

## **The complaint**

W, a limited company in liquidation, complains that Liberty Mutual Insurance Europe SE (“Liberty Mutual”) would not agree to deal with claims on its professional indemnity policy.

The complaint was brought to us on behalf of W by the liquidator, which I’ll refer to as R.

## **What happened**

W is a firm of financial advisers which gave advice to clients on transferring their pensions. A review by the regulator, the Financial Conduct Authority (FCA) found that in over 80% of the cases reviewed the advice given to transfer out of a defined benefit pension scheme was either unsuitable or did not comply with relevant rules or guidance, so W would have to contact clients about a redress proposal.

W notified Liberty Mutual of this in July 2020 as a circumstance that might lead to claims being made against it.

When W later contacted Liberty Mutual about claims related to the notification, Liberty Mutual said it did not think claims would be covered because the notification in July 2020 wasn’t valid; a “Circumstance” is something that suggests a claim by an identified claimant is likely to be made against the insured and it said claims either were not likely to be made or, if they were, were not from identified claimants.

Liberty Mutual also said there was an exclusion (referred to as the multiple transfers exclusion) that would apply to any claims relating to a particular pension scheme (which I’ll call the “N Scheme”).

On behalf of W, R complained to Liberty Mutual and then referred the complaint to this Service. R said:

- The notification was valid as W had provided a list of identified clients from whom claims were likely. It wasn’t a generic notification that some sort of claim was likely but gave clear details of the matters that meant claims were likely and identified the claimants.
- Liberty Mutual applied the exclusion for claims relating to transfers from N Scheme on the basis the exclusion applied to schemes with more than 25 transfers in a financial year, but the exclusion doesn’t refer to “financial year” and the intention was to cover cases relating to this scheme.

Our investigator thought the complaint should be upheld to the following extent:

- It was agreed that an exclusion applied to transfers from another pension scheme (which I’ll call the B Scheme).
- The notification was valid as claims were likely to be made by the individuals identified.
- The exclusion for N Scheme does apply, as the discussion between W and Liberty Mutual when the policy was renewed referred to numbers in a financial year and the exclusion was agreed on that basis.
- Five claims received following the block notification related to B Scheme and so were

excluded and one wasn't included in the notification. So there was only currently one claim to consider.

- Liberty Mutual should deal with that claim, subject to receiving relevant information about it.

Both parties replied to the view and there was further correspondence with the investigator. I won't set out all the comments in detail but will summarise some of the key points.

R says:

- It agrees the block notification was valid. This means any later claims from clients identified in the notification are valid claims, to be assessed in line with the policy terms.
- The multiple transfers exclusion should not apply to N Scheme; if it was meant to mean 'financial year' the policy terms should have said so.
- The exclusion was set at 25 in order to allow N Scheme cases to be included; W gave the figures for the scheme and Liberty Mutual intended to cover the risk.
- The view doesn't go far enough – there should be cover for any further claims that arise from the original notification; all non-B Scheme claims from the list of identified clients are to be assessed under the policy.

Liberty Mutual says:

- It agrees that both exclusions apply.
- It also agrees there's a distinction between claims that may be made and ones that are valid, but a claim is more likely to be made if it has validity; the likelihood of an invalid claim being made must be less than 50%.
- Regulatory investigation is not a "Circumstance" within the meaning of the term.
- Without prejudice to those points, it is content to review the one case referred to it.
- But there can't be a claim by W for any case which has been referred to the Financial Services Compensation Scheme ("FSCS") and the excess for each claim is £35,000, so there needs to be a claim for more than that before the policy responds.
- It doesn't have details for the one existing claim and without knowing the identity of that person, can't say whether they are within the scope of the notification or subject to either of the two exclusions. If this claim has been referred to the FSCS and redress is paid, there's no basis on which W can seek an indemnity. In fact, there's nothing for the ombudsman to consider, as there is no loss.

The investigator considered the additional comments but didn't change her view, which she confirmed was as follows:

- The notification was valid and claims from clients named on the list provided by W can be considered, subject to the two exclusions.
- Currently, there's one valid claim and this should be considered on receipt of relevant information from W.
- The FSCS would deal with any claims on a case by case basis and she couldn't pre-empt that.

