100 compensation for the distress and inconvenience caused by its wrongful refusal of the claim.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 15 July 2022.

Harriet McCarthy
Ombudsman