An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2018-0220
Sector:	Insurance
Product / Service:	Travel
Conduct(s) complained of:	Rejection of claim
Outcome:	Partially upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

This Complaint concerns the Respondent's refusal of a claim made under the Complainant's holiday insurance policy.

The Complainant's Case

The Complainant lives in Ireland and took out a holiday insurance policy with the Respondent to cover a holiday to Greece in June 2015.

The Complainant endured a number of trying experiences during the course of this holiday, with a litany of issues arising, during the trip. For the purposes of this complaint, the issue that the Complainant has with the Respondent is its failure to pay legal fees to enable the Complainant to bring proceedings against the holiday providers (and/or the hotel) seeking damages for personal injuries arising out of respiratory illness that he believes was caused by building works being carried out, on or near the site of the hotel.

The Complaint is that the Respondent, in refusing to pay legal costs associated with the Complainant's personal injuries claim, has not fulfilled its obligations under the policy. The Complainant is seeking compensation.

The Respondent's Case

The Respondent declined to pay out on foot of the Complainant's claim because it formed the opinion that there was insufficient prospect for success in achieving a reasonable

settlement of that personal injury claim. It cites the policy terms and conditions in that regard.

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 14 November 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.

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

The Complainant purchased multi trip holiday insurance from the Respondent's agent in August 2014. In June 2015 the Complainant travelled to Greece for a week long holiday, booked online in January 2015.

The holiday did not go well. The Complainant has detailed an extensive list of grievances in that regard. Ultimately, the Complainant submitted a claim to the Respondent seeking its agreement to defray the legal costs that would be incurred by him in bringing a claim against the holiday provider(s), primarily seeking damages for personal injuries arising out of a respiratory illness stated to have been caused by building works being carried out, on or near the site of the hotel (and also for mis-selling).

The net issue to be decided in this complaint is whether or not the Respondent, in refusing to pay the legal costs associated with the bringing of such legal proceedings, has acted in breach of its obligations under the policy and/or otherwise wrongfully.

/Cont'd…

Section 14 of the policy document contains the provisions in relation to cover for "***Overseas legal advice and expenses***". The maximum payable under this section is €30,000 per person insured. The basic premise of the cover is that the policy will pay legal expenses incurred by an insured in pursuing a claim for damages and/or compensation against a third party, who has caused accidental bodily injury to, or illness of, an insured.

Legal Representative is defined under the policy as the solicitor, firm of solicitors, lawyer, advocate or other appropriately qualified person firm or company appointed to act on behalf of the insured. The insured has the right to select and appoint his/her legal representative (subject to certain terms).

The exclusions to this cover are numerous. Under those exclusions, the policy does not cover:

- "*any Claim where it is [the insurer]'s opinion that the prospects of achieving a reasonable settlement are insufficient, and where the laws, practices and/or financial regulations of a country in which the incident occurred would preclude the obtaining of a satisfactory settlement or the costs of doing so would be disproportionate to the value of the Claim;*
  …
- *Legal Expenses incurred for any claim or legal proceedings brought against a tour operator, travel agent, carrier, insurer or their agents where the subject matter of the legal proceedings is eligible for consideration under an Arbitration Scheme or Complaint Procedure*
  …
- *Legal Expenses which [the insurer] considers unreasonable, or excessive or unreasonably incurred."*

Furthermore, certain Special Conditions are attached to the section, including a condition whereby authorisation to incur legal expenses will be given if the insured can satisfy the insurer that:

> "*it is reasonable for Legal Expenses to be provided in a particular case. The decision to grant authorisation will take into account the opinion of the Legal Representatives as well as that of [the insurer's] own advisors. If there is a dispute, [the insurer] may request, at [the insured]'s expense, an opinion of a barrister as to the merits of the claim or legal proceedings. It the Claim is admitted, the [insured]'s costs in obtaining this opinion will be covered by this Insurance".*

Section 14 of the policy is a complex section; the very nature of the cover offered is complicated. Clearly, an insurer wants to avoid a situation where it could be obliged to fund limitless and potentially unmeritorious litigation under the policy, but it also wants to offer a product that may be of assistance to a meritorious claimant. In the circumstances, while the wording of Section 14 is undoubtedly extensive, it is hard to see how it could be made much simpler while still adequately describing and explaining the level of cover being offered.

