DRN-4312583

The complaint

Mr W complains Zurich Insurance PLC declined a third-party claim he made, under the Third Parties (Rights against Insurers) Act 2010 (the 2010 Act), in respect of a policy taken out by a company, P.

Mr W is represented in bringing the complaint by a firm of solicitors who I'll refer to as N.

What happened

In 2012 Mr W was provided with investment advice by P. It recommended he invest in a Business Premises Renovation Allowance Scheme (BPRA). That involved him becoming a partner in a Limited Liability Partnership (LLP) which was to invest in the development of a hotel.

The LLP was funded by contributions from partners and an interest free loan provided by the developer to the partnership. The LLP's spending was intending to qualify for the BPRA meaning Mr W would receive income tax relief. And that tax relief would then be used to repay the loan provided by the developer. Mr W followed the advice from P and followed a further recommendation to invest more money in 2013. That was again on the basis it would be funded by a loan from the developer.

However, the developer didn't provide the interest free loan and Mr W was required to make the contribution himself. Other investors had difficulties making the required contributions and HMRC also began investigating whether the LLP did in fact quality for the BPRA. Mr W was served with a notice by HMRC to repay some of the tax claimed. And in 2016 the LLP went into liquidation. Mr W complained to us in 2018 about the investment advice P provided in 2012 and 2013.

Another Ombudsman considered those complaints. He concluded the advice was unsuitable and Mr W wouldn't have invested in the scheme but for that advice. Amongst other things he directed P to refund the amounts Mr W had paid (and would have to pay) to HMRC. And it should refund the amount Mr W contributed to the scheme (plus interest).

Unfortunately, P went into liquidation in July 2019 without paying those awards. Mr W sought to recover those amounts from P's professional indemnity policy under the 2010 Act. Zurich is the underwriter of the policy. It said the policy contained an exclusion for liability arising out of or relating directly or indirectly to "*the insolvency or bankruptcy of…any other business with whom you have arranged any insurance, investment or deposit".*

Zurich thought that applied here and quoted case law (Crowden v QBE Insurance (Europe) Limited – the Crowden case) which it believed supported its position. It didn't agree it had previously said the claim would be paid. Zurich also queried whether Mr W was eligible to bring this complaint to our service.

Mr W complained to us about Zurich's decision not to cover the first of the awards made against P (relating to the advice provided in 2012). We considered the jurisdiction position and another Ombudsman issued a decision last year. He concluded, on the basis of the

information which had by then been presented, this was a complaint we could consider. So an investigator went on to consider its merits.

She was satisfied the losses Mr W was claiming for were at least indirectly related to the insolvency of the LLP. And she thought the *Crowden* case which involved a similar exclusion clause established the insolvency only needed to be a contributing factor for the clause to apply. She thought that applied here and Zurich had fairly turned down the claim. And she didn't think there had been any claims handling issues by Zurich from the point Mr W became eligible to claim under the policy.

Zurich didn't respond to her view. N provided very detailed submissions. In summary:

- They didn't accept the exclusion Zurich had relied on applied in this case. The clause references liability (not loss). The liability arose as a result of the poor advice and that was established by our previous decisions. The proximate cause of the loss was the advice to invest in an unsuitable scheme which is an insured risk.

- The liability arose at the point that advice was given; it doesn't arise from the insolvency of the LLP four years later. Our decisions established there were inherent risks in the scheme that should have been apparent to the insured at the outset. And the losses suffered by Mr W existed prior to the insolvency and would have existed whether the LLP had become insolvent or not (because the investment had no reasonable prospect of obtaining the tax relief it had been set up to obtain).

- They didn't agree the LLP fell within the definition of entities specified in the clause and wasn't caught by the broader reference to "any other business". Case law has established that wording of that nature (unless enlarged by the context) limits the description to matters of the same kind. The businesses specified here are financial services providers and the LLP in this case wasn't remotely similar to that.

- They didn't accept the scheme in this case was an investment which fell within the definition set out in the Regulated Activities Order. They also disputed the insured had arranged the investment with the LLP; there was no evidence of arrangements between those representing the LLP and the insured

- They didn't accept the case Zurich had cited did have a read across to the situation here. In particular they said the exclusion clause in that case was materially different to the one here; for example the *Crowden* case included "claims and losses" as part of the exclusion.

- Even if it the clause did apply they didn't think it was fair to apply it. They disputed that the commercial purpose of the policy was to exclude claims such as those in this case. and said the clause wasn't prominently highlighted in the policy.

