

The complaint

Ms H complains as a director of G (a limited company) that The New India Assurance Company Limited rejected a claim on G's Care Homes Insurance policy relating to a loss of its registration and complains about the way the claim was handled.

Where I've referred to New India this includes its agents and claims handlers acting on its behalf.

What happened

G operated a care home for elderly residents. It had a Care Homes policy underwritten by New India which it took out in July 2016 and renewed each year until the policy was cancelled in November 2018 with effect from 28 September 2018.

The Care Quality Commission (CQC) carried out inspections at the home in May and June 2018. Following this the CQC issued a Notice of Proposal, proposing to cancel the home's registration.

Around the same time, the Local Authority gave notice of termination of its contract with the home and started moving the authority-funded residents to other care homes. In September 2018 the CQC issued a Notice of Decision under which the home would lose its registration. G opposed the cancellation and appealed to the First Tier Tribunal.

In December 2018 G made a claim on its policy through its insurance broker. New India asked the broker to provide further information to support the claim.

G's appeal to the Tribunal was unsuccessful. It has sought to appeal through the higher courts without success. G is no longer operating the care home and is in administration.

G made a complaint about the way New India was dealing with the claim which was referred to this Service and a final decision was issued in November 2022. In their decision the Ombudsman said New India hadn't declined the claim but had said it couldn't make a decision without further information from G. The ombudsman said New India should consider any further information G wished to provide to support its claim.

G provided further information concerning the basis for the CQC's decision to cancel the registration, including evidence presented on appeal at the Tribunal hearing. Based on this information, New India declined indemnity saying the conditions for cover had not been met.

G complained about the decision. In its final response letter New India confirmed its position. G remained unhappy and referred the complaint to this Service.

Our investigator didn't think the complaint should be upheld. She said:

- The policy provided cover where the registration was lost due to a cause beyond the policyholder's control.
- It was reasonable for New India to take account of the Tribunal's findings, and to conclude that G had had an opportunity to address the failings identified by the CQC

and had failed to do so.

- New India has shown that G didn't meet the conditions about notification of the claim. But even if it had, the loss of registration was from a cause within G's control and so it had failed to meet that condition of cover.
- When New India received further information from G it reviewed this in a reasonable time and there were no avoidable delays.

G disagrees and has requested an ombudsman's decision. Ms H has provided detailed comments in support of that request. I won't set them out in full but in brief, they include:

- The investigator's view is based on incorrect assumptions that
 - all statutory breaches are serious and lead to a loss of registration; and
 - the issue of a Notice of Proposal indicates serious statutory breaches, leading inevitably to a Notice of Decision and loss of registration.
- A Notice of Proposal has a very low bar and no serious consequences whereas a Notice of Decision has a very high bar. The Tribunal inserted its own allegations to ensure the CQC's burden of proof had been discharged.
- The Tribunal ignored most of their evidence and treated everything in the Notice of Proposal as being admitted. And the Court of Appeal failed to address these issues, simply repeating the Tribunal's findings of fact rather than addressing errors of law.
- They are now going to the European Court of Human Rights.
- New India simply accepted the Tribunal's findings and did not deal with all the arguments. The insurer's role should not be to assess the breaches of statutory obligations but to consider how G had used the policy.
- G did everything it could to prevent the closure.

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.

Ms H has provided lengthy and detailed submissions. I appreciate how serious the matter is for her but I won't address every point in detail. We're an informal dispute resolution service and our role is to provide an impartial review of a case, quickly and with minimal formality. My role is to use my judgement to decide what is fair, based on the main crux of a case. So I have only commented on what I consider is relevant to the outcome I have reached.

Insurers must deal with claims promptly and fairly, provide reasonable guidance to help a policyholder make a claim and appropriate information on its progress; and not unreasonably reject a claim.

The policy provides cover for a variety of risks but the relevant section of the policy for this complaint is section 12 - Loss of Registration Certificate. This section says

The Insurer will

(a) pay or make good the depreciation in the value of your interest in the Premises

(b) pay all costs and expenses incurred with its prior written consent in connection with any appeal against the forfeiture of or refusal to renew the registration certificate.

If the registration certificate granted for you to carry on the business as stated at the Premises is:

(a) forfeited under the provisions of the legislation governing such certificate

(b) refused renewal by the appropriate authority at the time of renewal

during the period of insurance from a cause beyond your control.

It's a condition of Section 12 that the policyholder will give notice in writing immediately on becoming aware of circumstances, including any proceedings being issued or any objection to renewal or other circumstances, which may endanger the registration certificate or its renewal. And the policyholder must supply such information and give such assistance as the insurer may reasonably require.

So G is covered if it suffers a loss as a result of losing its registration, but only if the loss is due to something outside its control. And this is subject to a claim being made immediately in circumstances that might lead to this happening./ and to providing any information reasonably required to consider the claim.

In the course of this complaint, Ms H has referred to the whole history of the matter going back to 2018. However, we have previously considered a complaint about how the claim was dealt with and another ombudsman issued a decision on that complaint in November 2022. As a final decision has been issued I can't comment on anything that has already been considered. The focus of this complaint is what's happened since that decision and whether New India was entitled to reject the claim.

