

## **The complaint**

Mr M complains Aviva Insurance Limited unfairly avoided his property owners insurance policy and declined his claim.

Aviva's been represented by an agent. For simplicity I've referred to the agent's actions as being Aviva's own.

## **What happened**

Mr M owned a property. It had a retail unit on the ground floor. This was let and in use as a vape shop. The upper floors were intended to be a separate residential property. In April 2023 there was a fire in the upper floors. That part of the property was being used as a cannabis farm. That area was extensively damaged. The retail unit was damaged by water used to extinguish the fire.

Mr M claimed against his Aviva property owners insurance policy. He had held it for the property since January 2012. In July 2023 Aviva informed Mr M it intended to avoid his policy (treating it as though it never existed) and not cover the damage. It said there had been a breach of the duty, set by the Insurance Act 2015 (the Act), to provide it with a fair presentation of the risk. It said it had been informed the ground floor was in use as pharmacy. It said Mr M had taken out cover via its 'online platform'. It explained had the true use, as a vape shop, been declared cover would have been declined by the online platform.

Aviva added that in that event the only alternative application route for cover – a traditional risk presentation application – would also have resulted in a decline. It explained that would have been due to various circumstance of the residential part of the property (referred to from here as 'residential facts'). These included a failure to comply with various requirements – including safety regulations, tenancy deposit rules, verification of tenant obligations and a licensing scheme. Aviva also reserved its right to avoid the policy on alternative grounds - related to Mr M's knowledge of the use of the upper floor as a cannabis farm.

In response Mr M raised various objections. He said the ground floor had changed from hairdresser to vape shop in 2016. He said he had, for the renewal of the policy in January of that year, explained the change of use to his broker. He said the broker had informed him it had been advised by Aviva to rate the property as a pharmacy – as that was the closest classification to vape shop. Mr M said because of that he hadn't queried the property being insured, at subsequent renewals, as a pharmacy. He provided an email from the broker to support his position.

In November 2023 Aviva issued a complaint final response letter. It had considered Mr M's representations but hadn't changed its position. It didn't accept it had previously been informed, by his broker, that the true use of the ground floor was a vape shop. It said it was avoiding the policy from its renewal date of 19 January 2023 – so before the date of loss. It considered Mr M had recklessly or deliberately breached the duty, of fair presentation of risk – so was retaining the policy premium. Aviva said it wouldn't be covering the claim. It continued to reserve its right to avoid based on alternative grounds.

Mr M wasn't satisfied, so referred his complaint to the Financial Ombudsman Service. He said he had advised his broker of the change of use in 2016. He said the broker had explained Aviva would class the property as a pharmacy. He refuted Aviva's position on the residential facts. He said he had lost out financially because of Aviva's avoidance of his policy and decline of the claim.

Our Investigator felt Aviva had unfairly avoided the policy. He was persuaded Mr M's account, of Aviva's 2016 advice to his broker, was most likely what had happened. With that in mind he felt it was reasonable that Mr M hadn't queried the pharmacy use classification when the policy renewed in later years – including January 2023. The Investigator said that meant there hadn't been a 'qualifying breach' of the Act that would allow Aviva to avoid the policy.

The Investigator said Mr M wasn't required, under his duty of fair presentation, to disclose the residential facts. So he said it wouldn't be reasonable for Aviva to avoid the January 2023 policy for him having failed to do so.

So the Investigator recommended Aviva reinstate the policy and remove any record of avoidance. However, he felt it was reasonable for Aviva to decline Mr M's claim – on the basis that he had breached policy requirements for electrical safety and verification of tenants – two of the residential facts.

Aviva didn't accept that proposed outcome. It said was entitled to avoid the 2023 policy. As the complaint wasn't resolved it was passed to me. Aviva didn't accept it had advised the broker, in 2016, that it would be acceptable to treat the property as a pharmacy. It said if that had happened there would be a record of it on its systems. It suggested Mr M's broker may have contrived the contact and advice from Aviva.

