

complaint

Mrs B complains that Zurich Insurance PLC (Zurich) unfairly declined her commercial insurance claim. To put things right, Mrs B wants Zurich to pay her claim in accordance with the terms of her policy, to pay interest on the settlement amount, and compensation for the trouble and upset she's experienced.

Mrs B brings her complaint on behalf of her business S, a limited company.

background

In August 2014, there was a fire at Mrs B's property ("**the Property**") that caused extensive damage. Mrs B claimed against her Zurich policy to cover the cost of repairs. Zurich rejected her claim and voided her policy, saying Mrs B had either misrepresented or not disclosed material facts.

Mrs B complained. She said there had been no non-disclosures or misrepresentations and that any information Zurich says was missing was caused by its failure to ask clear questions.

Zurich maintained its stance, so Mrs B brought her complaint to our service. Zurich objected to our service looking at the complaint, saying we didn't have jurisdiction to do so because of the number of employees S had.

Zurich also said the dispute would be better suited to court, because of allegations it made about tax evasion that it felt should be tested in court under cross-examination.

On 29 September 2016 our adjudicator issued an opinion, saying Mrs B's complaint should be upheld. He said Mrs B's complaint did fall within our jurisdiction, and he didn't agree the matter was better suited to court. He said Zurich should reinstate the policy and settle the claim in accordance with the terms and conditions along with interest and compensation.

Jurisdiction and company reinstatement

A different adjudicator then looked at the complaint and decided it wasn't one we could look at. He said that, because S had been dissolved on 14 July 2015, it wasn't an eligible complainant for the purposes of the rules our service must follow.

Mrs B disagreed. She said the ownership of the underlying business had remained unchanged. And that Mrs B was a direct beneficiary of the policy.

On 21 November 2016, another ombudsman at this service issued a decision, saying that Mrs B's complaint wasn't one we could consider. He said that S was not an eligible complainant as the company had been dissolved, so it didn't exist.

On 3 July 2017, Mrs B obtained a court order re-instating S to the Register of Companies. As a result of that court order, S is to be treated as never having been dissolved. And so, our service decided to take Mrs B's complaint back to the last point before we said we couldn't consider it.

At that time, our adjudicator had issued an opinion suggesting Mrs B's complaint should be upheld. Zurich didn't agree with our adjudicator. It repeated its previous arguments and suggested that, because S didn't own the Property in question, it was not able to make a claim at all. Zurich asked for an ombudsman to consider the matter afresh.

I issued a provisional decision on 13 November 2019. In it, I said:

"I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having reviewed Mrs B's complaint, I'm minded not to uphold it for the following reasons.

It's a fundamental principle of insurance law that, for a contract of insurance to be valid, the insured party must have an "insurable interest" in the subject matter of the insurance policy. In this case, that means, for the insurance policy to be valid, S must have some financial interest in the Property i.e. it must have something to lose if the Property suffers harm.

Zurich says that, because S didn't own the Property, and because the business traded as an unincorporated partnership, not through the limited company, S has no financial interest in the Property and that the claim fails as a result.

Having looked at the available evidence, I haven't seen anything that demonstrates S did have a financial interest in the Property. The Property is registered in the name of Mrs B and her father-in-law and so is not owned by S. And Mrs B's representatives have told me S doesn't have a lease of the Property.

My understanding is that tax on the underlying business's earnings is declared as a partnership in the names of Mrs B and her father-in-law. And I have seen Mrs B's certificate of registration for VAT from HM Revenue & Customs, which lists the legal entity as a partnership.

Mrs B has sent me several documents addressed to S, including a waste removal bill, a water bill and an electricity bill. But those documents alone don't demonstrate a financial interest and Mrs B hasn't provided me with anything that shows S made payments towards any such invoices or in connection with the business at all.

The Direct Debit payment schedule for the policy shows the policy premiums were paid by an account in Mrs B's name, not in the name of S. I have seen a bank statement in the name of S, so I can see it opened an account. But there is no activity on the statement, save for a static balance of £5. And I haven't seen anything that demonstrates S had any financial dealings with the business or even commenced trading.

I have also seen various other invoices, such as business rates and water rates, addressed to Mrs B and her father-in-law, without mention of S. And Mrs B's representative has told me that the limited company was only registered with Companies House so Mrs B could hold onto the name.

Mrs B has provided me with a license to play music at the Property, in the name of S. But that license has no value in terms of income, so S does not lose out because it is no longer possible to play music at the premises.

I understand why Mrs B thinks it's unfair that Zurich has rejected her claim. And I recognise she has lost her business and livelihood as a result of the fire. But she shouldn't feel like she's losing out on a technicality. From all I've seen, the insured party, S, simply isn't entitled to claim under the policy.

The evidence I've been provided with tells me Mrs B's business was run as an unincorporated partnership, and not through S. S didn't own the Property it's now seeking to claim for, it didn't pay for the insurance policy and it hasn't lost anything as a result of the fire. And I haven't seen anything else to demonstrate that S had a financial interest in the Property, sufficient to qualify as an insurable interest.

Where an insured party has taken out a policy, without having an insurable interest, the insurer is entitled to cancel the policy and treat it as if it were never in place. In this case, that means Zurich is entitled to decline Mrs B's claim.

Because I've said Zurich can treat Mrs B's policy as if it didn't exist, it should also refund any premiums paid by or on behalf of S.

Jurisdiction and dismissal

When Zurich asked for an ombudsman to consider the matter afresh, it said S didn't meet the definition of a micro enterprise under the FCA's handbook, and so it wasn't an eligible complainant.

Section 2.7.3 of the FCA handbook (available online) provides that an eligible complainant to the Financial Ombudsman Service must either be a consumer or a micro enterprise. In order for our service to be able to consider Mrs B's complaint, S must meet the definition of a micro enterprise.

