

The complaint

M has complained about U K Insurance Limited's (UKI) decision to avoid its Business Package insurance policy and refuse to pay its claim under it because of this.

M is represented by Miss B, who is a director.

What happened

Miss B took out a policy to cover M in April 2020 through an insurance broker, who I'll refer to as D. She renewed the policy in April 2021 and 2022. She made a claim in October 2022. A loss adjuster was appointed by UKI and discovered Miss B had a County Court Judgement (CCJ) against her name from 2018. He also discovered M had one against its name from 2020.

UKI's underwriters decided Miss B should have disclosed the CCJs when she took out the policy. It decided to 'void' her policy 'ab initio', although it didn't actually make it clear which policy it was voiding, bearing in mind M had taken out three policies with UKI by this point.

Miss B complained on behalf of M with the help of D. D argued that – based on its experience - UKI would still have offered the policy if Miss B had disclosed the CCJs. It also explained Miss B was not aware of the CCJ in 2018 when she took out the policy for M and on both occasions she renewed it.

UKI wouldn't alter its position, so Miss B asked us to consider M's complaint. One of our investigators did this. He explained that he was satisfied Miss B on behalf of M breached her duty to make a fair presentation by not disclosing the CCJs. And he was also satisfied UKI wouldn't have insured M if Miss B had disclosed the CCJs, which meant it was entitled to avoid M's policy and decline its claim.

Miss B asked for an ombudsman's decision and the case was passed to me.

I issued a provisional decision on 30 November 2023 in which I set out what I'd provisionally decided and why as follows:

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

The relevant legislation in this case is The Insurance Act 2015 (the Act). This required Miss B on behalf of M to make a fair presentation of the risk she was asking UKI to insure when she took out the policy in 2020 and when she took out further policies in 2021 and 2022.

In doing so, Miss B needed to disclose every material circumstance which she knew about or ought to have known about. The Act also states that an insured ought to know what should reasonably have been revealed by a reasonable search of information available to them.

If the insured, in this case M, fails to make a fair presentation of the risk the Act makes it clear that the insurer needs to decide whether the breach is a 'qualifying breach'. It is a

qualifying breach if, but for the breach of the insured's duty to make a fair presentation, the insurer would not have entered into the contract of insurance at all, or would have done so only on different terms. If the insurer decides it is a qualifying breach it then needs to decide whether it is deliberate or reckless or neither deliberate or reckless. If it decides it is neither deliberate or reckless it is only entitled to avoid the insured's policy if it can show it would not have entered into the contract on any terms but for the breach.

I've reviewed what UKI said in its letter advising M's broker it had decided to avoid M's policy. And I do not consider this letter is at all clear. It states that M's policy will be treated as if it never existed. But at this point M had had three policies with UKI. One starting in 2020, one starting in 2021 and one starting in 2022. However, I've assumed UKI is actually referring to voiding all three policies, as it decided M's failure to make a fair presentation with regards to the CCJs Miss B and M had against their names was neither deliberate nor reckless. And it seems to have refunded the premium for all three policies.

In my opinion, this was not the way to approach the matter. What UKI should have done was considered whether Miss B on behalf of M had failed to make a fair presentation when she took out each policy. And to avoid considering M's claim it needed to demonstrate it would not have offered the policy on any terms in April 2022 if Miss B had disclosed one or both of the CCJ's.

In view of this, I've considered – first of all – whether Miss B failed to make a fair presentation when she took out each of the policies. In doing this I've considered the questions she was asked or should have been asked by D on behalf of UKI. This is because I consider it good industry practice for an insurer to ask clear questions about matters it considers to be material to its acceptance of a risk.

The Statements of Facts I've seen for 2020 and 2022 contain the following question which it seems Miss B answered as 'no'. And I am assuming the same question appeared on the Statement of Fact in 2021, although I have not seen a copy of this.

'Has any proposer, director or partner of the Trade or Business or its Subsidiary Companies ever, either personally or in any business capacity been the owner or director of, or partner in, any business, company or partnership had a county court judgement awarded against them?'

In my opinion, this is a poorly worded question and quite difficult to follow. But I do think it makes it clear enough that Miss B needed to answer it yes if she was aware of any CCJs against her personally or against M.

