

The complaint

S, a limited company, complains U K Insurance Limited (UKI) voided its tradesman's insurance policy because it incorrectly described a past claim when taking out the policy. S is represented by one of its directors, Ms P.

What happened

S had insurance with a different insurer but in November 2019 they said they wouldn't be offering renewal terms. Ms P contacted S's broker who wasn't able to find an insurer from its panel who would offer renewal terms either. Following that call Ms P used the broker's online portal and obtained a policy with UKI.

When that policy was approaching renewal the broker contacted UKI to see if it would be offering terms and flagged a previous claim S had made. Having reviewed that UKI said when S made its online application it described this as a personal accident claim. But that wasn't correct; it was a public liability claim. And if it had been correctly described it wouldn't have offered cover at all. So it said would be avoiding the policy from the outset.

It also thought S had acted recklessly. It knew the broker wasn't able to arrange cover and thought S altered the information relating to the previous claim when making the online application to obtain cover. It said it would be retaining the premiums S paid for the policy.

Our investigator agreed the information provided about the previous claim was wrong. She didn't think S had made a fair presentation of the risk. And having reviewed underwriting information she was satisfied UKI wouldn't have offered cover if the previous claim had been correctly described. She didn't think UKI had done anything wrong in avoiding the policy.

But she noted S had declared the claim as part of its online application; the issue was it had wrongly said this was a personal accident claim. However, there were no explanatory notes about this provided as part of the application process. Nor had there been any discussion of how the claim should be categorised when Ms P spoke to S's broker. And it had been referred to by the previous insurer as a personal injury claim. She didn't think this was a reckless or deliberate breach. So she said UKI should return the premiums S had paid (plus interest on those from the date they were paid until the date they were returned).

S accepted her view. UKI didn't agree. It said Ms P told the broker about the previous employer's liability claim and had been advised verbally no quotes were available. In the online application she completed soon afterwards the description of the loss was changed to personal accident. UKI didn't agree it should return the premiums S had paid. So I need to reach a final 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.

As this was a commercial contract the law (the Insurance Act 2015) imposes a duty on the policyholder to make a fair presentation of risk. That means Ms P (on behalf of S) had to disclose everything she knew, or ought to have known that would influence the insurer's judgment in deciding whether to insure the risk and on what terms.

In this case when making the online application I can see S was asked "*Have you made any claims (whether insured or not) or has anyone asked you for compensation in the last 5 years*". If that is the case the form asks for further details including selecting from a dropdown list to describe the type of incident. That list included the option to select '*personal accident*' or '*public liability*'.

Ms P provided details of the claim and selected '*personal accident*' as the description of it. But that wasn't correct. This should have been described as a public liability claim. And I think that makes a significant difference to the risk UKI was taking on; I understand it automatically accepts personal accident claims because it doesn't provide that cover. So this wouldn't increase the risk under its policy whereas it would for public liability. I'm satisfied S did breach its duty to make a fair presentation of the risk to UKI when taking out this policy.

The Insurance Act sets out remedies available to an insurer where it can show that, but for the breach, it would not have entered into the insurance contract or would have done so but on different terms (a qualifying breach). I've reviewed the information UKI has provided and I'm satisfied if the claim had been correctly described by S in its application UKI wouldn't have offered cover at all. So this was a qualifying breach.

Where an insurer can show a qualifying breach was deliberate or reckless it can avoid the contract and doesn't need to return any of the premiums paid. If the breach wasn't deliberate or reckless but the insurer wouldn't have entered into the contract it can avoid the contract but must return the premiums paid.

The Act says a qualifying breach is deliberate or reckless if the insured either knew it was in breach of the duty to make a fair presentation of risk or didn't care whether it was in breach of that duty. And it's for an insurer to show a qualifying breach was deliberate or reckless.

In this case UKI believes it was (and so hasn't refunded the premiums S paid). It says during the call with the broker Ms P advised them of the liability claim and was told by the broker it was a "*no quote*". Ms P then went online soon after that call and completed an application in which she changed the description of the loss to personal accident. So on that basis it thought this was at least reckless.

If the situation was as described by UKI then it's likely I'd have agreed with the approach it's taken here. But having listened to the call between Ms P and the broker I don't think events took place as it describes. Ms P called the broker because the previous insurer had declined to renew. She highlighted a previous claim which had been settled out of court. The adviser asked for more information on this. And having checked with a technical team she confirmed that no insurers on their panel would provide a quote.

But neither she or Ms P described this as a public liability claim at any point in the call. That may well be how the adviser recorded the claim but I don't see Ms P would have been aware of that. And Ms P has explained she described the claim as a personal accident in the online application because she believed this was the correct description of it. I understand the claim itself related to an incident where an employee of another company was injured while working on S's premises. And I note a loss adjuster acting for the previous insurer did describe this in correspondence with S as a "*personal injury claim*".

As I've already said I agree that description was wrong and S breached the duty to make a fair presentation of risk. But I don't agree UKI has shown this was a deliberate or reckless act on its part. Mrs P wasn't aware from the call with the broker how the claim had been described in the information the broker submitted. Nor was Mrs P told which insurers were on the broker's panel (so she wouldn't have known UKI was one of them). So she can't have made a conscious decision (as UKI suggested) to provide different information in her online application to obtain cover as she didn't know how the previous claim had been described by the adviser.

Putting things right

I appreciate S is unhappy UKI voided its policy. But, as I've explained, where there's been a qualifying breach and, but for that breach, the insurer wouldn't have offered cover it is able to do that. However, where the breach wasn't deliberate or reckless it must return the premiums paid.

In this case that means UKI can avoid the policy but will need to refund the premiums S paid. Our investigator also said it should pay interest at 8% on that amount from the date of payment to the date of settlement. I've explained to the parties that I don't agree with that because UKI didn't do anything wrong in accepting the premium based on the information S provided at that time. But it should have refunded it when it voided the policy. So it will need to pay interest at 8% simple on the premium from the date of voidance until the date of settlement.

My final decision

I've decided to uphold this complaint in part. U K Insurance Limited will need to put things right by doing what I've said in this decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask S to accept or reject my decision before 4 May 2022.

James Park
Ombudsman