DRN-4608406

The complaint

T complains The National Farmers' Union Mutual Insurance Society Limited trading as NFU Mutual (NFU) declined its claim for cover under its commercial insurance policy relating to a legal action brought against T by a third party.

T is a sole trader business owned by Mr B who brings this complaint on T's behalf. I'll mainly refer to Mr B in my decision.

Where I refer to NFU, I include the appointed representative (AR) Mr B dealt with.

What happened

Mr B arranged commercial insurance for T with NFU in 2007. The policy has renewed each year since then at the beginning of August.

In around December 2022 Mr B made a claim on the policy for cover to defend a personal injury action brought against T by a third party. The third party alleged he'd had an accident in mid-August 2019 when carrying out work in connection with the roof of a steel framed building T had erected.

NFU declined the policy claim on grounds T's business activities were described in the policy as ground worker/mini digger operator and there was no cover for constructing steel framed buildings.

Mr B said NFU had been aware at all times of the work T did. He said if the policy didn't cover him, it had been mis-sold. And he was unhappy with the time NFU took to deal with his claim and the complaint he made.

Following an investigation NFU said:

- they hadn't provided advice to Mr B when selling the policy;
- the evidence showed Mr B had discussed T's insurance requirements with the AR in 2016 and 2017 and the policy had renewed in consultation with him;
- the 2017 renewal showed there was a discussion as to whether T required employer's liability (EL) cover and he'd declined it at that stage, but there was no evidence Mr B had ever brought to NFU's attention that T was involved in erecting steel framed buildings;
- the policy document set out the business description of ground worker/mini digger operator clearly; and
- Mr B had admitted he'd never read the policy documents, he had a duty to do so, and if he had, he ought to have realised the building work T was carrying out wasn't covered.

Mr B said:

- the AR was well aware of the work T did;
- he'd relied on the AR to arrange insurance that covered T's activities;
- he never read the policy documents in detail, trusting they were right; but even if he had seen the business description, he wouldn't have had any reason to question that it covered the erection of steel framed buildings.

NFU didn't uphold T's complaint, so Mr B brought it to the Financial Ombudsman Service.

Our investigator upheld T's complaint and said NFU should accept the claim. She said, in summary, there hadn't been a misrepresentation by T about its activities and Mr B had described his role and responsibilities to NFU; NFU hadn't shown there was a "qualifying misrepresentation" under the Insurance Act 2015 that meant T hadn't made a fair presentation of risk, as the job title was correct on the policy; and there was no evidence the alleged misrepresentation would have affected the terms of the policy.

NFU didn't agree. They said:

- there was no evidence Mr B had ever told them T carried out work erecting steel framed buildings which was quite different to carrying out groundworks;
- it was clear from their "Post Call Reports" (PCRs) and other records that questions were asked at renewal in 2016 and 2017 about the work T did and that there was a discussion about T's business activities of groundworker/mini digger operator;
- the renewal made clear Mr B must disclose any changes to T's business activities; and
- if they had known T was erecting steel framed buildings they would have applied a height limit of 10 metres, added the "Bona Fide checking clause" and charged an additional premium.

Our investigator considered NFU's responses. She still upheld the complaint. She said:

- NFU's PCRs didn't say explicitly what Mr B had discussed with the AR;
- there was no fact find on the file, so she'd had to reach her view based on the information she'd been provided with;
- a discussion between NFU's underwriter and the AR at around the time of the third party's alleged accident in 2019, when EL cover was added to the policy, suggested they'd been aware of the circumstances of the accident and the work T had been doing and that the AR had felt the business description of groundworker was adequate; and
- NFU had mentioned the Financial Ombudsman Service might consider the additional premium to be "de minimis".

NFU didn't agree. They said some of the evidence our investigator had mentioned was opinion from the claims investigator which NFU didn't agree with; the evidence clearly showed Mr B was asked about T's activities and told the AR it undertook groundworks, which were very different from erecting steel framed buildings; and no conclusions could be drawn about what Mr B had told the AR about T's activities from the amendment made in September 2019 to add EL cover to the policy.

