

The complaint

Mrs R is a sole trader, trading as S. She complains Accelerant Insurance Europe SA/NV turned down a claim she made on her combined liability insurance policy.

What happened

S offers horse riding services. In February 2023 Mrs R contacted Accelerant (via her broker) to notify it that a claim had been made against her. This related to a client who had been injured in April 2022 when she fell off a horse. Accelerant turned down the claim. It said it was a condition of the policy that the insured should give immediate notice to it of anything which might give rise to a claim being made against it.

In this case that hadn't been done. And it thought that delay had prejudiced its position because, for example, witness evidence hadn't been gathered. It also said the insured, as a business, hadn't followed basic procedures following the incident (relating to accident reporting) which directly led to the circumstances not being reported to it.

Our investigator thought, even if Mrs R wasn't aware of the incident, it was something she should reasonably have been aware of. So she thought the notification condition hadn't been complied with. And she thought Accelerant had shown it had been adversely affected (prejudiced) by that. So she didn't think it had done anything wrong in turning down the claim Mrs R made.

Mrs R didn't agree. She said:

- The injured third party had been taken out by a self-employed contractor at a yard in a different county to where she was based. So she didn't have any direct involvement with what happened and neither he or the third party reported the incident to her.
- Around the time of the incident it became apparent the contractor had been fraudulently misappropriating funds. He was fired nine days later. It was likely he didn't tell her about the incident because he didn't want to draw attention to the fact the horse ride hadn't been put through the correct channels.
- A reference to an accident having taken place was made in a diary by someone who also worked at the livery stable but this isn't something she was aware of at that time (in fact she wasn't of the existence and purpose of the book it was recorded in at all). She was unaware any incident had taken place until she received details of the claim and she reported it to Accelerant at that time.
- She also queried what action Accelerant would have taken if the incident had been notified to it given there hadn't been any formal claim made. She thought it was likely it wouldn't have taken further steps until that happened.

I issued a provisional decision on the complaint last month. In summary I said:

The relevant rules and industry guidelines say Accelerant has a responsibility to handle claims promptly and fairly. It shouldn't reject a claim unreasonably.

I've looked first at the terms and conditions of Mrs R's policy. That does include public liability cover for accidental bodily injury to any person. And so, in principle, the policy could indemnify her against sums she's legally liable to pay as damages and cover costs and expenses. However, it's a general condition of cover that the assured shall "give immediate notice to the Underwriters in writing of anything which may give rise to a claim being made against the Assured and for which there may be liability under this Insurance". Accelerant says Mrs R hasn't complied with that condition and has relied on that to turn down the claim she made.

*I don't think it's in dispute Mrs R told Accelerant about the claim as soon as she received papers relating to that. The issue is Accelerant wasn't told about the incident which gave rise to it at the point that took place (in April 2022). However, in *Kajima UK Engineering Ltd v Underwriter Insurance Co Ltd* the judge found "it is only circumstances of which the Insured is actually aware which can be the subject matter of a notification". And in this case Mrs R is a sole trader and it's she (trading as S) who is named as the insured in the policy schedule.*

I don't think Accelerant has demonstrated Mrs R was aware of the injury to the third party until she received a claim about it. I've seen nothing to show she was informed of it by the contractor who accompanied the third party on her ride. And given the circumstances of his subsequent dismissal it seems plausible he wouldn't have done so. The only record of the incident from the time is a diary entry completed by someone else. But again I've seen nothing to show that was brought to Mrs R's attention.

So I don't think Accelerant has shown Mrs R was aware of the incident with the third party until she received the claim against her. I appreciate the contractor working for her clearly was but I think it's the knowledge of the insured (Mrs R) which is relevant here. Accelerant has also suggested Mrs R is "vicariously responsible" for the actions of her employee. But it hasn't provided legal advice in support of how that would apply in relation to notification. And I don't think it's factually correct to say that in any case; Mrs R says the individual wasn't her employee but was himself self-employed.

Nor do I think the position Accelerant are seeking to advance is in line with that set out in the Insurance Act 2015. When considering the duties on an individual (which would include a sole trader) in relation to making a fair presentation of risk it limits the information they're responsible to providing to their own knowledge and anything which is known by an individual who is "responsible for the insured's insurance".