In August 2024 I explained to Mr M and Aviva what I would be considering within this complaint. I said I would consider the fairness of Aviva's decision to avoid the policy for non-disclosure of the property as a vape shop. I said I would also consider its argument that a 'traditional risk assessment' would have resulted in a decline of cover.

I said I wouldn't be considering Aviva's 'alternative grounds' for avoiding the policy – Mr M's knowledge of the cannabis farm. I said it hadn't, so far, asserted that ground. Instead it had warned Mr M it may do so if necessary. Mr M said he would prefer that matter not to be considered as part of this complaint. He would prefer to instead, if necessary, raise a further complaint.

I said should I ultimately require Aviva to reinstate the policy, for its avoidance being unfair, I wouldn't go on to decide on acceptance or decline of a claim. I said, as far as I was aware, Aviva hadn't taken a position on a claim (separate to its avoidance decision) against the terms of the policy.

I noted Aviva had referred, in a 'provisional decision' and complaint response, to the two issues of electrical safety and tenant verification considered by our Investigator as reasons to decline a claim. But I said I considered Aviva's reference to these had actually been in relation to misrepresentation and avoidance of the policy – not as part of consideration of a claim for loss against the terms of the policy. So I said it wouldn't be appropriate for me to consider the outcome of Mr M's claim, against the terms of the policy, as part of this complaint.

I invited Mr M and Aviva to provide a response. Mr M sent an acknowledgement, but Aviva didn't respond. So I issued a provisional decision that considered only the vape shop non-disclosure and 'traditional risk assessment' issues. As its reasoning forms part of this final

decision I've copied it in below. In it I explained why I intended to require Aviva to reinstate Mr M's policy and pay him £500 compensation. I also invited him and Aviva to provide any further comments or evidence for me to consider before issuing a final decision.

***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.*

*As this is an informal service I'm not going to respond here to every point or piece of evidence Mr M and Aviva have provided. Instead I've focused on those I consider to be key or central to the issue. But I would like to reassure both that I have considered everything submitted.*

*As the policy is a commercial one the relevant legislation is the Act. It requires policyholders to make a fair presentation of the risk to insurers. Where there's a 'qualifying breach' of that duty, it provides remedies for insurers. These include, depending on the circumstances, avoiding the policy, treating it as though it had been provided on different terms or taking a proportionate settlement approach to claims.*

*To make a fair presentation of the risk policyholders are required to ensure every material representation as to a matter of fact is substantially correct and every material representation as to a matter of expectation or belief is made in good faith.*

*Essentially Mr M's argument is that his January 2023 representation (or his broker's on his behalf) of the property as a pharmacy was of an expectation or belief made in good faith. The belief or expectation arose from Aviva having, in 2016, informed his broker that it would be acceptable to rate the property as pharmacy – as it was the closest available to vape shop.*

*Having considered everything provided I intend to find that the January 2023 representation was most likely made in good faith and there's been no qualifying breach of the duty of fair presentation.*

*After Aviva said it intended to avoid his policy Mr M made enquiries to his broker. He considered he had told it, in 2016, the use had changed to vape shop. In response it said it hadn't found evidence of him telling it that. But it did disclose relevant emails. These are dated 18 January 2016 – the day before the policy was due to renew.*

*At 12.22 the broker emailed Mr M. It asked him if he would like to proceed with his policy renewal. It asked him to call if he had any questions. It seems likely, based on the next email, that Mr M did call the broker to discuss a change in the use of the ground floor. Although there are no supporting notes or written records.*

*The next email is at 13.36 on the same day. This is again from the broker to Mr M. It said 'Further to our conversation today, I can confirm your insurer has advised to note the property as a pharmacy as this is the closest they can get and it is rated the same as a pharmacy. This amendment has resulted in your premium reducing to ...'*

*This clearly supports Mr M's account - even if it doesn't include a reference to 'vape shop'. First it seems likely, without evidence otherwise, that Mr M would have explained to the broker between the emails what the shop was to be used for – a vape shop. That seems more likely than him telling the broker it would be used for a different and false purpose.*

However, Aviva denies any contact from the broker about the matter. It said if there had been a contact there would be a permanent record on its IT system. It said there's no record and so there was no contact from the broker at the time.