/Cont'd…

In short, the policy will cover legal costs associated with claims made by an insured, where the insurer agrees that such a claim is likely to yield a successful outcome.

The Complainant submitted his claim under Section 14 initially by telephone, and then by email on the 28th of July 2015.

Analysis

The Respondent accepts that its original response to the claim was "unhelpful". It is for that reason that at that time the Complainant was offered €100.00 for trouble and upset. It appears that this payment was accompanied by the wrong letter – a pro forma settlement letter rather than one which accurately reflected the circumstances of this payment. The Respondent has apologised for this oversight.

The policy provides for legal costs associated with claims made where the insurer agrees that such a claim is likely to yield a successful outcome. The policy terms provide that the insurer can refuse to pay legal fees where, in its opinion, the prospects of achieving a reasonable settlement are insufficient, or the amount recovered would be disproportionate to the legal fees that would be incurred.

The Complainant's claim was ultimately refused by the Provider on the basis that "*the prospects for success in achieving a reasonable settlement are insufficient*".

It is not for this Office to adjudicate on the potential merits of the Complainant's claim for personal injuries against the holiday provider. Rather, this office must decide if the Respondent acted unfairly or unreasonably in declining the Complainant's claim, on the basis of the information with which it was presented.

I note that when the Provider wrote to the Complainant on 4 August 2015, a claim pursuant to Section 6 for benefit of €30,000 per person insured for personal accident, was declined on the basis that the definition of "*Permanent Total Disability*" laid out within the policy provisions, had not been met. The letter also addressed the claim under Section 14 for the cost of "*Overseas legal advice and expenses*" explaining that a claim for mis-selling of a holiday booking and breaches of health and safety would fall under the Arbitration Scheme operated by the travel company which was noted to be a member of the ABTA Arbitration Scheme and the Complainant was directed to the travel operator to pursue a complaint pursuant to that Arbitration Scheme.

The Complainant was unhappy however, in that regard.

The policy documents confirm that in a situation such as this one there is provision for a claimant (i.e. the Complainant in this instance, and his/her legal representatives) to put forward the opinion of a barrister (procured at the claimant's expense) as to the merits of the intended claim. No such opinion was however, ever furnished to the Respondent in order for it to re-visit its consideration of the Complainant's claim for legal expenses. The opinion of the Complainant's solicitor was not a barrister's opinion, as specified by the

/Cont'd…

policy terms and on that basis there is no evidence upon which I can ground a finding that the Respondent has acted wrongfully in refusing the Complainant's claim for legal expenses.

The Complainant contends that having to procure such an opinion at his own expense constitutes an artificial barrier to his claim, and a considerable financial barrier, in that he would be paying legal fees which ought to, in his view, be covered under the policy. I do not agree. If the Complainant was to procure and furnish a supportive opinion which satisfied the Respondent that the claim was of sufficient strength to fall within the policy cover, the Respondent would then be obliged to reimburse the cost of procuring that opinion, to the Complainant (under Section 14(C)(ix)).
The Complainant believes that the policy wording is designed to permit the Respondent to not ever have to pay out on foot of any claim. This, in my opinion, is not a fair assessment of the policy or the Respondent's conduct. Ultimately, the policy does not entitle an insured to all legal fees for any conceivable claim that he/she might wish to make. There are limits to what the policy will cover, and in my opinion, those limits are not unreasonable.

