DRN-4679160

The complaint

Ms B complains that Lloyd & Whyte Ltd gave inappropriate advice when arranging a medical indemnity insurance policy.

What happened

Ms B, a dentist, approached Lloyd & Whyte in 2020 in order to arrange a medical indemnity insurance policy. She'd previously arranged cover with a different broker, M.

Lloyd & Whyte recommended a "claims occurring" policy. Ms B's previous cover had been on a "claims made" basis and so Lloyd & Whyte said she should speak to M about arranging run off cover to ensure there were no gaps in her cover. Ms B did so.

Ms B renewed the policy in 2021 and 2022. She subsequently complained to Lloyd & Whyte about the advice she'd been given. She said her run off cover premiums had increased significantly in 2021 and 2022, and she'd only needed that cover because of the "claims occurring" policy which Lloyd & Whyte had recommended. Lloyd & Whyte rejected Ms B's complaint.

Our investigator thought Lloyd & Whyte hadn't given appropriate advice when Ms B took out the policy. He said Lloyd & Whyte should pay Ms B the cost of her run-off cover and pay £2,000 compensation to recognise the distress caused to her. Lloyd & Whyte didn't agree and asked for an ombudsman's decision.

My provisional decision

I previously issued a provisional decision outlining my considerations on this complaint. I thought that while the complaint should be upheld, the redress offered to Ms B should be different. In that provisional decision, I said:

It isn't disputed that Lloyd & Whyte arranged Ms B's policy in 2020 on an "advised" basis – this means that they obtained details of her requirements, and other information, and recommended a policy to her. In an advised sale, Lloyd & Whyte are required by the FCA's Insurance Conduct of Business Sourcebook (ICOBS) to "*take reasonable care to ensure that a policy is suitable for the customer's demands and needs, taking into account its level of cover and cost, and relevant exclusions, excesses, limitations and conditions.*"

It similarly isn't disputed that Ms B was made aware during the sales process that she was moving from a "claims made" policy which had been arranged by M, to a "claims occurring" policy arranged by Lloyd & Whyte.

"Claims made" and "claims occurring" policies are common in the medical indemnity insurance market. A claims made policy provides cover for claims which are made during the period of cover, irrespective of when the incident being claimed for occurred. By contrast, a claims occurring policy provides cover for incidents which occur during the period of cover, even if the claim is made after the policy expires.

There's no restriction on a policyholder moving between these types of policy, but it's a requirement of Ms B's professional registration that she has adequate indemnity insurance coverage in place on an ongoing basis. That means that when moving from a claims made policy to a claims occurring policy, it will be necessary to arrange alternative cover to ensure that any claims made after changing policies for incidents which occurred before the claims occurring policy cover started. This is known as run-off cover.

I can see that when Ms B contacted Lloyd & Whyte in order to arrange the policy in 2020, it asked for details of her existing cover. Ms B provided that information and it was established this policy was provided on a claims made basis. Lloyd & Whyte were recommending a claims occurring policy and so said Ms B should arrange suitable run-off cover with M. Ms B was also provided with guidance by Lloyd & Whyte about claims made and claims occurring policies, and the need to have adequate cover in place, including run-off cover where appropriate.

Ms B had further contact with Lloyd & Whyte about the policy it was recommending, and confirmed it was on a claims occurring basis. I therefore agree that Ms B was aware when she took the policy out that it was on a claims occurring basis, and that she needed to have run-off cover in place.

Ms B arranged run-off cover with M. This was done on a 12 month rolling basis, effectively requiring her to renew the cover every year in order to continue benefitting from the cover, and for the insurer to review the cover offered and premium charged. Lloyd & Whyte, in a submission to our service, has described this arrangement as "*unusual*." I assume from this that Lloyd & Whyte believe that run-off cover should be arranged on a longer term basis as opposed to review and renewal every 12 months.

The effect of the run-off cover held by Ms B has been that the premium she has been paying has increased significantly when it was renewed in 2021 and 2022. During the period of run-off cover, Ms B made three claims for incidents which had occurred while she held claims made policies. It seems to be agreed that the primary factor in the increasing premiums was the number of claims being made.

Lloyd & Whyte appear to believe that the issues identified by Ms M are the responsibility of M, as it was M who arranged the run-off cover. That isn't relevant to my decision here, as I'm considering Lloyd & Whyte's actions, not M's. What I need to consider is whether the advice Lloyd & Whyte gave Ms M, in recommending the claims occurring policy, was appropriate in light of her circumstances in 2020.

