

The complaint

F complains that Hubener Versicherungs AG (Hubener) declined its claim under its commercial buildings insurance policy following an escape of water.

Mr M owns F, a small hotel, and his claims consultant brought the complaint on F's behalf. For ease, I'll refer to F throughout my decision, but any such reference includes the actions of Mr M and his claims consultant.

What happened

A water pipe burst causing damage in parts of F's business premises. F claimed under the commercial policy held with Hubener. However, on reviewing the claim, Hubener found that the hotel hadn't been occupied by guests.

Hubener declined F's claim relying on the unoccupancy clause of the policy. Hubener said if F had told it when buying the policy, or at any time thereafter, that the hotel wouldn't be occupied, it would've reduced the cover to exclude water damage during unoccupancy.

F complained to Hubener about its decision because the premises were occupied by a caretaker who carried out routine inspections. Nevertheless, Hubener repeated its decision to decline because it said F had misrepresented the occupancy status of the premises when taking out the policy.

Our investigator thought Hubener declined the claim fairly and in line with the policy terms and conditions. She said that under the Insurance Act 2015 (the Act), a business customer is obliged to volunteer information which might be relevant.

F didn't agree. It said there was no definition of occupied, so it was unfair that Hubener declined the claim based on that term. F wanted Hubener to settle the claim and pay interest on the outstanding settlement.

I issued a provisional decision in July 2022 explaining that I was intending to uphold F's complaint. Here's what I said:

provisional findings

The key issue for me to decide, here, is whether it was fair for Hubener to decline F's claim for the reason it gave. Hubener said F had misrepresented the facts when it declared that the premises were fully occupied by the business, so it declined the claim under the unoccupancy condition.

Firstly, I should be clear that anything to do with the policy sale is out of jurisdiction. I'll only be looking at what was asked during the sale to decide whether Hubener's subsequent decision to decline was fair.

Looking at the statement of fact when F bought the policy, Hubener asked the following question:

Are the premises fully occupied solely by the business and not vacant for more than 14 consecutive days at a time?

F replied, "yes".

Having considered the question, two things occur to me. The first is that the question is ambiguous. It's not clear whether it's asking if the premises were occupied fully by just F's business, rather than, say, shared with other unrelated businesses using just some parts of the building.

The second thing is that when considering F's business is that of a hotel, it's unreasonable to expect that the hotel would be fully occupied all the time. So, would a vacant room mean the premises is classed as not fully occupied? While I don't think that's what Hubener means, there's no definition so it's difficult to say exactly what would be classed as fully occupied.

Crucially, the policy doesn't provide a definition of occupied.

The situation here is that F had a caretaker living on site five days each week, with the building empty over weekends. I accept that the caretaker would've been restricted to living in certain parts of the building, but his duties included inspection of the building on a regular basis.

So, based on the question asked, I can understand why F would've said "yes", the building was occupied. It wasn't empty, so I think that's a fair response.

Hubener referred to the policy conditions for unoccupied premises. The policy says:

You must tell Us immediately You become aware that any Premises or part of a Premises has become unoccupied.

Again, this is unclear when considered in the context of a policy for a hotel. For example, I wouldn't expect F to let Hubener know every time some of its rooms weren't booked.

Looking back at the statement of fact, Hubener also asked

Are the premises occupied over night ie. Proposer/Manager living on site or 24hr Security?

F answered, "no".

This throws further confusion on the matter because F did have a caretaker living on-site. So, it's clear Hubener sold the policy to F on the understanding that the property was not occupied overnight, yet it didn't apply any unoccupancy conditions.

Had Hubener applied unoccupancy conditions, it would've included shutting down utilities and draining water. Doing so would likely have prevented the caretaker from living on site. Therefore, it suggests unoccupied means that the premises are completely empty such that the utilities aren't needed.

I find that the two questions asked are contradictory and, therefore, I don't consider it fair or reasonable for Hubener to rely on the answers as a misrepresentation by F.

