Ombudsman determination
CIFO Reference Number: 16-001300
Complainant: [The complainant]
Respondent: [Company X]

It is the policy of the Channel Islands Financial Ombudsman (CIFO) not to name or identify complainants in any published documents. Any copy of this determination made available in any way to any person other than the complainant or the respondent must not include the identity of the complainant or any information that might reveal their identity.

A decision shall constitute an Ombudsman Determination under our law.

The complaint relates to the refusal by [Company X] to pay for treatment for [the complainant's] son [redacted for anonymisation purposes] with a diagnosis of accommodative estropia and left amblyopia.

[Company X's] refusal is based on its interpretation of the terms 'congenital disorder' and 'developmental problem' and are relying on a policy exclusion regarding

> '*Treatment of congenital defects or conditions which are a natural part of the aging process*'.

[Company X] states that the condition is related to the normal ageing and developmental process, therefore excluding it from cover.

Background

On 18 December 2015, [the complainant's son's] general practitioner [redacted for anonymisation purposes] wrote a letter of referral, requesting an assessment of [the complainant's son] , who was 2 years and 7 months old at the time. The referral letter explained that [the complainant's son] had developed a convergent squint affecting his left eye, noting that [the complainant's son's] father had a history of a childhood squint.

On 22 December 2015, [the complainant's son] was seen by Consultant Paediatric Ophthalmologist [redacted for anonymisation purposes]. [The Consultant Paediatric Ophthalmologist's] ophthalmic notes show that [the complainant] had noticed the squint some 10 weeks previously and had commented that it seemed to be getting worse. [The complainant's son] was diagnosed with accommodative estropia of his left eye (a left convergent squint).

[1] Financial Services Ombudsman (Jersey) Law 2014 Article 16(11) and Financial Services Ombudsman (Bailiwick of Guernsey) Law 2014 Section 16(10)

[The complainant] made a claim to [Company X] for insurance benefit from her employment insurance policy to cover the cost of treatment for [the complainant's son's] condition but, as detailed in a letter to [the complainant] dated 7 July 2016, the claim was rejected; although [Company X] had agreed to pay invoices up to and including 7 July 2016.

In its letter of 7 July 2016, [Company X] told [the complainant] that [the complainant's son's] condition was not covered by the policy and referred to the document 'Guide to your Health Scheme', under the section entitled 'What isn't covered', emphasizing:

- **Treatment** of **congenital** defects or conditions which are a natural part of the ageing process.

Additionally, [Company X] referred to the section entitled 'General Definitions' which reads:

- **Congenital**: a condition recognised at birth, or that it is believed to have been present since birth even if not immediately evident at the time of birth, whether inherited or caused by an environmental factor.

On 12 July 2016 [the consultant Paediatric Ophthalmologist] wrote an ophthalmic medical report in which he expressed his surprise at the decision of [Company X] to refuse insurance cover for the condition. He opined that the condition was not present at birth and that it had first been assessed when [the complainant's son] was two and a half years of age. [The complainant] provided a copy of this report to [Company X] for further consideration.

On 4 August 2016, [Company X] responded to [the complainant] upholding the earlier decision to refuse cover for [the complainant's son's] condition. The letter stated:

> *'[The complainant's son's] condition is congenital in nature, a defect which may not have been apparent at birth but has become apparent after birth.*
>
> *In addition to this, [the complainant's son's] condition is developmental in nature as it is not in keeping with normal development and therefore falls within the developmental exclusion.'*

The letter referred to the 'Guide to your Health Scheme', under the section entitled 'What isn't covered', particularly Paragraphs 5.42 and 5.63 respectively:

- Learning difficulties or developmental problems such as, but not restricted to, attention deficit disorders, dyslexia, bed wetting, **abnormal** growth or **deformity**.

- **Treatment** of **congenital** defects or conditions which are a natural part of the ageing process.

I note that [the complainant] was referred to incorrect paragraphs in the policy document by [Company X]; which exclusions can be found at paragraphs 9.17 and 9.40 of the copy of the policy she was provided.

