

complaint

Mrs J, a director of S Ltd, complains that Markel International Insurance Company Limited ("Markel") have unfairly declined her company's claim for legal expenses.

background

S Ltd, a residential family centre, holds a social welfare insurance policy with Markel. In June 2017, Ofsted (the company's regulator) took action to withdraw S Ltd's registration as its care centre was deemed inadequate, and the compliance notice previously issued by the regulator had not been complied with.

S Ltd made representations to appeal this outcome, but Ofsted refused to overturn its decision to cancel the company's registration. As a result, S Ltd took the case to the first-tier tribunal (care standards) to challenge Ofsted's decision. And the company sought to claim under its social welfare policy with Markel for the costs it would incur in taking action to challenge the regulator.

Markel said that the policy did not provide cover for legal expenses *per se*, but that it did include cover for 'management liability' and 'entity defence'. However, the insurer said that neither of these sections of the policy would respond to cover the costs of taking action against Ofsted. They also declined to provide any compensation for court attendance under the policy. Unhappy with this, S Ltd referred its complaint to this service.

Our investigator didn't uphold the complaint. He thought that Markel's interpretation of the policy terms and conditions was fair; and considered that the policy was for the *defence* of claims made against the insured – not for initiating proceedings of the sort S Ltd had mounted against Ofsted. So the investigator agreed that the circumstances of S Ltd's claim did not meet the requirements for cover under either of the sections it had proposed. S Ltd disagreed, so the complaint has been passed to me.

my findings

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've decided not to uphold it, and I'll explain why.

I've considered Markel's decision to decline the claim under each of the proposed heads of cover to establish whether their decision was fair and reasonable in the context of S Ltd's claim. The relevant sections that have been cited are: management liability (including officer's liability and disqualification proceedings); entity defence and compensation for court attendance.

management liability: officer's liability

Section 3a of the policy terms and conditions provides cover for:

a. "Officer's liability

We will pay any officer for their legal liability for damages and costs awarded against them arising from any claim first made against them...which arises from any actual or

alleged wrongful act, error or omission committed or attempted by an officer during their performance of their duties as an officer of yours”.

It isn't in dispute that Mrs J is an 'officer of yours' given that she's a director of S Ltd. But Markel submit that this section does not apply as it is intended to cover claims against individual officers in their capacity as an officer, not for action being taken against a whole company, as in S Ltd's case.

But Mrs J submits that the action taken by Ofsted against S Ltd is simultaneously being taken against her, as it has certain consequences for her in her capacity as an officer. As such, she contends that individual officers are covered under this section to negate allegations made against them.

I appreciate that Mrs J feels strongly that Ofsted's decision was an attack on her individually as an officer. And I accept that cover would potentially be available under this section if direct action were in fact being taken against Mrs J for acts or omissions carried out in her *capacity* as an officer. But as it stands, Ofsted's decision was in relation to cancelling the registration of the registered provider, which is S Ltd as a *company*. Limited companies and their officers/directors are discrete legal persons. The regulator was not taking action against Mrs J individually, or accusing her of wrongdoing in her capacity as an individual officer. So I do not consider Markel's interpretation of this policy section to be unreasonable.

management liability: disqualification proceedings

Section 3c of the policy sets out:

c. “Disqualification proceedings

We will pay any officer for costs and expenses arising from disqualification proceedings which are first ordered or commissioned and reported to us during the period of insurance shown in the policy schedule.”

'Disqualification proceedings' are further defined by the policy as meaning *“legal action taken against the officer following which they are liable to be disqualified from continuing to be a director or officer of yours”*.

Mrs J submits that it was necessary for S Ltd to appeal against Ofsted's decision in the tribunal because not doing so would have resulted in Ofsted not only cancelling the company's registration, but also Mrs J being disqualified in law from being a childcare provider. So she says the tribunal ought to be considered as 'disqualification proceedings' under the policy. And even though the action was technically brought by S Ltd, Mrs J says it was the only available response to the decision being taken by Ofsted in order to avoid her being disqualified as a director.

I've considered Mrs J's submissions carefully. But again, I can't ignore that the purpose of Ofsted's decision was to cancel the registration of the registered provider – which was the company S Ltd. It was not seeking to disqualify Mrs J personally as a company director or issue proceedings to that effect, so I do not consider the circumstances of the tribunal to be covered by this section. The action taken by S Ltd in the tribunal was ultimately to challenge an administrative decision concerning the company's registration; it was not specifically in relation to preserving Mrs J's status as a company director.

I appreciate that Mrs J considers disqualification to be a potential consequence of the cancellation (although this appears to be debatable based on later correspondence where Mrs J was told by her solicitor that the disqualification regulations and effects do not apply to residential family assessment centres). But in any event, I consider it a strained interpretation to say that the tribunal case ought to be regarded as 'disqualification proceedings' in itself because, fundamentally, that was not the nature of the decision taken by Ofsted, or the subsequent challenge of that decision in the tribunal.

