An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2018-0199
Sector:	Insurance
Product / Service:	Farm
Conduct(s) complained of:	Rejection of claim
Outcome:	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

The Complainants hold a farm multi-peril policy with the Provider, incepted on 6 March 2008. The complaint is in relation to a repudiation of claim on the said policy under Endorsement 302 which concerns professional fees for an audit conducted by the Revenue Commissioners on the first Complainant's business and related tax affairs. Endorsement 302 cover is in respect of professional fees and costs incurred by an insured arising out of an audit by Revenue. Revenue notified the Complainants of the audit on 13 October 2008 and concluded the audit on 3 June 2014. The audit concerned tax years 2004 to 2008. The finding by the Revenue Commissioners that there was an under declaration of taxes was appealed unsuccessfully to the Circuit Court.

The Complainants' claim under their farm multi-peril policy, their expenses arising from the Revenue audit in the amount of €31,611 in respect of legal and accountancy fees incurred following the Revenue audit. The Provider rejected the claim on the basis of Proviso 3 of Endorsement 302 which requires that an insured take reasonable care to maintain proper business accounts and to have accounts independently prepared on an annual basis. Subsequently the Provider has pointed to further breaches of various notification provisions which require the insured, among other things, to immediately notify the insurers of any event likely to result in a claim. The Provider further argues that no indemnity is provided for relevant accountants fees and expenses and lawyer's costs incurred prior to its written acceptance of a claim. The Complainants deny that they failed to take reasonable care or that there was a breach of Proviso 3 in relation to the maintenance of business accounts. It was further argued that the Provider initially refused to recognise that the policy included Revenue Audit cover and when it did so and a complaint was made to this office, the

Provider then sought to rely on further alleged breaches of condition in justifying its refusal to cover the claimed expenses.

The Complainants' Case

The Complainants claim that the business activities audited by Revenue originally related to a disposal of land by the first Complainant in 2007/2008. Revenue then extended the audit to include the years 2004, 2005 and 2006. Revenue informed the Complainants of this by letter dated 26 January 2010. The Complainants accept that the categories of income and expenditure audited related primarily to capital gains tax on the sale of lands and an option agreement but that matters pertaining to income tax and VAT were also addressed during the audits. The Complainants note that the assessment raised by revenue for the tax year 2008 was appealed to the Appeals Commissioner and subsequently appealed to the Circuit Court. Both appeals were unsuccessful and the Complainants had to pay their own accountancy fees and legal fees. The relevant accountancy and legal fees are itemised and set out in the amount of €31,611.

In a letter to the Provider's representative, D, dated 12 September 2016, the Complainants argued that they had complied with proviso 3 of Endorsement 302 and had taken all reasonable care to ensure that the business accounts were properly maintained and independently prepared. They argued that the first Complainant maintained all records in relation to his business accounts; submitted all records to his then accountants; provided all information and explanations requested by his accountant; and provided all information and explanations requested by Revenue during the audit. In response to the suggestion that there had been in under declaration of income tax, the Complainants stated that no under declaration of income tax arose in respect of the audit and that Revenue did not apply any additional income tax liability. The additional tax liabilities related entirely to capital gains tax.

By letter dated 22 August 2017, the Complainants argued that the Provider's representative, D, has sought from the outset to find some basis to decline the Complainants' Revenue audit expense claim. They argue that there were initially advised that the relevant cover did not apply to the insurance policy but that the Provider subsequently agreed that Revenue audit cover did in fact apply to the policy. The Complainants note that in March 2016, the first Complainant met with Mr M, a branch manager of the Provider, and informed Mr M of the Revenue audit case. They allege that Mr M requested that the first Complainant submit a claim to the Provider in full knowledge that the time limit set down in Endorsement 302 of the policy were not complied with so it cannot therefore be the case that the Provider now seeks to deny the Complainants' claim on the basis of a breach of the notification provision. Further, the Complainants allege that the alleged breaches were notified to them on 12 October 2016 following various correspondences in relation to compliance with proviso 3 of Endorsement 302. The Complainants do not accept that any breach of Proviso 3 occurred. The Complainants note that D initially sought to argue that there was an under declaration of income tax which had been determined to represent a breach of proviso 3 but that when the Provider was informed that no income tax liability arose following the audit, D advised that they had inadvertently referred to an under declaration of income tax and stated that an under declaration of any tax which the policyholder has a duty to pay represents a breach

/Cont'd…

of the terms of the policy. The Complainants argued that proviso 3 does not state that the claim would be denied when a tax liability arises and in fact makes no reference to tax but rather requires an insured to take "reasonable care" in relation to its business accounts. It is argued that the first Complainant demonstrated that he had taken reasonable care by ensuring that the business accounts were properly maintained and independently prepared annually.

