Before the Arbiter for Financial Services

Case 034 2020

BR (the complainant)

vs

Axeria Insurance Ltd. (C 55905)

(the service provider/the insurer)

Sitting of 15 December 2020

The Arbiter,

Having seen the complaint,[1] whereby the complainant submits that:

On the 10 August 2018, he was standing on a beach in Mauritius observing kite surfing when a kite surfer collided into him at high speed, causing a severe laceration to his right medial knee. He was initially treated at a hospital in Mauritius but required further treatment in the UK.

He made a claim with the insurer which was rejected. In essence, the claim was rejected because the insurance held that they did not cover accidents arising from participation in surfboarding and there is allegedly evidence from the hospital in Mauritius which stated that the '*right knee laceration was caused whilst kite surfing'.*

The complainant insists that he was not participating in the sport of kite surfing but was just a spectator on the beach, and the medical note dated 12 August 2018, which refers to this incident, is incorrect.

He initially asked the hospital to make it clear that the accident happened while he was observing kite surfing; however, this was declined on the basis that there

[1] *A Fol.* 4, 7-9

was no evidence to prove that he was observing the activity rather than participating in it. This is despite the fact that there is no evidence to prove that he was participating in the activity.[2]

He further submits that his evidence should be enough to substantiate his version of events because he cannot prove otherwise as he was alone on holiday. He was unconscious when he arrived at the hospital and was driven by a bystander on the beach who did not speak English. He did not, at any stage, inform the medical staff that he was participating in kite surfing when the incident took place and he is not aware on what basis this assumption has been incorrectly made by hospital staff.

Given that the medical note is incorrect and there is no evidence to support the position stated in the medical note, it is unreasonable for the Underwriter to reject his claim. The reference to kite surfing is not a medical diagnosis and a doctor is not qualified to give evidence on how an accident occurred. It is therefore not appropriate to rely on such statement.

The complainant further states that even though the medical note refers to '*kite surfing'* which is different from '*surf boarding'*, it is not included as one of the hazardous activities listed in the policy as being excluded. The clause appears to be exhaustive and therefore the lack of inclusion of the activity should have been taken into account by the underwriter. In addition, the policy distinguishes between different types of activities, such as, '*all skiing (dry, snow, water jet)* and *motor sports (both on land and on water); 'any form of aerial flight etc.'*

For all of these activities, it is made clear what form of the activity is covered and is accompanied by the word '*any*' or *'all'*. This is contrasted by the exclusion in respect of surf boarding, which simply states *'surf boarding'*.

It does not refer to kite surfing which combines several different aspects of other sports (including windsurfing, wakeboarding and kite flying - none of which are referred to in the policy), nor does it even state '*all'* or *'any'* forms of surf boarding which would arguably still be ambiguous and not include kite surfing, given the different elements of the sport.

[2] *A Fol.* 8

In conclusion, he states: (a) the activity which harmed him is not one which is excluded from the policy and, (b) he was not participating in any hazardous activities when the accident took place; he was simply standing on the beach.

Therefore, the Arbiter should order the underwriter to honour the claim.

Having seen the reply by the service provider which basically states that:

The Client provided two medical reports:

- 12th August 2018 (See Annex A) Inpatient Report: The report makes reference (quote): *'History of laceration right medical knee whilst **kitesurfing** …'*
- 13th August 2018 (See Annex B) Medical Report by Dr Ahsan: In this report, there is a statement saying that '*this 34-year-old surfer who sustained a **surfing accident** whilst holidaying in Mauritius;* and

This is the evidence that the Client supplied at the opening of the claim and before understanding that surfing of any kind is excluded.

Rationale for excluding kitesurfing

We would like to note that in line with the Policy Document (quote): '***Treatment arising from participation in hazardous pursuits** …'* is excluded and not covered. Upon researching on 'kite surfing', it is immediately evident that this type of activity is considered as **an extreme sport**. We would like to make reference to Wikipedia finding https: //en.wikipedia.org/wiki/Kiteboarding stating that:

*Kiteboarding, also known as kitesurfing (1), is an action sport combining aspects of wakeboarding, snowboarding, windsurfing, surfing, paragliding, skateboarding and sailing into **one extreme sport.***

A kiteboarder harnesses the power of the wind with a large controllable power kite to be propelled across the water, land or snow.

