DRN-4981384

The complaint

A limited company, which I will refer to as O, complains about the sale of its commercial insurance policy by A L Risk Solutions Ltd. O considers A L Risk Solutions Ltd ought to have sold it a policy that would have allowed it to claim for losses arising from the COVID-19 pandemic.

What happened

The following is intended only as a brief summary. Additionally, even where other parties have been involved, for the sake of simplicity, I have largely just referred to O and A L Risk Solutions Ltd (ALRS) where the actions relate to them or their agents. This includes the appointed representative of ALRS who was involved in arranging the insurance.

O operates as what I will refer to as a wedding reception business. It had insurance for this business, underwritten by a third-party insurer which I will refer to as X. This cover had originally been arranged directly between O and X some years ago. Due to changes within X, it seems to have become necessary for a broker to become involved if O wanted to continue to be insured by X. This happened in 2016. The policy with X was renewed on an annual basis for several years after this. The issue at hand relates to the policy that renewed in August 2019.

At this point I should highlight that there are seemingly two versions of the policy wording that X provides, and it is not entirely clear which version O had the benefit of. I will refer to these as the 2006 and the 2014 wordings.

In March 2020, O's business was interrupted by the COVID-19 pandemic and related government-imposed restrictions. O tried to claim under the policy it had with X, but the claim was declined. X said that the non-damage denial of access (NDDA) extension that O could have had on the 2014 version of the policy was optional, and had not been selected by O. And X also said that neither the NDDA extension nor the disease clause provided cover in the circumstances.

A complaint about this decline was brought to the Financial Ombudsman Service. But another Ombudsman issued a final decision on that complaint in January 2022. She considered X had acted fairly and reasonably by declining the claim under both versions of the policy. She did not consider the disease wording provided cover in the circumstances. She also said that the policy did not include the NDDA extension but, even if it did, the legal position at the time indicated the claim would not be covered under this wording.

Subsequent to this final decision, further case law emerged which indicates that – had O's policy included the NDDA wording – the claim would likely have been covered.

As a result, O complained that ALRS had mis-sold it the policy. And that ALRS ought to have sold O a policy that included the NDDA extension. O considered that, partly as a result of discussions it had with ALRS prior to the 2019 – and earlier – renewal of the policy, ALRS ought to have recommended that O have the NDDA cover. O also said that had it been provided with the full terms of the policy, including the potential NDDA extension, it would

have taken out this cover.

ALRS didn't agree though. It said that, prior to the emergence of COVID-19, the NDDA extension would have been considered to have provided O with little if any relevant additional cover for its business. And that O's complaint was being made with the benefit of hindsight.

O brought its complaint to the Financial Ombudsman Service. But our Investigator did not recommend that it be upheld. He did not consider that O's requirements at the time the policy was renewed in 2019 meant that ALRS ought to have recommended the inclusion of NDDA cover. He also thought that, whilst it did not seem ALRS had provided O with the wording of the NDDA extension, there was most likely a discussion about this additional cover – and that O had not chosen to include this when the policy renewed. So, he didn't think O would have taken out this additional cover, even if it had been provided with a copy of the wording.

O didn't agree with this outcome. It said that the evidence demonstrated that it wanted to secure the widest possible NDDA cover. As our Investigator was unable to resolve this complaint, it has been passed to me for a decision.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Having done so, I am not upholding this complaint. I'll explain why.

As mentioned, the above is merely a summary of the events and arguments. Both parties have made detailed submissions, setting out a number of points. And have provided evidence relating to these. I would like to assure both parties that I have considered these in full. However, I am not going to comment on all of them. Instead, I am going to focus this decision on what I consider to be the key issues. This is not intended as a discourtesy, but rather reflects the informal nature of the Financial Ombudsman Service.

There are essentially two questions that I need to answer. Was ALRS recommendation in the circumstances appropriate? And did ALRS provide information that was clear, fair, and not misleading? If the answer to either of these is "no", I then need to consider what the consequences of this were.

<u>The recommendation</u>

The policy was arranged on an advised basis. This means ALRS had to consider O's circumstances, and recommend a policy that was suitable.

Whilst it seems there were meetings with O, it does not seem that ALRS produced any formal demands and needs recommendations documents for O to review following these meetings. ALRS's recommendations appear to be more verbal, with O then being given the opportunity to consider these and ask any further questions.

O has suggested the meetings themselves were on short notice. I don't entirely agree with this though. O was usually given the option to choose when was most appropriate and offered a range of potential times over a period of a week or so. And it is also clear there was an opportunity for further discussion after these.

Indeed, O did raise some further potentially relevant questions by email following a meeting

in 2018. I will return to these below.

At this point, it is worth considering the cover that would be provided under the NDDA clause that was available with X. I have seen versions of this dated both 2012 and 2019, and there is no difference to the relevant wording. The section provides cover where the insured business is interrupted by a restriction or hindrance of access caused by the actions of the police or any other statutory body in response to a danger or disturbance within a mile of the insured premises. It also provides cover where there is unlawful occupation of the premises by third parties.

There are some further requirements that are relevant, including the need for the access to be hindered for more than the "franchise period". This period is not defined in the policy, which merely states that this will be specified in the policy schedule. I will return to this period later.

It should also be noted that both the 2006 and the 2014 wording included exclusions relating to claims arising from terrorism as part of the business interruption section. However, a further section provided terrorism specific cover. And the NDDA clause included a number of specific excluded causes, including strikes/labour disturbances, actions where there is prior notice, and the diseases listed in the disease section of the policy. These diseases were limited to a specified list, and did not include COVID-19 (so a claim based on COVID-19 would not be excluded from this cover – but also would not be covered by the disease section).