On 30 August 2016, [the complainant] made a complaint to [Company X] about its refusal to cover the eye condition and on 9 October 2016 a final response letter was written rejecting the complaint. In the final response, [Company X] relied upon paragraph 5.64;

> '*treatment of congenital defects or conditions which are a natural part of the ageing process*'.

I note that, once again, [Company X] referred [the complainant] to an incorrect paragraph of the policy.

[Company X] asserted in its final response that the interpretation of the word 'congenital' was being wrongly applied by [the consultant Paediatric Ophthalmologist]. It stated:

> *'I would advise however that the definition of 'congenital' in our policy document is not limited to the strict interpretation attributed by your consultant. The definition provided is 'a condition recognised at birth, or that it is believed to have been present since birth even if not immediately evident at the time of birth, whether inherited or caused by an environmental factor.'*
> *This definition should be considered in conjunction with the full wording, particularly with regards to 'conditions which are a natural part of the ageing process'.*

For me to determine this complaint I sought out an independent expert opinion on the condition, the medical practice definition of the terms 'congenital' and 'developmental', and whether the definitions are consistent with [Company X's] policy definition. CIFO engaged a [redacted for anonymisation purposes] Consultant Ophthalmic Surgeon [redacted for anonymisation purposes], who provided me with an independent expert report.

In its rebuttal to [the independent expert's] report, [Company X] also expressed the belief that [the complainant's son] was 'genetically pre-disposed' to developing a squint, based on information provided by [the consultant Paediatric Ophthalmologist] and [the complainant's son's] GP, [redacted for anonymisation purposes] that [the complainant's son's] father had a childhood squint.

Findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint, including the response to my Provisional Determination issued on 19 February 2018, from [Company X] and the reply to it from [the independent expert].

I note that [Company X] did not seek its own medical expert in its rebuttal of [the independent expert's] report, but instead relied upon several web pages and 'Google' search results.

In line with my statutory duty to disclose evidence, which I have relied upon in reaching my decision, I have provided copies of the documents to both parties, including [the independent expert's] report, and his response to [Company X's] subsequent rebuttal.

Conflict of interest.

In its response to the independent expert report, [Company X] expressed its concern that [the independent expert] and [the complainant's son's] consultant, [redacted for anonymisation purposes] were colleagues at [redacted for anonymisation purposes] Hospital in London. On that basis, [Company X] alleged that [the independent expert] was conflicted in this matter.

[redacted for anonymisation purposes]. Like all private hospitals, [redacted for anonymisation purposes] Hospital employs the professional services of leading consultants. In the case of [redacted for anonymisation purposes] Hospital there are some 600 consultants. This does not necessarily mean that the consultants are all colleagues. [The independent expert's] practice is independent of the [redacted for anonymisation purposes] Hospital and [the consultant Paediatric Ophthalmologist] is an NHS Consultant at [redacted for anonymisation purposes] Hospital.

[The independent expert] denies any conflict. He states that he and [the consultant Paediatric Ophthalmologist] do not work together, nor do they have any patients in common. I have received no information to the contrary.

On the balance of probabilities, I consider any connection between [the independent expert] and [the consultant Paediatric Ophthalmologist] to be, at best, tenuous and I find that there is no conflict of interest present in this case, and no reasonable basis to reject [the independent expert's] evidence.

Definitions Generally

[Company X] considers it is entitled to adopt a definition of a word or phrase which differs from a strict medical interpretation and has drawn an analogy with the United Kingdom's 1968 Theft Act. In that analogy, [Company X] explains that insurers will find the legal definition of theft to be too wide and therefore will invariably qualify their definition by various exclusions. [Company X] seek to rely upon the contractual agreement willingly entered into by both parties.

As a rule, all contract terms and notices must be transparent. Not only must easy-to-understand, legible and plain English be used, but the wording must allow customers to make informed choices. In my view, a provision in an insurance policy can be regarded as ambiguous when it is reasonably susceptible to more than one interpretation. I consider that, by virtue of its analogous response to the complaint, and having regard to the evidence of [the consultant Paediatric Ophthalmologist] and [the independent expert], [Company X] confirm the ambiguity exists.

