

The complaint

Two linked companies, that I'll refer to as U1 and U2, complain about the decision of Aviva Insurance Limited to avoid their commercial insurance policy and decline their claim.

What happened

The following is intended as a brief summary of events. Additionally, whilst other parties have been involved, for the sake of simplicity I have just referred to U1 and U2 (collectively U), and Aviva.

U had a commercial insurance policy underwritten by Aviva. The policy had existed since August 2019, renewing annually. The policy was taken out through a third-party broker, and was set up with U's business described as "computer software". This was the type of business selected from a dropdown list.

U has since described its actual business operation as being an intermediary booking platform which connects clients with therapists who provide massage and wellbeing services.

In 2022, U notified Aviva of a liability claim. Effectively, a third party who had booked services via U's platform was alleging assault by a practitioner. Aviva responded saying that it was avoiding the policy from its inception in 2019 onwards, on the basis that U had failed to fairly present the type of business it operated, and that had it done this correctly Aviva would not have offered it this policy. As a result, Aviva did not agree to cover the claim. It did though refund the premiums U had paid, less amounts paid in settlement of claims for loss of items.

Other reasons for the avoidance and potentially for the claim not being met have also been raised, but it is not necessary for me to explore these as part of this decision.

U disagreed with Aviva's decision and complained, bringing its complaint to the Ombudsman Service. However, our Investigator did not recommend the complaint be upheld. She thought that U had failed to provide accurate details of its business when the policy was taken out, and that Aviva was entitled to avoid the policy on this basis. She also said that although Aviva might have offered U a different policy, this was not the same contract that had been taken out.

U remained unsatisfied and its complaint 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 would like to reassure the parties that I have considered the submissions in full. A number of different arguments have been raised, covering a number of issues. However, as reflects

the informal nature of the Ombudsman Service, I am not going to address each of these. Instead, I am going to focus on what I consider to be the key issues.

The exact nature of U's business has been discussed at length. What is clear to me though is that U was not operating a "computer software" business as this would reasonably be understood. Quite potentially, it was also not a "provider of wellbeing services" as has been suggested. But regardless of how best U's business could be defined, in order to take out the policy that it did, this business would need to fall within one of the categories available from the dropdown list.

Having looked through this list, I do not consider that U's business fits any of the categories listed. The list does include practitioners such as physiotherapists, which would likely apply to the therapists U had arrangements with. But this is not the service U itself was providing.

So, when the policy was taken out, U (or the broker acting on its behalf) should have looked through this list and identified that none of the categories fitted the business activities it was engaged in. And so, none of these categories should have been selected. By selecting a category that did not apply to its type of business, U was not accurately presenting the risks posed by insuring it. I consider this to be a breach of the duty of fair presentation, as set out in the Insurance Act 2015 (the Act) and which applies to the circumstances of this complaint.

Aviva has said that it does not consider the breach to have been deliberate or reckless, and it has refunded the policy premiums. So, I just need to consider whether the other action taken by Aviva is in line with the appropriate remedies available under the Act.

Aviva has said that as none of the dropdown options were appropriate, U should have contacted Aviva by phone. But that, as none of the options were appropriate, even if this had been done cover under this policy would not have been provided. Aviva has said that no underwriting criteria specifically confirms this, and U has raised this as an issue. However, I agree with Aviva that it stands to reason that if there are a list of acceptable categories, and a situation is outside of those categories, cover would not be offered.

It might be that, in some circumstances, a business activity is close to but not quite as listed – and in such cases there might be a discussion of whether Aviva would agree to provide cover. However, in this case, I do not consider that any of the categories listed are close to describing U's activities. So, I am persuaded that Aviva would not have offered this policy to U had it appropriately described its activities.

U has said that Aviva may have offered a different policy. And that in doing so, this would effectively be the contract still being entered but on different terms. U has argued that this means the policy should not be avoided, but merely amended to provide cover on these different terms.

U has argued that even minor amendments may mean that a different contract is entered. And that the Act is not intended to be applied in this way. However, I am not persuaded that this means where a different product/policy is being taken out, this is not a different contract.

I consider that the Act clearly allows for an insurer to avoid *the* contract (by which I mean the disputed contract) if it can show that but for the breach it wouldn't have entered into it. Aviva may well have agreed to write the risk under a different, manually brokered, product. But then it would've been a completely different contract on completely different terms from the one taken out. This is different to a situation where the same policy/contract might be provided but perhaps with a higher premium or certain risks excluded or warranties made.

So, I can't agree with U about this point. It's not whether *any* contract would've been entered

into by Aviva but whether *this* contract would've been entered into. And I'm satisfied that Aviva has shown it wouldn't have done so if it had known about U's business activities.

Even if I am wrong on the legal position here, my role requires me to reach my decisions on the basis of what is fair and reasonable in all the circumstances of the complaint. Taking everything into account, it is clear that Aviva was not made appropriately aware of U's business activities and that, had it been made aware of these, it would not have offered the contract of insurance that it did. So, I consider it is fair and reasonable that Aviva be allowed to avoid this contract from the point of inception.

As this is the decision Aviva has taken, it follows that I cannot fairly and reasonably ask it to do anything more.

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 U1 and U2 to accept or reject my decision before 22 March 2024.

Sam Thomas
Ombudsman