An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

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| **Decision Ref:** | 2019-0109 |
| **Sector:** | Insurance |
| **Product / Service:** | Household Buildings |
| **Conduct(s) complained of:** | Rejection of claim - non-disclosure & voiding |
| **Outcome:** | Upheld |

## LEGALLY BINDING DECISION
## OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

### Background

The Complainant, a UK resident, incepted a 'smallholders' insurance policy ("Policy") with the Provider, which is a regulated financial service provider in the Republic of Ireland, with effect from 18 December, 2015, to 17 December, 2016, for her property through an intermediary broker.

On or about 16 March, 2016, the Complainant noticed that damage had been caused to buildings and structures on the property by a third party she had contracted to perform construction works at the premises. She notified the Provider of her claim on 9 June, 2016. By final decision dated 31 May, 2017, the Provider indicated that it would not pay the Complainant's damage claim on the following basis of which it claims was:

> material non-disclosure at policy inception, as to the number of horses stabled by the Complainant, and
>
> the use of the land the subject of the Policy.

### The Complainant's Case

The Complainant maintains that the damage caused by the third party is covered by her policy on the basis that it constitutes malicious damage. She paid the third party £17,000 to construct, amongst other things, a manège, car park, and land drains.

The third party, however, was not qualified to undertake the work and was subsequently convicted for offences arising out of him carrying out construction for remuneration on properties in the area.

The Provider believed that the Complainant was operating a licenced riding school from the property, but the Complainant maintains that this was not the case. The Complainant argues that the property was not used for DIY Livery and there were no buildings on the property used for non-farming purposes. There were six horses on the property at the date of inception of the Policy. While horses owned by the Complainant were ridden by family members, charity groups, school children and friends, this was not for profit or remuneration. Some people gave hay and feed for the horses or were involved in their maintenance but this was merely on a voluntary basis. A Facebook page that was set up for the property and which described the property as an "*equestrian centre*", was intended to publicise the future business activities of the Complainant. The property was not used for business purposes at the material time; the first time the property was used as a business premises was in October 2016.

The Provider had previously offered stg. £4,000 for malicious damage to fencing and a stable arising from the incidents complained of. It was only when the Complainant notified the Provider of her further claims for malicious damage for the sum of stg. £50,000, that the Provider sought to void the contract.

The Complainant seeks compensation.

**The Provider's Case**

The Complainant's broker incepted the Policy through an online system. On investigation, the Provider concluded that the damage the subject of the claim did not fall within the definition of a smallholders risk. The premises were purchased with the intention that they be used as an equestrian centre. The Provider argues that the Complainant's broker input inaccurate data in respect of DIY Livery and the amount of horses at the premises into the online system to obtain a quote on behalf of the Complainant. Had the accurate information been input, the Provider states that would not have accepted the risk under the Policy. There were twelve horses on the premises on the date of the incident the subject of the claim.

The Provider notes that at point 28 of the Complainant's statement of 8 September, 2016, the Complainant states '*we do pony rides at fetes etc for a small charge*' and at point 29 she states '*we also work with charity to provide experience days.*' In the complaint, the Complainant indicates that two ponies had been brought to local school fetes. Had that been disclosed, the Provider would have declined to provide insurance.

The 'smallholders' policy was designed for a smallholder who has a small plot of land with a small amount of livestock.

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At paragraph 1 of page 19, the Policy provides ("business exception"):

> '*The Insurers shall not be liable for any Loss claim or Damage arising from the Policyholder carrying out any Business or activity other than the use of the Premises for horticulture or agriculture, including the rearing or management of domesticated livestock.*'

The activities conducted by the Complainant were outside the scope and definition of the Complainant's Policy. The Complainant, rather than operating a private stable, was operating an equestrian centre for profit. She was providing recreational equestrian facilities both on and off the property, had volunteers working on her premises and provided livery services. Facebook activity posted on behalf of the Complainant supports the contention that the Complainant was operating a business from the premises. The premises had previously been used as an equestrian centre and as stated by the Complainant in her statement, she had planned to use the property as an equestrian centre once the construction work was completed and she had obtained a licence to do so. The Provider states that if it had been aware of the Complainant's intention, cover would not have been provided.