Under the *contra proferentem* principle, an ambiguous clause is construed against the party seeking to rely on it. It applies in particular to the party seeking to take the benefit of an exclusion or limitation of liability. While the rule has a very limited role in relation to commercial contracts negotiated between sophisticated parties of equal bargaining strength[2], I find that [Company X] and [the complainant] are not of such equal bargaining strength and therefore I find that the rule is noteworthy in this circumstance.

Technical or scientific words are usually given their technical or scientific meanings unless the context indicates otherwise.[3] I find no evidence of context which would cause me to deviate from the technical or scientific meaning.

[Company X] imply that the instructions to [the independent expert], as set out by CIFO, were asking him to provide an opinion on which he would require legal or technical insurance qualifications. I disagree. CIFO was asking for [the independent expert's] expert opinion on the definition of a specific medical condition and whether or not he considered that definition was incongruous with the exclusions provided in the insurance policy.

This matter turns on the definitions of medical terms, not legal or insurance terms, which issues I have dealt with earlier in this section.

The weight of [the independent expert's] opinion, with regard to the definitions of the medical terms, are however directly relevant to my decision on whether or not the conditions should be excluded under the terms of the policy.

Likewise, had [Company X], who are not medical experts, wished to provide a qualified opinion on the medical definitions and relate them to the policy exclusions, it was open to [Company X] to provide CIFO with its own expert medical witness opinion to rebut [the independent expert's] opinion. [Company X] has not done so.

Ultimately, it is for me to decide whose evidence I prefer after consideration of all available evidence.

<u>Congenital - Definition</u>

[The independent expert's] expert opinion is very firm that neither [the complainant's son's] squint, nor the amblyopia are, by any definition, congenital.

In his opinion, the squint is not a part of any aging process, was not present at birth, was not inherited nor caused by any environmental factor. [The independent expert] adds that:

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[2] In *Persimmon Homes -v- Ove Arup* [2017] EWCA Civ 373, the Court of Appeal confirmed that the contra proferentem rule had a very limited role to play in relation to commercial contracts negotiated between parties of equal bargaining strength. However, it is still applied in circumstances where the parties are not of equal bargaining strength (see *Lexi Holdings Plc -v- Stainforth* [2006] EWCA Civ 988 and *Pratt –v- Aigaion* Insurance Company [2008] EWCA Civ 1314).

[3] Chitty on Contracts (32nd ed. 2015), chapter 13.

'*had [the complainant's son] been examined or screened at birth or in his first year by an ophthalmologist, no squint would have been present, and no significant eye abnormality would have been detectable.'*

'It could not have been predicted at any stage or in the eye examination (before he presented at age 2 and a half years), that [the complainant's son] would have developed a squint'.

[The independent expert] concludes that [Company X's] definition is incorrect and deeply flawed for the reasons set out in his report.

The definition of the word 'congenital', according to the [Company X] policy, has two distinct factors to consider. It is either:

- A condition recognised at birth; or,
- A condition that it is believed to have been present since birth even if not immediately evident at the time of birth, whether,
  - inherited or
  - caused by an environmental factor.

It is clear from all the evidence that [the complainant's son's] condition was not recognised at birth, therefore I need only consider the second factor of [Company X's] definition, which requires the presence of either inheritance or environmental cause.

The Oxford English Dictionary defines 'belief' as:

An acceptance that something exists or is true, especially one without proof.

The [Company X] policy definition does not state who must hold this belief, but it would be reasonable to presume that the belief must be held by [Company X]. In my view, [Company X] cannot justify holding this belief, particularly when held against the evidence of two consultants (one independent), both of whom consider the condition not to have been inherited or caused by an environmental factor.

[Company X], in its rebuttal of [the independent expert's] independent expert report, refers to its own research in the area. [Company X's] research however, consists of open source internet search results or references from web pages.

In my view, opinions based on such research are insufficient and unconvincing in comparison to the opinion of experts relying on their qualifications and significant experience in a specialized field of medical science. I consider it somewhat surprising that [Company X] seeks to criticize [the independent expert's] opinion on the basis of such limited internet research.

I have considered the definitions provided by [Company X] and that of the independent expert, including the further representations. On a balance of probabilities, I prefer [the independent expert's] evidence and I find no evidence on which [Company X] could

reasonably hold the belief that the condition was inherited or caused by an environmental factor.