Aviva suggested the broker made up a query to, and response from, Aviva. It also suggested Mr M 'adopted the description of "pharmacy" throughout'. I've considered these alternative possibilities. But Mr M's explanation of events seems the most likely to me. I say that having considered various other factors.

I accept Aviva doesn't have a record of any conversation with the broker. I've considered its certainty that there would have been one. But it's possible for individuals or systems not to function as they should always. I accept it's possible the broker did invent the enquiry and response. But it seems more likely that it happened without Aviva taking or maintaining a record of it.

I've also given weight to Mr M's point that vapes and vape shops were less common and less known of in 2016 than in 2023. Considering that it seems quite possible that Aviva wouldn't have, at that time, a specific vape shop classification in its underwriting criteria. Despite requests it's been unwilling, or unable to, evidence of its underwriting approach to vape shops in 2016.

I've also taken into account that electronic cigarettes have previously, if not so much now, been considered a tobacco smoking cessation product. So there perhaps is, or was at the time, some logic to considering a vape shop under a broad heading of 'pharmacy'.

On balance I find it most likely Mr M did inform the broker of the vape shop use, that the broker did discuss this with Aviva – and that its advice to classify use as a pharmacy reflects that conversation.

For that reason I consider Mr M, or his broker, acted in good faith when representing the use as 'pharmacy' for the January 2023 renewal. There was an expectation or belief that it was acceptable to Aviva. That means I don't consider there to have been a breach of the duty of fair presentation. It follows that there are no remedies available to Aviva under the Act. So I intend to find its decision to avoid the policy, on the grounds Mr M didn't declare the vape shop use, to be unfair and unreasonable.

I also intend to find it wouldn't be fair and reasonable for Aviva to avoid the policy based on its 'traditional risk presentation application' position. That type of application would only have happened had Mr M been declined by its 'online platform' following a declaration of a vape shop – something that didn't happen.

As that traditional risk presentation didn't happen, it's just a hypothetical position put forward by Aviva. It said any application would have been declined because of the residential facts. But Mr M was never in a position, not having been asked about the relevant residential facts, to have declared them. So it wouldn't be fair or reasonable for Aviva to avoid his policy on the grounds that he didn't declare those residential facts.

### **Putting things right**

So I intend to find Aviva can't fairly avoid Mr M's policy on the two grounds I've considered – for non-disclosure of the property as a vape shop and 'traditional risk assessment'. I will require it to reinstate the policy. If Aviva wishes to assert a further ground for avoidance of the policy it should do so within reasonable time. If it does so

*and Mr M's dissatisfied with its position, he could consider raising a further complaint. If Aviva doesn't assert its further ground for avoidance it will need to consider his claim against the terms of his policy.*

*I also intend to require Aviva to pay Mr M a limited amount of compensation to recognise the distress and inconvenience resulting from its unfair avoidance decision. As a minimum he's been inconvenienced by having to challenge that decision. So I intend to award £500 compensation.*

*My award is limited as I can't know at this point if his claim would have been settled had Aviva not avoided the policy for the reason considered in this complaint. There may be other reasons for Aviva to avoid any liability. So it follows that I can't award compensation, as part of this complaint, to recognise the impact on him of the claim being declined.*

### **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.

When responding to my provisional decision neither Mr M nor Aviva provided further comments or evidence for me to consider. So I haven't been provided with any reason to amend the outcome I proposed.

### **Putting things right**

For the reasons given above Aviva can't fairly avoid Mr M's policy on the grounds of non-disclosure of the property as a vape shop and the 'traditional risk assessment'. So it will need to reinstate the policy.

If Aviva wishes to assert a further ground for avoidance of the policy, it should do so within reasonable time. If Aviva doesn't assert further ground for avoidance it will need to consider Mr M's claim against the terms of his policy.

Aviva must pay Mr M £500 compensation.

### **My final decision**

For the reasons given above, I uphold the complaint. I require Aviva Insurance Limited to put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 6 November 2024.

Daniel Martin  
**Ombudsman**