COVID-19 or the resulting pandemic cannot reasonably be said to have been expected by insurers, brokers or their customers at the time O's policy was sold to it. So, I need to consider whether there were potential causes of a hindrance of access to O's premises that ALRS ought reasonably to have advised should be insured against.

It is generally accepted that, prior to the COVID-19 pandemic, the expectation of insurers – and brokers, such as ALRS – was that NDDA clauses would provide cover for situations such as bomb scare, gas leaks, traffic accidents, structures at risk of collapse or an affray. So, was there a need for O to have cover against such events?

O's premises are located on the outskirts of a major city, but are themselves reasonably rural. They are not in a built-up area. Therefore, it would be difficult for me to agree that there was an obvious need for O to insure itself against interruption caused by the majority of the above situations. Any gas leak or structural collapse that might impact O would most likely take place on its own property – and so would likely be covered under 'damage' causes of interruption. The premises are not located on a major road, and there are multiple routes to the property. So, unless a traffic accident occurred directly outside the entrance to the property, it would seem unlikely a claim would arise. And it would seem the risk of a bomb scare or affray in the locale would be minimal.

Of course, there is always some risk of one of these events happening. But a broker's role when advising a customer is to consider their circumstances and provide advice on what is most suitable for their needs. There is effectively a never-ending list of potential causes of loss. And it would not be fair or reasonable to expect a broker to advise a customer to take out cover against all of them. Were a broker to do so, it would more likely be that they would be mis-selling the policy on the basis they were advising the customer to take out unnecessary cover at a higher cost.

Bearing this in mind and considering O's circumstances at the time of the 2019 renewal, I am unable to agree that ALRS ought reasonably to have advised O that it needed NDDA cover. So, I am unable to conclude that ALRS's recommendation to take out/renew a policy

that did not include such cover was inappropriate.

The information provided

O has said that, had it been provided with the wording of the NDDA extension it would have taken this out, regardless of ALRS recommendation. So, I have thought about the information ALRS provided.

It does seem that ALRS could have provided more clarity during the renewals. It does not seem that ALRS had a good understanding of what cover it was recommending though. It isn't clear even now whether the policy that O was provided was based on the 2006 or the 2014 wording. And there is some doubt ALRS was even aware of the 2014 wording at this time.

ALRS were provided with a copy of the policy wording from X after the 2018 renewal, and this was passed onto O. This would not have included the NDDA terms though, as they do not form part of this wording, nor are they an available extension to this wording. It is a potential extension to the 2014 wording. So, it does not seem O was ever provided with a copy of the NDDA terms.

It does seem there was a discussion about potential non-damage denial of access in the meeting that preceded this renewal though. And O then raised some questions about this by email.

The questions related to the potential for certain events, specifically terrorist acts, taking place away from O's business premises that might interrupt O's business as a result of access being denied. The examples used in the email are the Croydon riots and resulting ash from fires, and potential nuclear or chemical attacks that might lead to contamination in a similar manner. The email raising these questions was sent after the 2018 renewal date, but clearly prior to the 2019 renewal.

X did respond at this point, pointing to the terrorism section of the policy, but not providing any detailed response. Just prior to the 2019 renewal date, ALRS again raised O's queries over a potential claim for chemical, biological, radiological and nuclear poisoning risks. X responded, just after the renewal date, explaining that the policy contained exclusions on pollution and contamination. But that the terrorism section would provide cover if the act were the result of such activity.

The timings here do not demonstrate ALRS provided O with information it might need in good time for it to make an informed decision. However, I also need to consider the impact of this.

The written questions mentioned above relate to terrorist acts. And whilst the business interruption section itself excluded such cover, the separate optional terrorism section did provide this cover. The policy ALRS sold had this optional extension added. So, even if ALRS had provided clearer and more timely information about this aspect, I don't consider O would have acted differently. It wanted to know if terrorist acts that caused an interruption to its business would be covered, even where its own property was not damaged. This was seemingly the cover it was seeking to ensure it had. And the policy that O was sold did include this cover. So, I am unable to conclude O would've bought further cover based on this.

It does seem likely that the discussion that took place prior to the emailed questions went beyond discussing terrorism. And that this did include a broader discussion of NDDA. ALRS has said that, having discussed this with O, it determined that it would have little or no need

to claim for an event that lasted more than the franchise period.

Without clearer notes of the discussion, I can't be certain what was discussed in this meeting. It does not seem that this would have been based on the exact wording of X's NDDA clause. But, I am persuaded there was a discussion about NDDA cover generally. And that following this discussion, O's concerns were limited to ensuring it had cover in relation to terrorist (or similar) events.

It's also notable that it seems the primary reason O ended its relationship with ALRS in 2021 was that it no longer required insurance with X. This supports the position that O wanted to maintain cover with X in the years prior. And this seems to be the case despite ALRS suggesting O might receive a better deal with another insurer in those years. Regardless of the reasons for such decisions, it does seem clear that O was active in considering its position and the cover it wanted.

Given that I do not consider ALRS ought to have recommended NDDA, and that there was a discussion about NDDA which did not lead O to determine that it needed this cover anyway, I am not persuaded that O's position here would have been different had it been provided with the actual wording of the NDDA clause.

I appreciate this is not the outcome O, or its directors, were hoping for. However, for the reasons above, I am unable to ask ALRS to do anything more in the circumstances of this complaint.

My final decision

My final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask O to accept or reject my decision before 14 February 2025.

Sam Thomas
Ombudsman