- They referenced a recent Financial Conduct Authority (FCA) consultation exercise which said the use of these clauses wasn't fair and reasonable. And while the changes the FCA then implemented didn't come into effect until June 2019 that was before Zurich had said it would be using this clause to turn down the claim.

- In addition they said Zurich had previously told P cover was in place and it was therefore unreasonable of it to now seek to rely on the exclusion. And they cited email correspondence from Zurich and its panel solicitors in support of that position. In this context they raised issues of estoppel, waiver and contractual promise to pay.

I issued a provisional decision on the complaint in June. I said:

My determination of this complaint is made in line with the regulator's Dispute Resolution Rules (DISP). These rules say I must make my decision by reference to what I consider to be fair and reasonable in all the circumstances of the case. DISP 3.6.4R says I need to take into account relevant:

- *law and regulations;*
- *regulators' rules guidance and standards;*
- *codes of practice; and*
- *where appropriate) what I consider to have been good industry practice at the time.*

The Insurance Code of Business Sourcebook (ICOBS) says an insurer should handle claims promptly and fairly. It shouldn't reject a claim unreasonably. I think it's reasonable to take those rules into account when deciding this complaint.

In considering that here I've read the extremely detailed submissions N made in support of Mr W's complaint and I've given careful thought to each of the material points that were made.

Mr W's complaint relates to investment advice provided by P in 2012. I'm not considering in this decision the separate claim I understand Mr W made to Zurich in relation to the investment advice provided in 2013 and the Ombudsman's decision on that. N made clear in its initial submissions to our service that it intended to raise this as a separate matter.

I've looked first at the terms and conditions of P's policy on which Mr W is seeking to exercise the rights transferred by the 2010 Act. The policy says at section 2 under the heading 'Cover':

We will indemnify any insured in respect of any claim first made against any insured and notified to us during the period of insurance in respect of any civil liability including liability for claimants' costs and expenses arising out of the conduct of the business within the territorial limits.

At 2.9 the policy says:

We will also indemnify you in respect of:
2.9 Ombudsman awards
a) Any amount paid or payable
b) The cost of taking any steps which you are directed to take in accordance with any final binding award or determination of any ombudsman appointed in respect of any case accepted by the ombudsman for review under any recognised scheme applicable to the business and which may otherwise be the subject of indemnity under this policy. Provided always that you give written notice to us as soon as reasonably possible after becoming aware that a case directly affecting you is being reviewed by an ombudsman.

Any subject or concurrent civil action arising out of any complaint made to the ombudsman hereunder will be deemed to be notified in accordance with condition 3. Our liability will not exceed £150,000 in respect of any single award or determination of any ombudsman. Should there be a series of awards made by an ombudsman attributable to the same or different claimants but arising from a single originating cause, event or source then our liability in respect of all such awards will not exceed in the aggregate the limit of indemnity stated in the schedule and this limit will form part of and not be in addition to the limit of the indemnity stated in the schedule.'

In this case an Ombudsman's decision was issued in April 2019 making an award against P in favour of Mr W. I don't think it's in dispute that, in principle, the policy would cover the claim that has been made against it. The issue is whether the exclusion Zurich has quoted applies. That exclusion appeared in Section 3 'Exclusions' (which started on page 14). At page 16, the insolvency exclusion appears and says:

> *Section 3 - Exclusions*
> *This policy does not cover:*
> *…*
> *14. Insolvency*
> *Liability arising out of or relating directly or indirectly to:*
> *a) Your insolvency or bankruptcy*
> *b) The insolvency or bankruptcy of any insurance company, underwriting agent, bank, building society, unit trust or any other business with whom you have arranged any insurance, investment or deposit.*
> *Provided always that this exclusion will not apply to defence costs up to £150,000 in the aggregate during the period of insurance. This limit will form part of and not be in addition to the limit of indemnity stated in the schedule.'*

In its letter of 2 September 2019 to P, Zurich says this about the application of the exclusion:

> *Application of exclusion 14*
>
> *Exclusion 14 of the Policy applies based upon the following:*
>
> *[P] arranged the Investment with [the LLP];*
> *[the LLP] is a business that became insolvent at least at the point that it was placed into Administration;*
> *[the LLP's] insolvency was, at the very least, an indirect cause of the Clients' losses and therefore [P's] liability in this matter.*
>
> *In light of the above, and taking into account the relevant case law, such as Crowden v QBE (2017) EWHC 2597 (Comm), Zurich is entitled to rely on Exclusion 14 to decline indemnity in respect of the Claims once the defence costs only sub-limit of £150,000 has been fully incurred. As this limit has been reached, Zurich will no longer fund the defence of the Claims.*

Does the exclusion apply?