As I've said above, Lloyd & Whyte knew Ms B was moving from a claims made to a claims occurring policy, and that she'd need to have appropriate run-off cover in place. I'm satisfied it made her aware of the differences between claims made and claims occurring policies, that she was aware of the differences, and also made her aware she needed to have run-off cover in place.

Where I think the issue arises is that, after informing her she needed to have adequate run-off cover, Lloyd & Whyte didn't seek from Ms B any details of her run-off cover, in order for it to assess whether a claims occurring policy was appropriate for her, in light of her obligations on the run-off cover which was being proposed by M and how it would operate.

In moving to a claims occurring policy in 2020 with the run-off cover arranged by M, I think Ms B was exposed to an unreasonable risk. In the event of claims being made it was reasonably foreseeable that her run-off cover premium would significantly increase at each renewal. That would, or should, have been apparent to Lloyd & White if they had asked Ms B for details of the run-off cover that was being proposed. It's fair to say that Lloyd & Whyte's

obligation to provide appropriate advice extends to ensuring the claims occurring policy is appropriate in light of the run-off cover that is being proposed, even if Lloyd & Whyte isn't arranging that run-off cover.

On that basis, if Lloyd & Whyte had done this, I think it's reasonable to conclude that it would have recommended that Ms B would be better suited to a claims made policy. The additional risk of moving to a claims occurring policy with the run-off cover proposed was, I think, too high. The advice given recommending the claims occurring policy was unreasonable.

I went on to say, that to put things right:

Our investigator thought Lloyd & Whyte should meet the costs incurred by Ms B for the run-off cover (plus 8% simple interest on the amounts paid by Ms B). He also said Lloyd & Whyte should continue to cover Ms B's run-off premiums until they were no longer required, or appoint a loss adjuster in the event of future claims being made which would otherwise fall within the run-off cover. I don't agree with this.

If Ms B recovers the full amounts paid for the run-off cover, and is excused from any liability to meet costs related to the run-off cover in the future, she's effectively being provided with that cover at no cost. That isn't fair, as she'd have been liable for costs of relevant cover if she'd remained on a claims made policy.

My starting point, if I consider that the claims occurring policy was inappropriate, is that I'm effectively saying Ms B would have been better served by holding a claims made policy. It therefore follows that I need to try to establish what she'd have paid for such a policy during the relevant period. If that's less than she actually paid for the claims occurring policy and run off cover, then she should be entitled to the difference.

I asked Lloyd & Whyte what the premiums would have been if it had arranged a claims made policy for Ms B, but it said that it's unable to arrange such a policy as it doesn't have these arrangements with the underwriters it works with.

I also asked M (the previous broker) for an indication of what the claims made policy premiums would have been between 2020 and 2022, taking into account the claims Ms B would have made on such policies over that period. It said while it was able to provide the renewal quote Ms B was offered in 2020, it wasn't possible to establish with certainty what the premiums would have been in 2021 and 2022.

I asked Lloyd & Whyte for the premiums paid by Ms B for her claims occurring policies between 2020 and 2022. The premiums were:13

- 2020: £4,284.89
- 2021: £2,781.89
- 2022: £3121.75 (inclusive of a mid-term cover change)

The amounts paid for the run-off cover between 2020 and 2022 were:

- 2020: £1,440
- 2021: £2,700
- 2022: £5,956

This means Ms B paid a total of £20,283.71 for the claims occurring and run off cover between 2020 and 2022.

M confirmed the renewal premium for Ms B's claims made policy in 2020 was £1,993.44. I've said that Ms B would have been better served by staying on a claims made policy, but establishing the exact premiums she'd have been charged isn't possible based on what we've been told by Lloyd & Whyte and B.

I considered whether I should require Lloyd & Whyte to approach either underwriters or another broker to establish a more precise figure for the 2021 and 2022 premiums for a claims made policy. I don't think this is practical, for a number of reasons. The first is that I can't be sure that doing so would be easily achieved either via another broker or an insurer directly. It would seem that obtaining this information would require Ms B to provide information about the claims that have been made against her between 2020 and 2022. This would almost inevitably cause her further inconvenience and distress, and take some time to resolve.

On balance, I think the most appropriate way forward is to seek to estimate what claims made premiums for the period from 2020 to 2022 may have been based on the information provided by Lloyd & Whyte and M.