As the work carried out on the property was carried out by a third party, the damage caused by that third party were not recoverable under the Policy and was a matter to be resolved between those parties.

By letter dated 26 February, 2018, the Provider waived the issue of non-disclosure as an issue to be considered by this Office. Rather it stated that it wished to:

> '*Narrow the issues of dispute down to the intent of the Policy Coverage and how this would respond to the loss presented.*'

**The Complaint for Adjudication**

That the Provider wrongly voided the Complainant's Policy and rejected the insurance claim.

**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.

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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 18 February 2019, 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 issuing of my Preliminary Decision, both parties made further submissions as follows:

1. Letter from the Provider to this Office dated 26 February 2019.

2. E-mails from the Complainant to this Office dated 10 and 11 March 2019.

3. E-mail from the Provider to this Office dated 14 March 2019.

Following consideration of these additional submissions from the parties, I set out below my final determination.

**Jurisdiction**

During the course of the investigation, this Office identified a jurisdictional issue to be resolved. While the Provider was an entity regulated in this jurisdiction, at page 4 of the Policy, it set out that the laws of the United Kingdom, the Channel Islands and the Isle of Man were the applicable laws. This Office accordingly wrote to both the Complainant and the Respondent seeking their agreement to adjudicate the complaint in accordance with the laws of this jurisdiction. The Complainant consented by letter dated 21 February, 2018 and the Provider consented by letter dated 26 February, 2018.

**Analysis**

The Provider, in an e-mail dated 29 September, 2016 at paragraph 2, states:

> '*The challenge from* [loss adjusters] *will be we have never defined small holding, and, whilst the policy gives guidance on this point re number of acres etc. there is no formal definition*.'

The loss adjusters, in a letter dated 19 September, 2016 to the Provider states the following:

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> '*It is worth noting that the number of horses on the premises have always exceeded those provided for within the Statement of Fact, although it could be argued that this is not pertinent to the actual claim. The Insured has now confirmed that it was clearly her intention to set up the premises as a commercial stables, although it does not appear that this has* [sic.] *happened at the time of the losses.*'

I am satisfied that both those statements accurately represent the position. There is, in fact, no definition provided in the Policy as to what constitutes a small holding. Voidance on the basis that the insured premises is not a small holding was, in my view, therefore, unreasonable.

In its post Preliminary Decision submission dated 26 February 2019, the Provider suggests that in relying on the "*opinion*" of their assessor to conclude that there is no definition of small holding in the Policy is an error of fact. I do not rely on the opinion of the assessor to reach this conclusion. I have examined the 93 page policy document and can find no reference within it to the definition of small holding. The information defining a small holding is only present in the Risk Guide, not the Policy Document. I do not find it acceptable that the Provider would seem to deny a claim and void a policy on a matter that is not included in the Policy Document.

The only clause that could potentially permit the Provider to void the Policy on the basis of the 'intent of the Policy Coverage' in the circumstances presented is the business exception.

The business exception applies to any loss or damage 'arising' from **the use of** the premises for any purposes other than horticulture or agriculture. [My emhphasis].

At section 1 of the Schedule to the Complainant's Policy, insured peril number 9 is defined as:

> '*Impact… caused by any vehicle or animal belonging to or under the control of the Insured or any member of his family permanently residing with him, or the Insured's staff of Employees.*'

At page 9 of the Policy, 'Employees' is defined as:

> '*a) Any person(s) employed by You under a contract of service*
>
> *d) Persons offering their services on a labour only basis*
> *…*
>
> *f) Self-employed persons*
> *…*
>
> *g) Any person(s) supplied to or hired in or borrowed by You.*'

The damage arose from impact caused by a vehicle under the control of an employee of the Complainant within the meaning of the Policy. It is precisely one of the activities

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contemplated as being within the scope of the Policy. It was, in my view, unreasonable of the Provider to reject the claim in these circumstances.

I do not accept the Provider's argument that the Complainant was using the premises for business purposes at the time of the incident giving rise to the claim. The Provider maintains that the Complainant was using the premises as an equestrian centre. The Complainant states that, while it was her intention to use the premises for the purpose in the future, she had not yet begun to do so.