I therefore find that [the complainant's son's] condition was not congenital.

[Company X] has claimed [the complainant's son] was genetically pre-disposed to developing a squint and bases this assertion on the fact that [the complainant's son's] father had a childhood squint.

In my view this is an unqualified opinion from [Company X] and there is no evidence produced which is supported by an expert in genetic ophthalmology. I am surprised that [Company X] seeks to make such a claim regarding a specialized medical subject without instructing its own expert witness to support that assertion.

Conversely, [the independent expert], independently instructed by CIFO to assist with this case, appears to have experience in genetic ophthalmology, including running specialist clinics. [The independent expert] describes some 30 or more types of squint and states that hardly any are purely genetic.

With regard to the evidence provided to me, I find no evidence to support [Company X's] assertion that [the complainant's son] was genetically pre-disposed to developing a squint. The evidence provided strongly suggests that a causal genetic development is highly unlikely.

<u>Developmental – Definition</u>

[The independent expert] has provided a full explanation as to why he considers [Company X's] use of the term 'developmental' to be spurious, factually incorrect medically, nonscientific and nonsensical. In his opinion:

> '*If a child develops any illness or disease at any point after being born, it is (by definition) not in keeping with normal development. The definition can therefore be (inappropriately) applied to include anything that 'develops.''*

I am in agreement with [the independent expert's] opinion that the use of the word 'developmental' is an overly ambiguous and sweeping term. Therefore, I find that [the complainant's son's] condition distinguishes itself sufficiently from the excluded conditions listed at paragraph 9.17 (or, according to [Company X], paragraph 5.42) to the extent that I cannot consider his condition to be subject to exclusion.

I note that [the independent expert's] recommendations at page 14 of his report extended to [Company X] giving serious consideration to re-writing their guide section 'Exclusions or What isn't covered?', suggesting the words 'congenital' and 'developmental' have been misused. [The independent expert] also recommended that [Company X] authorise and agree to pay for all treatment in relation to [the complainant's son's] squint (past and present), including Consultant consultation fees, orthoptist fees, and any future treatments, including surgery, if this is required.

As these matters are not the subject of the current complaint and these medical costs have yet to be incurred, I make no determination on these matters. I am, however, inclined to agree with [the independent expert] that [Company X] should authorise and agree to pay for all past treatment in relation to [the complainant's son's] squint.

[Company X] has stated that the policy, provided through [the complainant's] employment is now cancelled.

It is a principle of this office that [the complainant] should be placed back into the situation she would have been in had the claim been properly accepted.

CIFO is unable to compel [the complainant's] employer to reinstate the previous policy. I consider that, had [the complainant's son's] treatment been authorised, [Company X] would have continued to remain liable for the costs of that treatment, notwithstanding the policy not being renewed, as the act which gave rise to the claim occurred while the policy was in force.

Ideally, had [the complainant] chosen to instruct [the consultant Paediatric Ophthalmologist] or an equivalent consultant privately, as would have been the case had this claim been properly accepted, all reasonable costs for relevant future treatment for this condition should have been met by [Company X].

However, I find that such costs are purely speculative and therefore I make no determination with respect to as yet undetermined future costs.

<u>Distress, inconvenience and costs</u>

[The complainant] has provided me with a letter describing the impact this has had on her family and I am satisfied that this has been a difficult and distressing period for [the complainant's son] and his parents. They would naturally have been extremely concerned about the problem and would have at least found some comfort in having access to private medical care as provided by the policy.

At the age of two and a half, [the complainant's son] was subjected to various examinations which, at that age, he would not have understood. The relationship built up between [the complainant's son], and his parents with [the consultant Paediatric Ophthalmologist] was therefore important in alleviating the distress [the complainant's son] and his parents were enduring. The refusal of [Company X] to cover the costs of ongoing treatment meant that this supportive bond was removed after 6 months, adding significantly to the distress.