The first part of this is straightforward, as we know a renewal was offered to Ms B for her claims made policy at a cost of £1,993.44 in 2020. I've used this figure as my starting point.

A claims made policy premium would, in my opinion, have increased in 2021 and 2022 as a result of claims having been made, in common with many insurance policies. That would seem to be one of the reason the run-off cover premiums increased in 2021 and 2022. I think, to estimate the 2021 claims made premium, the fairest way is to apply the same rate of increase to the 2020 renewal quote that was applied to the 2021 run-off cover premium.

To estimate the 2022 premium the same method should be used, using the 2021 estimated claims made premium and the 2022 run-off cover premium.

Ms B's premium for her run off cover in 2021 was 1.875 times the 2020 premium. By applying that same increase to the 2020 claims made policy renewal quote, an estimate premium of £3,737.70 is reached for a claims made policy in 2021.

The 2022 run off cover premium was 2.21 times the 2021 premium, so applying that same increase to the estimated 2021 premium of £3,737.70, this equates to a 2022 estimated premium of £8,260.32.

The total estimated premiums on this basis for the period between 2020 and 2022 would be £13,991.46.

I think the fairest outcome is therefore to require Lloyd & Whyte to pay Ms B the difference between what she did pay for the claims occurring and run off cover (£20,283.71) and the estimated premiums from the calculations above (£13,991.46). It should also pay 8% simple interest on these amounts, from the dates Ms B made the relevant payments to the date of settlement, to take into account our usual approach where a consumer has overpaid or been otherwise deprived of funds they'd have otherwise have had access to.

I haven't been made aware of the arrangements that were made in 2023 in terms of the run-off cover premiums, or whether run-off cover was still required. If Ms B did have to take out further run-off cover beyond the 2022 policy, then it would follow that the same formula should be used to calculate a further payment to Ms B – that being the amounts paid by Ms B for a claims occurring policy and run-off cover less the amount she'd have paid for a claims made policy (by looking at the 2023 run off premium compared to the 2022 premium)

and applying the same rate change to the estimated 2022 premium of £8,260.32, plus 8% simple interest.

Moving forward, it would also follow that Ms B would be better placed (if her run-off cover is still required and is unable to secure long-term (as opposed to renewable) run-off cover by moving to a claims made policy at the earliest opportunity. That would prevent any further need for run-off cover to be secured and limit Lloyd & Whyte's continued liability for part of such costs.

Ms B also suffered a significant amount of distress as a result of the inappropriate advice given by Lloyd & Whyte. She's outlined to us the impact of the increased run-off premiums on her finances and health. Our investigator thought Lloyd & Whyte should pay £2,000 compensation to recognise this.

While I don't seek to diminish the effect of the increased premiums on Ms B, there are a number of factors which I need to consider when assessing what level of compensation is appropriate. The first is that even if Lloyd & Whyte had given appropriate advice and arranged a claims made policy, the premiums would likely have increased significantly between 2020 and 2022, as I've outlined above. This means that the distress caused by the increasing premiums, and Ms B's concerns about whether cover would continue to be available or affordable at renewal would have still existed. Secondly, I need to consider the effect of on Ms B of having claims made against her, and the inconvenience and distress which would occur by needing to make insurance claims in relation to these. That distress would also have always arisen, regardless of the situation with the premiums and type of cover.

On that basis, I don't believe I can attribute all of the distress and inconvenience caused to Ms B to the actions of Lloyd & Whyte. I do think that the advice had a detrimental effect on Ms B, causing her to need to cover with two different insurers, involving two brokers over a period of several years. She would also have been distressed when she was told that the run-off cover, which was required because of Lloyd & Whyte's advice, was increasing in price significantly each year, although this is tempered by the fact that a claims made policy would likely have also increased in price over the same period.

In light of these points, I think that compensation of £500 for the distress and inconvenience caused to Ms B is more appropriate in the circumstances. I think this amount reflects the impact of the errors made by Lloyd & Whyte, taking into account Ms B's ill health but also that not all of the distress caused to her arose from Lloyd & Whyte's actions.

The responses to my provisional decision

Both Lloyd & Whyte and Ms B responded to my provisional decision.

Ms B provided details of her premiums from 2023 for the run-off cover and claims occurring policies. The claims occurring policy premium was £2,771.44 and the run-off cover premium was £9,821.00.