Compared to the other sailing sports, kiteboarding is both among the less expensive (including equipment) and the more convenient. It is also unique in that it harvests the wind energy from a much larger atmosphere volume, comparing to sail size.

The statement in bold above is not considered as ambiguous as argued by the lawyers and the statement itself covers all types of hazardous activities.

Further to the above, this sport is also a combination of different sports including surfing and skiing which are outrightly excluded. In fact, 'kitesurfing' is widely considered as a professional sport considering the different combination of skill sets required to master the skiing and surfing at the same time. Simple google search results in addition to Wikipedia confirm this argument. Professional sports are excluded in terms of the definition: '*or any form of professional or semi-professional sport.'*

Further circumstances on the case

The claimant attached a medical report dated **30th October 2019.** This report made reference to a *direct trauma to his knee from another kite surfer*. A point which we find to be anomalous as the incorrect medical evidence was not argued by the lawyers in their letter dated 11th November 2019, a copy of which is being attached herewith (marked as Annex C). In line with their letter, the lawyers noted that the client was surfing and further argued that kitesurfing is not listed. It was never mentioned by the same lawyers that this injury was caused by a third party. I find the below totally contradictory to their letter of 3rd February 2020 which was sent as an attachment to the complaint.

Attached is the relative text for your consideration. Please refer to the text in bold:

We refer to previous correspondence on this matter between you and our client, in particular your email from Emily Scoble dated 28 August 2018 and your letter dated 28 September 2018.

We understand that our client's claim for private medical treatment has been refused on the basis that your policy documents state that ***you do not cover accidents which take place during 'surf boarding' and there is evidence from our client's doctor that he sustained this injury while surfing.***

In fact, this is incorrect. The evidence to which you refer (a note dated 12 August 2018, copy enclosed) states that our client was 'kite surfing', which is plainly a different activity to surf boarding, and is not included as one of the hazardous activities listed in your policy as being excluded.

We would like to note that in the event that the accident has been caused by a third party, then a police report would have been accompanied or attached to Annex A. Such police reports would cover any witness recounts of the course of events and interrogations made to the third party who has caused the injury. Also, the client, whom in terms of insurance principle is expected to act in utmost good faith, did not provide material facts on the case from the outset. The injury caused to him by the third party were made by him later on and included only in the medical report dated 30th October 2019. This medical report was issued following our letter of 10th October 2018.

On the basis of the above analysis, we feel that there are no grounds to compensate the client both on the fact that this sport is excluded and also on the fact that the evidence does not tally with the course of events as presented and as further argued in our letter.

Having heard the parties

Having seen all the documents submitted by the parties

Considers

According to Chapter 555 of the Laws of Malta, the Arbiter '***shall determine and adjudge a complaint by reference to what, in his opinion, is fair, equitable and reasonable in the particular circumstances and substantive merits of the case'***.[3]

In order to decide the complaint in a fair, equitable and reasonable manner, the Arbiter has to consider and evaluate the versions given by the parties, examine and analyse the documents submitted by the parties and, finally, reach his conclusions with the ultimate aim of administering justice between the parties.

The Complainant's Version

The complainant testified[4] that he had a terrible accident whilst in Mauritius when he suffered a knee injury as a result of which he was operated in an

[3] Art. 19 (3)(b)
[4] *A Fol.* 109 *et seq*

emergency fashion in Mauritius. He received extraneous physiotherapy and rehabilitation in order to get better and was given advice that he needed further surgery to save his right knee.

He made a claim for medical expenses with his private medical insurer which was refused. They declined the claim on the basis that he was allegedly kite surfing based on a medical note from the hospital in Mauritius stating that his injury was caused whilst kite surfing.

The complainant further stated that this was definitely a kite surfing accident but at no stage was he participating in the activity. What happened was that he was hit by a kite surfer in a kite surfer district in Mauritius and caused the injury to his right knee. He was hit by the board of the kite surfer that was out of control whilst the complainant was observing on the beach.

The reference in the hospital's medical note created a lot of complications for him. The medical note '*has been retracted from the official medical report from the doctor'* and, since he did not manage to get a positive outcome from the insurance, he filed the complaint with the Arbiter.