During the investigation of this complaint, the Complainant has taken issue with the fact that he was not told that his calls were being recorded. I am not satisfied that this constitutes grounds for me to make a finding against the Respondent, as the recording of the calls was not disproportionate or otherwise contrary to law, and there is no evidence that the recordings have been used for a purpose other than to maintain adequate records, in accordance with the Respondent's obligation and indeed such records are of benefit in responding to complaints. Any grievance that the Complainant has that the Respondent has breached the provisions of data protection legislation can of course be brought to the attention of the Data Protection Commissioner, which is the appropriate forum for any such concerns; any complaints regarding the extent and the limits of data protection legislation are not a matter for the FSPO.

The Respondent has, after its own investigation, informed this office that it was in breach of the Consumer Protection Code 2012 in issuing a letter on the 18th of September 2015 that ought to have been issued prior to the 16th of September 2015. I have noted this minor breach, and I also note that the cheque sent to the Complainant in August 2015, was ultimately cancelled. The Respondent's letter of 5 November 2015 advised that the Respondent would await the Complainant's instructions as to whether or not to re-issue that cheque. It is unclear to me whether that cheque was ever re-issued. I take the view however, that the payment of €100 in recognition of how "*unhelpful*" the Respondent's original response to the claim was, was not adequate in the circumstances and indeed the Respondent sent a letter to the Complainant with a cheque for €100, the terms of which did not reflect the true position.

I consider it more appropriate therefore for the Respondent to make a compensatory payment to the Complainant in the sum of €400. Accordingly, if the payment for €100 was previously re-issued to the Complainant, I direct the Respondent to issue him with a further payment in the sum of €300. If the original payment of €100 was not re-issued since November 2015, I direct the Respondent to make a compensatory payment to the Complainant in the sum of €400, in recognition of its errors.

/Cont'd…

In a recent submission from the Complainant, following the issue of the Preliminary Decision to the parties on 14 November 2018, the Complainant has expressed dissatisfaction that this office has not addressed the contents of the medical reports which he submitted to the insurer in order to establish the nature of his injuries. I am satisfied however that in circumstances where the complaint maintained by the Complainant (which has been the subject of this investigation by the FSPO) is a complaint concerning the refusal of the Provider to discharge the legal costs incurred by the Complainant, it is not necessary for this office to offer any opinion regarding the content of those medical reports. Rather, this office is required to consider the cover made available to the Complainant under the heading of "*Overseas Legal Advice and Expenses*" in order to decide whether the actions of the Provider were reasonable in declining to meet the Complainant's legal costs.

Finally, I note that the Complainant has referenced the steps he took to pursue his position via the Small Claims Court in the U.K. which has led to him achieving a settlement with the tour operator. Whatever the Complainant's rights against the tour operator however, this decision concerns only the conduct of the respondent financial provider, arising from its obligations as underwriter of the Complainant's travel insurance policy.

Accordingly, for the reasons outlined, the substantive element of the Complainant's complaint is not upheld, but I consider it appropriate to partially uphold the complaint bearing in mind the customer service aspect of the matter which arose.

/Cont'd…

Conclusion

- My Decision pursuant to ***Section 60(1)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, is that this complaint is partially upheld on the grounds prescribed in ***Section 60(2(g).***

- Pursuant to ***Section 60(4) and Section 60 (6)*** of the ***Financial Services and Pensions Ombudsman Act 2017,*** I direct the Respondent Provider to make a compensatory payment to the Complainant in the sum of €400, to an account of the Complainant's choosing, within a period of 35 days of the nomination of account details by the Complainant to the provider. (If however the Provider's original payment for €100 was re-issued by the Provider and those funds received by the Complainant, the Respondent should instead pay the Complainant an additional payment in the sum of €300.) I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in ***Section 22*** of the ***Courts Act 1981***, if the amount is not paid to the said account, within that period.

- The Provider is also required to comply with ***Section 60(8)(b)*** of the ***Financial Services and Pensions Ombudsman Act 2017.***

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.

MARYROSE MCGOVERN
DIRECTOR OF INVESTIGATION, ADJUDICATION
AND LEGAL SERVICES

14 December 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.