'Investment' and 'arranged'

At the outset, I agree with N that in order for the exclusion clause to apply, the liability of P needs to have arisen out of or related to directly or indirectly the insolvency of the business with whom the investment was arranged [my emphasis].

N has suggested the clause doesn't apply because P didn't arrange an investment with the LLP in this case; their argument is both that the LLP wasn't an 'investment' as defined by the Regulated Activities Order and that P didn't 'arrange' it.

It is not contested that the investment in this case is an unregulated collective investment scheme (UCIS). In my view, it is clear that UCIS are 'investments' as defined by the FSMA (Regulated Activities) Order 2000 ('RAO'). They are collective investment schemes, which are specified investments under art 81 of part III of the RAO. The fact that they are referred to as 'unregulated' signifies only that they are not subject to the same requirements that apply to authorised UK collective investment schemes – making them inherently higher risk.

I am therefore satisfied that the LLP qualifies as an 'investment' in line with the exclusion. And while N has sought to argue that the arranging of the investment here would fall outside of the regulated activity of "arranging deals in investments" specified in art 25 of the RAO, I don't think that is the case. That activity includes within the definition of investments, collective investment schemes. Similar wording applies to the regulated activity of "advising on investments (except pension transfers and pension opt-outs)" which is why we were able to consider Mr W's original complaint about the advice he was given by P to invest in this scheme.

So I think the wording of the policy would include the investment in this case. And while N argues P didn't 'arrange' that investment, I don't agree. I appreciate there may not have been direct contact between P and those responsible for the LLP but there doesn't need to be for this to constitute 'arranging' in line with the wording of the RAO and the FCA's Perimeter Guidance (PERG). The regulated activity covers:

- *making arrangements for another person (whether as principal or agent) to buy, sell, subscribe for or underwrite a particular investment…" and*

- *making arrangements with a view to a person who participates in the arrangements buying, selling, subscribing for or underwriting investments falling within PERG 8.32.1G (1)(a) to (c) (whether as principal or agent).*

In relation to the first point the FCA makes clear that a person "brings about or would bring about a transaction only if his involvement in the chain of events leading to the transaction is of enough importance that without that involvement it would not take place". But the second point is broader and would include, for example, a business helping a consumer fill out an application for an investment and passing the application to the investment company.

I've thought about how that applies here and have reviewed information from when the investment was taken out. A meeting note from P says "once [Mr W] had his questions answered and was happy to proceed we completed the application for [the LLP]". And the suitability report from P says "for details of the fee paid to us for arranging this investment, please refer to the Investment Memorandum". I'm satisfied that would fall within the regulated activity of arranging deals in investments and be caught by the policy exclusion as it relates to this.

Any other business

N also say the LLP in this case isn't caught by the part of the exclusion clause which refers to "any other business". It says the LLP doesn't fall within any of the specified businesses set out in the term. And it believes the ejusdem generis principle should apply so that where specific words are followed by general words, the general words are interpreted as being limited to things of the same kind as the specific ones. N also argue if the clause had the meaning which Zurich contends this would have been highlighted to P by its broker.

The LLP was set up to operate an unregulated collective investment scheme. So I think N are right to say it wasn't any of the specific business types listed in the exclusion – i.e. it wasn't an insurance company, underwriting agent, bank, building society or unit trust. I've therefore considered the ejusdem generis argument it put forward in relation to the "any other business" part of the clause.

In my view the exclusion is qualified in relation to the specified businesses and "any other business" by the inclusion of the wording "with whom you have arranged any insurance, investment or deposit". Those words are, to my mind, significant when construing the meaning of 'any other business' and should be taken into account.

Taking into account the wording of the clause as a whole (which includes both the preceding specified businesses and the following words, 'with whom you have arranged any insurance, investment or deposit' I think it's reasonable to interpret the words 'any other business' as referring to a business with which it's possible to arrange any insurance, investment or deposit. I think this is consistent with the contract as a whole, and is particularly the case as the specified, 'unit trust' category is itself a type of collective investment scheme. P's brokers may have interpreted matters differently. But for the reasons I've explained I think Zurich acted reasonably in concluding the LLP was caught by the reference to "any other business" in the exclusion.

