

The complaint

Mrs D's complaint is about a claim she made against her former employer's Markel International Insurance Company Limited commercial insurance policy.

Mrs D says Markel unfairly declined that claim.

What happened

The complaint that was brought to this Service by Mrs D was in relation to a claim she made against her former employer's commercial insurance policy, pursuant to the Third Parties (Rights against Insurers) Act 2010.

The claim was in relation to an award she'd obtained against her former employer in the Employment Tribunal. The former employer entered into creditor's voluntary liquidation shortly before the Order was obtained. The Third Parties (Rights against Insurers) Act 2010 allows Mrs B to make a claim on behalf of her former employer in these circumstances.

Markel initially said that Mrs D wasn't eligible to claim on the former employer's policy, so Mrs D complained to this Service. The investigator who considered that complaint expressed the view that she was eligible to claim on the policy. Markel subsequently accepted this and agreed to consider the claim as if it had been made by Mrs D's former employer. Having done so, they then went on to reject it for a number of reasons, including:

- Their policyholder (Mrs D's former employer) didn't notify them of Mrs D's claim during the time they were on cover and solvent and this was in breach of the policy terms;
- Their policyholder didn't contact Markel's legal advice line when Mrs D's claim was made;
- The fact that the claim was notified so late by Mrs D meant they were prejudiced because they couldn't determine whether it was one they would have provided cover for;
- Their obligation to provide any cover at all would have ended when their policyholder went into liquidation.

Mrs D didn't agree with Markel's position so asked us to consider whether they'd fairly declined the claim. Another investigator considered her complaint and determined that it should be upheld. He thought that the reasons given by Markel to turn down cover weren't valid and that the issue of prejudice could be circumvented by directing Markel to now assess the claim under their policyholder's terms. This would allow Markel to determine whether the claim was one they would accept. Accordingly, the investigator directed that Markel do the following:

- Instruct a Solicitor or Barrister to advise on the policyholder's prospects of successfully defending a claim against Mrs D to ascertain whether cover would have been provided for the claim at all.
- The Solicitor or Barrister should be provided with those documents that would have been

available in September/October 2020. If Markel doesn't have any of those documents, Mrs D can supply them.

- The Solicitor or Barrister should not be advised of the outcome of the claim.
- The Solicitor or Barrister should also be advised not to do their own research on the case.
- If the assessment shows the Solicitor or Barrister believes the policyholder did have reasonable prospects of defending the claim, Markel should pay Mrs D's claim.
- If the assessment shows the Solicitor or Barrister believes the policyholder did not have reasonable prospects of defending the claim, Markel is entitled to decline the claim made by Mrs D in place of their policyholder.

Markel didn't accept the investigator's view to start with. They disputed the policyholder's entitlement to cover based on its failure to contact their legal advice line when Mrs D's claim was made. Our investigator considered this further and took the view that the term in relation to this was inconsistent with another term in the policy, which suggested that a policyholder wasn't obliged to contact the legal helpline. Where policy terms are ambiguous, it's our usual approach to interpret them in favour of the party who didn't draft them. Because of this, the investigator said Markel wasn't entitled to apply them to decline cover.

The investigator also put some further points to Markel that Mrs D had made and expressed a view on them as follows:

- The Solicitor or Barrister to be instructed by Markel should be an employment specialist.
- Mrs D should be able to see the instructions to the Solicitor or Barrister before they go out because she's the only person who has first-hand knowledge of the facts of the underlying case. As such it's reasonable for her to be involved so that the person instructed has an accurate picture of the facts. The purpose of the assessment is however for the person instructed to draw conclusions about the merits of former employer's case so the instructions should be neutral and confined to the facts. The instructions should not be used as an opportunity for either party to advocate in either direction.
- Mrs D and Markel should agree on what documents should be sent to the person instructed to advise on the merits of the former employer's claim.
- The advice received should be disclosed to Mrs D by Markel.

Markel agreed with the investigator's further view and recommendations. They said they would instruct their panel firm to consider the claim accordingly. The only remaining issue in dispute between the parties relates to this specific issue. Mrs D doesn't think the panel firm is impartial and as such would like an independent Barrister to be instructed. Markel, on the other hand say that if things had happened as they should have, they would have instructed their panel firm, as they propose to do here, and so are unprepared to instruct anyone else. Our investigator said the position Markel has adopted is reasonable. Mrs D doesn't agree. Because of this the matter has been passed to me to decide.

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.

Having done so, I take the view that Mrs D's complaint should be upheld in accordance with the investigator's final recommendations. I've explained why below.

Given the agreements reached between the parties, I don't propose to revisit the initial complaint made by Mrs D save to endorse the position they've reached so far as what needs

to happen for Markel to determine whether this is a claim they are prepared to pay.

Mrs D has asked for me to determine whether her claim should be paid by Markel but that's not a decision I can make. The outcome of that will depend on the assessment carried out by the Solicitor or Barrister instructed by Markel in the manner the investigator has set out.

