DRN-4837852

The complaint

Two limited companies, that I will refer to together as C, complain about the information and service they were provided by Pre-School Learning Alliance Trading Limited trading as Early Years Alliance, in connection with the COVID-19 pandemic.

What happened

The following is intended only as a brief summary of events. In terms of the parties to the complaint, to keep things as simple as possible, I have just referred to C and Pre-School Learning Alliance Trading Limited trading as Early Years Alliance (EYA). However, the circumstances mean that I have also had to refer, anonymously, to a number of third parties.

C operates as a nursery business, with a number of locations. C held a commercial insurance policy underwritten by an insurer that I will refer to as R. The policy had been arranged by EYA and, as far as is relevant, ran from June 2019 to June 2020. The policy provided cover for a number of areas of loss. One of these was business interruption.

When the policy had been renewed in June 2019, C was sent a copy of the policy schedule that did not include an extension that it ought to have. This extension provided cover for losses caused by:

> "closure of the Premises or part thereof on the order or advice of any local or governmental authority as a result of an outbreak or occurrence at the Premises of A) Any human contagious or infectious disease other than Acquired Immune Deficiency Syndrome (AIDS) or any AIDS related condition, an outbreak of which is required by law or stipulated by the governmental authority to be notified…"

As the extension had not been set out in the schedule, C was unaware of its existence or full details at the time of the sale. However, the policy summary – which did not technically form part of the contract of insurance – did refer to there being cover relating to disease.

Following the outbreak of COVID-19, C contacted EYA on 26 February 2020 to check whether its policy would provide cover for losses caused by this disease. Unfortunately, a recording of this call – nor any other made around this time – is not available, so it is not possible to know exactly what was said. But C has said that it was making this contact to ensure it had appropriate cover in place.

It should be noted that the individuals involved with C also operate other businesses. At this point in February 2020, they contacted the insurers for at least one of those other businesses, identified that they did not have cover in place that would have provided cover for COVID-19, and arranged alternative cover.

Several more calls were made to EYA after this, on 5, 6, 11 and 12 March 2020. Again, we do not have recordings of these calls. We do have a copy of an email EYA sent to C on 11 March 2020. This email said that the policy did contain "an Infectious Disease Extension", but did not set this wording out. The email went on to say:

> "As… the Infectious Disease Extension is embedded into this cover… a claim for

> Loss of Revenue due to COVID-19 would be considered.
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> Though as I have no claims authority, I cannot confirm the outcome of the claims submitted for consideration.
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> Please also note that claims for closure due to COVID-19 will only be considered if the closure was instructed by a Public Health Authority."

After the Government had introduced restrictions on businesses in late March 2020, C contacted R to claim on the policy. However, the claim was declined.

A complaint about this claim decision has previously been considered by the Financial Ombudsman Service. In 2022, an Ombudsman issued a decision about this, but found that as C had not demonstrated that there was more likely than not an occurrence of COVID-19 at its premises that had led to the government-imposed restrictions, R had acted fairly and reasonably in declining the claim.

C's current complaint is about the information and assistance provided by EYA. C considers that EYA failed to provide appropriate documents when the policy renewed in 2019, and that it did not give clear information about the cover provided in February and March 2020.

C ultimately brought its complaint about EYA to the Financial Ombudsman Service. EYA has offered C £150 compensation for not responding to C's requests for call transcripts. EYA said that, as these calls were not recorded, no transcripts are available, but that it should have responded to C's request.

Our Investigator initially didn't uphold the main issue of C's complaint. He agreed that there had been some problems with EYA's service, but he did not think that C would have been able to find alternative cover in late-February / early-March 2020 that would have provided cover in the circumstances.

C responded with details of a policy that was being offered in March 2020 and that would seemingly have provided appropriate cover. As a result of this, our Investigator changed his opinion and upheld the complaint. He thought that the consequential loss of EYA's mistakes was that C hadn't been able to claim successfully, and so EYA should compensate C the amount it would have been able to claim on the alternate policy C had identified.