So I do not think Markel have acted unreasonably by denying cover under this section.

entity defence: investigations

Section 4c of the policy reads:

c. "Investigations

We will pay you for costs and expenses arising from an investigation which is first ordered and commissioned and reported to us during the period of insurance shown in the policy schedule".

The term 'investigation' is further defined by the policy as *"any official investigation, examination, inquiry or other proceedings instigated against you by any official body or institution, other than HM Revenue & Customs, that is empowered to investigate your affairs in respect of health and safety"*.

S Ltd says that this section of the policy is engaged because Ofsted is an official body who is empowered to investigate affairs in a way which has caused a risk to its business, and that adverse publicity exists to an extent that fulfils the policy's definition of 'crisis'. Amongst other things, the policy defines a 'crisis' as *"investigation by any official body that is empowered to investigate your affairs where in our opinion there is a risk to your business as a consequence of adverse press..."* But in referring to the need for a 'crisis', S Ltd appears to have conflated the requirements of cover under section 4c (investigations), which has no such requirement, with other sections.

The only section of the entity defence cover that seemingly requires a 'crisis' is section 4a:

a. "Public relations crisis management

We will pay you for costs resulting from the use, with our prior agreement, of the crisis response service following a crisis".

This section provides cover for the costs of using the insurer's crisis response service, which the policy describes as 'public relations specialists'. It does not provide cover for legal costs and expenses of the sort S Ltd is seeking to recover after taking action against Ofsted in a tribunal setting. S Ltd says it also had to engage solicitors and counsel to defend its reputation before the Family Court due to the risk of potential adverse findings being disclosed by the District Judge. I haven't been provided with any further information in relation to this. But again, I do not think this section of the policy would cover such costs, as it only covers the costs of the insured using Markel's crisis response service, not the insured instructing its own legal team. So I do not consider section 4a to be engaged in either of these circumstances.

I have therefore considered the requirements of section 4c as they are stated in the overall and correct context of the policy (namely, without interpolating the definition of 'crisis') where cover requires an 'investigation' – i.e. *"an official investigation examination, inquiry or other proceedings instigated against you by any official body or institution...that is empowered to investigate your affairs in respect of health and safety"*.

Markel declined cover under this section as they said that Ofsted undertake inspections routinely as part of the ordinary course of the insured's business, so it cannot be considered a health and safety investigation. But on the other hand, S Ltd submits that there was an investigation by an official body (Ofsted) in respect of health and safety in which they had to respond. It acknowledged that there hadn't been an accident which was being investigated by the Health and Safety Executive, for example, but that there was conduct which the regulator was saying was unsafe and failing to meet statutory requirements.

I accept there may have been elements of Ofsted's inspection that would've been concerned with health and safety in the broadest sense. But it would likely have been just one measure being considered amongst various others as part of a routine inspection that led to the regulator issuing requirements on S Ltd to improve, which were not subsequently met and led to the company's registration being cancelled. So I'm not persuaded that this can reasonably constitute a health and safety investigation of the sort the policy was intended to indemnify, and I consider Markel's reasons to decline cover on this basis to be fair in the circumstances.

management liability: compensation for court attendance

S Ltd further contends that it is entitled to compensation for court attendance under section 3n of the policy which sets out:

n. "Compensation for court attendance

If at our request any officer of yours or any employee attends a court as a witness in connection with a claim we will pay the following amounts:

- *for any officer £500 per day*
- *for any employee £250 per day*

for each day on which attendance is required".

S Ltd says that the tribunal proceedings required the attendance of its officers and employees as witnesses, and that it is unreasonable for Markel not to pay compensation under this section. But this policy section will only cover court attendance that has been requested by the *insurer*, not for officers and employees to attend proceedings that have been initiated by the company itself. So I do not consider it unreasonable that Markel did not accept the insured's claim under this section either.

Finally, S Ltd says that Markel initially provided the services of a consultancy to assist with the claim, which it says demonstrates there was an acceptance that the company was covered for their dispute with Ofsted. But I don't agree. An insurer is entitled to assess the validity of a claim by appointing third parties before deciding whether or not to provide indemnity. And I'm not persuaded that the initial appointment of a third-party consultancy by Markel would amount to an express or implied acceptance of the claim by the insurer.

In summary, and after considering each of the policy sections above, I do not consider Markel to have declined S Ltd's claim unfairly. I appreciate this has been a difficult time for Mrs J, and I understand that she is currently disputing the tribunal judgment and overall conduct of the inspectors throughout the whole process. But I'm afraid this does not make a difference in terms of whether the action being taken falls into the scope of cover under the policy. And for the reasons outlined above, I'm not persuaded that the circumstances of S Ltd's dispute with Ofsted are covered by the policy.

my final decision

For the reasons given above, I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask S Ltd to accept or reject my decision before 14 July 2019.

Jack Ferris
ombudsman