As no agreement has been reached I need to make a 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.

We have received detailed submissions from both parties. We were set up to provide an informal alternative dispute resolution service and our role is to provide an impartial review, quickly and with minimal formality. I use my judgement to decide what's fair, based on the main crux of a case. So I won't comment in detail on every single point that has been raised and will focus on the key points that are relevant to the outcome I've reached.

The relevant industry rules and guidance say insurers must deal with claims promptly and fairly; provide reasonable guidance to help a policyholder make a claim and appropriate information on its progress; and not unreasonably reject a claim. They should settle claims promptly once settlement terms are agreed.

The policy provides cover "*against any Loss resulting directly from any Claim made by any third party for Civil Liability... in connection with the conduct of Professional Business by the Insured or by any Employee of the Insured and first made against the Insured and notified to the Insurer during the Period of Insurance as stated in the Schedule...*"

The policy terms go on to set out how claims should be notified:

*The Insured shall, as a condition precedent to any liability of the Insurer, give to the Insurer as soon as reasonably practicable, notice in writing of any Claim made upon it or upon any Insured or of any Circumstance of which it becomes aware and if during the subsistence of this Policy the Insured shall give such notice then any such Claim or Claims which may subsequently be made by or against it arising out of the said Claim or Circumstance shall for the purpose of this insurance be deemed to have been made during the subsistence hereof. Any such notification to the Insurers occurring later than the expiry of the Period of Insurance shall not constitute a valid notification.*

A Claim is "*a written or oral demand for, or an expressed intention to demand, compensation from the Insured arising out of the conduct of Professional Business for which indemnity is provided under this Policy.*"

And "Circumstance" is defined as follows:

*Information discovered, during the Period of Insurance, by the Insured which suggests that a Claim by an identified claimant is likely to be made against the Insured. For the avoidance of doubt, such information does not constitute a Circumstance merely because the Insured has sold or advised in relation to a product or class of investment that is the subject of adverse press comment, regulatory investigation or has known liquidity issues.*

W notified Liberty Mutual of a Circumstance in June 2020. If that was a valid notification and any claims followed on from that, those claims would be covered unless there was an exclusion or some other reason in the policy terms that meant they were not covered. I've considered each of these points in turn.

#### *The notification*

I'm satisfied there was a valid notification. W provided a list of clients that were affected; individuals were identified and claims were likely. Liberty has questioned whether there were likely claims from identified individuals. The outcome of the FCA review was that W was required to offer clients the option of a loss calculation/redress payment. So those clients were put on notice there was an issue with the advice they had been given and redress might follow.

In those circumstances, it's likely that someone who thought they had been misadvised about transferring their pension would seek compensation and a claim on the policy would

follow. There was a list of named individuals, so they had been identified.

There is the question of whether what happened with the FCA was a regulatory investigation and not a “Circumstance” within the meaning of the term. The term refers to regulatory investigations and concerns about a product or class of investment. So it’s referring to wider issues – perhaps where there are general concerns about a product or type of product. I note that in its final response to W’s complaint, Liberty Mutual said it wasn’t arguing that the fact W had been the subject of an investigation meant cover was excluded. I don’t think it would be reasonable to say this was not a Circumstance as defined, where there was a specific investigation into the advice W had given to certain clients.

#### *Exclusion applying to B Scheme*

It’s accepted by both sides that an exclusion was in place for any transfers involving B Scheme. So any claims from those clients would not be covered. But Liberty Mutual also says claims involving N Scheme were excluded.

#### *Exclusion applying to N Scheme*

The exclusion Liberty Mutual relies on says:

*The Insurers shall not indemnify the Insured in respect of any Claim(s) or Claim Circumstance(s) that arise, directly or indirectly, from Defined Benefit / Final Salary Pension Transfers from a pension scheme where:*

- *More than 25 clients have been transferred out of the same Pension Scheme per annum.*

There were more than 25 transfers involving N Scheme during one financial year. But R points out that the exclusion doesn’t specify a financial year – it simply says “per annum”. R says that means a calendar year. And if the numbers are calculated on the basis of a calendar year, the number didn’t exceed 25.