Liability arising out of or relating directly or indirectly to

I've therefore gone on to consider whether Zurich are right to say the liability in this case arose out of, or was related directly or indirectly to, the insolvency of the LLP. On balance I don't think they were. Looking at the policy terms, I think the 'liability' the relevant clause refers to is that of P (and not Zurich as the insurer). The policy sets out the cover it will provide and says, "we will indemnify any insured in respect of any claim first made against any insured and notified to us during the period of insurance in respect of any civil liability including liability for claimants' costs and expertise arising out of the conduct of the business within the territorial limits".

The exclusion clauses in the policy then go on to restrict the cover it provides, including by limiting liability arising out of or relating directly or indirectly to the insolvency of a business with which an investment has been arranged by the insured firm (exclusion 14, outlined in full above). Given the wording of the policy as a whole, I think it's reasonable to say that restriction would apply to the civil liability of P that was owing to Mr W, which was determined by the ombudsman's decision against P and established by the judgment of the court.

The question is therefore whether that liability has 'arisen out of or relates directly or indirectly to' the insolvency of the LLP. And I think the Crowden case is relevant to my consideration of this issue. I accept there are clearly differences between that case and what's happened here. I also agree the wording of the exclusion clause in the Crowden case, although similar, has broader application because it covers "claims, liability, loss, costs or expenses", whereas Zurich's policy exclusion only covers 'liability'. But I nonetheless consider that the comments that the judge in Crowden made about the extent to which the insolvency needed to have impacted on the liability in question are relevant here.

In that regard, I note that the judge referred to the words of the policy in that case (i.e. 'arising out of or relating directly or indirectly to the insolvency,') and said "the undeniable sense of these words is to emphasise that the causative effect of the relevant insolvency need not be as strong or efficient so as to constitute a proximate cause".

He went on to say that for the exclusion to apply the insolvency must be "specifically accountable as a cause of the claim, liability or loss: in this sense, it must be significant; it must stand out as a contributing factor, at least, to the claim, liability or loss."

The judge didn't draw any distinction between "claim, liability or loss" in his judgment. So while I appreciate the clause in this case only references 'liability', I don't think that means the Crowden case isn't relevant to what's happened here. On that basis, I take note of what the court said in Crowden that for the exclusion to apply, the insolvency of the LLP doesn't have to be the proximate cause of P's liability (the 'dominant' or 'effective' or 'direct' cause). However, it does need to stand out as a contributing factor to it.

I don't think it was. In reaching this view, I note that 'liability' isn't defined in the policy, but I have taken account of the definition in Jowitt's Dictionary of English Law:

> *"The condition of being answerable in law, or actually or potentially subject to a civil obligation, either generally, as including every kind of obligation, or, in a more special sense, to denote inchoate, future, unascertained or imperfect obligations, as opposed to debts, the essence of which is that they are ascertained and certain. Thus when a person becomes surety for another, he makes himself liable, though it is unascertained in what obligation or debt the liability may ultimately result."*

The Cambridge dictionary defines 'liability' as, "the fact that someone is legally responsible for something."

I have also given careful regard to the terms of the sealed consent order given by the court in favour of Mr W on 17 September 2022. The particulars of the claim speak to a claim for 'breach of duty/and or contract'. The ombudsman's decisions, in which complaints against P were upheld, are attached to the schedule for the particulars of claim and are said to contain the details of the loss and damage that are included in the schedules of loss. The particulars of the claim outline the ways in which the scheme failed to achieve its objectives of securing tax benefits and income.

It points to the features of the scheme that rendered it high risk and outlines the failures of the firm at the point of sale (including failures to complete fact finds, establish attitudes to risk, conduct affordability checks and to advise the claimants of the risks inherent in the scheme). All in all, the claim appears to be framed as a negligence/ /breach of contract claim, but details of the claims are contained in the attached ombudsman awards with the Court directing payment of an ascertained amount in the ombudsman awards in resolution of the claim.

In light of that, when considering the meaning of 'liability' in the circumstances of the claim under the policy, I have taken into account the fact that, for a breach of contract claim, the cause of action in law would accrue at the time of the breach (i.e. when the advice was given).

I appreciate that for a negligence claim, it would normally be when a claimant suffers actionable damage. But in that context, I've noted that in Halsall v Champion Consulting Ltd [2017] EWHC 1079 (QB)) (which also related to a scheme involving tax arrangements) the judge said, "It seems to me that it was the point at which the claimants entered into the planning that they suffered damage". He went on to conclude, "It was not inevitable at that point that they would be denied the tax relief and they may have been financially better off as a result of being exposed to the risk, but it was at that point that they were tied into the "commercial straitjacket". The court went on to hold that the investors suffered damage when they entered into the contracts in the tax scheme, when the "defect" in the form of the advice was incapable of cure.