In view of this, I think Miss B did need to answer it 'yes' and disclose the CCJ against M when she took out all three policies. But I do not think she needed to disclose the CCJ against her personally. I say this because she clearly knew about the CCJ against M when taking out all three policies. And it seems she either forgot to mention it or told D and it forgot. But I'm satisfied she did not know about the CCJ against her personally and I do not think it is right to say she ought to have known about it. I say this because when taking out a commercial policy, I wouldn't expect a director to do a personal credit check on themselves, unless they had some reason to think they might have something adverse on their credit history. And I can't see Miss B would have thought she did, based on what's she's said about how the personal CCJ against her came about.

This means I think Miss B – on behalf of M – did fail to make a fair presentation of the risk to UKI when taking out all three policies with M because she or D didn't disclose the CCJ against M.

In view of this, I've considered whether UKI has done enough to show these breaches of Miss B's duty on behalf of M were qualifying ones.

UKI has only provided the underwriting guide its underwriters were using in 2017, which it has said was in use in 2020 and at renewal. Although it hasn't said whether it means both renewals. But, I have assumed it was in use when Miss B took out all three policies for M.

I've noted that the guidance gave a great deal of leeway to the individual underwriter in deciding whether to accept a risk where the insured or one of its directors had CCJs against their name. And I am slightly concerned by a comment in UKI's file, which suggests that it may have accepted such risks previously, but there wouldn't have been a £25,000 claim outstanding. I say this because the fact there is a claim outstanding should not be a consideration at all when an insurer is deciding whether an insured's breach of their duty to make a fair presentation is a qualifying one and what action to take because of it.

However, I've also noted that UKI's underwriters are confident they would have carried out further credit checks on M and Miss B if she'd have declared one or both the CCJs and declined the policy. Although, I think UKI was referring to the fact it would have declined the policy in 2020. So it hasn't really commented on what it would have done in 2021 and 2022.

But I am not persuaded by the evidence UKI has provided that its underwriters would have decided not to provide a policy for M in any of these years. Or that it would have provided one on different terms. I say this because the underwriting guide refers only to risks demonstrating a combination of multiple CCJs and other factors as being unacceptable. It also refers to the consideration of mitigating circumstances and the amount of the CCJ's compared to the premium. And all of this suggests to me that a risk like the one M presented with two CCJs, with one being a personal one, and none of the other factors that I can see applying, would have been acceptable to UKI on normal terms. D has suggested it has previous risks for what might be best described as business with a poorer financial background accepted and it has provided a couple of examples. And all of this is why I am not persuaded that UKI wouldn't have offered the policies at all to M. And, as things stand I think it would have offered them on normal terms.

This means I do not consider UKI's decision to avoid M's policy in 2022 or either of its previous policies, assuming this is what it intended to do, was reasonable. And I consider the fair and reasonable outcome to M's complaint is for UKI to reinstate all three policies and make sure its records and any external databases reflect this. It must then consider M's claim in accordance with the terms of the policy it took out in 2022.

I've considered the inconvenience of having three policies wrongly avoided for M. And I think it was inconvenient. But to some extent how inconvenient depends on whether UKI would have settled its claim. And I don't know if it would have done at this stage. Also, I am mindful of the fact that Miss B or D on her behalf did fail to make a fair presentation of the risk to UKI for all three policies. So, I don't think it would be fair and reasonable to award M any compensation for inconvenience. And I can't award compensation to Miss B personally for the worry of M's policies being avoided.

I gave both parties until 14 December 2023 to provide any further comments and evidence in response to my provisional decision. Miss B has not provided any further comments or evidence on behalf of M.

UKI has provided a response from its underwriter. They've said that they provided the relevant underwriting circular applicable to consideration of the CCJ previously. And this shows they would have followed the same stance at renewal as if the policy was new business.

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 considered the underwriting evidence UKI had provided prior to issuing my provisional decision, including the underwriting circular its underwriter has referred to. And I explained why I was not persuaded by this evidence that UKI's underwriters would have decided not to provide a policy for M. Or that it would have provided one on different terms. And nothing UKI has said has altered my opinion in this regard. Therefore, I see no reason to reach a different conclusion on the fair and reasonable outcome to this complaint to the one I set out in my provisional decision.

Putting things right

For the reasons set out in my provisional decision and above, I've decided to uphold M's complaint about U K Insurance Limited and make it reinstate all three of its policies and consider M's claim under the policy it took out in 2022. It must also make sure its records and external databases do not show any of the policies as avoided.

My final decision

I uphold M's complaint and order UK Insurance Limited to do what I've set out above in the 'Putting things right section'.

Under the rules of the Financial Ombudsman Service, I'm required to ask M to accept or reject my decision before 15 January 2024.

Robert Short
Ombudsman