The complainant's representative also submits that the individual who drove the complainant to the hospital had not known the complainant and reported to the doctor an incorrect version of what really had happened. Kite surfing is not included in the policy. This was an alternative defence to the other defence that the complainant was in fact not participating in kite surfing. It is finally submitted that the accident was clearly covered by the policy and the complainant insists that the claim should be upheld by the service provider.

The Service Provider's Version

Claire Camilleri Gauci, on behalf of the service provider, submitted that although the complainant says that his injury was caused by a third party, the first medical records were received on the 12 and 13 August 2018 referring to an accident '*whist kite surfing'*. These certificates were the first evidence submitted with the claim. In the meantime, they had been corresponding with the complainant and his lawyers throughout the course of 2018 and 2019 in relation to this claim.

She cited an extract from a letter received from the complainant's lawyers which stated:

'*We understand that our client's claim for private medical treatment has been refused on the basis that your policy documents state that* ***you do not cover accidents which take place during 'surf boarding' and there is evidence from our client's doctor the he sustained this injury while surfing'.***

It did not mention that the injury was caused by third parties. The service provider refused the claim around the 10 October 2018, and it was later that the complainant mentioned the third party.

The witness asked herself how can it be that no police report was filed as well? When a third party is involved in an injury there should be a police report. The evidence that was always provided by the complainant was that the accident had happened whilst surfing.

With regards to kite surfing, the witness stated that it is important that one understands the nature of this sport because there is a clause in the policy which states that:

'We do not cover treatment in participation in hazardous pursuits or in relation to professional sport'.

From the research she carried out, **surf boarding** is surfing and boarding at the same time and is controlled by wind. Since she is not a professional, she cannot say whether ***surf boarding*** and ***kite surfing*** are the same or not. Annex C talks about injury whilst surfing. It is a combination of both. From the evidence they had, the complainant was participating in the sport.

Further Considers

Basically, the parties are not agreeing on two issues.

1. Whether the complainant was participating in the sport of kite surfing or whether he was a spectator and hit by a third party;

2. Whether kite surfing is excluded by the policy.

As to the first contention, namely, whether the complainant was participating in the sport or not, the complainant contests the correctness of the certificate

issued by the hospital after he was discharged from the hospital in Mauritius exactly after the accident.

The certificate issued by the Clinique Fortis Darne on the 12 August 2018 described the diagnosis as:

'History of laceration right medial knee while kite surfing.'[5]

On the 13 August 2018, another medical certificate issued by Dr Ashan (London) referred to the complainant as a *'34-year old surfer who sustained a surfing accident whilst holidaying in Mauritius.'*[6]

The complainant states that the reference '*in the medical note'* was '*retracted from the official medical report from the doctor*'.[7] Although from this testimony it is not clear whether the complainant is referring to the medical note of the 12 August 2018 or that of the 13 August 2018, or both, from the complainant's representative submissions the Arbiter understands that the complainant is referring to the certificate of the 12 August 2018 because his representative is mentioning the '*correction'* in the medical report in relation to the person who allegedly took the complainant to hospital.

From the records of this case, the '*correction*' seems to have been made in the report issued by Justin Roe on the 30 October 2019, who stated that:

'*As you know, Andrew has had an unfortunate injury while in Mauritius. He had a direct trauma to his knee from another kite surfer.'*[8]

As submitted by the service provider with reference to the letter of the 30 October 2019, this was issued more than a year after the accident and after the claim was refused by the service provider. In fact, the complainant himself admits in his complaint that the claim was rejected on the 10 October 2018.[9] Moreover, the reference letter of the 30 October 2019 is not in reality a medical report based on an objective assessment of the incident, but it is just a narration

[5] *A Fol*. 34
[6] *A Fol.* 19
[7] *A Fol.* 110
[8] A *Fol*. 22
[9] *A Fol.* 7

of what the complainant told A/Prof Justin Roe more than a year after the claim was rejected by the insurer.

Moreover, this reference letter makes reference to '***another*** *kite surfer'* implying that the complainant is a kite surfer himself. This letter does not give detail how this other kite surfer caused the incident and does not exclude that the complainant was not participating in the event. The wording is simply: '*a direct trauma to his knee from another kite surfer*' which could also mean that the complainant was hit by the other kite surfer during his participation in the sport.