EYA did not agree, and as our Investigator has been unable to resolve the complaint it was passed to me for a decision.

I issued my first provisional decision on this complaint on 15 November 2023. I explained that, particularly in February and March 2020, C was not provided with clear information from EYA about the cover provided by this policy in relation to the COVID-19 pandemic. I set out in my provisional decision that the key issue was what C would have done at the time had EYA done what it ought to have, and provided clear information.

Whilst I was satisfied that C would have sought alternative cover, for the reasons set out in my first provisional decision, I was not persuaded that C would have been able to identify a policy that would most likely provide the cover it was seeking. C had been able to show that there was a policy available, from an insurer I referred to as V. And that a broker, M, who specialised in arranging insurance for childcare providers, was placing policies with V at the relevant time. However, given the understanding of the relevant broker (M) of the cover offered by this policy, I thought it most likely that C would have been told this policy did not offer cover (if this policy were even discussed).

As a result, whilst I thought EYA should offer C compensation for the inconvenience caused,

I was not persuaded that it should compensate C for any further consequential loss in relation to C's ability to claim for its business interruption losses.

Whilst EYA accepted my provisional findings, C did not. C pointed out that it was likely that, had the V policy been discussed, M would have offered a quote and held the policy – so that it could have been entered after the point it became clear it would offer cover (even though new quotes would not be offered at this time).

C was also able to obtain and provide recordings of phone conversations its staff had held with another insurance company, H, around the time in question. These conversations related to C's other separate companies, but C considered they showed what it would have said in relation to any attempt to gain alternative cover for its nursery businesses. Copies of these conversations were provided to EYA. But it did not consider they affected the findings in my provisional decision.

However, having considered the evidence again, I was minded to come to a different outcome, and I issued a second provisional decision on 11 April 2024. The following is an extract from that decision:

> "As mentioned, in my previous provisional decision I explained that I considered EYA had failed to provide C with information around its policy that was clear, fair and not misleading. I also felt that had such information been provided, C would most likely have sought alternative cover. My findings and reasoning on these points have not changed.
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> However, I was at that time not persuaded that C would have been able to identify a policy that was available and that would most likely offer cover. The availability of policies that would provide cover for COVID-19 related claims was rapidly reducing at the time, as insurers sought to limit their potential exposure to claims. And whilst C had identified a policy that was available at the time, and that ultimately would have provided cover, I was not previously persuaded that C would have understood that it did provide cover. It is on this point that I have changed my provisional findings.
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> M's position in the market is as a childcare insurance specialist. So, it is likely that C would have held a conversation with them, had it been seeking alternative cover for its nursery businesses. And the policy from V was available for new quotes up until 12 March 2020. It is likely that C would have had a conversation with M prior to this date.
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> I was minded to consider that M's understanding of the policy coverage prior to 12 March 2020 would mean that it would have either told a prospective customer that this policy did not offer cover for COVID-19 related claims, or that this policy would not even be included in a discussion of policies that might offer such cover.
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> M has said of this policy:
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> > "We received confirmation from [V] in the late hours of the 12th of March that the Government and Local Authority Action extension under the Loss of Revenue section would respond to government ordered lockdowns. Whilst this was an area of discussion/challenge up until the point of clarification, we were quickly able to determine that the Compulsory Closure would not respond due to the operative wording being written on a specified diseases basis. This was information that was conveyed to customers and potential customers on and around mid-February onwards."
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> The policy from V included two clauses that a claimant might potentially claim under following loss relating to disease. The first of these, referred to by M as the Compulsory Closure clause, is limited to circumstances where loss is caused by one

(or more) of a list of specified diseases. As COVID-19 was not included on this list, it was seemingly straight forward for M to identify that this would not offer cover in response to a COVID-19 related loss.

The second clause is broader, providing cover for:

> "Interruption of or interference with the childcare business in consequence of access to the premises being hindered or prevented as a result of the actions or advice of a government or local authority following an emergency which is likely to endanger life or property."

