An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2018-0077
Sector:	Insurance
Product / Service:	Other
Conduct(s) complained of:	Claim handling delays or issues
Outcome:	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

This complaint relates to the Provider's decision to settle legal proceedings taken against the Complainant in respect of a workplace accident. The Complainant, a transport company, had a policy of insurance underwritten by the Provider which covered a number of vehicles. A driver employed by the Complainant was delivering concrete to a construction site when the accident occurred. The injured party was employed by an agency and not by the Complainant. The injured party suffered damage to his fingers when attempting to unload concrete from a vehicle belonging to the Complainant. Proceedings were issued by the injured party against a number of parties, including the agency that he was employed by, the party responsible for the site, and the Provider. In the course of litigation, a decision was taken by the Provider on the advice of its legal representatives to release the other co-defendants from the proceedings and ultimately to settle the action for €100,000 with no admission of liability to the injured party. The Provider is aggrieved that any settlement was made with the injured party as it does not believe that it had any liability towards this party. The Complainant is further aggrieved at the level of settlement which was reached. The Complainant is also concerned that its no claims bonus is affected by a decision taken unilaterally by the Provider and with which it does not agree. The Complainant has requested that there be no impact on its no claims bonus arising from the settlement reached with the injured party.

The Complainant's Case

In an oral complaint made to the Provider, a representative of the Complainant noted his concern that the Complainant was not liable for the accident in question and does not

believe that the claim should have been paid or paid to the level that it was. The Complainant is also concerned that it's no claims bonus is affected by the payment.

In a letter to this office dated 7 May 2017, the Complainant notes that it is deeply aggrieved at the way its case was handled by the Provider and those involved with the investigation. It notes its belief that if the barrister had been in possession of the true facts, she would have been in a far stronger position to defend the case. It notes that it was instructed by the solicitor representing the Provider not have any interaction with those present at the joint inspection on 3 August 2016. The Complainant is of the view that this has resulted in serious inaccuracies being presented to the barrister in question. The Complainant suggests that the concrete chute was in perfect working order. It suggests that the offending chute was not hydraulically operated and rather that it hinges off the main chute which is in turn hydraulically operated and operates by simply pulling it by the handle to a vertical position and leaving it to fall using gravity. The Complainant cannot therefore see how there could have been a hydraulic failure. It further argues that had there been a hydraulic failure, the truck would not have been able to discharge its load and that there are a number of people present who could have verified that the load was in fact discharged on the day in question. The Complainant accepts that the truck in question was repainted at some point after the accident.

The Complainant is adamant in its view that the safety hook was on the truck at the time of the accident and that had it been allowed to participate at the inspection on 3 August 2016, it would have vigorously argued that point. It suggests that the hook was present on the truck for many years prior to the accident and that its employees could have verified this under oath. It accepts that its driver may have been naive in believing that the injured party was competent in the operation of the chute but that is common practice at construction sites and usually witnessed by safety officers. It accepts that it placed a safety sign on the back of the truck following the incident but suggest that this was a responsible reaction to the incident and done in good faith to help prevent further incidents.

In a further response to an opinion on liability from counsel, the Complainant takes issue with a number of points raised. The Complainant notes that the injured party claimed that there was a hydraulic malfunction of the concrete chute on the day of the accident that caused the chute collapse and inflict injury upon him. The Complainant accepts that this conclusion was also arrived at by engineers on behalf of the injured party and engineers on behalf of the two co-defendants in the action following an inspection on 3 August 2016. The Complainant notes that the view was also taken that the configuration of the chute was different on 3 August 2016 as opposed to its configuration on the day of the initial inspection by WW on 10 October 2014. The Complainant does not accept that the configuration was different, other than a paint job to the vehicle. The Complainant states that it is not fair to say that its representatives were not available to demonstrate the operation of the vehicle as the company was advised by the solicitor acting on behalf of the Provider to have no interaction whatever with the parties present. The Complainant's view is that the case was lost on this basis as if the company had been given the opportunity, it would have been easy to demonstrate that even if hydraulic failure occurred that the injured party's version of events could never have ensued. The Complainant further suggests that it could have

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demonstrated that the injured party's version of events was implausible as the accident could not have happened in the way the injured party contends that it did.

The Complainant suggests that if the Provider had pursued a defence rather than a settlement, there was a reasonable legal chance to obtain photos of the vehicle directly after the incident occurred as photos were taken by an engineer working on site for the third defendant to the proceedings.

These photos would, in the Complainant's view, have proven that the chute was in perfect condition on the day in question. The Complainant also suggests that a number of witnesses could have verified that there was a safety hook on the vehicle prior to the incident, a fact that was in dispute between the parties to the litigation. The Complainant suggests that the injured party's suggestion that he had been out of work for a period after the incident is untrue as an agent of the Complainant met the injured party on the same site a few weeks later. The Complainant points to a query raised by the Provider as to why it was the only defendant left standing in the case and the Complainant expresses its view that if it had been allowed to participate in the inspection on 3 August 2016, this would not have happened. The Complainant suggests that too much weight was given to the submissions of the opposing engineers in the case and that the case should have been defended more vigorously.