The fact that the complainant was a surfer also results from the reference letter of the 13 August 2018, where the complainant is also referred to as a surfer: '*34-year-old* ***surfer***[10] *who sustained a* ***surfing accident***[11] *whilst holidaying in Mauritius'.* The information in this letter was also given to the medical professional by the complainant.

Both this letter and the hospital's report are much closer to the accident than the letter of the 30 October 2019, which is basically the complainant's narrative after the claim was rejected a year before; and after lengthy discussions with the service provider which alleged that **participation** in this kind of sport was not covered by the policy.

Furthermore, the complainant states that he was taken to hospital in an unconscious state. There is no mentioning of this in the hospital's medical report of the 12 August 2018, which is the only objective narrative of the accident *at the moment it occurred.* The complainant contradicts the hospital report on the basis that the information to the medical team was given incorrectly by a person who took him to hospital. The complainant does not prove that this person had any reason to give such '*incorrect*' information.

Moreover, the report of the 12 August 2018 is a discharge report, given to the complainant who had the opportunity to contest the certificate at the time it was handed to him. If the complainant was not satisfied with the report as he claims, he was in a position to qualify the report to the service provider when

[10] Emphasis by the Arbiter
[11] *Ibid.*

submitted with the claim. However, this report started to be challenged by the complainant after the claim was refused by the service provider.

The Arbiter also notes that the report of the 12 August 2018 is to some extent confirmed by the reference letter of the 13 August 2018 which refers to the complainant as a '*surfer*' and refers to the incident as '*a surfing accident'*. As submitted by the service provider, the mentioning of a third party as causing the incident started to be mentioned much after the date of the incident. Finally, the Arbiter is of the opinion that if a third party had caused the incident, the complainant was duty bound to report the case to the police to be in a position to present to the insurer the best evidence possible. The Arbiter rests on the hospital's medical report which was issued by medical professionals at the time of the incident and which was filed with the claim by the complainant as true evidence of the event.

This report was neither objected to by the complainant's legal representative in its communication with the service provider of the 11 November 2019.[12]

As a matter of fact, the complainant's lawyer quotes the medical report issued by the hospital as follows:

'*The evidence to which you refer (a note dated 12 August 2018, copy enclosed) states that our client was "kite surfing" which is plainly a different activity to "surf boarding".'*

For the above-stated reasons, the Arbiter is not convinced with the complainant's assertion that he was not participating in kite surfing.

Whether 'kite surfing' is covered by the policy

The hospital's report of the 12 August 2018 refers specifically to '***kite surfing'***. Therefore, the Arbiter's job is to evaluate whether '*kite surfing'* is covered or excluded by the policy.

[12] *A Fol*. 107

In its correspondence of the 28 August 2018 to the complainant[13] the representative of the service provider refused the claim on the basis that the policy did not cover:

'*Treatment arising from participation in hazardous pursuits - abseiling, bungee-jumping … **surf boarding,**[14] white water rafting and any sport for which you receive remuneration or any form of professional or semi-professional sport.'* The emphasis is on **surf boarding**.[15]

In its final submissions the service provider insists that they do not cover:

'… treatment in participation in hazardous pursuits or in relation to professional sport'.[16]

However, the representative of the service provider herself submitted that:

'*I am not a professional to say whether **surf boarding** and **kite surfing** are the same or not'.*[17]

The Arbiter fully understands the position taken by the representative of the service provider in this regard because from his research the Arbiter also met the same difficulty.

Kite surfing and *kite boarding* are considered as basically the same sport:

'*Generally speaking, kite boarding and kite surfing are different names for the same water sport.*

From a purely statistical point-of-view, the term kite boarding is more popular in the United States, Canada, Argentina, France, and the Czech Republic, while kite surfing remains the favourite designation in Brazil, Europe, Middle East, Russia, India, and Oceania.'[18]

Then, **kite surfing** has been described as:

[13] *A Fol.* 10
[14] The service provider's emphasis
[15] *Ibid.*
[16] *A Fol.* 111
[17] *A Fol.* 112. Emphasis of the Arbiter
[18] https://www.surfertoday.com/kiteboarding/what-is-the-difference-between-kiteboarding-and-kitesurfing

'*a sport in which you move across water by standing on a board and holding onto the strings of a large kite (= a piece of cloth on a frame,* ***that is moved by the wind****)*.[19]

On the other hand, **surf boarding** has been defined as:

'*a sport in which a person stands or lies prone on a surfboard and* ***rides the crest of a breaking wave*** *toward the shore; surfing'.*[20]

For the layman, like the Arbiter, these two sport activities appear to be similar though not the same.