The FCA handbook defines a micro enterprise

as: "an enterprise which:

- (a) employs fewer than 10 persons; and*
- (b) has a turnover or annual balance sheet that does not exceed €2 million"*

Zurich contends that S has more than 10 employees (11), including Mrs B and her husband. It relies on a document provided by Mrs B entitled "list of employees from 1st January 2012 to - 24 August 14" that names nine employees, excluding Mrs B and her husband.

Because the complaint is brought on behalf of S, and because of what I have said above about the status of S, it seems to me that any employees were employed by an unincorporated partnership. And so, S had no employees, with the possible exception of its two directors.

So, I'm satisfied that S has fewer than 10 employees for the purposes of section 2.7.3 of the FCA handbook. And so, S can be considered as a micro enterprise.

Dismissal

Zurich also said there are allegations of serious fraudulent activity to be determined. And that the Financial Ombudsman Service should dismiss the complaint, as those issues are better dealt with under oath in court.

As I have said, I can't see any evidence that S has ever traded or paid VAT, or any other taxes. The reason it has not paid such taxes is because it's not liable to do so: any tax liabilities fall on the unincorporated partnership. As there are no allegations of tax evasion against S, it follows that it would not be appropriate for me to dismiss the complaint. And I'm satisfied that this complaint is one I can properly address."

I asked Mrs B and Zurich to provide any further submissions or evidence by 27 November 2019. Zurich accepted my provisional decision and said it had nothing further to add.

Mrs B didn't accept my provisional decision. In summary, she said:

- If her case is looked at from a 'fair and reasonable' perspective, she meets the test for insurable interest because she owns both the Property and S, so she has lost out;
- Her situation is comparable to that of a property that's rented through a 'basic commercial arrangement' whereby the property is 'in the name of the tenant' but the contract of insurance is in the name of 'the commercial entity'; and
- If it's right that she has no insurable interest, the policy was mis-sold as it didn't meet her demands and needs, and she relied on the broker to provide a suitable policy. And that the broker is an agent of Zurich, so Zurich is responsible for its actions.

Mrs B asked me to reconsider my decision and uphold her complaint.

my findings

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

Mrs B says she has an insurable interest because she owns both the Property and the policyholder (S). So, looking past the pure legal approach and considering our service's fair and reasonable principles, Mrs B says her situation provides the required relationship to meet the test for 'insurable interest'.

Mrs B is right in saying our service has a fair and reasonable remit and that we don't decide complaints purely based on the letter of the law. That remit comes from section 3.6 of the DISP rules of the FCA handbook (available online), which says:

"3.6.1 The Ombudsman will determine a complaint by reference to what is, in his opinion, fair and reasonable in all the circumstances of the case.

3.6.4 In considering what is fair and reasonable... the Ombudsman will take into account:

(1) relevant:

(a) law and regulations;

(b) regulators' rules, guidance and standards;

(c) codes of practice; and

(2) (where appropriate) what he considers to have been good industry practice at the relevant time.”

When I reached my provisional findings, I did so based on what I thought was fair and reasonable to both parties. In the circumstances of this particular case, while the legal position isn't the only matter I have to consider, I haven't seen anything to persuade me that it would be reasonable to depart from the established legal principle of insurable interest.

I acknowledge that Mrs B owns both S and the Property. And that Mrs B has lost her business as a result of the fire. But the fact that the policy was in the name of S, which had no financial interest in the Property is fatal to the claim. If I were to agree with what Mrs B has said, I would effectively be transferring the benefit of the policy from S to Mrs B which I can't reasonably do in this case.

Mrs B also compares her situation to that of a landlord and tenant arrangement whereby a property is insured by a landlord but is in the tenant's name. But in that scenario, the landlord *would* have an insurable interest as the legal owner of the property. The property would only be 'in the tenant's name' by way of a tenancy agreement or lease of some kind. That simply grants a right of possession and doesn't extinguish the landlord's ownership.

But in any event, I can only consider the facts of the case put before me. And, for the reasons I've said above, S can't claim against the policy because it didn't have an insurable interest.

Finally Mrs B said that, in light of my provisional findings, the policy didn't meet her needs. She says the broker should've addressed the issue of ownership at the point of sale, that she relied on the broker to advise her appropriately and that Zurich is responsible for the broker's actions.

So, Mrs B is raising two potential issues: that the broker has made a mistake, and that Zurich is responsible for the broker's actions. Because the complaint I'm looking at is against Zurich, any complaint about the broker must be dealt with separately. If Mrs B wishes to complain about the broker's actions, she must first contact the broker to put her complaint to it. The broker will then have the opportunity to respond to the complaint, before Mrs B can ask our service to look at it.

The same applies for Mrs B's complaint that Zurich is responsible for the broker's actions. When Mrs B first brought her complaint to our service, she complained that Zurich had declined her insurance claim. That's the complaint Zurich responded to and is the complaint our service has addressed. She didn't complain that she'd been mis-sold the policy or that Zurich is responsible for the broker's actions.

Because Mrs B hasn't previously raised this complaint with Zurich, I'm not able to consider it. Mrs B may say that she couldn't have known about this aspect of her complaint until recently. And I'm not suggesting otherwise, but the rules our service must follow state that a business must be given the opportunity to respond to a complaint, before we address it. So I can't consider the matter as part of this complaint.

my final decision

My final decision is that I don't require Zurich Insurance PLC to pay Mrs B's claim. But I am asking it to refund any premiums paid by or on behalf of S in respect of the policy in question.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B to accept or reject my decision before 17 January 2020.

Alex Brooke-Smith
ombudsman