Taking all of that into account, it is my view that P's liability accrued at the point the investment was arranged for Mr W, further to P's advice to enter into the scheme. The extent of that liability (and the amount of loss that had resulted) was determined by the subsequent Ombudsman's decision and subsequently established by a judgment of the court.

I appreciate it was the LLP's insolvency that led to the sale of the underlying property (and meant there was an automatic clawback by HMRC of the tax rebates because the property hadn't been held for long enough to qualify for them). But I understand that once the arrangements had first been made, it wouldn't have been possible for Mr W to extract himself from the scheme at all without loss.

In this regard, I note that the ombudsman's decision in favour of Mr W against P, which was attached to Mr W's particulars of claim, indicated that Mr W's holding in the investment was largely illiquid until such time as the property was sold. The ombudsman found that Mr W needed to keep his interest in the LLP for seven years – if he failed to do so, any tax relief attained would be clawed back by HMRC.

I also note that P had argued that the scheme failed because the LLP went into administration and the hotel was sold. It said it should not be held responsible for Mr W's loss, as it had not caused the failure of the LLP and that there were many factors involved. But the ombudsman found:

> *I should say that I also don't agree with P that the key question is to determine why the partnership failed nor do I agree that the complaint is brought with the benefit of hindsight. It's clear that the failure of the partnership, and the total failure of Mr W's investment, has prompted his complaint. But, as I go on to explain below, there were a number of inherent risks in the scheme which I am satisfied ought to have been foreseen at the outset. It's one of the factors that meant the scheme itself carried a high risk of capital loss – in addition to the fact that there were a number of reasons why any relief paid by HMRC might need to be repaid by Mr W.*

I have taken all of this into account and am of the view that Mr W's circumstances, upon entering the scheme, would seem to reflect the "commercial straitjacket" referenced in the Halsall case. He was, at that point, effectively stuck in a defective scheme from which he was unable to extract himself without sustaining loss. On that basis I don't think it's reasonable to say the subsequent insolvency of the LLP 'stood out as a contributing factor' to P's liability.

That is because P's liability would have existed regardless of whether the insolvency took place. I accept that in the Crowden case, the court ultimately held that the exclusion clause did apply. But the important distinction is that the clause in that case excluded cover not only for liabilities arising out of an insolvency, but also cover for claims, liability, loss, costs or expenses. If, for instance, the exclusion clause in this case had been drafted to exclude liability and loss arising from an insolvency, I would be more inclined to say the exclusion applied. But cover for liability only is in my view clearly drafted more narrowly than that.

So it follows that I don't think Zurich can turn down the claim on the basis of the exclusion clause it's cited.

Is it fair and reasonable for Zurich to apply the exclusion clause?

I've also considered whether it would in any event be fair and reasonable for Zurich to apply the exclusion clause in this case.

In other words, if the exclusion clause did apply (which for the reasons I've explained I don't think it does), would it be fair and reasonable for Zurich to apply it to the circumstances of Mr W's claim?

N argue that it isn't fair of Zurich to do so in the light of an FCA consultation exercise (on the future funding of the Financial Services Compensation Scheme - FSCS) which it says concluded the use of these clauses wasn't fair and reasonable and led to changes in the regulatory framework. And it says that although the policy pre-dated those changes, the exclusion wasn't applied by Zurich until September 2019, which was after they had been implemented.

I don't think there's a direct read across between the FCA consultation exercise and what happened here because the FCA's focus was, in the main, on how clauses worded in this way might prevent the FSCS from making a claim on the policy. The FCA's stated rationale for the changes it subsequently made was "the changes are intended to ensure that more consumer claims are paid by insurers which could help to reduce the cost of the FSCS to other firms."

But I do appreciate in its 2018 consultation paper the FCA said "where a firm has, for example, provided negligent financial advice for a consumer to invest in a fund, we do not believe a claim on that firm's PII should be excluded by virtue of the insured or the fund becoming insolvent, provided the claim has been notified correctly and the product is not otherwise excluded."

And, under the heading 'How this links to our objectives', the FCA went on to say:

Consumer protection…Clauses in PII policies that prevent a person other than the PIF (eg the FSCS) from making a claim could result in consumers not receiving the full amount of compensation they are owed.

So I think it is reasonable to say the FCA did have broader concerns about clauses like this. And it subsequently made changes to the relevant rules which required personal investment firms to have professional indemnity insurance policies that didn't limit cover where the policyholder or a third party is insolvent.