However, it seems that sport advisers make a clear distinction between **kite surfing** and **surfing**:

'*kite surfing and surfing* ***are really very different sports****, they have some points of contact only when it comes to surfing the waves, so a direct comparison is not always possible and in many cases it really makes little sense, but it can be useful to compare them to help those who would like to get closer to choosing in a more conscious way to which to orientate, or at least to start with!'* [21]

This leaves the Arbiter in the same position of the service provider's representative when she said that she was not in a position to decide whether *surf boarding* and *kite surfing* were the same sport.

In the Arbiter's opinion, this creates doubt and ambiguity about the term '*surf boarding*' as spelled out in the policy.

The exclusion clause in the policy states that:

'*treatment arising from participation in hazardous pursuits -*

Abseiling, bungee jumping, flying light aircraft, hang gliding, horse racing or hunting or jumping or polo, ice hockey, motor sports (both on land or on water), mountaineering and outdoor rock climbing, any form of aerial flight (except as a passenger or crew member travelling on a fully licensed standard type aircraft owned or operated by a recognised airline over an established route,

[19] https://dictionary.cambridge.org/dictionary/english/kitesurfing
[20] https://www.dictionary.com/browse/surfboarding
[21] https://www.tabularasateam.it/en/blog/kitesurfing-vs-surfing/

parachuting and parascending, pot-holing, scuba or sub-aqua diving, all skiing(dry, snow, water, jet) ***surfboarding****, white water rafting and any sport for which you receive remuneration or any form of professional or semi-professional sport.'*

It is an accepted principle that when a contractual clause is clear there is no room for interpretation and the ordinary meaning of the word prevails and the intention of the parties prevail. However, when there is doubt about the meaning of a word or expression, the adjudicator has no other means at his disposal other than to try to interpret it.

In this case, there is a clear doubt whether '*surf boarding'* includes *'kite surfing*' as well. The complainant says that surf boarding and kite surfing are two different sports and, therefore, kite surfing is not excluded from cover. On the other hand, the service provider states the contrary, but in her final submissions, the service provider's representative also shed doubt as to whether surf boarding and kite surfing were the same or not. It is clear that there is doubt and ambiguity about the meaning and extent of the term '*surfboarding*'.

In interpreting a dubious exclusion clause in an insurance contract, the most common view is that the *contra proferentem* rule (Benefit of the doubt rule) applies.

In the famous judgement ***Houghton vs Trafalgar Insurance Company Ltd***[22] *SOMERVELL LJ stated that:*

'... If there is any ambiguity, since it is the defendants' clause, the ambiguity will be resolved in favour of the assured'.

The *contra proferentem* rule has been widely applied even in other jurisdictions. For instance, in an Indian case, the Supreme Court in ***Sushilaben Indravadan Gandhi and anr v. The New India Assurance Co Ltd and Ors***[23] also applied the principle that in case of an ambiguity, an exemption of liability clause in insurance contracts is to be construed against the insurance company.

[22] [1954] 1 QB 247

[23] https://www.lexology.com/library/detail.aspx?g=a6420c20-4560-4bc8-9f9f-dacf34608956

Moreover, in insurance contracts, exclusion clauses serve a particular purpose and are different from exclusion clauses in ordinary contracts:

'*Unlike some exclusion or exemption clauses in ordinary contracts, an exclusion clause in a contract of insurance is not usually designed to exclude, restrict or limit a party's legal liability.* ***Rather, these clauses carefully define the boundaries of the risk to be insured by setting out what will not be covered under the contract of insurance. While insuring clauses are often broadly worded for simplicity, exclusion clauses are often used as a tool to narrow the scope of coverage provided.***

Exclusion clauses should be distinguished from other terms in the contract of insurance, such as conditions precedent and warranties. ***The purpose of an exclusion clause is to define, from the outset, the specific risks which will not be covered by insurers in any event under the policy.*** *Conditions precedent and warranties, on the other hand, will only affect the scope of cover when they are breached by the insured.*'[24]

When the Arbiter considered the particular exclusion clause merits of this case, he came to the conclusion that:

1. Although the clause states that the policy does not cover treatment arising from participation in hazardous pursuits, then the policy mentions a good number of activities considered as hazardous.