The Provider's assertion is based on the information provided in the Complainant's Statement of Fact provided to its loss adjusters and its investigation of a Facebook page maintained on behalf of the Complainant. The relevant statements are as follows (the numbers correspond to those contained in the Statement of Fact):-

> '*7. Our plans were to turn it into a riding school and do teaching*';
> '*22. We have not done any riding lessons or teaching at the site*';
> '*23. Some pony club type activities for family and friends*';
> '*25. People volunteer to help out*';
> '*27. We do not charge for this*';
> '*28. We do pony rides at fetes, etc. for a small fee*';
> '*29. We also work with a charity to provide experience days*';
> '*30. I have applied to the council for a licence to be a riding school*';
> '*81.* [In relation to the Facebook posts] *The purpose was to let people know what we were doing and to attract future business*';
> '*84. I am allowed to teach freelance*';
> '*85. I do not do this at my yard*';
> '*86. We do pony club days and we get a donation from them for hay and food*';
> '*87. We have also done parties for friends as well*';
> '*88. Again, we just get a donation or we give a free ride if they help out*';
> '*89. We set up with a Facebook page when we thought we were going to get the licence*';
> '*91. We asked about a licence a year ago and I needed to get another qualification*';
> '*92. We then recently applied for the licence*';
> '*97. We are not running a business at the site*'.

The Provider sent the Complainant an undated letter indicating its decision to void the policy *ab initio*, which states:

> '*The information presented is that the property was previously used as an equestrian centre and following your purchase, this remains the case whether as a* [sic.] *fee paying or voluntary basis.*'

The Provider relies on the Facebook posts made on behalf of the Complainant to ground its position that the Complainant was conducting a business from the premises. The Facebook posts can be readily reconciled with the Complainant's position that, at some point in the future, she planned to establish an equestrian centre but that she had not done so at the date of damage.

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The only evidence that has been furnished to establish that a fee was received for the provision of equestrian services were the above statements contained in the Complainant's Statement of Fact. There are two issues of note in those statements as follows:

1. While money was received for some services provided on the premises, the money provided was on a voluntary, rather than obligatory basis;

2. The '*pony rides at fetes, etc. for a small fee*' were given off the premises.

Accordingly, the money provided to the Complainant for use of her horses on the premises cannot be said to have accrued to her in the course of 'carrying out any business' within the meaning of the business exception. The sums paid to the Complainant for pony rides at fetes took place off the insured premises. For that reason, they do not, in my view, come within the terms of the business exception.

On the basis of the foregoing, I find that the Complainant was not using the premises for business purposes at the material time.

In relation to the post Preliminary Decision submissions received, I note that having adopted the position that the Complainant was running a business from the site, the Provider, following on from my Preliminary Decision, changed its stance to denying the claim on the basis of malicious acts by an employee.

The Provider, in its post Preliminary Decision submission of 26 February 2019, raises the issue under the General Policy Conditions that the Complainant should have exercised reasonable care in the selection and supervision of employees. I do not accept this as a reasonable reason to deny the claim and void the policy. Given the subsequent incarcerations of the employee in question, it is reasonable to conclude he was not honest. Even if the Complainant had undertaken some form of investigation of his character, and it is not clear if the Complainant did, it may not have been possible to identify his intentions from the resources available to the Complainant.

The Provider also relies on the non-supervision of the employee by the Complainant as a contributory factor to the damage caused. Given the illness suffered by the Complainant at the time and her enforced absence while undergoing medical treatment, I find it unreasonable of the Provider to seek to use this as a reason to deny the claim and/or void the Policy.

It is not clear to me why carrying out preparatory work on land owned by the Complainant, in order to change its purpose in in the future would disallow a claim under the policy. If such a restriction existed, it was not communicated to the Complainant.

Nothing in the post Preliminary Decision submissions have altered my view on this complaint.

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For the reasons set out above, I find that the Provider unreasonably voided the Complainant's Policy and refused to process and pay the claim. Accordingly, I uphold the complaint and direct the Provider to reinstate the Policy and admit and pay the claim in the normal manner.

**Conclusion**

My Decision pursuant to ***Section 60(1)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, is that this complaint is upheld, on the grounds prescribed in ***Section 60(2) (c), (e) and (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 rectify the conduct complained of by reinstating the Policy and admitting and paying the claim in the normal manner.

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.**

**GER DEERING**
**FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

16 April 2019

**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.**