By letter dated 13 September 2017, the Complainant referred to a letter from the Revenue Commissioners to the first Complainant dated 3 March 2014 which sets out the final settlement details in relation to the liabilities arising during the audit. They note that in relation to the tax year 2004, the penalty applied by Revenue is 15% of the tax liability arising. The penalty applied is the lowest penalty level of "insufficient care" where no qualifying disclosure is made. The Complainants note that in relation to the liabilities arising for the tax year 2008, Revenue did not apply any penalty for that year. The Complainants argued that under the policy, the first Complainant is required to take "reasonable care" to ensure that his business accounts were properly maintained and it argues that reasonable care was taken which is supported by the low-level penalty applied by Revenue. The Complainant states that the assertion by the Provider that a 30% penalty for "gross carelessness" was applied by Revenue in relation to the audit is factually incorrect.

By letter dated 17 October 2017, the Complainants point out that the Provider seeks to rely on penalties applied by Revenue in the order to support the decision to decline the claim. It argues that Revenue applied no penalties for 2008 and the minimum level of penalties for 2004 was applied at a level of "insufficient care". They argue that the Revenue audit revolved around how the capital gains tax liability was calculated and concerned the claim for capital gains tax relief. They argued that Revenue accepted that the lowest level of penalties should apply for 2004, no penalties for 2008 should be imposed and that no income tax liability arose as the business accounts were correct. The Complainants further point to the Provider's argument that Revenue declined to apply interest and penalties to undeclared income as the liability was covered by payments already made and that if those payments had not been made, the tax liability undeclared income would have been subject interest and penalties. The Complainants argued that this statement is incorrect and that the payments already made refers to capital gains tax payments for the years 2005, 2006 and 2007. It also argues that the Provider was wrong to add a false implication to the Revenue letter as the Revenue letter only refers to payments made in the years 2005 to 2007 and does not relate to relevant tax payments for 2004 and 2008.

The Complainants further refer to an accusation by the Provider that the Complainants' accountant agreed that a €5,000 discount applied by a previous accountant on its fees was due to an admission that the previous accountant had misinformed their client, the Complainants. The Complainants argue that this is incorrect and that their present accountants do not or could not know why a discount was applied as this is a matter for the previous accountants to explain why they applied a discount their fees. The Complainants argue that the Provider has continually tried to find some basis to decline the claim. The first Complainant was initially advised that the insurance policy did not cover Revenue audit expenses but this was not the case and the Provider subsequently accepted that the policy was effective on the date of the claim. The first Complainant was then advised that he did

/Cont'd…

not comply with proviso 3 of Endorsement 302 but the Complainants argue that it can clearly be shown that necessary "*reasonable care*" was taken with his account as required. When the Provider was advised that the matter would be appealed to this office, the Complainants suggest that additional grounds were then added as a basis for a declining the claim, based on exceptions 1(a) and 1(d) and special conditions 1 and 4. The Provider then sought to support its case by relying upon the level of penalties applied by Revenue in the audit and stated that the penalties applied were in the "gross carelessness" category.
The Complainants argue that this is factually incorrect and that the final letter from Revenue dated 3 June 2014 confirms otherwise. The Complainants argue that the relevant insurance policy provided cover for expenses incurred in the event of a Revenue audit, that the accounts maintained by the first Complainant were correct, and that his accounts and tax returns were submitted to Revenue by his accountants annually, as required.

By letter dated 4 November 2017, the Complainants deny that the first Complainant withheld information of his tax affairs from Revenue as alleged by the Provider. The Complainant further argues that the reference made to disclosure in the Revenue letter does not mean that information was withheld from Revenue. The Complainant argues that the Revenue letter of 31 May 2011 refers to the fact that no qualifying disclosure was made by the first Complainant to Revenue and that if a qualifying disclosure had been made, reduced penalties would apply. It argues that the minimum level of penalties were applied by Revenue for 2004 and no penalties were applied by Revenue for 2008 as set out in Revenue letter dated 3 June 2014.

By letter dated 17 November 2017, the Complainant drew attention to the wording of Endorsement 302 and proviso 3 of same. The Complainants argued that the Provider has failed to identify any aspect of the business accounts that were not properly maintained. Further, the Complainants allege that the Provider seeks to rely upon a tax liability arising out of the Revenue audit as a basis upon which to allege that the accounts were not properly maintained without providing any evidence to support the allegation. They suggest that if the Provider succeeds in denying the claim for expenses on the basis that the tax liability arose in the audit, the policy cover for Revenue audit expenses contemplated in Endorsement 302 is effectively void. The Complainants argue that the Provider failed to demonstrate that the client did not comply with proviso 3 of the insurance policy and therefore the claim for expenses incurred in the Revenue audit is in accordance with the insurance cover and the claim for expenses should therefore succeed.

