

The complaint

A limited company, that I will refer to as C, complains about the sale of its commercial insurance policy by Goldcrest Ins Ltd.

What happened

The following is only intended as a brief summary of events. Additionally, for the sake of simplicity, I have just referred to C and Goldcrest even though other individuals have been involved in correspondence and so on.

C operates as a building and plumbing company, and had taken out insurance via Goldcrest for a number of years. The policy renewed annually at the start of April each year.

In March 2020, C's business was impacted by the COVID-19 pandemic and it made a claim on the policy that covered April 2019 to April 2020. A number of months later, C attempted to make a further claim for business interruption on the policy that started in April 2020. However, this was ultimately declined on the basis that when the policy had renewed in April 2020 an exclusion had been added relating to claims arising from infectious disease or human contagious disease.

C complained to Goldcrest that it had not made it aware of this exclusion when the policy was renewed. It said that had it been made aware of this exclusion, it might have considered other cover. So, it felt Goldcrest should compensate it for not being able to claim for its losses under this policy.

When Goldcrest did not agree with C's complaint, it brought it to the Financial Ombudsman Service. However, our Investigator did not recommend the complaint be upheld either. He did think that Goldcrest had failed to highlight what was a significant term. But he didn't think C would have been able to take out a policy that did provide cover at this time, even if it had been aware of this exclusion on this policy. So, he didn't think C would have been able to successfully claim for its losses in any event and hence there was no consequential loss from Goldcrest's error.

C responded, saying that it had made commercial decisions based on the belief that it was covered for its losses. As the Investigator was unable to resolve the complaint it has been passed to me for a decision.

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.

I agree with the Investigator that it is most likely that Goldcrest did not highlight this change to the policy at the time of renewal. And that, given the circumstances at the time, this was a significant term that should have been highlighted.

I appreciate Goldcrest's comments about telephone calls and discussions that it apparently had with C around this time, and that insurers were adding such exclusions to almost all relevant policies at this time. But this does not persuade me that Goldcrest did in fact highlight this exclusion. And just because those in the insurance industry were not surprised by the addition of such exclusions, does not mean that a customer ought to have known about them. Without any clear record of the conversations it had with C, Goldcrest is unable to demonstrate that it is more likely than not that it informed C of this exclusion.

So, I consider that there was most likely a failing by Goldcrest during the sales process.

The issue that I need to determine next is what the impact of this was. Where something has gone wrong, the Financial Ombudsman's role is effectively to put the parties back in the position they would've been in had it not been for this error.

Had Goldcrest done what it should have, C would likely have asked whether there was another available policy that would provide cover. However, Goldcrest has confirmed that none of the policies it was able to source would have done so. And C has also said that its own research has confirmed this. So, even if Goldcrest had done what it should have, C would not have been able to successfully claim for its losses. This means the inability to claim, and hence the losses caused by the later business interruption, were not a consequence of any failing by Goldcrest. And so, I can't fairly and reasonably direct Goldcrest to compensate C for this.

I consider it is likely that, even with this exclusion, C would still have taken out insurance - the policy provided cover for a number of events that C would most likely have still wanted. And Goldcrest's recommendation of this particular policy was largely based on it being the cheapest available that met C's needs as far as was possible. So, I think the cost of the policy was something C would always have incurred.

C has said that it made commercial decisions based on the belief it would have been able to successfully claim. As the Investigator has pointed out though, it was not until early 2021 that C could have been reasonably assured that it could claim. I have noted its comments that it was confident in the outcome of the Supreme Court judgment in the FCA test case. But given the court of the first instance had come to a different outcome, I am not persuaded C would have been confident this would be changed.

Additionally, regardless of either C's belief or actual ability to successfully claim, a policyholder is required to act on the basis that it is not insured and to mitigate any losses that might be sustained. So, even if it had cover that meant it could successfully claim, C ought to have taken the same decisions it would have if it didn't have this cover.

I have thought about the fact that C was left in a position where it believed it was covered and then found out this was not the case. However, C is a limited company and as such is unable to suffer distress. And its directors, as individuals, are not the customer of Goldcrest or the complainant in this case, so I am unable to award compensation for any distress they might have suffered.

I have thought about the inconvenience that would have been caused by C's belief that it could claim. It may be that it carried out work pursuing this claim that it otherwise would not have. However, whilst this may have caused some inconvenience, I am mindful that C was at the same time pursuing its claim about the losses it eventually recovered in relation to the 2019-2020 policy. So, I don't think any additional inconvenience incurred would merit any compensation.

I am also mindful that had it actually read the policy schedule – which would be prudent

when both taking out the policy and when making a claim – it would have noted the relevant exclusion and so would not have suffered any inconvenience. This does not absolve Goldcrest of its responsibilities by any means – it had a requirement to highlight the exclusion and it did not do so. But it is a factor I need to bear in mind when thinking about the consequences of this failure.

Ultimately, whilst I consider Goldcrest failed to adequately highlight a significant policy term at the point of renewal, I am not persuaded that C suffered any consequential loss as a result of this that leads me to make an award. I appreciate this is not the outcome C or its directors were hoping for. But I can't fairly and reasonably ask Goldcrest to do anything more in response to the complaint.

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 C to accept or reject my decision before 18 January 2024.

Sam Thomas
Ombudsman