DRN-4866305

The complaint

A company, which I'll refer to as J, complains that U K Insurance Limited ("UKI") rejected a claim on its commercial property insurance, declared the policy void and retained the premium it had paid.

What happened

J took out a new commercial policy underwritten by UKI in July 2022. When buying the policy, J answered a number of questions set out on the statement of fact which, amongst other things, asked if the proposers, directors or partners of J had been the subject of compulsory or voluntarily liquidation or a winding up order in the last five years. J answered "no".

In January 2023 J made a claim on the policy. When looking into the claim, UKI identified that the directors of J had all been directors of another company ("S") which had become insolvent.

UKI wrote to J saying it intended to treat the policy as void because there had been a reckless misrepresentation, which entitled it to treat the policy as if it never existed and retain the premium.

J complained. It said S went into voluntarily liquidation in September 2016, which was more than five years before the policy started, but UKI did not change its decision. So J referred the complaint to our Service.

J has been represented in the complaint by solicitors. They said:

- The question was answered on 22 July 2022. Five years before that was 22 July 2017. The directors were no longer involved in the company in 2017.
- From the date the company entered into liquidation – September 2016 – the directors no longer had any involvement; it was in the hands of the liquidator. So they had answered correctly – they had not been involved in a process of a Creditors' Voluntary Liquidation within the five years before 22 July 2022.

Our investigator's initial view was that J had not given a fair presentation of risk, but UKI hadn't provided evidence showing it would have done something different if the correct information had been provided. So this was not a qualifying breach that would allow it to void the policy.

UKI provided further evidence. After considering this, the investigator said that, as UKI had provided evidence it would not have offered cover, this was a qualifying breach. And in the circumstances it was fair to treat it as reckless. He thought the directors of J must have known the previous company had been the subject of liquidation and a winding up order less than five years earlier.

J's solicitors provided further submissions. They referred to case law and said, amongst other things, based on the way the question was worded it was reasonable for the directors

to conclude UKI did not wish to know about liquidations other than those specified in the question.

UKI also provided further comments. It maintained its view that a clear question had been asked and said the case law J's solicitors referred to doesn't consider the specific wording of the declaration, which referred to the directors personally or in any business capacity.

The investigator didn't change his view and J requested an ombudsman's decision. Their solicitors provide further comments. I won't set them out in full but the key points include:

- There's no duty to disclose something the insurer has waived its right to know. If a question asks whether individuals have been declared bankrupt, it waives the need for disclosure of the insolvency of companies of which they have been directors.
- If there is ambiguity in the question, so that on one view of the reasonable meaning conveyed to the reasonable reader of it the answer was not false, the insurer cannot say that on the other meaning of the words the answer was untrue so as to invalidate the policy.
- A Creditors Voluntary Liquidation is an event that a company is the subject of, not an individual.
- A reasonable reader would not have understood UKI to be requesting details about natural persons' involvement with other businesses. If it wished to make an inquiry into insolvency events of other companies which the directors of J had been involved with, UKI could have used words referring to such other companies.
- There's no reason why UKI should have been concerned with the financial health of any other businesses to which J's directors were connected.
- The starting point is that no reasonable reader would approach the question thinking the insurer was seeking wide-ranging information about the historical financial health of companies who were not being insured.

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.

J's solicitors have provided lengthy submissions, referring in detail to relevant caselaw, and UKI has also commented in detail. I have considered all the points made but won't set them out in detail. That's in line with our role, which is to provide an impartial review, quickly and with minimal formality. I use my judgement to decide what's fair, based on the main crux of a case.

So I won't comment in detail on every single point that has been raised and will focus on the key points. And while I must take account of relevant law, my role is to decide what's fair and reasonable, taking into account all the circumstances of the case.

This was a commercial policy. Under the relevant law (the Insurance Act 2015) J had a legal duty to make a fair presentation of the risk. This means J – or the directors on its behalf – had to disclose either

- everything they knew, or ought to have known, that would influence the insurer's judgment in deciding whether to insure the risk and on what terms; or
- enough information to put the insurer on notice that it needed to make further enquiries about potentially material circumstances.

The Insurance Act says the policyholder "ought to know" what should reasonably have been revealed by a reasonable search of information available to them.