The Provider's Case

By letter dated 19 August 2016, the Provider's representative, D, noted that initial notification of the Revenue audit was issued to the first Complainant on 13 October 2008, which date represents the date of commencement of the audit and the date of the claim for the purposes of policy cover. D argues that the Revenue audit established that there are been incorrect claims for retirement relief in 2004 and 2008 and that there had been an under declaration of taxable income between 2005 and 2007. D referred to Proviso 3 of Endorsement 302 which obliges an insured to take "*reasonable care to ensure that the business accounts have been properly maintained and independently prepared annually*". D stated that "*Under-declaration of income tax has been determined to represent a breach of*

/Cont'd…

Proviso 3, and therefore also a breach of the terms under which Revenue Audit cover is provided under the policy". D therefore advises that it has been instructed by the Provider to notify the Complainants that the claim for Revenue Audit costs is therefore declined.

A further letter from D dated 27 September 2016 notes that as requested, the Complainant's claim for Revenue audit costs has been reviewed by the Provider and it has confirmed the declinature of liability on the grounds of breach of Endorsement 302 to the policy.

It notes that in its previous letter of 19 August, it inadvertently referred to under declaration of income tax as having been determined to be a breach of the terms of the endorsement, when "*an under declaration of any tax, which the policyholder had a duty to pay, represents a breach of the terms of the policy*." It argues that the obligation under proviso 3 requires that the trading accounts of the business are properly maintained and independently prepared and it is not sufficient to argue that the Complainants provided all trading information to the accountants and to infer that they prepared incorrect trading accounts and returns for submission to Revenue.

By letter dated 12 October 2016 from the Provider's representative, D, it was alleged that in addition to the circumstances of the audit demonstrating a breach of Proviso 3 of Endorsement 302, breaches would also arise under a number of other policy conditions:

- exception 1(a) in relation to accountants' fees and expenses or lawyers costs incurred before the written acceptance of a claim;
- except 1(d) in relation to a failure to notify the Provider of the audit within 60 days of becoming aware of the investigation;
- special condition 1 arising from the alleged failure to advise the Provider as soon as possible of any investigation which may give rise to a claim and in all cases before any accountants fees and expenses for lawyers costs have been incurred;
- special condition 4 arising from an alleged failure to submit to the Provider all accounts for accountants' fees and expenses or lawyers costs payable immediately on their receipt;
- general condition 10 of the multi-peril policy wherein the insured is required to immediately notify insurers of any event likely to give rise to a claim within 30 days.

D states that the audit was notified to the first Complainant by Revenue on 13 October 2008 and the audit was completed on 3 June 2014 but the claim was not reported to the Provider until 7 March 2016, some 21 months after the completion of the audit.

By letter dated 11 January 2017 (the final response letter), the Provider noted that the claim involves an audit conducted by the Revenue Commissioners of the first Complainant's business and related tax affairs from 2004 to 2008 inclusive, resulting in an assessment by Revenue of undeclared taxes together with penalties and interest. The Provider notes that appeals to the Revenue Commissioners and the Circuit Court failed to alter the original decision. The Provider refers to the letter from its representative, D, dated 12 October 2017 which identified the breaches contributing to the declinature of the claim as set out above. It further noted that the audit was notified by Revenue on 13 October 2008 and completed

on 3 June 2014 but that the claim was not reported until 7 March 2016. The Provider points to general condition 10 of the policy requiring a policyholder to forthwith/immediately notify the insurer of any event likely to result in a claim. It highlights that exception 1(a) specifies that the endorsement does not provide indemnity for accountants fees or expenses or lawyers costs incurred before the written acceptance of a claim by or on behalf of the company. Exception 1(d) also provides that indemnity is not provided in respect of "*any investigation or hearing which has not been advised to the Company within 60 days of the Insured becoming aware of such investigation*".

The Provider further points to special condition 1 and 4. Finally Proviso 3 of the endorsement is highlighted, which states that cover is operable provided that the insured takes "reasonable care" to ensure that the business accounts have been properly maintained and independently prepared annually.

The Provider argues that while cover under the policy can operate when a Revenue investigation is settled by negotiation, the finding by the Revenue Commissioners of an under declaration of tax is a failure to take reasonable care to maintain proper accounts or that those accounts be prepared independently an annual basis, either or both of which represent a breach of the proviso. The Provider suggests that if the accountants that prepared said returns were negligent, legal advice should be sought. The Provider concludes that in summary, the failure of appeals to the Revenue Commissioners and the Circuit Court to reverse the Revenue's assessment of a considerable under-declaration of tax and the imposition of associated penalties result an in inability on the Provider's part to alter its denial of indemnity.

In a response dated 10 August 2017 to questions raised by this office, the Provider suggests that Revenue Audit cover is provided under the multi-peril policy by way of Endorsement 302 which is subject to various provisos, exceptions and special conditions. The Provider argues that Revenue Audit claims do not involve "damage" as is normally the case with claims and rather that the event giving rise to a claim is the issue by Revenue of a notification that the policyholder has been selected for audit. It suggests that the cover, when liability is accepted, is in respect of professional fees incurred by an insured arising out of the audit. Liability, once accepted by the Provider, operates to cover reasonable fees from the date on which the insured receives notification of the forthcoming audit until the audit has been completed. The Provider argues that an extended audit time can be an indication of difficulties in the audit on the part of Revenue but this not always so and the widening of the scope of the audit can be an indicator. The Provider notes that it denied indemnity in relation to the claimed legal and accountancy fees on the basis of a breach of Proviso 3 of Endorsement 302 but also notes the further breaches previously set out in the letter from its representative, D, relating to failure of notification.