The Provider's Case

In a final response letter dated 24 March 2017, the Provider notes that the Complainant's motor policy covers its legal liability to third parties arising out of accidents involving the insured vehicle. It confirms that it primary duty is to its policyholder and, like all insurers, it will support its insured's position as far as possible on the basis of the evidence before it. It argues however that it has to consider the likely view of the court as regards liability for an accident and the viability or economics of settling a third party claim out of court as opposed to incurring additional legal costs and expenses for allowing a matter to proceed to litigation. Having reviewed the file, the Provider notes its understanding that its agent, WU, procured the opinion of a barrister to determine the likely findings of the court and that a copy of this opinion was provided to the Complainant. It notes the barrister's opinion which advised that it would be very difficult to defend the case in court.

The Provider also brings attention to the policy wording under the heading entitled "Dealing with Claims" which provides that the Provider can:

> "*Take over, defend or settle any claims in your name or that of any other person insured by this Contract of Motor Insurance and can deal with the claim in any way that we think is appropriate*."

The Provider notes that the barrister's opinion is very clear and that it cannot see any reason to disregard her opinion. The Provider expresses its view that the claim was handled in an appropriate manner and that the correct outcome was reached.

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Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainant was given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision I have carefully considered the evidence and submissions put forward by the parties to the complaint.

Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties 9 July 2018, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

In the absence of additional submissions from the parties, the final determination of this office is set out below.

In relation to jurisdiction, the Complainant has provided evidence that the annual turnover of the company is less than €3 million per year and that it is not a member of any group of companies. Therefore, it falls within the definition of a consumer for the purpose of taking a complaint to this Office.

The matter to be considered is whether or not the Provider was entitled to settle the proceedings in the present case without the authorisation of the Complainant. The policy documentation submitted to this office confirms that under the contract between the parties, the Provider was entitled to settle the proceedings. In a section entitled "dealing with claims", policy provides as follows:

> "*We can:*
>
> - *take over, defend or settle any claims in your name or that of any other person insured by this Contract of Motor Insurance and can deal with the claim in any way that we think is appropriate*".

Under section 7 entitled "no claims discount", the policy provides as follows:

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> "*We will reduce or remove your No Claims Discount if we make any payment whatsoever, even if the accident is not your fault, unless we get the money back from someone else*."

On the basis of the contract between the parties, therefore, the Provider is entitled to settle claims made against an insured such as the Complainant and to deal with a claim in any way it thinks appropriate. It is further clear that an insured's no claims discount will be affected by any pay out made by the Provider. The contract does not contemplate the insured having any control over the decision to negotiate proceedings taking against it.
The Complainant appears to have informed WU of the occurrence of the accident in an accident report form dated 3 October 2014. The Complainant indicates its belief that it was not liable for the accident as the injured party had no authority and under no obligation to interfere with the chute mechanism on the vehicle. The Complainant indicates that it did not report the incident at the time of the accident on 2 July 2014 as the company was of the view that it was blameless for the injuries incurred by the third party. The Provider does not appear to have taken any issue with the delay in notification. It was clearly a notice on the basis of this accident report form that the Complainant did not consider itself to be liable for the incident.

It is clear that the Complainant in the present case is strongly of the opinion that it should not have been held liable for the accident in question. It has raised its view that the injured party's claims were not properly investigated and that, if they had been, it would have been clear that there was no malfunction of the concrete chute on the day of the accident and that the injury suffered was entirely the fault of the injured party himself who should not have interfered with the chute mechanism. I can understand the frustration of the Complainant and the position it finds itself in in the present case and I have no doubt that its view that it would not ultimately have been found liable by a court is genuinely held. I also appreciate the frustration that an insured such as the Complainant must feel in a case such as this where a decision is made, effectively on its behalf, to settle a claim with no admission of liability where this decision will ultimately affect the insured's no claims bonus.

The contract of insurance between the Complainant and the Provider expressly allows for the Provider to settle a claim on behalf of an insured.

The Complainant made it clear that it was not happy that the proceedings had been settled nor was it settled for the sum of €100,000. I accept that the Provider and its agent, WU, explained as fully as they could why the relevant decision had been taken. I note that a formal written opinion on liability was obtained from junior counsel who had acted in the proceedings to explain the reason why the offer was made. This opinion was provided to the Complainant with a view to explaining the decision that was taken. It further appears from audio recordings that were provided to this office that the Provider listened to the concerns raised by the Complainant and put the Complainant's representative in touch with the solicitor who had charge of the proceedings so that she could further explain why the relevant decision was taken. In the circumstances, I accept that the complaint itself was handled appropriately by the Provider who gave as much assistance as it could to the Complainant in an attempt to alleviate its concerns.

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It is impossible to predict with certainty the outcome of any court proceedings. Legal advisers with experience in the area of personal injuries can only give their advice and make decisions in conjunction with their clients on the basis of what they perceive to be the most likely outcomes based on their experience and the evidence in front of them.

I make no finding as to the appropriateness of the settlement as once the Provider had decided to take over, defend or settle the claim, this became a matter for the commercial discretion of the Provider.

In light of all the circumstances, I do not uphold this complaint.

Conclusion

My Decision pursuant to ***Section 60(1)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, is that this complaint is rejected.

The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.

GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

30 July 2018

Pursuant to *Section 62* of the *Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will publish legally binding decisions in relation to complaints concerning financial service providers in such a manner that—

(a) ensures that—

(i) a complainant shall not be identified by name, address or otherwise,
(ii) a provider shall not be identified by name or address,
and

(b)* ensures compliance with the Data Protection Regulation and *the Data Protection Act 2018.