The only issue left for me to decide is whether Markel are entitled to instruct their panel firm or whether someone else should be instructed. Mrs D has made a number of submissions on this issue which I've summarised as follows:

- The panel firm is connected to Markel and is not independent. She's provided a link from the panel firm's website which she feels supports this.
- The panel firm were likely to have been involved in advising Markel throughout her complaint to them which means there's a conflict of interest that excludes them from advising on this claim.
- The panel firm are likely to assess the claim in Markel's favour so the professional instructed by them should be independent. Mrs D has suggested a Barrister that can consider the matter.
- The policy terms say that if her former employer had made the claim themselves against their policy, they would have been entitled to a legal opinion from their own representative so she should also be entitled to this now.

I've considered what both parties have said and in particular Mrs D's strength of feeling on this issue, but I don't agree that Markel aren't entitled to instruct their panel firm. If things had progressed as they should have and their policyholder had made a claim against their policy before going into liquidation and when the claim was made by Mrs D, Markel would have instructed their panel firm to consider the merits of the claim.

The panel firm are independent professionals with their own Codes of Conduct and professional standards. They have their own regulator and complaints procedure. So whilst there might be a connection between the corporate entities between Markel and the panel firm, this doesn't in itself prevent those Solicitors from providing independent legal advice- as they're obliged to do. And there's nothing that I've seen that suggests the panel firm aren't able to do that.

Mrs D has cited a conflict of interest on the basis that the panel firm may well have advised Markel in relation to her complaint against them. I don't know if the panel firm provided Markel with any advice in relation to this issue and I don't in any event think it's material. That's because the issue they'd be being asked to advise upon would be whether a claim by Markel's former policyholder would have had reasonable prospects of success based on an agreed set of papers. That is a separate legal issue. I don't consider there to be a conflict of interest because Mrs D is not Markel's policyholder- her former employer is, and the question is whether they were entitled to cover. I appreciate this will go on to determine whether Mrs D's claim is payable, but I don't think the connection is close enough to mean there's a conflict of interest. I say so because the investigator has made clear that the Solicitor or Barrister instructed should not be advised of the outcome of the claim Mrs D made at Tribunal or to do their own research on the case. I think this goes far enough to protect Mrs D's position, even if Markel had taken advice from the panel firm in respect of the complaint she'd made against them.

I don't agree with Mrs D that the policy terms between Markel and Mrs D's former employer gave them freedom to choose their own representative. Rather they require their

policyholder's claims to have reasonable prospects of success before they'll agree to fund any claims on their behalf. It is of course open to policyholders, as it is to Mrs D, to obtain their own opinion at their own cost, should they wish to do so. But at this stage I can't say that Markel should be responsible for those costs. They would after all be doing the same thing they would have done had their policyholder made a claim on their policy at the correct time by instructing their panel firm to assess the strength of that claim. As Markel would ultimately be the ones to pick up the costs of that claim, it's entirely reasonable that they should be able to choose who they instruct to consider this.

Finally, I know Mrs D has made some submissions about the documents she wants made available to the Solicitor or Barrister considering the claim. As the issue has yet to be discussed between the parties, it's not something I intend to comment on as it's not a live dispute that requires determination. I do however encourage the parties to reach agreement on this matter for the sake of expediency. To assist I've set out and endorsed the investigator's original findings on this issue below, which, on the whole, were accepted by both parties.

Putting things right

To put things right, Markel should do the following:

- Instruct a Solicitor or Barrister of their choice to advise on the policyholder's prospects of successfully defending a claim against Mrs D to ascertain whether cover would have been provided for the claim at all.
- The Solicitor or Barrister should be an employment specialist.
- The Solicitor or Barrister should be provided with those documents that would have been available in September/October 2020. If Markel doesn't have any of those documents, Mrs D can supply them. Mrs D and Markel should agree on what documents should be sent to the person instructed to advise on the merits of the former employer's claim provided they fall into the category of documents that were available in September/October 2020.
- Mrs D should be able to see the instructions to the Solicitor and Barrister before they go out because she's the only person who has first-hand knowledge of the facts of the underlying case. So it's reasonable for her to be involved so that the person instructed has an accurate picture of the facts. The purpose of the assessment is however for the person instructed to draw conclusions about the merits of former employer's case so the instructions should be neutral and confined to the facts. They should not be used as an opportunity to advocate in either direction.
- The Solicitor or Barrister should not be advised of the outcome of the claim
- The Solicitor or Barrister should be advised not to do their own research on the case.
- If the assessment shows the Solicitor or Barrister believes the policyholder did have reasonable prospects of defending the claim, Markel should pay Mrs D's claim.
- If the assessment shows the Solicitor or Barrister believes the policyholder did not have reasonable prospects of defending the claim, Markel would have been entitled to decline the claim made by Mrs D in place of their policyholder.
- The advice received should be disclosed to Mrs D by Markel.

My final decision

For the reasons set out above, I uphold Mrs D's complaint against Markel International Insurance Company Limited and direct them put things right in the way I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs D to accept or reject my decision before 20 July 2023.

Lale Hussein-Venn
Ombudsman