The Provider argues that the claim was declined because of a breach of Proviso 3 of Endorsement 302 on the basis that the tax returns are based on the insured's accounts, details of which are incorporated in the tax return. The Provider argues that an under declaration of taxes being determined by the Revenue represents failure to maintain proper accounts. It argues that the insured was also informed that breaches had occurred in relation to exceptions 1(a) and 1(d) and special conditions 1 and 4 and general condition 10

/Cont'd…

of the policy. It argues that Revenue penalised the insured under the category of 'gross carelessness'.

The Provider argues that it has complied with the Consumer Protection Code in that its loss adjuster issued a letter to the Complainants confirming its appointment; all telephone calls were documented; and a letter from the loss adjuster to the Complainants' accountants set out the Provider's decision to decline the claim on the basis of the failure to take reasonable care in the submission of tax returns. The Complainants were also informed of details of an internal appeals mechanism.

The Provider argues that denial of lability was based on the findings of Revenue that the first Complainant had under declared taxes lawfully due.

The Provider takes issue with any suggestion that the under declaration resulted from the negligence of the Complainants then accountants. The Provider accepts that differences in interpretation of how particular income and/or expenses are dealt with in accounts and subsequent tax returns arise on a regular basis, often resulting in either an additional tax liability or an entitlement to a refund coming to light during a Revenue audit. It argues that, in this case, liability arose from a failure to disclose taxable income over a number of years and an incorrect claim of retirement relief in clear contravention of established practice and regulations. The Provider suggests that when the insured contested the assessment by Revenue in May 2011, Revenue appear to have widened the scope of the audit resulting in a revised increased liability.

By letter dated 4 September 2017, the Provider's loss adjuster is stated to have argued that the Provider's representative, D, was not seeking a basis to decline the claim but rather the policy schedule documentation provided to D indicated that Revenue audit cover had not been added to the relevant policy. The Provider subsequently confirmed that cover had been added in October 2008 under a general policy decision to immediately add Revenue audit cover to all farm multi-peril policies. He suggests that the amendment to the policy documentation was not affected before the following renewal in 2009 but that the position was subsequently rectified. The loss adjuster is also reported to have argued that Mr M, who was informed of the relevant Revenue audit claim, had no role in determining policy liability and that the application of policy terms and conditions was a matter that could only be determined after full investigation of the background and circumstances pertaining to a claim. He suggests that the Provider has no record to indicate there was any in-depth discussion of the claim at the time that Mr M was informed of it.

The loss adjuster argues that had the Revenue Commissioners and subsequently the Circuit Court judge accepted that, in the particular circumstances of the first Complainant's case, reasonable care had been taken to ensure that the business accounts have been properly maintained and independently prepared annually, no penalties would presumably have been levied in addition to the under declared tax subsequently established by the Revenue Commissioners to be due by the first Complainant. If the fault lay with the accountants, he argues that was something that would have been identified by Revenue or the judge in question and a case could have been taken against the accountants. He argues that, instead,

/Cont'd…

the Revenue Commissioners determined the penalty to be applied on the grounds of “gross carelessness”.

By letter dated 4 October 2017, the loss adjustor points to the Revenue letter of 31 May 2011 which applies a penalty rate of 30% for 2004, falling into the category of “gross carelessness”. For 2008, the loss adjustor argues that the penalty rate was just below 25% which is above the starting rate for the category “insufficient care”. The loss adjustor points to Revenue’s decision not to apply interest and penalties to undeclared income as the liability was covered by payments already made. He argues that these ‘payments already made’ refer to payments which were made by the first Complainant in error and that had those payments not been made, the first Complainant’s tax liability on undeclared income would have been subject to interest and penalties. The loss adjustor further points to the Revenue assessment which highlights the absence of disclosure at the outset of the audit and the nature and scale of the relief disallowed in determining that penalties would be applied. The letter notes that the assessment was not accepted as the audit continued until June 2014 where a final assessment of the liabilities was agreed in the total sum of €450,683.

The loss adjustor accepts that he cannot comment on how the final agreed settlement was reached but that the eventual amount paid was significantly more than had been levied against the first Complainant in the assessment in 2011. The loss adjustor notes that the Circuit Court refused the appeal and the first Complainant was confirmed as a tax defaulter. The loss adjustor states that in a phone conversation between the first Complainant’s present accountant and a member of the Provider’s staff, the accountant agreed that a €5,000 discount was granted to the first Complainant by his old accountants due to admission on behalf of the previous accountants that they had misinformed the client. The loss adjustor argues that if the first Complainant had maintained all records properly and all records had been submitted to it accountants, why was he found to have had undeclared income?