She also said she was happy to move back to a claims made policy, subject to securing the relevant run-off cover and maintaining an appropriate level of cover generally. She'd made enquiries about her rights to cancel the run-off cover she already had in place.

Ms B also explained, with reference to the compensation being suggested, that her motivation in making the complaint was to resolve what she described as the mis-selling of the policy by Lloyd & Whyte, and outlined the impact of that on her, including being unable to sleep and having to take time off work.

Lloyd & Whyte gave a detailed response to the provisional decision, outlining why it considered it had acted reasonably when it arranged the claims occurring policy in 2020. I don't intend to list, or address, every point made by Lloyd & Whyte, but think they can be reasonably summarised as:

- It was unclear why M had only arranged run-off cover on a yearly, renewable basis rather than a longer period.
- My findings would potentially create a duty on Lloyd & Whyte (and other brokers) to give advice about the actions of third party brokers.
- Lloyd & Whyte could source a claims made policy, and potentially estimate premiums for such policies between 2020 and 2023.
- Ms B moving to a claims made policy moving forward would not be appropriate or in her best interests.
- Lloyd & Whyte continues to believe the advice given in 2020 was appropriate, given Ms B's claims history to that point, and her demands and needs. To say that advice was inappropriate is based on applying hindsight due to the claims that were made against the run-off cover.
- My findings could have a significant impact on the insurance market as it suggests that it isn't appropriate for a policyholder to move from a claims made policy to a claims occurring policy.

Neither party made any comment on my suggested route to calculating a fair redress amount, or the amount of compensation I said should be paid.

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've started by reviewing the findings, and reasons for those findings, that I made in the provisional decision. I'm satisfied that the core finding, that in Ms B's specific circumstances the advice given by Lloyd & Whyte to move to the claims occurring policy in 2020 was inappropriate, remains a reasonable outcome.

I've carefully considered the points made by Lloyd & Whyte in regards to this, particularly when it refers to M's actions in arranging renewable, yearly run-off cover and why the advice was appropriate in 2020.

With regards to M's actions, I understand Lloyd & Whyte's position here, and assume from its comments that it believes there are failings on M's part. As I've said before, my role isn't to examine the appropriateness or reasons for M's actions. I can't comment on why M acted the way it did, or say whether the run-off cover arranged was appropriate. The fact is Ms B had run-off cover, arranged on a renewable yearly basis. The question I seek to address is whether, in light of that, Lloyd & Whyte's advice was appropriate.

I also acknowledge Lloyd & Whyte's strength of feeling that its advice was appropriate, and note the reasons it gives. However, I don't consider that I should change my findings on this point, as its submissions haven't addressed what I think to be the critical point here. This is that the extent, limitations and period of cover of the run-off cover should have formed part of Lloyd & Whyte's considerations when it recommended the claims occurring policy in 2020. Other than advising Ms B to ensure she had run-off cover in place, and confirming she did have this, I haven't been provided with anything to show that the specific details of that cover formed a part of its considerations in recommending the policy it did. As I've previously

explained, if it had done so then I think the risk of moving to a claims occurring policy would have been evident and meant that such a policy wasn't appropriate.

I accept that moving to a claims occurring policy from a claims made policy could have been appropriate for Ms B if the run-off cover she held didn't create an unreasonable risk, and this is an important element of my decision here. Lloyd & Whyte's duty to provide appropriate advice included, in my opinion, the need not only to check that Ms B had run-off cover in place but also that moving to a occurring made policy was appropriate given the specific nature of her run-off cover. It's because Lloyd & Whyte didn't do that second part that I've reached the conclusion I have. I don't think any of my decision making is a result of looking at what happened and what should have happened with the benefit of hindsight.

This links to Lloyd & Whyte's points about the consequences of my decision on the actions of brokers and the insurance market. The first point, that this may create a duty on brokers to comment on the actions of other brokers is one I don't agree with. What I've said here is that in checking whether it's appropriate to move between a claims made and a claims occurring policy, a broker should check the extent and limitations of run-off cover which are potentially being arranged by a third party. I can't see how this leads inevitably to commenting on the appropriateness of the advice of the third party. The point of obtaining such information is to inform the advice given by the broker.

