DRN-4273913

The complaint

P, a company, complains about The New India Assurance Company Limited's (New India) decision to decline cover for a claim it made under its commercial insurance policy for legal expenses. New India also voided the policy and retained the premium paid by P. P is unhappy with this as well as the handling of its claim more generally.

The complaint is brought by Mr A, a director, on behalf of P.

All references to New India include their claims handlers and agents.

What happened

P made a claim on its New India commercial insurance policy for legal expenses in response to a claim made against it by one of its customers for personal injury.

New India accepted the claim and instructed a panel firm of Solicitors to act for P. In May 2022 New India wrote to P saying they were not prepared to continue funding the claim, that they would be voiding the policy and retaining the premium.

They said this was because they had discovered P had not made a fair presentation of risk when taking out insurance because it had answered 'no' to a question about Mr A being a director for another company that had been dissolved a year before he applied for insurance to New India, when he had been asked a specific question about this. As such New India concluded that there was a qualifying breach of P's duty to it and that the breach was deliberate or reckless.

After some initial correspondence about another Director that New India identified as related to P, it became clear that that the policy hadn't been taken out in P's legal business name. It was missing a word in the name which meant the policy was taken out in a different registered businesses name. New India said this meant P wasn't entitled to indemnity under the policy in any event.

P argues that the disclosure it failed to make wasn't significant, such that it would have meant it didn't give a fair presentation of risk to New India. That's because it says that Mr A dissolved another company as part of a routine restructure and that there were no debts to creditors as a consequence. As such, P said that Mr A didn't present any risk to New India at all. P also says that the mistake it made in insuring itself under a different name related to the omission of one word and the insurance it took out was clearly in relation to itself and its associated profile so it would be unfair for it not to be covered by the policy now.

P wants New India to provide cover now and compensate it for having to fund its own legal fees when it was left without legal representation. It also wants to be compensated for the way in which New India's panel firm conducted its claim when they were instructed, and it wants to be covered for any adverse cost risks as a result of the panel firm's conduct.

Our investigator considered P's complaint and concluded that it should be upheld. New India didn't agree, so the matter was passed to me to decide.

I issued a provisional decision earlier this month in which I said:

"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 won't be upholding P's complaint. I'll explain why.

It appears that when P took out insurance with New India, it noted the wrong company name on the proposal form. It did this by omitting a word from the company name. P says this was an oversight as it generally referred to its business as the company name it gave, but this wasn't its legal name. P says that the risk information presented within its proposal form was accurate and related to the correct business entity. As such it doesn't think it's fair for New India to decline cover based on this as it was a simple error that could be amended.

I've thought about what both parties have said including the submissions New India made about this issue which I noted in the background section of this decision under the title 'What happened' above. I think the name that P registered as its company name does pose a problem because it is not the legal name of the entity it wanted to insure. And given there's another entity with the same legal name that P wanted to insure, I can see why New India have taken the position they have. For the purposes of this decision however, I don't think this makes any material difference to the outcome of P's complaint. That's because I think New India was entitled to decline P's claim, void the policy and retain the premium. So P wouldn't be any better off even if I decided the company name issue in its favour. I've set out my reasons for my decision on the main issue I've decided in this complaint below.

When the policy was renewed, the relevant law was the Insurance Act 2015, under which there's a duty to make a "fair presentation" of the risk. This duty applied at each renewal of the policy. When buying or renewing the policy the party seeking insurance – in this case, P – was required to disclose every circumstance they knew, or should have known, which would influence a prudent insurer in deciding whether to underwrite a risk or what premium to charge. In addition to the legal position, the documents provided to P made clear how important it was to provide relevant information. Mr A himself accepts that he was under a duty to provide material evidence. And he was specifically asked to confirm that whether he or any partners or directors in connection with P had been the director of any company which went into liquidation, administration or receivership or is currently undergoing any voluntary or mandatory insolvency or winding up procedures. Taking into account the statements in the form that P was asked to confirm, the warnings about disclosing information and the need to say if anything was incorrect, and the wider legal duty to disclose anything that would influence the insurer's decision about offering cover, my judgment is that P knew (or should have known) that New India would have wanted to be told about Mr A's involvement in another company that was liquidated a year before P was applying for cover. So, this should have been disclosed. By not telling New India about this, P mispresented the risk and failed to meet its legal duty – whether the duty of "utmost good faith" or the duty make a "fair presentation" of the risk.

If the insured party fails to disclose this kind of circumstance, and the insurer can show it would not have offered the policy if it had been disclosed, it's entitled to void the policy. And if the breach was deliberate or reckless, it doesn't have to refund the premium to the insured.

I've considered whether New India has shown the failure to disclose Mr A's involvement in another company that was liquidated would have made a difference. The underwriting evidence shows the starting point in these circumstances is that the risk would be considered unacceptable, and the underwriter has confirmed this. So, cover wouldn't be offered. P doesn't think Mr A's involvement in another company being wound up would've

changed its risk profile because that company was liquidated for the purposes of a company restructure with no financial concerns or unpaid creditors. I've considered this but don't think the reason for the liquidation, or the way in which that company was liquidated matters much. That's because New India's underwriting criteria was wide enough to cover a situation like this irrespective of the financial risk P perceives it has to New India. And it's up to New India to decide what circumstances its prepared to insure. Looking at the underwriting evidence I'm satisfied what the underwriter has said is consistent with the guidance New India was following when it discovered Mr A's involvement in the liquidation of another company. So, I think it's reasonable to rely on their evidence.

I appreciate that P might think its failure to disclose Mr A's involvement with another company that was liquidated might simply be a mistake and there wasn't a deliberate or reckless breach of duty. New India has considered the breach to be either deliberate or reckless. Having considered this carefully I agree this was reckless. An insolvency is a significant event and it occurred only a year before P applied for cover, so I don't think it's something one would simply forget. In my judgment, it's something P must have been aware of, and failing to disclose it in these circumstances was reckless. So New India doesn't have to repay the premiums.