The loss adjustor states that while the level of penalties assessed by Revenue can be indicative, the level assessed or even whether penalties are levied does not determine policy liability. He notes that in this case the breach of proviso 3 arises from the first Complainant’s failure to declare taxable income to Revenue which has been determined previously to represent a failure to keep proper accounts on the grounds that any declaration of a taxable liability has to be supported by accounts. The loss adjustor also argues that the additional liability levied in 2014 after Revenue re-investigated the first Complainant’s business affairs would not have arisen or should have been apparent on the first inspection if the insured had been keeping proper accounts. The loss adjuster states that he cannot accept that the extra additional liability would not have attracted additional penalties and can only assume that a compromise was required to finalise matters.

By letter dated 25 October 2017, the Provider argues that the wording of Revenue’s letter of 31 May 2011 is clear and the fact that the first Complainant was finally assessed by Revenue to have an additional agreed liability of €450,683 under various heads seems to demonstrate that the first Complainant had not taken reasonable care to maintain proper accounts. The Provider points of the long drawn out nature of the audit and Revenue’s comments in the May 2011 letter that there had been an absence of “*any disclosure*

/Cont’d…

whatsoever" which confirmed its view that the first Complainant continued after the audit to withhold full information of affairs from Revenue.

By letter dated 9 November 2017, the Provider argues that had proper accounts been maintained by the first Complainant and the correct tax paid at the relevant time after the original liabilities arose, the final conclusion reached by Revenue in relation to the audit of the first Complainant's affairs would not have been what actually transpired. It notes that it cannot be disputed that Revenue was obliged to carry out an in-depth investigation into the relevant tax affairs to establish whether additional liabilities arose or that Revenue did apply penalties when those liabilities were eventually quantified. The Provider further argues that it cannot be ignored that the Circuit Court upheld Revenue's position in the case brought against them in connection with the audit of the first Complainant's affairs.

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 Complainants were 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 10 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.

The following additional submissions were received from the parties, after the Preliminary Decision issued:

1. Letter from the Complainants' representatives to this Office dated 24 July 2018,

/Cont'd…

2. Letter from the Provider to this Office dated 30 July 2018,

3. Letter from the Complainants' representatives to this Office dated 8 August 2018,

4. Letter from the Provider to this Office dated 10 August 2018,

Having considered those submissions, my final determination is set out below.

The relevant provisions of the contract of insurance in the present case are as follows:

"***302 Revenue Commissioners Audit***

It is agreed that Section 2 of this Policy extends to indemnify the Insured for Accountants' Fees and Expenses or the cost of a Lawyer, appointed by the Company, reasonably incurred in representing the Insured: –

1. *when an investigation into the Insured's business is settled by negotiation, or*

2. *at Revenue Commissioners' hearings in respect of an in-depth investigation by the Revenue Commissioners into the Insured's business accounts.*

Provided that:-
…

(3) the Insured has taken reasonable care to ensure that the business accounts have been properly maintained and independently prepared annually
. . .

(5) an in-depth investigation is deemed to have commenced when Revenue Commissioners first requested in writing that the business accounts and records are sent for examination or give notice of attendance to investigate the Insured's business accounts and records

. . .

*"**Exceptions***

This Endorsement does not provide indemnity:

1. *In respect of or arising from or related to:-*

   (a) Accountants fees and expenses or Lawyers' costs incurred before the written acceptance of a claim by or on behalf of the Company
   . . .

(d) Any investigation or hearing not advised to the Company within 60 days of the Insured becoming aware of such investigation.

. . .

Special Conditions

(1) the Insured must advise the Company as soon as possible of any investigation or hearing which may give rise to a claim in all cases before any Accountants' fees and expenses or Lawyers' costs have been incurred by the Insured.

. . .

(4) the insured must submit to the Company all accounts for Accountants' fees and expenses and Lawyer's cost payable under this Endorsement immediately on their receipt."

Proviso 3

The Provider primary relies on an alleged breach of Proviso 3 to Endorsement 302 to justify its decision to decline the Complainants' claim. After a general statement that indemnity will be provided in respect of accountants' and legal expenses concerning Revenue investigations, proviso 3 states:

"*Provided that:*

(3) the insured has taken reasonable care to ensure that the business accounts have been properly maintained and independently prepared annually".

It appears to be common case that the relevant expenses claimed would be covered by Endorsement 302 in the absence of any breach of policy conditions.