There are a number of exclusions relating to this, but none that would be obviously relevant. Cover is limited to a maximum indemnity period of three months, and a financial liability limit of £100,000 – a point that I [will] refer back to in due course.

Whether or not such clauses provided cover for claims relating to the COVID-19 pandemic was not something that was clear to all insurers – or brokers – in March 2020. Indeed, whilst V appears to have accepted at an early date that this clause did provide cover, a clause similar to this was one of those included in the FCA test case[1], and the initial judgment on this was not made until some six months later. So, it is not surprising this was an area of discussion/challenge.

C has said that if the policy had been discussed it would have taken out a quote and reviewed the wording itself. I do not doubt this. As C has said, such a quote would be free and be on a no-obligation basis. Given the evidence C has provided of its attempts to take out appropriate insurance for its non-nursery business, and the other circumstances at the time, I am persuaded it would have taken out the option of a free quote. And, given that such a quote still would have been honoured after 12 March 2020 when V confirmed it would cover relevant claims, I think this would have led to the policy being incepted.

The issue is whether, given M's knowledge that the first clause did not offer cover and uncertainty over whether the second clause did, would M have discussed this policy with C had it called in February/March 2020?

In thinking about this, I have considered what C would likely have been asking for when seeking alternative cover. As set out in my provisional decision, it already had cover for some limited circumstances relating to COVID-19. C's policy with R provided cover where there was an occurrence of COVID-19 at the premises. So, C would have been seeking different cover to this.

It isn't clear exactly what questions were asked of EYA in February and March 2020, so we can't know what C said in terms of the cover provided by its policy with R. However, C has said that its actions were driven in part by events in Lombardy, Italy. This involved a government enforced closure of businesses. And I find it persuasive that this would have been a concern C held at the time.

This is reinforced by the conversations C's staff had with H, in relation to its non-nursery business. When initially contacting H, C explained that it was looking for cover:

> "…if Public Health England said we're closing, that's it. Like as in quarantine or whatever."

Based on the cover C already held, the apparent motivating factor driving its actions, and the content of the conversation its staff held with another insurer, I am persuaded that it is most likely that C would have expressed to M that the cover it was seeking was in relation to government enforced closure (though perhaps phrased slightly differently).

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[1] *The Financial Conduct Authority & Ors v Arch Insurance (UK) Ltd & Ors* [2020] EWHC 2448 (Comm)

It would then have been for M to consider the policies it had available and to see whether any of these provided such cover. It seems that the only policy it carried that might offer cover would be that from V. So, the question then is which is more likely; that M would have said we don't offer any, or that it would have said we do carry one – but it isn't clear whether it does provide such cover. I am persuaded that it is more likely M would have said the latter.

Whilst M would have had to make sure it was not misleading a potential customer, it is reasonable to say that it would have been motivated to make a potential sale rather than decline this. It has been confirmed that, around this time, M was offering quotes to potential customers of the V policy. And I think it is more likely than not that, had C called M, it would have provided a quote to C. And that, had it done so, C would then have been able to take out the policy after the clarity was provided by V on 12 March 2020. This would then have given C cover that it ultimately would have been able to claim under.

Taking everything into account, my revised provisional decision is that EYA failed to provide C with information that was clear, fair and not misleading. And that the consequence of this was that C did not take out an alternative policy that would have provided it cover for the circumstances of its loss. So, EYA should compensate C the value of this consequential loss.

At this point, however, it is necessary to quantify this loss.

C has said that, as it is formed of two companies, it would have taken out two policies – given the financial limits on the relevant cover in the V policy. I find this persuasive. Given C's overall desire to ensure it had as much cover as possible, I think it most likely that it would have chosen this option.

However, each of these would have been limited in the scope and extent of their coverage. As well as the financial and time limits referred to above, it is relevant that the policy only provides cover, essentially, where access to a nursery has been hindered or prevented by government action.

