

The complaint

A limited company that I will refer to as T complains about the decision of U K Insurance Limited trading as NIG to avoid its commercial insurance policy and decline its employers' liability claim.

What happened

The following is only intended as a brief summary of events. Additionally, whilst other parties have been involved in the complaint, for the sake of simplicity, I have largely just referred to NIG and T.

T held a policy underwritten by NIG. As far as is relevant, the policy renewed in March 2021. In June 2021, an employee of T suffered an alleged accident at work, and a claim for compensation was made against T. T contacted NIG to claim under the employers' or public liability sections of the policy.

Ultimately, NIG decided to avoid the policy, refunding the premium, and to not meet the claim. This was on the basis that when the policy had renewed T had failed to declare the relevant type of work or type of location involved in the accident were circumstances that T's operations included. NIG made its decision on the basis that, amongst other things, the answers given to the following questions were inaccurate:

"Does the business use any process involving the application of heat other than soldering irons?" Answered "No"

"Type of properties the business undertakes work on?" Answered "Private Dwellings or Blocks of Flats only"

NIG said that T carried out pothole repairs at motorway service stations, involving the application of heat. This was the work that led to the alleged accident. And T was aware of this work when the policy renewed in March 2021. NIG said that had the answers given to the questions above were incorrect. And that had they been correctly answered, this would have led to the policy not being sold.

T complained about this and when NIG didn't alter its decision, T referred the complaint to the Financial Ombudsman Service. However, our Investigator did not uphold it. She said that T had a duty to make a fair presentation of the risk posed at the time the policy was taken out. And that in answering these questions incorrectly, T was in breach of this duty.

The Investigator was also satisfied that NIG would not have offered the policy had these questions been answered correctly, so she felt avoiding the policy was fair and reasonable. T disagreed with this, as it did not consider NIG had provided adequate evidence or justified its decision. As such, the complaint has been passed to me for a decision.

I will add at this point that a separate complaint has been raised by T about the third-party broker who arranged this policy. I understand that this broker was acting on T's behalf. My decision, however, only concerns the actions of NIG in avoiding the policy and so not meeting the claim.

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.

Having done so, I am not upholding this complaint. I'll explain why.

Whilst it is not overly relevant in the circumstances, I would point out that the policy contains at least one exclusion relating to the event leading to the alleged accident. The policy excludes claims relating to work other than on private dwellings or blocks of flats. This was not the location of the alleged accident, and so – regardless of NIG's decision to avoid the policy – it does not appear the relevant claim would be covered. NIG has also referred to a couple of other exclusions – relating to working on motorways and 'heat work', but it is less clear these would apply in the circumstances.

However, not only does the avoidance of the policy mean such a claim would not be considered anyway, it also has a potential impact on T going forward – as this avoidance will likely need to be declared when renewing cover and also other potential claims during this period would not be covered. So, I will focus on the decision to avoid the policy.

I appreciate T took its policy out through a third-party broker. But as this broker was acting on T's behalf, NIG is entitled to consider any information provided, or not provided, by this broker as being from T. And whether or not a commercial customer chooses to use a third party, the Insurance Act 2015 (the Act) places the duty of fair presentation on the customer. As I say, issues of how the broker facilitated this are being considered separately.

The Act requires, in effect, a commercial customer to disclose every material circumstance which the insured knows or ought to know, or failing that, sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances. NIG has not treated this as a deliberate or reckless breach, so it merely needs to be shown that T knew it was in breach of the duty, or did not care whether it was in breach.

T knew about these works at the time the policy was renewed. Given the questions above are specific about the type of work and location of such work, I consider that it ought to have been clear to T that the answers to these questions constituted information that was material to the circumstances of risk. So, I consider T ought to have provided different, accurate, information in relation to the questions above. And its failure to do so was a breach of the duty of fair presentation.

NIG has me with provided an extract from its underwriting criteria. Due to the commercially sensitive nature of this, I am unable to share it with T. However, I am satisfied that – at least in regard to the second question above – NIG would not have offered T the policy had it known about the location of T's work.

Answers to the first question would apparently have led to a referral to an underwriter for consideration. NIG has said that such a referral would have led to a decline, but this is less clear than it is in relation to the second question. And as the correct answer to the second would have led to automatic decline, it is not necessary for me to consider what the potential decision of the underwriter at the time would have been. The policy would not have been offered regardless of this first question.

As the policy would not have been offered had T not breached the duty of fair presentation, it follows that I consider NIG has fairly and reasonably avoided T's policy.

My final decision

My final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask T to accept or reject my decision before 18 January 2024.

Sam Thomas
Ombudsman