2. Not only is the list of hazardous activities an extensive and specific one, but it also enters into certain details, so much so, that certain hazardous activities like '*aerial flight*', '*all skiing*' are qualified to remove any doubt about them.

3. Moreover, after the specific list of hazardous activities the clause is **concluded** by '*and any sport for which for which you receive remuneration or any form of professional or semi-professional sport*'.

[24] https://www.lexisnexis.co.uk/legal/guidance/exclusion-clauses-in-insurance-contracts, Emphasis of the Arbiter

4. The list of hazardous activities is therefore exhaustive and only includes the hazardous activities specified in it.

5. Kite surfing, the activity in which the complainant allegedly participated, is not specifically mentioned.

If the insurer did not include a particular risk, it did not intend to include it and since it drafted the contract it would only be fair and reasonable that any doubt should militate against it. This is not just the embodiment of the *contra proferentem* rule but is also the pronouncement of the general principle of interpreting a policy in a fair manner.

An exclusion clause is limiting the liability of the insurance company and as such the insurer is considered to have taken all the necessary measures (including the appropriate legal advice) to draft the clause in a precise manner to suit its purposes. Since the scope of the clause is to limit the risk for the insurer, it is up to the insurer not to include dubious or ambiguous terms.

Furthermore, the Arbiter is guided by the principles of fairness, equity and reasonableness and in his discretion, he should consider the applicable law or guidelines both on a European or local level.[25]

When it comes to **consumer contracts**, it has been widely accepted even on a European Union level, that consumer contracts have to be drafted in simple and intelligible language and whenever there is doubt as to the interpretation of a term, it should be interpreted in favour of the consumer.

This principle established in the European Council Directive 93/13/EEC[26] also found its route into Maltese consumer legislation.

In fact, the Consumers' Affairs Act,[27] provides that:

'*47. (1) In any consumer contract, where all or some terms offered by a trader to a consumer are in writing, these terms shall be written in plain and intelligible*

[25] Cap. 555, Art 19(3)(c)

[26] Art. 5 states: In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. **Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail**. (Arbiter's Emphasis)

[27] Cap. 378 of the Laws of Malta

language which can be understood by the consumers to whom the contract is directed.

(2) ***Where any term is ambivalent or any doubt arises about the meaning of a term, the interpretation most favourable to the consumer shall prevail.***

As has already been stated in this decision, a controversy, a serious doubt and an ambiguity have arisen about the extent of the meaning of '*surf boarding'*.

Consequently, according to law, the interpretation most favourable to the consumer prevails. In this way, the law also tallies with *contra proferentem* rule explained above.

Therefore, the Arbiter cannot conclude that kite surfing was excluded from cover, and the burden of proof to prove that **surf boarding** included **kite surfing** rested on the service provider. The only witness brought forward by the service provider declared that she could not say whether surf boarding and kite surfing were the same. Consequently, the service provider did not prove the exclusion of kite surfing from insurance cover.

For the above stated reasons, the Arbiter decides that the complaint is fair, equitable and reasonable in the particular circumstances of this case[28] and is accepting it in so far as it is compatible with this decision

Compensation

The complainant asks the Arbiter to order the service provider to pay him: '*the losses of* ***approximately*** *£9200,'* and for '*further surgery and rehabilitation which has been* ***estimated*** *to cost in the region of £20,000'.*

The Arbiter is accepting the complainant's request that the claim regarding the injury be accepted by the insurer.

However, the Arbiter cannot order the payment of '*approximations*' or '*estimates*' as suggested by the complainant in his complaint.

[28] Cap. 555, Art. 19(3)(b)

Therefore, by way of compensation the Arbiter orders Axeria Insurance Limited to accept and process the claim regarding the injury sustained by the complainant merits of this case, and pay the complainant (against receipts), for all medical care necessary in accordance with the limits of the policy, if any.

The legal costs of these proceedings are to be borne by the service provider.

Dr Reno Borg
Arbiter for Financial Services