I accept it didn't make those changes retrospective and I appreciate that P's liability and the insolvency of the LLP both happened prior to the changes coming into force. However, Zurich's decision on the claim (and therefore it's application of the exclusion clause) took place after the changes had been made. And the FCA was clear in its consultation paper that it didn't believe claims should be excluded on the basis of the insolvency of the fund in question. I think it's reasonable to say that principle would also cover the insolvency of the LLP in this case.

Taking into account the requirement in our rules to consider what is fair and reasonable in all the circumstances of the case (and to take into account relevant regulator's rules, guidance and standards when doing so) I'm satisfied that my decision that the exclusion clause does not apply is also the fair and reasonable outcome in this case. This isn't about retrospective application of the FCA rules on insolvency exclusions in professional indemnity insurance. Rather, it is what I consider to be fair and reasonable in all the circumstances of the case. Further, I am satisfied that my view is also in line with the FCA's position that the cost of meeting a consumer's loss in these circumstances should be borne by the insured firm or its insurer, rather than the FSCS (see para 3.5 of FCA Handbook Notice no. 60).

Responses to my provisional decision

Both parties responded to my provisional decision. Zurich made further points relating to our jurisdiction to consider the complaint. I've explained in a separate decision why I'm satisfied the complaint is within our jurisdiction. In relation to the merits it said:

- The judgment in the *Crowden* case confirmed the insolvency exclusion could have broad effect. It thought my provisional decision was inconsistent in that I'd accepted it was the LLP's insolvency that had led to the sale of the underlying property (and a clawback of the tax rebates). But I'd nevertheless concluded the insolvency of the LLP didn't stand out as a contributing factor to P's liability.
- The judgment in the *Halsall* case predated that in *Crowden* and shouldn't impact the later judgment.
- The FCA's rules following its consultation exercise on the future funding of the Financial Services Compensation Scheme had taken effect from 1 June 2019 and didn't apply retrospectively. The policy in place between Zurich and P had incepted long before that date. So as a matter of law the new rules didn't apply to this policy.
- Previous views we'd expressed on the case were a more accurate reflection of the correct position – for example we'd said that as Mr W's losses were at the very least indirectly related to the LLP's insolvency the exclusion clause had been applied fairly by Zurich.
- The provisional decision was arbitrary and inconsistent with what we'd said in another complaint on which a different Ombudsman had issued a final decision. So it thought there had been an error in law here.

N also provided comments on behalf of Mr W. In summary it said:

- It wasn't appropriate to ask Zurich to reconsider the claim against the remaining policy terms. It drew attention to the time this matter had taken and its concerns about Zurich's past conduct. It didn't think it would be fair for a further claim decline to have to be resolved through another complaint to our service
- Zurich should be required to pay interest on all sums due under the policy from the point payment should have been made.
- Mr W should be entitled to a payment for distress and inconvenience. It didn't agree Zurich had acted in a timely manner in relation to this claim as the exclusion clause hadn't been deployed until September 2019 which was three years after the claims were first made. And it didn't think it was fair to do so in any case. It provided an email from Mr W outlining the impact this matter had had on him and his family.
- Not making an award would mean there was no adverse consequence for Zurich wrongly turning down the claim and arguing our service wasn't able to consider the complaint.
- It was appropriate Mr W sought legal advice given the complexities of the case and it wouldn't be fair for him to pay the costs of that. So Zurich should reimburse him for these costs.

- It also set out actions it thought should be taken in relation to other complaints made to our service and on which a final decision hadn't been reached. And it made comments relating to how any awards made under the policy should be calculated.

It also requested the opportunity to see any submissions made by Zurich before a final decision on the complaint was reached.

So I need to reach a final decision.

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.

Zurich's comments on my provisional decision

I agree the *Crowden* case is relevant to what's happened here. And I've taken into account points the judge made, including his finding that for the exclusion to apply the insolvency must be *"specifically accountable as a cause of the claim, liability or loss: in this sense, it must be significant; it must stand out as a contributing factor, at least, to the claim, liability or loss."* Although it does not need to be the proximate cause.

But I don't agree my provisional decision is inconsistent in relation to this or that it is 'internally inconsistent' as suggested by Zurich. In saying this, Zurich has referred to a finding in my PD that it was the LLP's insolvency that had led to the sale of the underlying property (and a clawback of the tax rebates). It says this is inconsistent with my finding that the insolvency of the LLP did not stand out as *'a contributing factor to P's liability'*.