On 20 March 2020 the Government restrictions required nurseries to close (other than to children of key workers). I consider this would be an interruption that falls into the cover provided by the V policy. However, this restriction was removed on 1 June 2020. There were safety measures in place that may have impacted the number of children that might be able to attend a nursery. And I appreciate this would likely have continued to cause a loss to C. But this would not have been something that hindered or prevented access to the premises. Albeit in smaller numbers, children would not have been hindered or prevented from entering.

As such, it is only the loss from 20 March 2020 to 1 June 2020 that would have been covered by the V policy.

C has provided some financial information in support of its losses. For the first of its businesses, its losses over this period would have exceeded £100,000. So, I am satisfied that EYA would need to compensate C at least this amount for this business' losses.

In terms of C's other nursery business, the figures it has provided indicate it would have likely suffered approximately £35,000 loss over this period. I would stress that the evidence provided in terms of this loss is reasonably limited. And I have had to use this to make an estimation of the loss for the end of March as no breakdown is given for this. But given the information available, from both this complaint file and the related complaint about the claim on the R policy, I consider this to be a reasonable figure.

Had C taken out the policies with V, it would have been able to claim in March 2020 –

> as it did on its policy with R. Given V's position, I consider the claims would have been settled promptly and most likely on an interim payment basis. I consider that the losses C suffered in March 2020, would have been met by V at the end of May 2020. With the losses from April and May being met at the end of June and July respectively. This would given enough time for the losses to crystalise, and the claim to be assessed and paid.
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> As this didn't happy, C has been without the funds that would have been paid in 2020. And I consider it reasonable that EYA also pay C for the consequential loss caused as a result. In the absence of other evidence, I consider the most appropriate way of calculating this is to add 8% simple interest per annum from when each of the payments would have been made to the date of settlement."

I invited both parties to respond to my second provisional decision. C accepted the findings and outcome, but EYA did not.

EYA responded to the second provisional decision saying, in summary:

- It accepts that the service provided prior to 19 March 2020 fell short of what could reasonably be expected, and it was willing to pay compensation of £500.
- However, the second provisional decision made assumptions, about what advice M would have given and what action C would have taken, which defy logic.
- The second provisional decision fails to properly take into account the uncertainties over what V would have done.
- And so, the provisional decision fails to assess C's complaint on a "loss of chance" basis, rather than on the balance of probabilities.
- Finally, that no meaningful scrutiny of C's claimed losses has been made, including what impact government support would have had on these.

Having considered EYA's response and taking into account the circumstances of the complaint, I was minded to agree that it was appropriate to apply the legal principle of loss of chance to the assessment of redress. And I also accepted that the assessment of the redress would require additional work.

I set out my thinking on these points to C and EYA, and asked for any further comments they had. Both parties agreed that it was appropriate for a third party to calculate the loss C experienced that would have been met had C taken out policies with V. EYA did not entirely agree with the level of redress that would need to be applied. But C did not comment on the point relating to loss of chance.

I have therefore set out my reasoning in more detail below.

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 have come to largely the same conclusions as set out above in my provisional decision. I consider EYA failed to give appropriate and accurate information to C. I also consider that, had accurate information been provided, C would likely have taken out alternative policies that would have covered at least part of its losses.

However, as I cannot be certain of everything that would have been done by the third parties that would otherwise have been involved, I consider that EYA should only meet 75% of the

loss that would have been covered had these policies been taken out. I also consider that it is appropriate for an independent third party to calculate the losses that would have been covered by these policies.

I will expand on the reasoning set out above to explain my conclusions.

I should also say that EYA has provided detailed comments around the points it has made in relation to this complaint, and in response to my second provisional decision. I do not intend to repeat all of this here. But I will address what I consider to be the key issues.

Largely speaking, it is not disputed that EYA made an error and did not provide the information that it ought to have to C. The outstanding issues are around what would have happened had EYA given correct information. And how this should be taken into account when thinking about the redress.

Complaints relating to what the likely actions of particular individuals would have been, in circumstances that did not in the event arise, always pose difficulties. It is hard to be certain what would have happened in the counterfactual.