In order to maintain this relationship, [the complainant's son's] parents attempted to find the money to carry on with the private care and managed to pay for two further consultations with [the consultant Paediatric Ophthalmologist] on 12 July 2016 and 27 September 2016 respectively, at a cost of £215 per session for a total cost of £430. I have received copies of the relevant invoices in this regard. This was money they felt compelled to find to minimise the distress to [the complainant's son] given his age and the trust formed with [the consultant Paediatric Ophthalmologist]. [The complainant] states that sourcing the money to pay for private healthcare put a strain on her

relationship with her husband at a time when they should have been bonding as a new family.

The family say that they could not sustain the cost of the private treatment indefinitely and [the complainant's son] has since been seen by several different consultants, none of whom has built the relationship of trust that previously existed with [the consultant Paediatric Ophthalmologist].

[The complainant] describes feeling bullied by [Company X], who appeared to be contradicting everything they had been told by their consultant; whose opinion is supported by the independent expert. [The complainant] describes suffering from numerous sleepless nights and anxiety about their son's condition over a considerable period of time.

Despite her perception, I find no evidence of bullying. I am, however, satisfied that [the complainant] and her family have endured significant unnecessary distress, inconvenience and cost as a result of [Company X's] refusal to cover the costs of treatment. Consequently, I find it would be fair and reasonable that [Company X] should reimburse [the complainant] in the sum of £430 for the costs incurred in trying to maintain the working relationship with [the consultant Paediatric Ophthalmologist], plus simple per annum interest of 8% from the dates of payment; this being total reimbursed sums of £34.59 and £30.96 respectively; a total interest payment of £65.55

Furthermore, for the significant distress and inconvenience suffered as a consequence of this refusal, and from [Company X's] continued resistance to this claim, even after my preliminary decision, I consider [Company X] should pay [the complainant] the sum of £2,500.

The total amount [Company X] should pay for distress, inconvenience and expenses is £2,995.55.

CIFO Costs

[Company X] not only rejected this claim unfairly but also cast aspersions on the reputation and integrity of [the consultant Paediatric Ophthalmologist], which in my view were entirely unsubstantiated. As a result, CIFO considered it necessary to obtain the opinion of an independent expert in this field [redacted for anonymisation purposes]. They continued to attack the integrity and expertise of [the independent expert] and his opinion. I find that [Company X's] conduct in this matter was unreasonable and caused additional resources and expenses to be incurred by CIFO in reviewing this complaint.

Additionally, the unique nature of this complaint, and [Company X's] intransigence in accepting the unreasonableness of its position, required CIFO to obtain the counsel of an experienced ombudsman who also works with the UK Financial Ombudsman Service and is a specialist in the field of insurance.

In accordance with Article 17(1)(a) of the Financial Services Ombudsman (Jersey) Law 2014, I award the sum of £2,925 against [Company X] in favour of CIFO to cover the

costs incurred in obtaining the independent expert report from [the independent expert], and £500 to reimburse CIFO for the costs incurred in seeking the counsel of the consulting insurance ombudsman.

The total amount awarded for costs in favour of CIFO is £3,425.

Decision

My decision is that the complaint is upheld in this matter. [Company X] should pay £2,995.55 to [the complainant] and £3,425 in costs to CIFO, this being a total sum of £6,420.55.

[The complainant] must confirm whether she accepts this determination either by email to ombudsman@ci-fo.org, or letter to Channel Islands Financial Ombudsman, PO Box 114, Jersey, Channel Islands JE4 9QG, by 6 September 2018. The determination will become binding on [Company X] and [the complainant] if it is accepted by this date. If we do not receive an email or letter by the deadline, the determination is not binding. At this point [the complainant] would be free to pursue her legal rights through other means.

The costs payable to CIFO are not dependent upon [the complainant] accepting the determination.

If there are any particular circumstances which prevent [the complainant] confirming her acceptance before the deadline within 30 days of this determination, she should contact me with details. I may be able to take these into account, after inviting views from [Company X], and in these circumstances the determination may become binding after the deadline. I will advise both parties of the status of the determination once the deadline has passed.

Please note there is no appeal against a binding determination, and neither party may begin or continue legal proceedings in respect of the subject matter of a binding determination.

Douglas Melville
Principal Ombudsman and Chief Executive

Date: 8Th August 2018