When interpreting the policy terms, the starting point is to give the words their ordinary meaning and to reflect the intention of the parties and the commercial sense of the agreement. Without further clarification, the ordinary meaning of “per annum” might be taken to be a calendar year. But I’ve considered what the parties’ intentions were.

When the policy was renewed, W was asked for details about numbers of transfers from individual schemes. W set out the numbers on the basis of financial years and said this was because the insurers used financial years. Liberty Mutual proceeded on that basis.

In the particular circumstances here, where the figures were put forward by W based on financial years and renewal was offered on that basis, that was the intention of the parties. It would make commercial sense for the term to be interpreted as meaning financial years as that was the basis on which the contract was entered into. To do otherwise would go against the intentions set out at the time.

In fact, the information given by W wasn’t accurate; it gave a figure of 22 when the correct number was higher. R says if a higher figure had been given, Liberty Mutual would still have covered the risk but with a higher limit; a small number of additional clients would not have led Liberty Mutual to decline W as a client. Liberty Mutual said it would increase the limit to 25 but would hope W “*would not be going near 20 for new cases...*” If anything, I think the evidence is that Liberty would have preferred to limit the risk to a lower figure.

The intention may have been to cover cases relating to N scheme, but only on condition that no more than 25 clients had been transferred out of the same pension scheme in a financial year. Liberty Mutual wanted to limit the risk to that number.

Taking all of this into account I think the fair way to apply the term is on the basis of a financial year, with the limit of 25.

For these reasons I consider it reasonable for Liberty Mutual to apply this exclusion to claims arising from advice to transfer away from N Scheme.

There has also been discussion about whether this exclusion applies to all claims relating to N Scheme or only those for the particular year in question. The term excludes “*any Claim(s) or Claim Circumstance(s)*”; I think that’s clear and it doesn’t restrict the exclusion to certain years. So any claims relating to N Scheme would be excluded.

### *Other issues*

Liberty Mutual says any claims will now be referred to the FSCS, so there’s no loss to W and nothing for it to deal with. I understand the FSCS may accept claims from clients of W. But there’s no certainty around how the FSCS will deal with them.

In the first instance, a client may make a claim against W and the insurance cover would apply (subject to the exclusions referred to above and any other relevant terms). A client shouldn’t be compensated twice for the same thing but that would need to be considered in each case. If a claim has been dealt with by the FSCS there may be no loss for Liberty Mutual to cover but that would need to be considered each time.

Liberty Mutual also says the excess is £35,000 so there needs to be a claim for more than that before the policy responds.

An excess is applied where there’s a successful claim and is the first part of a claim, which the policyholder pays. Strictly speaking, the amount of the excess is not a loss covered by the policy. But normal practice would be to assess the claim and deduct the excess from any settlement. If the value of a claim is less than the excess, the insurer doesn’t need to make a payment, but that doesn’t mean there wasn’t a claim that could be made in the first place.

Of the claims already referred, one was not included in the notification and most of the others are caught by one of the exclusions, so there’s only one that, on the face of it, is valid. I agree Liberty Mutual should consider that claim. It doesn’t have all the information it needs but is aware of the identity of the claimant. Subject to W providing the further information needed to assess the claim, Liberty Mutual should deal with it.

### *Summary*

- The notification is valid and any claims that follow from that notification from an individual included on the list provided with the notification should be assessed in line with the policy terms and conditions, including the current claim that has not yet been assessed, and taking into account any awards by the FSCS.
- The exclusions relating to B Scheme and N Scheme both apply, so any claims relating to those schemes are not covered.

### **My final decision**

I uphold the complaint and direct Liberty Mutual Insurance Europe SE to deal with any

claims arising from the notification in July 2020 which are not caught by the two exclusions set out above, in line with the remaining policy terms and conditions including the excess and policy limits.

Under the rules of the Financial Ombudsman Service, I'm required to ask W to accept or reject my decision before 19 April 2024.

Peter Whiteley  
**Ombudsman**