

The complaint

Ms G has complained that she was mis-informed by Ark Insurance Group trading as Sigma Law Insurance at the time (Ark) that an insurance policy she took out to protect her against a potential tax liability, had Financial Services Compensation Scheme (FSCS) protection.

What happened

In December 2012, Ms G was given tax mitigation advice, from a third party, regarding an impending residential property purchase. Ms G says that as part of the advice, she was recommended an insurance product that would protect her against any liability that arises. She says that the cost of the policy brokered by Ark including fees, was approximately £16,000.

Ms G says that the property purchase completed in January 2013, but that she was subsequently informed by HM Revenue and Customs (HMRC) that she had a tax liability of nearly £40,000. Ms G, through her advisors, appealed this decision.

In January 2015, Ms G says she was told that the original insurer had gone into administration, but that a new insurer had taken over the policy on the same terms of cover. Following years of dispute with HMRC, Ms G says that her advisers informed her in November 2020 that they would no longer be contesting the HMRC decision. An insurance claim is made after this.

It was after this that Ms G says that she was told that the new insurance underwriter was in administration. A claim was made for FSCS protection but in May 2022 she was told that her claim for protection wasn't successful.

Ms G complained to Ark in October 2022, that she had been given policy documentation from them in December 2012, informing her that FSCS cover applied to her policy. Ark responded to say that Ms G wasn't their customer, nor was she the policy holder. They said she therefore wasn't an eligible complainant of theirs.

Ms G wasn't happy and so she brought her complaint to our service for an independent review. Our investigator looked into it. He agreed with Ark. He said that whilst Ark were an authorised intermediary, their customer was Ms G's advisor.

Ms G remained unhappy. She said that as a beneficiary of the policy, she had a right to complain. She pointed to third party rights under contract law. As no agreement was reached, the complaint has been passed to me for a decision.

I issued a provisional decision on 12 October 2023, an extract is below and forms part of this decision.

My provisional decision

Why I think we can consider this complaint

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having done so, I am currently of the opinion that the complaint is one we can consider, but isn't one that should be upheld. I'll explain why.

Our rules which set out which complaints we can and can't consider are set out in the Financial Conduct Authority's Dispute Resolution Handbook ("DISP"). They state within DISP 2.3.1R that:

The Ombudsman can consider a complaint under the Compulsory Jurisdiction if it relates to an act or omission by a firm in carrying on one or more of the following activities: (1) regulated activities ...or any ancillary activities, including advice, carried on by the firm in connection with them. DISP 2.7.6R also says that:

To be an eligible complainant, a person must also have a complaint which arises from matters relevant to one of more of the following relationships with the respondent:

So, this complaint must arise from matters relevant to one of the listed relationships, with Ark. One of the relationships is that of "a person for whose benefit a contract of insurance was taken out with or through the respondent". The policy in question here was undoubtedly taken out through Ark. They arranged it and administered it. I don't believe that is contentious or being contested. Therefore, a regulated activity occurred with Ark setting up the policy.

Ms G complaint is that the information they gave her regarding FSCS coverage was misleading. She had been sent, directly, policy schedules, summaries and wordings. I believe that was part of the arrangement of the policy. Even though that arranging was of a policy for the advisory firm, it was ultimately for Ms G's benefit. Ark dealt with her directly, and that is what she is complaining about.

So, it seems to me that Ms G complains about Ark's carrying out of a regulated activity, and the things she complains about are relevant to the fact she stands to benefit from a contract of insurance taken out through Ark. So, we can consider this complaint.

I recognise that Ark might argue that the documentation being complained about wasn't produced by them and they are not responsible for the content. However, they sent it to Ms G, and so I think a question over their responsibility for its content, is a matter for the merits of this complaint and not the jurisdiction.

I would also like to note that Ms G has made arguments about third-party rights she has under the contract. However, I don't believe they apply here in the way she has suggested. The insurance contract itself was between the advisory firm as policyholder and the insurer. She does have rights to claim and complain there – but only to the insurer who she alleges failed to perform the contract. However, that doesn't alter her position in regard to Ark, who merely arranged the contract.

Why I don't think this complaint should be upheld

I am mindful of how long this issue has been going on for Ms G and also how long she has been waiting for an answer from our service. Because of this, I

want to communicate my outcome on the merits of her complaint against Ark, as soon as I can.

For me to uphold the complaint, I would need to be satisfied that Ark made an error with the information it gave Ms G. I appreciate that Ark have said that they weren't responsible for the policy information and that it is the insurer. However, the policy docs we have been provided with from the time, clearly state Sigma Law Insurance at the top. They also include "© Sigma Law Insurance - SDLT Mitigation Planning Insurance _ Policy Wording" in the footer. Further it was Ark/Sigma who sent the documentation to Ms G. It is they who need to ensure communications are fair, clear and not misleading. I am therefore satisfied that Sigma and now Ark, would be responsible if they didn't do so.

Ms G has argued that the documentation contains misinformation that the policy she purchased provided cover from the FSCS. However, from what's been provided to us, I don't think that's the case. It states that the original insurer are members of the FSCS and that Ms G may be entitled to cover under that scheme. It goes on to say "non-compulsory insurance such as this is covered for 90% of the claim, with no upper limit".

I'm not persuaded the document guaranteed the FSCS would pay out. The FSCS considers cases on an individual basis and I don't think any such guarantees could be made. I don't think Ark ought to have been able to foresee that the FSCS would decline Ms G's claim - and so I don't think it would be fair and reasonable to hold it responsible for not informing her this would happen.

In summary, whilst I think this is a complaint we can look at, I don't believe it is one we can uphold. I sympathise with Ms G that this has been going on for many years and the impact she has said it has had on her health. However, I don't find the documents to be mis-leading and I do think scheme protection had the potential to have applied but ultimately the claim was rejected after consideration.

Ark didn't respond to my provisional decision. I therefore had nothing further to consider from them and went on to consider Ms G's response regarding the merits of the case.

Ms G responded with several points, including:

- The documentation states that FSCS coverage is applicable,
- It is irrelevant whether ARK could have foreseen that cover may not be given,
- She has given several examples where it doesn't state that cover 'may' apply and that I have been selective in my wording.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Whilst I understand Ms G's comments that some of the wording regarding FSCS coverage was unclear, I am referring specifically to the policy summary and policy wording that were

provided to her by Ark.

The policy summary states, *"If we are unable to meet our liabilities you may be entitled to compensation under the Financial Services Compensation Scheme (FSCS)".* Clearly stating she only may be entitled.

The policy wording states *"Guarantee Protection Insurance Ltd & Millburn Insurance Company Limited are members of the Financial Services Compensation Scheme. You may be entitled to compensation from the scheme if Guarantee Protection Insurance Ltd &/or Millburn Insurance Company Limited is unable to meet its obligations. This depends on the type of business and the circumstances of the claim".* I think this also made it clear that there was no guarantee of coverage.

Other documents might not have been as clear, but I believe these were enough to show that there was no guarantee. Further, regarding my point on foreseeability. I don't believe that Ark were misleading Ms G, as I don't believe they were aware FSCS coverage didn't apply. This is supported by their long dispute with FSCS regarding the coverage decision.

My final decision

My final decision, for the reasons set out above, is that whilst this complaint is one that this service can consider, it isn't one that should be upheld.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms G to accept or reject my decision before 29 November 2023.

Yoni Smith
Ombudsman