Taking account of the relevant law, the policy terms and all the circumstances, I think New India's decision was fair.

I know that P is unhappy with the panel firm's handling of its claim under the policy terms when New India appointed them. New India isn't responsible for that firm's conduct. The panel firm of Solicitors are independent professionals with their own codes of conduct and regulator. So, if P remains unhappy with their conduct, it will need to raise this with the panel firm first or refer it to The Legal Ombudsman to consider."

I asked both parties whether they had any further comments or evidence they wanted me to consider in response to my provisional decision. New India hasn't replied. Mr A, on behalf of P has replied. He's made some detailed submissions, most of which have already been advanced when P brought its complaint to this Service. For the sake of completeness I've summarised, in brief, what Mr A has said below:

- It's correct that P's business name was incorrectly stated in their proposal form however all the information provided related to P, so couldn't have materially influenced New India's underwriting risk.
- The mistake in name had no bearing on anything from New India's point of view other than connecting P to the organisation that was stated on the proposal form at a later date.
- I have fundamentally misunderstood the basis on which the previous business Mr A was involved in was wound up. It wasn't insolvent nor was there any other financial concern in relation to this; it was wound up for the purposes of a restructure. This business wasn't connected to P and didn't present any financial risk to New India.
- He doesn't agree that P's failure to disclose the correct information was reckless. He says this was a high bar and requires the proposer not to care as to the accuracy of its proposal and that this requires more than carelessness on P's part. He considers the question asked of P to be reasonably interpreted to refer to financial failure and as such it wasn't reckless to answer 'no' to it.
- He hasn't seen New India's underwriting criteria. He doesn't accept that it's reasonable for New India to have declined cover just because one of P's directors was previously involved in a business that was wound up, without the issue of financial problems being a feature. This is an unusual position to adopt and uncommercial.

- He wants me to require New India to provide evidence from their underwriting guide to support what they've said and a witness statement with a statement of truth attached from them saying they have never knowingly insured a business where a director has been involved in the solvent winding up of another company.
- It's not fair and reasonable for me to allow New India to void the policy in this case.
- New India acted in a contradictory way for several months by appointing lawyers and making case management decisions including not responding to a Part 36 offer to settle before voiding the policy. Because of this New India have waived their right to void the policy now.
- P's position has been prejudiced by New India's decision to avoid cover because the advice it received has now meant it can't settle the claim on the same terms it might have if it had accepted the offer made at the time.

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 remain of the view that P's complaint should not be upheld. Whilst New India haven't responded to my provisional decision, Mr A's additional submissions haven't persuaded me that the outcome I provisionally reached was incorrect.

I don't intend to address P's submissions about the wrong company name being insured because, as I said in my provisional decision, I don't think this makes a difference to the outcome of this complaint.

The submissions Mr A has made in relation to whether the other company he was involved in was in financial difficulty or not also don't make a difference to the outcome of this complaint. I say so because the question Mr A was asked when taking out the insurance on P's behalf was clear; namely whether he or any partners or directors in connection with P had been the director of any company which went into liquidation, administration or receivership or was currently undergoing any voluntary or mandatory insolvency or *winding up procedures*.

I appreciate that the reference to winding up procedures formed part of a series of questions that might have given the impression that financial risk was something New India was considering but I don't accept this meant the question could reasonably be misinterpreted. As such I remain of the view that P's failure to answer the question correctly couldn't be anything other than reckless for the reasons I've already set out.

I know Mr A hasn't seen New India's underwriting criteria, but I have. That information isn't something a business usually shares with policyholders because it's commercially sensitive. For that reason, we wouldn't share it with customers either. What I've seen is wide enough to cover a situation where Mr A was involved in another company that was wound up, irrespective of the way in which it was wound up and the financial risk Mr A perceives this might have had to New India. And as I've said, it's up to New India to decide what circumstances its prepared to insure. Looking at the underwriting evidence, I'm satisfied what the underwriter has said is consistent with the guidance New India was following when it discovered Mr A's involvement in the liquidation of another company. So, I think it's reasonable to rely on their evidence.

I appreciate that Mr A feels the position that New India has taken is uncommercial and that it must have insured other businesses where their directors had been involved in companies that had been wound up before. That may well have been the case at different points in time either before or after the underwriting criteria I've seen was applicable. But even if it wasn't, I

don’t think it matters. That’s because New India were entitled to take the position they have based on their underwriting criteria at the time and the fact that they were reasonably able to rely on that.

Mr A feels that the position New India have taken has prejudiced P given the work that’s already been undertaken on P’s behalf by the Solicitors appointed. I have no doubt that cover being avoided in this way left P in a difficult position, but for the reasons I’ve set out I don’t think New India did anything wrong by avoiding cover. And I’m satisfied that P had the benefit of cover it wouldn’t have been entitled to had it given New India the correct information about Mr A’s history with the other company from the outset. So, in my view P has received more than it was entitled to. P did obtain representation itself after New India voided the policy. The fact that the advice it might have received from new Solicitors might have differed from that of New India’s appointed representatives isn’t something New India is responsible for. As I said in my provisional decision, those Solicitors are independent professionals with their own codes of conduct and a separate regulator. If Mr A is unhappy with the advice P received, he can raise this with that firm directly or contact the Legal Ombudsman.

My final decision

For the reasons set out above, I don’t uphold P’s complaint against The New India Assurance Company Limited.

Under the rules of the Financial Ombudsman Service, I’m required to ask P to accept or reject my decision before 28 August 2023.

Lale Hussein-Venn
Ombudsman