By letter dated 27 September 2016, the Provider's representative, D, stated that "*an under declaration of any tax, which the policyholder had duty to pay, represents a breach of the terms of the policy*." I accept (as has been argued by the Complainants) that this is not stated anywhere in the insurance policy document. There is no reference to the Provider's entitlement to decline the claim if a tax liability arises after an audit. I accept the Complainant's argument that, on this basis, the Provider would not pay out on any insurance policy in relation to a Revenue audit expense claim where a tax liability arose for a policyholder so the insurance would effectively be rendered useless unless an insured either avoided an additional liability pursuant to the audit or successfully appealed an audit assessment. As with any exclusion clause, if the Provider wished to avoid paying out on Revenue audit expenses in any case where tax liability arises, it was obliged to express the relevant exclusion clearly in the policy. It has not done so in the present case and indeed makes no reference whatever to an additional tax liability arising as relevant to its consideration.

/Cont'd…

The Provider is obliged to demonstrate that it comes within the terms of a relevant exception if it wishes to decline cover. Proviso 3 focuses on the exercise of reasonable care to ensure that business accounts are properly maintained and independently prepared annually.

No evidence has been provided to demonstrate that the Complainants failed to have their business accounts independently prepared annually. The only question that arises is whether 'reasonable care' was taken to ensure that the relevant accounts were properly maintained. The Provider does not provide any independent evidence of the alleged breach but rather points squarely to the fact of the Revenue audit and the settlement ultimately agreed in June 2014 as evidence of a failure to maintain proper business accounts.

An audit notification was issued to the first Complainant by the Revenue Commissioners on 13 October 2008. The notification was expressed to focus on a capital gain tax return for 2007. It is noted that there appears to have been an error on behalf of the first Complainant's then advisers as the sale of land should have been included in the capital gain tax return for the year 2008 rather than 2007 as the gain was assessable in 2008. By letter dated 26 January 2010, the first Complainant was informed that Revenue intended to extend the scope of the audit from the claim of retirement relief by the second Complainant in 2008 to include the years 2004, 2005 and 2006, including the position in relation to an option agreement entered into in 2004.

An amended Notice of Assessment of Capital Gains Tax for the year 2008 was issued to the first Complainant on 11 May 2011. In summary, Revenue concluded that in 2004 a claim for retirement relief was incorrectly made and the claim was disallowed. It further found that from 2005 to 2007, there was undeclared income from options payments. In addition in 2008, all requirements necessary for a claim of retirement relief for the second Complainant had not been met and the claim was disallowed.
Further, the Revenue Commissioners proposed a penalty in relation to the 2004 and 2008 audits under the category of "gross carelessness". A sum of over €250,000 was requested in settlement of the outstanding liability and it was noted that publication would apply.

I note that there is a disagreement between the parties in relation to a reference to disclosure in the May 2011 assessment. I am satisfied that the reference was to the fact that no qualified disclosure had been made by the first Complainant in response to the initial audit letter in 2008 and that the reference to disclosure cannot have the meaning argued for by the Provider (i.e. that the first Complainant withheld information of his affairs from Revenue).

The 2011 assessment allowed retirement relief to the first Complainant and was appealed on 25 May 2011 on the grounds that the second Complainant was also entitled to retirement relief. The determination by the Appeal Commissioners was handed down on 22 November 2012 and the appeal was rejected. The determination was appealed by the first Complainant and an appeal was listed before a Circuit Court in February 2014. Written submissions were prepared on behalf of the Complainants and the Revenue Commissioners and copies thereof have been provided to me. It appears from the submissions that the issue to be determined was whether the second Complainant held a beneficial interest in certain lands so as to be

/Cont'd…

able to claim relief pursuant to section 598 of the Taxes Consolidation Act 1997. The issue in the case appears to have been the interpretation of the word "owned" in section 598. It appears that the first Complainant was the legal owner of the lands in question. It was submitted on behalf of the Revenue that the Appeal Commissioner did not have jurisdiction to deal with equitable matters relating to the beneficial ownership of lands.

It was further argued that when hearing an appeal from a determination of the Appeal Commissioners, a Circuit Court judge exercises the same powers and authority and has the same restricted jurisdiction. Although I have no details in relation to same, I note that the appeal was rejected and that the Circuit Court upheld Revenue's assessment.

By letter dated 3 June 2014, the first Complainant was informed that the audit was concluded upon the offer of payment of over €450,000 in settlement of the liabilities identified during the audit. These related to underpayment or non-payment in respect of capital gains tax on land disposals and the availability of relevant reliefs. No additional income tax liability was assessed by Revenue in relation to the business accounts of the first Complainant. The letter details the additional liabilities broken down as follows:

> "**2004**
>
> Tax €184,737 Interest €69,252 Penalty €27,715
>
> **2008**
>
> Tax €117,500 Interest €51,449"

I note that when compared to the 2011 tax assessment, the tax liability for the year 2008 was reduced by Revenue in the 2014 settlement and that the tax liability for the year 2004 was increased with a consequent increase in interest. No penalty was levied in respect of 2008. The penalty levied in respect of 2004 was reduced slightly from the 2011 assessment in the 2014 settlement despite the fact that the tax liability assessed had increased quite significantly.