When considering the possible alternative actions of a party involved in a dispute, it is appropriate to consider this on a balance of probabilities basis. So, this is all that is needed when considering the aspects that relate to C's actions.

However, the position when considering the possible alternative actions of third parties not directly involved in the dispute is different. Here, according to the legal position, the appropriate method of assessment is on a loss of chance basis. Essentially, this means the claimant – C in this case – will recover a percentage of the loss that corresponds to the chance the loss would have been avoided, or the gain would have been made.

In the counterfactual that has been proposed and discussed already, there are two key third parties involved: M and V. So, I need to think about how likely it would have been that these parties would have taken the actions required to reach the position where C's claim(s) would have been met.

Firstly though, I will consider whether it is more likely than not that C itself would have taken the other actions required of it to reach this position. I have already discussed much of this above, so will do so briefly here.

I am satisfied that it is more likely than not that C would have sought alternative cover had EYA provided accurate information. There is sufficient supporting evidence, including for example its actions in relation to the separate companies, that means this is at least more than 50% likely. And, given M's position in the market and its specialisation in the area of work the C was engaged in, I consider it most likely that C would have approached M.

I also consider it is more likely than not that, had C been made aware of this policy, it would have taken up the option of a free quote for this policy (assuming this was offered). C was making significant effort to ensure it had as much cover as was possible at the time – at least in relation to its other businesses. And I have no reason to doubt that it would have taken on a free quote for a policy that might potentially offer cover, even if there was no certainty of this at the time.

Lastly, I consider it more likely than not that C would than have entered the policies (assuming it was able to), once it became clear the relevant clause in the policy, which I'll refer to as the "Government Action" clause, would provide cover. And that C would have claimed for its losses.

I then need to consider the likely actions of M and V, and what these mean for the chance that C would have been able to successfully claim for its losses.

Having been approached by C, M would have need to have taken them on as a customer. There is no evidence to suggest this would not have happened though. M has not suggested this would have been an issue at the time, and has since taken C on as a customer.

EYA has said that it is not clear that M would then have advised C to take out the policy with V. I should point out that there is no indication that M would be providing its services on an advised basis, so this question is more whether M would have provided C with details of the V policy.

EYA has made its point based on the understanding that M would not have considered the V policy to provide cover in the circumstances that then developed – and for which C was seeking cover. EYA has referred to comments in my first provisional decision, about a separate case considered by the Ombudsman Service, where there was evidence from M that it had advised a customer that the V policy did not provide cover for the pandemic.

However, as has been set out in my second provisional decision, M has since provided further information. M has said that it was clear that the Compulsory Closure clause would not respond in the circumstances. However, M has said that whether the Government Action clause would respond was, “an area of discussion/challenge up until the point of clarification”.

Whilst the uncertainty at the time means that I don’t consider M would have advised a customer that this policy would provide cover, I do think that it is highly likely that M would have made C aware of the policy – especially given how I think C would have most likely phrased its request for cover, as set out above. I also consider there to be no reason that M would not have arranged a quote and then arranged for the policy to be entered, assuming V would have granted this.

As to what V would have done, I have asked V to provide its own evidence, but due to the passage of time it has not been able to respond with any information.

Evidence has though been provided from M that other customers were provided with quotations for policies with V around this time. M has said that:

> “After the 12/03/2020 new enquiries were held, and any contract certain quotation was honoured – those being where full terms were quoted with a 30-day quote guarantee.”

M has also provided some details of numbers and dates of policies actually entered after 12 March 2020. And I have seen evidence from other complaints dealt with by the Ombudsman Service that supports this.

There is nothing in C’s circumstances to make me think a quote would not have been provided to C. Whilst I am not an underwriter nor am I qualified to assess the risk posed by a potential customer to an insurer, particularly where the specific rating process of that insurer is unknown to me, I am not aware of anything in C’s circumstances at the time that suggest a quote would not have been offered. So, I consider is it highly likely that C would have been offered this quote for the V policy.