Since the complaint hadn't been resolved, it was passed to me to decide. I recently issued a provisional decision, an extract of which follows:

"**What I've provisionally 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.

I may not mention everything the parties have said. No discourtesy is intended by that. It simply reflects the informal nature of the service we provide. I'd reassure the parties I've considered everything they've said carefully in coming to a decision about what is a fair and reasonable outcome. As I'll explain, I've come to the same view as our investigator. Since my reasons are different in part, I'm issuing a provisional decision so the parties can comment further before I reach a final decision.

We expect insurers to handle claims fairly and promptly and not to decline claims unreasonably, in line with Financial Conduct Authority rules. I'll consider T's position against that background. The starting point is the terms and conditions of the policy.

From what I understand, NFU accept T would have had a valid claim under the public liability section of the policy if the claim had been covered. They've mentioned the claim could also have been reviewed as an EL claim but there was no EL cover in place at the time. However, they declined the claim on grounds there was no cover since the business description in the policy of groundworker/mini digger operator doesn't include the work T was carrying out at the time of the third party's alleged accident. I've considered this complaint on that basis.

Unfortunately, there are limited records showing what Mr B discussed with NFU about T's business activities. Since the AR has retired, NFU haven't been able to get a statement from him. They say, broadly, they didn't advise Mr B on the cover they sold him. And the insurance documents, PCRs and other records they've been able to find show that Mr B had confirmed at each renewal that T's business activities were limited to groundwork and the operation of a mini digger.

Mr B says he relied on the AR to advise him on the cover T required. He's explained he met the AR on a regular basis to discuss his insurance requirements for T and his other business interests. He's said they met face to face at Mr B's premises and the AR was well aware of the work T carried out.

Since what the parties say conflicts, I've balanced their evidence to come to a view about what is more likely than not to have happened and to decide what is a fair and reasonable outcome in all the circumstances.

The available policy documents say NFU offers advised and non-advised sales. They say that where a customer requires advice they will assess their demands, needs and suitability for the product they are recommending; and they will provide a demands and needs statement setting out the reasons for their recommendation. For non-advised sales, the demands and needs section will say NFU haven't made a recommendation. In T's case the demands and needs sections contained a recommendation. In the circumstances, and given Mr B's testimony the AR was advising on all his business insurance needs, I'm satisfied NFU were advising Mr B on suitable cover for T.

It was reasonable for Mr B to rely on NFU's recommendation provided he'd given them accurate information about the activities T was carrying out. Mr B had an obligation under the terms of the policy and in law - under the Insurance Act 2015 - to give a fair presentation of the risk he was asking NFU to insure.

NFU say Mr B misrepresented T's activities. Their underwriters have confirmed they would have included additional terms and charged a higher premium if they'd known T was involved in erecting steel framed buildings. And NFU have altered the cover and the

premium since Mr B made the insurance claim in 2022. But, to avoid dealing with T's claim and to have declined it fairly, NFU need to show Mr B did misrepresent the position. I'm not satisfied he did.

I acknowledge NFU's point that all the policy documents describe T's business as groundworker/mini digger operator. I note NFU reviewed the work T was carrying out in 2011 following a transfer of existing policies onto a new system. From what I can see the description of groundworker/mini digger operator was applied to the policy following that review and remained the same until changes were made in 2023.

Mr B's told us T started erecting steel framed buildings in 2015, so I wouldn't expect the business description to have been different in 2011. Unfortunately, NFU don't have any records of the renewal review that took place in 2015. The 2016 and 2017 PCRs record T's business description as being groundworker/mini digger operator and that the business activities hadn't changed. But I don't think they show clearly, as NFU say they do, that Mr B confirmed in his discussions with the AR at that time that T's business activities were limited to groundworks and the operation of a mini digger. There are no records of the conversations that took place. The AR isn't available to give evidence. And Mr B says the AR was well aware of the work T did. I find Mr B's evidence persuasive.