The Complainant is therefore correct that Revenue did not levy any penalty in respect of 2008 and that the penalty levied in respect of 2004 was at 15% of increased liability. I note the Provider's submission that its loss adjuster was not prepared to accept that the additional liability that was levied by Revenue between 2011 and 2014 would not have attracted additional penalties and so a compromise must have been required. I am not prepared to accept this argument which appears to be based on an unsubstantiated assumption on the part of the loss adjuster in question. The clear evidence before me from Revenue is that no penalty was applied in respect of 2008. It is difficult to understand how the Provider can purport to base a decision to repudiate liability in this case, even in part, on such an assumption.

I further reject the argument by the loss adjuster that if Revenue or the Circuit Court judge had determined that reasonable care had been taken with the maintenance of accounts that presumably no penalty would have applied. This is a mischaracterisation of the role of the

/Cont'd…

Revenue Commissioners and the Circuit Court judge in question, especially when one considers the substance of the appeal that was being made related to the availability of retirement relief and not as to whether proper business accounts have been maintained. I do not accept that the determination had to be made in these circumstances as to whether or not “reasonable care” had been taken. Instead, it appears that Revenue ultimately opted not to apply any penalty in respect of 2008 and applied a 15% penalty in respect of 2004 which does not appear to have been the subject of the Circuit Court appeal to which the majority of the accountants and lawyers fees relate.

I note from the Revenue penalty percentages table provided that a 15% penalty falls within the category of “insufficient care” which directs a penalty to be levied of between 10% and 19%. The next category, of “gross carelessness”, directs a penalty of between 20% and 49% in respect of first qualifying disclosures and between 30% and 74% in respect of second qualifying disclosures. It would therefore appear that Revenue considered that the outstanding liability from 2004 fell into the category of ‘insufficient care’ while there was no want of care in respect of the 2008 liability. The Provider in the submissions has repeatedly referred to the imposition of a “gross carelessness” penalty by Revenue in this case. While I accept that the 2011 assessment initially purported to apply such a penalty, it ought to have been clear to the Provider at the time the submissions were made and is certainly clear to me that this assessment was re-evaluated and that the penalties applied in 2014 were of a lesser degree.

In all of the circumstances, I am not satisfied that the Provider has demonstrated that the Complainants have breached Proviso 3 of the relevant endorsement. I am not, therefore, satisfied that the Provider was entitled to repudiate liability in respect of an alleged breach of Proviso 3. If this was the only basis upon which liability was denied, I would therefore be likely to uphold the present complaint but I do not believe that there has been compliance by the Complainants with other relevant notification conditions.

<u>Notification Conditions</u>

I note that exception 1(a) provides that the endorsement does not provide indemnity in respect of fees incurred before the written acceptance of a claim on behalf of the Company. There is no suggestion in the present case that the Complainants sought and received the Provider’s written acceptance of the claim prior to incurring the relevant accountants’ fees and lawyers’ expenses. I therefore accept that exception 1(a) has not been completed in the present case.

I note that exception 1(d) provides that the endorsement does not provide indemnity in respect of fees related to an investigation or hearing not advised to the Company within 60 days of the insured becoming aware of such investigation. The first Complainant was advised of the Revenue audit in October 2008. It appealed the initial 2011 assessment in 2012 and a final settlement was reached in June 2014. Notification of loss was made to the Provider in March 2016. Regardless of whether it is determined that the relevant investigation commenced (either in 2008, 2011, 2012, or 2014), the relevant notification to the insurer was not made within 60 days of the Complainants becoming aware of the investigation. I therefore accept that exception 1(d) has been breached in the present case.

/Cont’d…

For the sake of clarity, I am also inclined to the view that notification should have been made in 2008 when the first Complainant was notified of the audit on the basis of proviso 5 of the policy which deems the commencement of an in-depth investigation at the time that Revenue first requested in writing that the business accounts and records are sent for examination. Revenue's letter of 13 October 2008 requests that the first Complainant forward documentary evidence of the capital gains tax computation, all deductions and reliefs claimed and the purchase contract or evidence of acquisition of any asset disposed of. It therefore seems to me that the 60-day limit ought to have run from 13 October 2008, though the issue does not require a definitive finding due to the lateness of notification irrespective of what date is applied.

I note that special condition 1 obliges an insured to advise the Company as soon as possible of any investigation or hearing which may give rise to a claim and in all cases before any accountants' fees and expenses or lawyers costs have been incurred. As the first Complainant was notified of the Revenue audit in 2008 and appealed the 2011 assessment both to the Appeal Commissioners and the Circuit Court, it is clear that the obligation to advise the Provider "as soon as possible" of the investigation was not met by quite some margin when notification was made in March 2016. Further, it is clear that the relevant fees were incurred prior to notification being made to the Provider. I therefore accept that special condition 1 has not been completed in the present case.