Following the previous decision, G provided information to New India and, having considered that information, New India said it would not provide cover. This is on the basis the loss of registration was due to issues within G's control. New India also says G breached the requirement to notify a claim immediately.

G was aware of issues that might give rise to a claim after the inspections in May and June 2018, and certainly by August, but didn't notify New India until the December. So it didn't comply with the requirement to inform New India immediately. That doesn't necessarily mean this breach would allow New India to reject the claim if the delay didn't make any difference. But in any event I think there's a more fundamental reason why New India was entitled to reject the claim.

The policy only provides cover if the loss of registration is due to something outside G's control. That's the crux of the matter - if it happened because of something that was in G's control then there's no cover.

Ms H has provided very detailed arguments about this. I've considered all the points she makes but I'm not persuaded by them.

She has said it can't be right that just because the CQC registration has been withdrawn liability can be repudiated automatically, when the insurance policy in question is specifically for the loss of registration. A claim wouldn't automatically be rejected simply because of a loss of registration and there would be circumstances where cover would be provided – for example where the home has to give up its registration due to some unforeseen event that means it can't continue. But not if the withdrawal is due to something within the policyholder's control.

Ms H says they did everything they could to prevent the loss of registration happening. I agree G tried very hard to avoid it – opposing the notice and appealing to the Tribunal. It put together detailed evidence and made submissions about all the steps taken to try and keep the registration. This included making changes in working practices and engaging a company that provides expert consultant services to turn around care homes in difficulty. I don't doubt that strenuous efforts were made.

But ultimately, the home lost its registration because the Tribunal didn't accept the steps G had taken should allow it to continue; the Tribunal noted that Ms H and the other directors had done their best but their best wasn't enough.

Ms H has set out in great detail why she thinks the Tribunal's decision was flawed and why it wouldn't be fair for New India to rely on it.

G sought to overturn the decision through the appeals process and ultimately sought permission to appeal to the Court of Appeal, but this was refused. The appeal judge's reasoning referred to the Tribunal's careful analysis of the evidence and said the suggestion that the Tribunal had excluded G's evidence was demonstrably incorrect. The judge concluded that the appeal had no real prospects of success. G applied to re-open the refusal of permission to appeal but the appeal judge refused the application, saying it didn't identify any discrete errors of law and simply reargued the case on the facts. The judge said even if the Tribunal was wrong on the facts, there was no error of law.

It's not for me to decide whether the loss of registration was correct, or to challenge the findings of the Tribunal or the appeal courts. What I need to decide is whether New India's decision was fair in the circumstances. It's reasonable for New India to take into account what the Tribunal and the courts concluded. The Tribunal had the opportunity to consider all of the evidence and hear witness evidence. The conclusion reached was that G had been made aware of the issues and had the opportunity to put things right but hadn't done so. In light of that, it was reasonable for New India to conclude these were things that were in G's control and there was a direct connection between G's actions and the removal of the registration. So it could reject the claim on that basis.

The policy terms require G to supply such information and give such assistance as New India may reasonably require. That's in line with the general position that in the first instance, it's for a policyholder to prove their claim. So the starting point is that G has to prove it has suffered a loss that's covered by the policy. Once G has provided the information New India needs to consider the claim, it can then make a decision.

New India had asked for all correspondence between G and CQC. G's solicitors contacted New India in November 2022, after the previous Ombudsman's decision was issued. The Ombudsman said it was reasonable for New India to consider its position had been communicated to G, and if G wanted it to consider its claim, it was for G to provide copies of the correspondence with CQC as requested.

G asked New India what information it required. On 7 December 2022 New India declined the claim. I appreciate New India hadn't replied to G confirming the information it needed. But New India had previously said it needed to see all the correspondence between the CQC and G and the previous Ombudsman's decision confirmed this. So G should reasonably have been aware it needed to provide that.

G provided information in February 2023 and when New India received this, it reviewed it to see whether it changed its decision. That's what I'd expect it to do. After considering the information New India said the claim would not be covered.

As G was unhappy with the decision, Ms H pursued a complaint. New India's decision didn't set out the referral rights to this Service as clearly as it should have, but G was made aware it could come to us (and of course, had done so previously). Overall, I think New India dealt with the claim reasonably after November 2022 and wasn't responsible for any unreasonable delay. Ms H may have found it frustrating to have to make a fresh complaint to New India and then refer it to this service. But as things had moved on since the previous complaint

and there were fresh issues to be considered, that was the appropriate way to proceed.

I know this has been very difficult for the directors of G ever since the inspections in 2018; it has been a slow process with a great deal at stake for them. But I can't reconsider issues dealt within the previous Ombudsman's decision and for the reasons set out above, I'm satisfied the claim was ultimately dealt with in a reasonable way and the decision to refuse cover was in line with the policy terms and was fair.

My final decision

My final decision is that I don't uphold the complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask G to accept or reject my decision before 2 August 2023.

Peter Whiteley
Ombudsman