I also can't agree with the characterisation that my decision leads to a position where it's never appropriate for a broker to recommend moving from a claims made policy to a claims occurring policy. My decision is limited to the specific circumstances of Ms B's complaint and the policies she held. Lloyd & Whyte have said that her run-off arrangements were "*unusual*" and it had a lack of familiarity with her original claims made policy. My decision doesn't, from what I can see, create any new obligation on a broker, make a general finding about the appropriateness of claims occurring, claims made or run-off policies or say that a broker should never recommend moving between these types of policies. My decision is solely that in Ms B's specific circumstances, Lloyd & Whyte's advice to move from a claims made policy to a claims occurring policy was inappropriate, for the reasons I've outlined.

I acknowledge Lloyd & Whyte would be in a position to arrange a claims made policy, and that it had indicated as such in correspondence with our service prior to the provisional decision. I've no doubt Lloyd & Whyte could arrange such a policy, given its extensive experience in arranging medical indemnity insurance policies. My provisional decision mis-characterised its response on this point. However, I think it would be agreed, and indeed it has been suggested by Lloyd & Whyte, that obtaining suggested premiums dating back to 2020 and covering the period in question would involve a significant amount of administration and work on the part of Lloyd & Whyte and require Ms B to obtain a significant amount of information and send this to Lloyd & Whyte. That would inevitably prolong this matter and potentially lead to further disputes. I've addressed this in my provisional decision and previously said I don't think would be an appropriate step.

Turning to the issue of ongoing cover, which has been addressed by both parties in their responses, I acknowledge I had suggested Ms B would be better placed moving forward having a claims made policy. I know Lloyd & Whyte disagree with this. I hadn't made a formal finding on this point, or given a suggested direction to that effect in the provisional decision and I don't intend to do so now. This is especially the case in light of the further information received from Ms B about her 2023 premiums.

It's clear that both Lloyd & Whyte and Ms B know much more about the specific circumstances of her insurance needs than they did in 2020. Ms B's aware of her run-off cover needs and the risks which arise from moving between policies. I understand that Ms B's policy will be due for renewal in June 2024.

The upcoming renewal links to the 2023 premiums Ms B paid for the ongoing run-off cover and claims occurring policies. The total of these is £12,592.44 and the premium for the run-off premium increased from £5,956 in 2022 to £9,821, a factor of 1.65. By applying that same rate of increase to the hypothetical 2022 claims made premium of £8260.32, it comes to an estimated claims made premium of £13,629.53. It may therefore be suggested that by 2023 Ms B's premium for a claims made policy may have exceeded the combined run-off cover and claims occurring premiums.

It would seem on this basis that it's not possible to say which policy (or combination of policies) Ms B would be best served by moving forward. A number of factors, including the costs, Ms B's ongoing obligation to have run-off cover and the need to avoid gaps in cover, the limitations and extent of cover, as well as the likelihood of further claims being made on the run-off cover need to be considered. It would be unwise for me to make any further recommendation or direction on how Ms B should be best insured moving forward, given the variables I've identified above.

Turning to the redress I'd recommended, I haven't seen anything to dissuade me from applying the principles I'd previously suggested should form the basis for calculating a fair settlement. As I outlined previously, the amount Ms B did pay between 2020 and 2022 was £20,283.71, and the amount she would (based on the principles I set out) have paid was £13,991.46. This is a difference of £6,292.25, representing the additional she's paid as a result of the inappropriate advice. That should be the amount refunded, plus interest as I outlined.

Similarly, the compensation amount I suggested remains, I'm satisfied, fair in the circumstances. I acknowledge, and sympathise, with the very difficult circumstances Ms B has encountered. I also understand that her motivation in making the complaint wasn't to seek compensation. However, the distress and inconvenience she has suffered should be recognised, albeit that this is mitigated for the reasons I've previously explained.

My final decision

It's my final decision to uphold this complaint. In order to put things right, Lloyd & Whyte Ltd must:

- Pay Ms B £6,292.25, this being the difference between the amounts paid for her claims occurring and run- off cover between 2020 and 2022 and the renewal and estimated premiums for claims made policies for the same period.
- Pay 8% simple interest on this amount from the dates Ms B paid the costs to the date of settlement.
- Pay £500 compensation. Lloyd & Whyte must pay this amount within 28 days of us telling it Ms B accepts our decision. If it doesn't, it must pay simple interest at a rate of 8% from that date to the date of settlement.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms B to accept or reject my decision before 11 April 2024..
Ben Williams
Ombudsman