However, in referring to this part of my provisional decision, Zurich has omitted the full extent of my finding in which I explained that, once the arrangements for Mr W had first been made, it wouldn't have been possible for Mr W to extract himself from the scheme at all without loss. It followed that in my view, the liability arose at the point he entered the scheme and would have existed regardless of whether the insolvency took place. The insolvency may have compounded the loss suffered, but it did not bring about the liability (which had already been incurred).

And Zurich does not seem to have acknowledged the clear differences between the exclusion clause in this case and the one in the *Crowden* case. The clause in that case excluded cover not only for liabilities arising out of an insolvency, but also cover for claims, liability, loss, costs or expenses.

The exclusion in Zurich's policy is more narrowly worded to only exclude liability arising out of or relating directly or indirectly to the insolvency of a business with whom the investment was arranged. I explained in some detail in my provisional decision why I was satisfied the liability had accrued at the point the investment was arranged and why the subsequent insolvency of the LLP didn't therefore stand out as a contributing factor to that liability. I said it is a significant distinguishing feature that Zurich's policy does not refer to claims, loss, costs or expenses arising out of the insolvency, and I made it clear that if it did, I would be more inclined to say the exclusion applied.

Zurich argues the *Halsall* case I referenced isn't relevant because it predates the *Crowden* case. However, it is my understanding that would only be relevant if the judgments were in conflict with each other. I don't think they are. In my view they involved entirely different issues - for instance, the *Halsall* case didn't relate to the interpretation of an exclusion clause in an insurance contract. Rather, it concerned a claim against the provider of allegedly negligent investment advice.

For the reasons I explained in my provisional decision, I think the findings in both cases are relevant to the outcome of this complaint. And I remain of the view that Zurich can't turn down the claim on the basis of the exclusion it cited.

Turning to the points Zurich raised about the FCA rules on exclusion clauses like this, I made clear in my provisional decision I was aware these rules weren't retrospective. I accept that the relevant PI policy in this case was agreed by P before the date on which the FCA's new rules on insolvency exclusions took effect (1 June 2019). But I also explained that our rules require us to consider what is fair and reasonable in all the circumstances of the case (and to take into account relevant regulator's rules, guidance standards and good industry practice when doing so). And, having taken into account what the FCA had said about these clauses, I was satisfied my decision that the exclusion clause didn't apply was also the fair and reasonable outcome in this case. That remains my view.

Zurich also says my findings are inconsistent with a decision another Ombudsman issued on a different case. I don't agree. I have given careful regard to that case and in my view there are significant differences between the facts of that case and this complaint. In particular, I note that the other case doesn't involve a liability arising from investment advice and the arranging of an unsuitable investment. Rather it involves a liability arising from a breach of contract that was brought about directly by the insolvency of a tour operator.

In my view, the circumstances are completely different. As I say, in this case the liability in question arose at the time the investment was entered into by Mr W and would have been incurred *whether or not the insolvency took place*. That was not the case in the other complaint, where the liability of the tour operator in question came about *only as a result of* the insolvency of another tour operator. It follows that I don't agree I've been inconsistent with that case, as Zurich suggests, and in any event I should be clear that each complaint must be decided on its own merits. Consistency in decision making is important, but the decisions of other ombudsmen do not operate as binding precedent.

I also note the points Zurich makes about the findings of the adjudicator in this complaint. I appreciate my outcome differs to what she decided. But it's not unusual for an Ombudsman to reach a different outcome when reaching a final decision. I don't agree that means I've reached an arbitrary decision. I've given the adjudicator's views careful regard. However, I am required to reach my own view of the fair and reasonable outcome in this complaint and I've explained in detail in my provisional decision and in this final decision what the reasons for that outcome are.

N's response to my provisional decision

I appreciate N thinks I should direct Zurich to pay this claim rather than reconsider it against the remaining policy terms. I recognise the matter has been ongoing for some time. But I nevertheless think it's fair (and in line with our normal approach for complaints like this) for Zurich to have the opportunity to review the claim against the remaining policy terms.

I acknowledge N's concerns that Zurich might not reach a fair decision (which it's reiterated in more recent correspondence), but I nevertheless think the right way to proceed is to allow Zurich to consider the claim afresh, and for any further dispute to be resolved between the parties or through a fresh complaint to Zurich and to our service if necessary.