Finally I note that special condition 4 obliges an insured to submit to the Company all accounts for accountants' fees and expenses and lawyer's costs payable under the endorsement immediately on the receipt. An invoice dated 19 January 2012 from the Complainant's accountant in the sum of €6,150 covers advice in relation to capital gains tax. A further invoice dated 20 September 2012 in the sum of €1,845 covers the preparation of a detailed tax return for 2011 and preparation for and attendance at the appeal court hearing. An invoice dated 30 September 2013 in the sum of €1,476 covers the preparation of a detailed tax return for 2012 and assistance given in reviewing capital gains tax matters. A bill of costs issued from a solicitor's firm on 15 April 2015 in the sum of €22,140 covers solicitors and barristers' fees in respect of the appeal to the Circuit Court. It would therefore appear that, other than an element of the two smaller invoices from September 2012 and September 2013 which cover the preparation of tax returns, the vast majority of the €31,611 claimed by the Complainants is directly related to challenging the Revenue assessment of the capital gains tax liability of the first Complainant. I further note, however, that these invoices date back as far as 19 January 2012. It does not therefore appear that the relevant accounts were submitted to the Provider immediately on receipt. I therefore accept that special condition 4 has not been complied with in the present case.

In a post Preliminary Decision submission, the Complainants' representative states *"[the Provider] failed to provide our client with details of the Revenue Audit expense cover applied to his 2008/2009 policy in or around October 2008 and we understand our client only first received written details of the new cover with his policy renewal documentation in March 2009 when renewing his insurance cover for 2009/2010. However, our client's 2009/2010 policy did not inform him that Revenue Audit cover was in place for 2008.*

/Cont'd…

It was only in or around July or August 2016, during this claim process, that [the Provider] confirmed that our client did actually have cover in place on the date of claim in October 2008. [The Provider] originally advised our client that the relevant cover only commenced in March 2009.

The Complainants' representative goes on to argue that:

> *"As [the Provider] did not advise our client of the Revenue Audit expense cover in place in October 2008, our client was not in a position to make the necessary notifications as he was not made aware of the cover and the notification requirements by [the Provider] in 2008 when the cover was added to his policy".*

I accept that the Complainant was not made aware until March 2009 that cover had been added to his policy that would potentially cover Revenue audits.

However, I note that general condition 10 of the relevant policy requires an insured to notify the Provider in the event of any occurrence which may give rise to a claim under the policy forthwith. I accept that general condition 10 has not been complied with.

The Condition is as follows:

> 10. **Claims:** In the event of any occurrence which may give rise to a claim under this policy:
>
> (a) The Insured shall forthwith notify the Company in writing with full particulars.

There are, in my view, a number of events that should have caused the Complainant to notify the Provider from March 2009 on – most certainly well before 2016.

In light of these significant notification requirements and the failure of the Complainants to seek the prior approval of the Provider in advance of incurring the relevant professional fees, I accept that the Provider was entitled to decline the relevant claim. The relevant non-compliance cannot be considered as minimal in light of the long period of delay of notification and, in addition, the policy wording seems to contemplate prior agreement and oversight by the Provider in relation to the fees incurred, which is not an unreasonable requirement. The Provider was denied any opportunity of involvement in this regard. I note in particular that exceptions 1(a) and 1(d) are expressed in terms that the endorsement "does not provide indemnity" unless the conditions are fulfilled so are in the nature of conditions precedent.

I therefore accept that the relevant non-compliance support the Provider's entitlement to repudiate the claim rather than providing a mere entitlement to damages for any prejudice caused by the delayed notification or lack of prior acceptance of the claim. In these circumstances, I accept that the Provider was entitled to decline the claim and I do not uphold the complaint due to the areas of non-compliance with the policy conditions outlined above, and in particular, the non-compliance of exceptions 1(a) and 1(d).

/Cont'd…

I note that the Provider initially sought to rely on a breach of Proviso 3, and that this breach has been submitted as the primary reason for the decision to decline, and while I have not been convinced that there was such a breach, I ultimately must accept that the Provider was entitled to decline the claim based on the breach of notification provisions outlined above. I further note that the issue of the late notification was raised by the Provider in a telephone call with the Complainant around 7 March 2016 so this issue was flagged at a very early stage by the Provider. The Complainants were also informed by letter dated 7 March 2016 that the loss adjusters were dealing with the claim on a without prejudice basis, despite the fact that the Complainants may have been unaware of the cover on the policy, as a claim should have been submitted in writing within 30 days of the date of completion of the audit. I accept that the Complainants may not have been aware of the potential availability of cover until notification was in fact made by them and that they further may not have been aware of the necessity to notify within the relevant periods set out above. However, they had been notified by the Provider in March 2009 that cover was in place and the notification obligations were clearly outlined in all policy documents. Therefore, I must accept that the Provider was entitled to refuse indemnity on this basis.

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

/Cont'd…

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

11 October 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.