If the insured fails to do this the insurer has certain remedies, provided the breach of the duty of fair presentation is a qualifying breach, as set out in the Act. If the insurer shows it would not have offered the policy at all, or would only have offered it on different terms, then it's a qualifying breach.

So the starting point is that there was a duty on J to disclose anything that was relevant to the UKI's decision whether to offer the policy – and take reasonable steps to check any available information and consider what should be disclosed.

The proposal form included some questions. The relevant question for this decision said:

Based on the knowledge of any senior management and anyone involved in arranging the insurance after making a reasonable search, has any proposer (as a company or individual including any decision makers involved in how the business's activities are to be managed or organised), director or partner of the business (or of its subsidiary companies not otherwise excluded), either personally or in any business capacity:

…

in the last 5 years been declared bankrupt or been the subject of bankruptcy proceedings, an Administrative Receivership, a Company or Partnership or Individual Voluntary Arrangement, a Debt Relief Order, an Administration Order, a Compulsory Liquidation, a Creditors Voluntary Liquidation, a Winding Up Order or any equivalents in Scotland or Northern Ireland?

J concluded there was no need to disclose the fact all four directors of J had also been directors of another company that went into liquidation. There are two main arguments J's solicitors put forward as to why it was reasonable not to disclose this.

First, they say the company had been placed into voluntary liquidation in September 2016 and from that date the directors no longer had any involvement in the company; it was in the hands of the liquidator.

The process may have started in 2016, but the question didn't ask about when it started. The question was whether it had been subject to any of the insolvency processes in the last five years. The company was dissolved in 2019, which was within the previous five years.

The second point – and the one on which most of the submissions have been made – concerns the wording of the question.

Where an insurer ask questions these may limit the duty of disclosure, if it may be inferred the insurer has waived its right to information.

The solicitors' submissions are detailed but in essence, the issue is whether it was reasonable for J to conclude that UKI had waived its right to know about other companies of which J's directors had also been directors. They say the wording of the question was ambiguous, and no reasonable reader would have thought UKI was seeking wide-ranging information about the historical financial health of companies not being insured. I've thought about this carefully but I don't agree.

The question specifically refers to the directors' previous involvement "*either personally or in any business capacity".* So I think it was clear this was not just about the directors personally, but about any business activity. And the question went on to list various types of

insolvency – both personal and corporate. Taken together, I think the directors were aware they had to disclose any such insolvency events in the last five years.

The question asked whether – in either a personal or in any business capacity – they had been the subject of, amongst other things, a voluntary liquidation or a winding up. That's not ambiguous. The liquidation process started in 2016 but was not completed until 2019 – within the previous five years. A company of which they had been directors had been subject to a liquidation within five years. Based on the wording of the question, I don't think it would have been reasonable to think UKI did not wish to know about this liquidation. So to answer "No" was incorrect.

J's solicitors argue the wording of the question is sufficiently vague to impose a potentially very onerous burden; it would be burdensome if investigations had to be made as to every business that every director had been involved with. Perhaps if the directors of J had held numerous other directorships that might be the case. But there's no evidence of that here. In any event, they knew S had been placed into a liquidation process.

Finally, the solicitors say that to construe the intention of the insurer in asking the question, context is important, and insolvency was not an insured risk, so there was no reason why UKI should have been concerned with the financial health of any other businesses J's directors were connected to.

It's for an insurer to decide what risks it wishes to cover and on what basis. The intention behind asking this specific question is supported by the fact UKI does not offer cover in this situation; the intention of that wording is to identify cases where the criteria are not met and so are outside UKI's risk appetite.

For these reasons, I think there was a breach of the duty of fair presentation. UKI has shown it would not have offered the insurance if it had known about the insolvency. So I'm satisfied this was a qualifying breach.

If a qualifying breach is deliberate or reckless, the insurer can void the policy, reject any claim and keep the premium.

The directors of J must have known S had been the subject of liquidation within the previous five years and so the answer was incorrect. In these circumstances I consider it was fair to treat this as a reckless breach.

I appreciate J has found itself in a difficult situation, for example facing higher insurance premiums, as a result of what happened. But taking everything into account, it was reasonable for UKI to reject the claim, void the policy and keep the premium.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask J to accept or reject my decision before 12 November 2024.

Peter Whiteley
Ombudsman