And because I'm not directing Zurich to pay the claim, I'm not able to make an interest award. My power to award interest is provided by s229 of the Financial Services and Markets Act 2000 which provides:

> *229 Awards.*
>
> *…*
>
> *(2) If a complaint which has been dealt with under the scheme is determined in favour of the complainant, the determination may include—*
>
> *(a) an award against the respondent of such amount as the ombudsman considers fair compensation for loss or damage …suffered by the complainant ("a money award");*
>
> *…*
>
> *(8) A money award—*
>
> *(a) may provide for the amount payable under the award to bear interest at a rate and as from a date specified in the award; and*

It follows that I'm only able to award interest on a 'money award' (for example where we're directing a business to make a payment for financial loss). That isn't the case here.

I appreciate N feels an award should be made for the distress and inconvenience caused to Mr W. I've read the email N provided in which Mr W goes into some detail about how he's been affected by what happened. I was sorry to learn of the impact on him and his family.

However, the focus of the email is primarily on the actions of P and the original investment advice it gave. That isn't something Zurich is responsible for. In this decision I'm considering what happened after Mr W made his claim to Zurich (not what happened prior to that when P was in discussion with Zurich as the policyholder). Mr W's claim to Zurich was made after the insolvency of P in July 2019 and Zurich had turned down his claim relying on the exclusion clause by early September. I don't think that timeframe was unreasonable in the circumstances so it remains my view that no payment for distress and inconvenience should be made.

N says not making an award for distress and inconvenience would mean there was no adverse consequence to Zurich for wrongly turning down the claim. But it's not our role to fine or punish a business. That's the role of the regulator, the FCA, and I understand N has already contacted them.

Our role is to consider whether fair compensation is required to compensate for distress or inconvenience caused to the complainant. In this case I agree Zurich incorrectly turned down this claim, but it remains my view that this wasn't a straightforward case and (for the reasons I've explained) there wasn't delay in Zurich considering it.

I also think Zurich was entitled to raise its concerns about whether the complaint fell within our jurisdiction when Mr W first contacted us about it. Taking all of that into account it remains my view that the direction I've made for it to reconsider the claim does enough to put things right in this case.

I've also considered whether Zurich should reimburse Mr W for the legal costs he incurred. I recognise that, as N has said, our rules do allow us to direct a business to cover some or all of the costs reasonably incurred by the complainant in respect of a complaint (and include interest on that amount). But the rules also make clear that awards of costs are unlikely to be common because in most cases complainants should not need professional advisers to bring their complaint to our service.

In this case I understand why Mr W sought professional help with his complaint. I acknowledge, for instance, that it would have been difficult for him to have progressed his complaint without the legal support that enabled him to obtain a judgment by consent against Zurich. But his representatives told us they commenced those proceedings in March 2018 (prior to both P's insolvency and Zurich's decision to turn down the claim). So I don't think costs incurred in relation to that can be ones Zurich is responsible for.

I appreciate Mr W may have incurred some further costs in moving those proceedings (which had been stayed) to a conclusion but, in my view, that is a cost he would have needed to incur in all likelihood at some point in order to access his rights under the 2010 Act. The other costs he incurred in connection with the bringing of his complaint more generally were not costs he needed to incur and therefore, in my view, this is not an appropriate case in which to make an award of costs against Zurich.

I note the comments N has made about other complaints and the calculation of any award under the policy. But I'm only considering in this decision the complaint Mr W made about the decline of his claim relating to investment advice provided in 2012. I can't consider here complaints from others who aren't party to this complaint. And if Mr W is unhappy with any further decisions made by Zurich in connection with his claim, and that leads to a dispute that cannot be resolved between them, then Mr W would need to refer the matter back to this office as a separate complaint.

All in all, and for the reasons I've explained, I'm not satisfied that Zurich has correctly or fairly turned down Mr W's claim and it will need to reconsider this against the remaining policy terms. As I outlined in my provisional decision, I've therefore not needed to consider the alternative points N has raised about the past correspondence between Zurich and P and any estoppel or waiver it says has come about as a result.

Finally, I recognise N wanted to see Zurich's response to my provisional decision prior to a final decision being reached. But I've considered Zurich's response and I don't consider it has raised any new material points that might lead me to change my views. In light of the considerable period of time that has already elapsed in the consideration of this dispute, and in the interests of drawing the matter to a close as quickly as possible, I don't think there is a need to obtain comments from N on this prior to me reaching this final decision.

My final decision

I've decided to uphold this complaint. The insolvency exclusion clause should not be applied by Zurich to decline Mr W's claim. Zurich Insurance PLC will need to reconsider Mr W's claim against the remaining policy terms.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 14 November 2023.

James Park
Ombudsman