The Act also covers a situation in which an individual (an employee or agent) perpetrates fraud against his or her principal (whether the insured or the insurer). The Explanatory Notes says "the wording is intended to capture a common law exception to the general rules of attribution, known as the Hampshire Land principle, which broadly means that a company or other principal is not fixed with knowledge of a fraud practised against it by its agent or officer".

I appreciate that applies in a different context to the one here. But I think it's nevertheless reasonable to take into account those principles. I don't think they support an argument that Mrs R's knowledge should reasonably include matters known to a self-employed contractor which weren't passed on to her for reasons which were likely linked to the fraud he was allegedly carrying out and for which I understand a prosecution is pending.

I accept the position might be different if the reason a sole trader wasn't aware of an incident was because of a failing on their part (for example the failure to put in place proper procedures for the recording of an accident). In that situation it might well be fair to say that, even if they didn't know about an incident, they should have done. But I don't think that's what happened here.

Mrs R has provided details of S's accident protocol for a fallen rider which include the completion of an accident report which is to be read and signed by the visiting rider. And that should then be followed with a check on the fallen rider the following day. The protocol is signed by the contractor who accompanied the third party in this case. So while he clearly didn't follow that process I think it's reasonable to say he had been made aware of what was required. Taking all of that into account I don't think Accelerant has correctly applied the late notification clause here.

But even if it could show it had, in order to fairly turn down the claim it would still need to show how that had prejudiced (adversely affected) its position. I don't think it has. I can see an investigation report carried out for Accelerant identified the contractor had left the insured's employment "under a cloud" and so it was unlikely they'd be able to obtain a substantive account of events to challenge the allegations made. And the report suggested the late notification had impacted that.

However, I don't think that is the case. It's not clear to me if the claim had been notified in April 2022 what, if any, investigatory work Accelerant would have undertaken. But even if it had sought to contact the contractor I understand he was dismissed nine days after the incident took place. And the reasons for his dismissal were the allegations of fraud I've previously referenced. So I think Accelerant's concerns about him being a hostile witness who it wouldn't be able to obtain testimony from are likely to have applied at any point it sought to do so. I appreciate that might impact decisions on whether it could defend the claim against Mrs R. But that's not something which flows from any late notification of it.

Putting things right

For the reasons I've explained I don't think Accelerant has correctly or fairly turned down the claim Mrs R made. So it will need to reconsider this against the remaining terms and conditions of the policy.

If cover is available for the claim Mrs R has made it will need to cover this in line with those terms. It will also then need to cover any reasonable and necessary legal costs Mrs R has incurred in doing so herself which fall within the scope of policy coverage.

I appreciate those costs won't be ones that Accelerant has given its written consent to (as required by the policy) but given the reason for that is because of its decision to wrongly turn down her claim it can't fairly decline to cover them on that basis.

I also think Mrs R, as a sole trader, will have been caused distress and inconvenience by Accelerant declining her claim incorrectly. In order to recognise the impact of that on her Accelerant will also need to pay her £250.

Responses to my provisional decision

Mrs R was pleased with the outcome I'd reached. Accelerant said it hadn't been aware of the involvement of the self-employed contractor with the incident or that they were the one who'd dealt with it all. So that wasn't known during its investigation. But it didn't have anything further to add.

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.

I'm not sure Accelerant are correct to say it wasn't aware of the involvement of the self-employed contractor. The loss adjuster's report explains who the instructor was and that he'd "*left the Insured's employment under a cloud*". The report doesn't comment on the specific reasons for his dismissal but I think Accelerant had enough information to query this if it had wanted to. But, in any case, Accelerant hasn't challenged the overall outcome I reached in my provisional decision. So I don't have any reason to alter the findings I set out in that.

Putting things right

For the reasons I've explained I don't think Accelerant has correctly or fairly turned down Mrs R's claim on the basis of late notification. So it will need to reconsider this against the remaining terms and conditions of her policy. If cover is available for her claim it will need to cover this in line with those terms. It will also then need to cover any reasonable and necessary legal costs Mrs R has incurred in doing so herself which fall within the scope of policy coverage. And it will need to pay Mrs R £250 to recognise the impact on her of this claim being incorrectly declined.

My final decision

I've decided to uphold this complaint. Accelerant Insurance Europe SA/NV will need to put things right by doing what I've said in this decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs R to accept or reject my decision before 11 April 2024.

James Park
Ombudsman