That quote would have given C a timeframe in which to accept the insurance proposal, and a decision to actually take out the policy could and, most likely, would have been made later.

It isn’t clear exactly when C might otherwise have called M. However, this is likely to be

around the end of February 2020, after the initial call to EYA. That would mean there would have been several weeks, between this initial call and the date V stopped offering new quotes, for a quote to have been provided to C.

Based on M's comments, that would mean the proposal would have been available for acceptance at the point V confirmed the Government Action clause would provide cover. And, taking into account M's comments, I consider it highly likely that V would have honoured the quotation and that C would have taken out the policy. Given that V has met the claim of other customers in the circumstances C would have had to claim for, there is no significant reason to conclude V would not then have met C's claim(s).

Overall, I consider it highly likely – and in several cases almost certain – that the actions required of M and V, in order for C to have otherwise been able to successfully claim, would have taken place. However, there is a level of uncertainty in this chain of alternative events that means it would not be appropriate to conclude there was a 100% loss of chance and say EYA should meet C's losses in full.

I note that EYA has said that the counterfactual circumstances mean that there are a number of actions that would have been required from M and V. And that if even one of these did not happen, C would not have been able to claim.

But, given the high likelihood I consider there to be of each of these actions having taken place, I think the above only reduces the loss of chance partially. I do think it is quite likely that the third parties would have taken all these actions. So, I think it is more likely than not. But I also think it is less likely than certain.

I have also thought about whether it would be fair and reasonable for me to depart from the law in this area. Whilst I am required to take into account the law, including the principles around loss of chance, I am required to come to my decision based on what is fair and reasonable in all the circumstances of the complaint. So, where I conclude that strictly applying the legal position does not result in a fair and reasonable outcome, I am able to depart from it.

However, the involvement of multiple third parties and the lack of clarity, at the time discussions would have taken place, about whether the policy with V would have provided cover means that I do think there are some uncertainties here. And I consider it is fair and reasonable for these to be reflected in the outcome.

Taking everything into account, I think a fair and reasonable outcome is to consider there was a 75% chance of the actions above actually happening. This would mean the outcome would be for EYA to cover 75% of the loss that C would have recovered had it taken out the policies with V.

The last point EYA made in response to my second provisional decision was in relation to the calculation of this loss. As was noted in my second provisional decision, the evidence provided of this to date has been limited. So, I do agree there is a valid point here.

Having thought about this, I suggested to both parties that the appropriate way to resolve this was for EYA to offer C a choice of one of three independent loss adjusters, to be paid for by EYA. The loss adjuster would then assess the loss C suffered and determine how much of this would be covered by C having a policy from V for each of its two companies. Both parties largely agreed to this.

Putting things right

Pre-School Learning Alliance Trading Limited trading as Early Years Alliance should:

- Give C the option to choose one of three independent loss adjusters.
- Pay for and instruct the chosen loss adjuster to calculate C's losses as though C had had the benefit of the relevant policy with V for each of its two companies.
- The calculation should deduct any of the relevant proportion of any sums C received from:
    - the Coronavirus Job Retention Scheme,
    - early years entitlement payments / dedicated schools grants that continued, and
    - any relevant claim settlement received already.
- The calculation should also take into account the £100,000 maximum claim limit applicable to each of the two policies.
- Calculate interest on the sum(s) the loss adjuster determines would have been an insured loss, on the basis that interim settlements would have been made on 31 May 2020, 30 June 2020, and 31 July 2020. This interest should be at a rate of 8% simple, and be calculated from these dates to the date of settlement.
- Pay C 75% of the loss adjusters' calculated "insured loss" and interest.
- And pay C £500 compensation for the inconvenience caused, less any payment EYA has already made in relation to this.

My final decision

My final decision is that I uphold this complaint. Pre-School Learning Alliance Trading Limited trading as Early Years Alliance should put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask C to accept or reject my decision before 30 August 2024.

Sam Thomas
Ombudsman