I agree with NFU that Mr B ought reasonably to have read the documents NFU sent him to check the cover and point out if anything was wrong with it, given its importance to T's business and its potential liabilities. And I acknowledge they contained warnings that Mr B should check the policy provided the cover he required for T. But even if he had looked at them more carefully and noted the endorsements relating to groundworks that NFU have mentioned, he'd have had no reason to think T didn't have the right cover in place. Mr B understood the groundworker description included the steel work construction T was carrying out. I can understand why NFU say the two activities are entirely different. But I don't think that matters. On balance, I think the AR was aware of the work T did; Mr B relied on the AR to arrange suitable insurance for T; and it was reasonable for Mr B to think the business description covered all T's activities.

NFU point out that Mr B discussed the possibility of adding EL cover to the policy in 2017 but declined it. And they note EL cover was added in 2019. Since I understand NFU to have accepted cover would apply under the PL section of the policy, I don't think it's relevant when EL was added to the policy. But the exchanges between the AR and underwriter in 2019 are relevant to the AR's understanding of the business description.

Those exchanges don't refer directly to an accident happening. But the timing of the conversation suggests it's more likely than not NFU looked at EL as a result of a conversation with Mr B about the alleged accident, even though Mr B doesn't remember one. NFU have explained that any changes to the business description would be advised by AR to the underwriter and the underwriter would then type it into the business description field on their system. So, it's reasonable to say it was the AR's responsibility to give the underwriter accurate information about the work T was doing. Since the business description didn't change in 2019, I think it's more likely than not the AR was already aware of the work T did but thought the business description was enough to cover it.

NFU have noted and Mr B accepts he didn't take up policy reviews between 2019 and 2021. I don't think that affects things. EL cover was added in 2019, which addressed any concerns he may have had about a claim in the future from someone who might be viewed as an employee. Mr B thought he had cover in place for the activities T was carrying out. He wouldn't have had any reason to let NFU know about any changes in relation to that.

Bearing everything in mind, I think NFU unfairly declined T's claim under the policy, and I intend to uphold this complaint.

My provisional decision

I intend to uphold this complaint and direct The National Farmers' Union Mutual Insurance Society Limited trading as NFU Mutual:

(1) to consider T's claim in line with the remaining terms and conditions of the policy; and
(2) since T has had no option but to pay costs in connection with the legal proceedings, to meet T's reasonable costs to date in line with the cover provided under the policy."

Developments

Mr B had no comments to make on my provisional decision. NFU didn't agree with my outcome and have provided additional comments. I'll consider what NFU has said below and go on to give my 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.

I'm grateful for NFU's comments and appreciate their strength of feeling about T's claim and complaint. I've noted everything they've said. I won't set it all out in detail, but I'll summarise the key points:

1. They wouldn't expect a ground worker to be steel erecting and would expect to be told if they were. The insurance considerations for each are different.

2. It's not right to say there were no records of the conversations that took place between the AR and Mr B in 2016 and 2017. The PCRs show clearly that the business activities shown in the policy schedule were discussed and that Mr B confirmed the business activities hadn't changed. There can't be any more definitive evidence than something in writing. The relevance of the PCRs is brought into question if I ignore them in coming to my decision and uphold the complaint.

3. In relation to the 2019 correspondence between the AR and underwriters, they don't follow my reasoning that because the AR didn't update the business activities, it means they were always aware of T's business activities. It's more logical to say that because the AR didn't update the business activities they weren't aware of T's steel erecting activities.

4. The AR was experienced. If he'd been told about the third party claim and how it had happened, he would have reported it to the claims team straightaway and further consideration would have been given to the business activities.

5. It's possible T added EL in the hope that if the third party made a claim further down the line, the policy would cover it; we simply don't know and ultimately there is no evidence the AR was made aware of T's business activities.