Very simply, F bought the hotel expecting to trade, suffered restrictions because of lockdown, but had a caretaker on site for five days each week. The evidence F provided in

the form of council tax bills and video footage supports this. So, I don't think, in the circumstances, it was reasonable for Hubener to decline the claim under the unoccupancy condition because F's caretaker was living at the premises.

In summary, then, the evidence suggests that Hubener declined F's claim by relying on a policy condition which it applied unfairly in the circumstances. To put matters right, I'm minded to require Hubener to reconsider the claim.

To be clear, I'm not instructing Hubener to accept the claim. That's because it must have the opportunity to consider the cause of the damage and assess the claim against the remaining terms of the policy.

I said I was minded to require Hubener Versicherungs AG to:

- reconsider F's claim for water damage under the remaining terms and conditions of the policy.

I asked both parties to send me any further comments and information they might want me to consider before I reached a final decision.

Hubener repeated its opinion that the complaint was outside jurisdiction for this service. That said, Hubener challenged whether my view had taken into consideration that F made an incorrect disclosure about occupancy given the reintroduced lockdown rules.

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've decided to uphold F's complaint.

Firstly, it's important to point out that I won't deal with the issue of jurisdiction here. That matter has been dealt with separately. For clarity, the issue I'm deciding is whether Hubener declined F's claim fairly, for the reason it gave, and in line with the policy.

Put simply, Hubener declined F's claim for water damage caused by a burst pipe because it said the hotel wasn't occupied when the peril occurred, or indeed at policy inception. Under the policy, F is required to declare when the premises become unoccupied.

In my provisional decision, I said F provided sufficient information to show that the property was occupied, and F said it was open for trade. I've reconsidered the evidence provided, which includes recordings from internal cameras, a photo of people in the hotel, and the caretaker's council tax bill for the premises. The dated videos show people entering the hotel - although they don't stay long – and, on a separate day, the caretaker carrying out what appears to be cleaning duties. The photo shows someone sitting at the hotel bar with evidence of drinks, and someone else using their phone as if taking photos of the bar area.

I don't think Hubener is disputing that the caretaker lived on-site. It says the issue is whether the hotel was operational. Hubener said the hotel wasn't open for trade so the policy unoccupancy endorsement would've been active. But, looking at the videos and photo, it appears that the hotel was open and available for trade.

I've explained in my provisional decision why I don't think the occupancy clause is the same as operational. Nevertheless, I've thought about Hubener's claim that the hotel was never operational. I asked F for its previous insurance policy, which confirmed that the cover was

for an unoccupied business premises. F said it cancelled the previous policy when the hotel was due to open for trade, and I note that the date matches exactly the date that the policy with Hubener started. This suggests to me that it's more likely than not that the hotel status had changed from unoccupied/non-operational to occupied and available for trade. I see no reason for F to have cancelled a valid policy for an unoccupied hotel to start a new one with Hubener unless, as F said, it was to cover a now operational hotel.

While I appreciate that the policy requires F to notify Hubener if any part of the property becomes unoccupied, I can't reasonably say F failed to do so. That's because the evidence indicates it was open to customers. So, it wouldn't be reasonable for F to declare it was unoccupied just because it hadn't yet attracted overnight guests. Hubener confirmed that the lockdown rules for that time had been lifted and, when reintroduced, allowed hotels to trade in a limited capacity.

Overall, then, I'm persuaded by the evidence that F was open for trade and didn't need to declare the premises as unoccupied. Therefore, I don't find that Hubener declined the claim fairly for the reason it gave.

As I've said, that doesn't mean Hubener should settle the policy. Firstly, it's for F to show that it suffered an insured peril – loss covered under the terms of the policy - and then Hubener must have an opportunity to look into F's claim and consider it in line with the policy terms and conditions.

My final decision

For the reasons I've explained above, and in my provisional decision, I uphold F's complaint and Hubener Versicherungs AG must:

- reconsider F's claim for water damage under the remaining terms and conditions of the policy.

Under the rules of the Financial Ombudsman Service, I'm required to ask F to accept or reject my decision before 9 December 2022.

Debra Vaughan
Ombudsman