6. As I understand it, in 2018 NFU gave a quote for insuring a similar business that turned out to be a defendant in the same legal action as T. In 2021 an NFU AR said they believed the quote wasn't accepted due to the premium being higher than a

previous insurer's because the previous insurer hadn't taken the business's steel erecting activities into account.

I acknowledge that NFU have different considerations for insuring ground workers and steel erectors. But I don't think that makes a difference to the outcome of this complaint. The issue here is whether Mr B had let NFU know about the steel erecting activities T was carrying out.

I acknowledge too that the PCRs are a record of the conversations that took place between the AR and Mr B in 2016 and 2017. I take NFU's point that, broadly, since they are written evidence they carry weight. But, as I said in my provisional decision, I don't think the PCRs show clearly, as NFU say they do, that Mr B confirmed in his discussions with the AR at that time that T's business activities were limited to groundworks and the operation of a mini digger. They provide a short summary. They aren't clear evidence of the wider discussion that took place and whether the AR and Mr B understood the business description was adequate to include the steel erecting activities T was involved in.

NFU's own investigation shows the PCRs are their only written record of what the AR and Mr B discussed. It says no other paperwork or call recordings have been found. And the AR hasn't provided a witness statement. NFU's evidence has to be balanced against Mr B's testimony. And having done that, in the particular circumstances of this complaint, I don't think the PCRs show the whole story. Mr B's described a long-term business relationship where the AR visited him at his own premises, discussed all his insurance needs and his reliance on the AR's advice. I'm persuaded, on balance, the AR was aware of the work T was doing. And it was reasonable for Mr B to think he had the right insurance in place for the activities T was carrying out.

NFU now say the events of 2019 should be ignored and the focus should be on what happened before and, in particular, the 2016 and 2017 PCRs. I considered what happened in 2019 since they provided evidence of it. Even if I ignore the events of 2019, it doesn't change my view for the reasons I've explained above.

Even so, I see no reason to change my mind about the 2019 events. In my provisional decision I said the exchanges in 2019 don't refer directly to an accident happening but that the timing of the conversation suggests it's more likely than not NFU looked at EL as a result of a conversation with Mr B about the alleged accident, even though Mr B doesn't remember one. I should have made things clearer. In his statement Mr B says he did mention the accident to the AR at the time and the AR advised him on action to take; but he didn't recall discussing adding EL to the policy.

I find Mr B's testimony to be persuasive. I note the AR was experienced. But NFU can't know for certain the AR would have reported the claim in 2019 if Mr B had mentioned it. It seems plausible the AR would have given Mr B the advice he's described in his statement.

I don't think any firm conclusions can be reached about the addition of EL to the policy in 2019. NFU consider Mr B asked for that to happen. Whatever the position, it's a reasonable conclusion to reach that the change was made following a discussion about the third party's alleged accident and the possibility T might need EL insurance in the future.

I don't think NFU's point about the agency's knowledge of the need to code business activities correctly is relevant here. Whilst it shows an awareness on the part of the AR responsible for the note they've provided, the note appears to have been made in 2021 which is later than the events we're concerned with here. Even if that's wrong, the AR involved wasn't the AR Mr B was dealing with. And even if the AR had been Mr B's contact, their awareness of how T's activities should have been coded doesn't mean it would

definitely have happened in practice. So, I don't think it's evidence that can reasonably be relied on by NFU to support their position.

Bearing everything in mind, I am not persuaded to change my outcome. I uphold this complaint for the reasons set out in my provisional decision and those I've set out above in response to NFU's comments.

Putting things right

NFU should put things right on the basis I set out in my provisional decision.

My final decision

I uphold this complaint and direct The National Farmers' Union Mutual Insurance Society Limited trading as NFU Mutual:

1. to consider T's claim in line with the remaining terms and conditions of the policy; and
2. since T has had no option but to pay costs in connection with the legal proceedings, to meet T's reasonable costs to date in line with the cover provided under the policy.

Under the rules of the Financial Ombudsman Service, I'm required to ask T to accept or reject my decision before 15 March 2024.

Julia Wilkinson
Ombudsman