DRN-3708790

The complaint

Mr B complains HDI Global SE unfairly declined a claim on his commercial insurance policy, following a fire.

What happened

Mr B's policy covers multiple properties he owns. He made a claim in December 2020 after a fire damaged one of the properties. The property in question is two adjoining buildings. The buildings were let to two different tenants and used for commercial purposes.

Mr B's claim was declined due to an alleged misrepresentation about the use of the building in which the fire started. Whilst Mr B has dealt with several different parties, HDI is the insurer that underwrites the cover, so it's responsible for his complaint.

At renewal each year, the policy administrator asked Mr B's broker to check the renewal documents and confirm if there had been any changes.

In March 2018, the broker confirmed it had been through the renewal details with Mr B. The broker noted changes to the use of four of the insured properties. In respect of the property that suffered the fire, the broker confirmed: "*This now has a garage and a…"* (I haven't quoted the use of the adjoining building as its not relevant to this complaint, and the information could potentially be used to identify the property by those who read the published final decision).

HDI previously had the occupancy of the building now being used as a garage, listed as a 'motor accessories manufacturer'. Due to an oversight, the policy administrator failed to update the occupancy from 'motor accessories manufacturer' to 'garage'.

In March 2019, the broker highlighted to the policy administrator that the occupation of the property hadn't been updated to a *"… and a garage".* The policy administrator went on to update the occupation of the adjoining building. But the building where the fire started remained recorded as a 'motor accessories manufacturer'.

In August 2019, a new tenant took over the building where the fire started. The tenant was operating a MOT station and tyre fitting service.

In February 2020, the policy administrator asked the broker a number of questions ahead of the March 2020 renewal, including: *"Any changes to the Risk / Occupancies?"* The broker noted he had been in contact with Mr B, and it answered: *"No change"*.

Mr B's policy renewed in March 2020, and the building continued to be recorded as a 'motor accessories manufacturer'. The fire occurred in December 2020. HDI declined Mr B's claim on the basis it wouldn't have covered the building had it known it was being used for tyre fitting.

HDI accepted that, in March 2018, Mr B confirmed the building was being used as a garage. But, HDI said the use changed in August 2019, which Mr B didn't inform it about. HDI noted that, ahead of the 2020 renewal, Mr B was specifically asked whether there had been any changes to the risk and occupancies of his properties, to which Mr B answered 'no'.

Mr B referred a complaint to this service. One of our investigators thought Mr B's complaint should be partially upheld. He accepted HDI was entitled to avoid the policy and refuse any claims. However, he didn't think the misrepresentation was deliberate, so he thought HDI should refund the 2020/21 premiums for the property in question.

HDI agreed with our investigator's recommendations. But because Mr B was unhappy with the outcome, his complaint was passed to me to decide.

I issued a provisional decision, explaining I intended to uphold the complaint. In my provisional decision I said:

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

Because Mr B's policy is a non-consumer contract, the Insurance Act 2015 is the relevant misrepresentation legislation that applies to this complaint.

To summarise, the Act explains:

- *Mr B had a duty to make a fair presentation of the risk.*

- *If Mr B breached his duty, and the breach is 'qualifying', there are specific remedies available to HDI depending on whether the breach was 'deliberate or reckless', or 'neither deliberate or reckless' (also referred to as 'innocent').*

- *A breach is deliberate or reckless if the policyholder knew they were in breach of their duty, or they didn't care whether they were in breach.*

- *A breach is qualifying if, but for the breach, HDI wouldn't have entered into the contract, or would have done so on different terms.*

So, the first part of the test is whether Mr B breached his duty to make a fair presentation of the risk. The Act sets out the following:

- *Mr B had to disclose every material circumstance which he knew or ought to have known – or failing that, Mr B had to give sufficient information to put a prudent insurer on notice that it needs to make further enquiries;*

- *Mr B had to make disclosures in a reasonably clear and accessible manner; and*

- *every material representation made as a matter of fact must be substantially correct, and every material representation made as a matter of expectation or belief must be made in good faith.*

As per one of the loss adjuster's reports, prior to August 2019, the building was operated as a motor engineers, providing mechanical servicing.

I'm not persuaded Mr B knew, or ought to have known, the change of use from 'mechanical servicing' to 'MOT station and tyre fitting' was a material circumstance. Overall, I find it reasonable that Mr B – who wouldn't have been aware of HDI's underwriting criteria – continued to describe the occupancy as a 'garage'.

HDI clearly covers commercial properties being used as a 'garage'. However, HDI is aware it doesn't cover garages that provide a tyre fitting service. In such circumstances, I would reasonably expect a prudent insurer to make further enquiries when the property to be insured is referred to, or described as, a garage.

Had Mr B been asked about tyre fitting services when he first told the policy administrator the occupancy had changed to a garage in March 2018, I would accept he ought to have known the change of tenant in August 2019 was a material circumstance (given they provided a tyre fitting service). However, I haven't seen HDI made such enquiries in March 2018.

Whilst there was a change of tenant in August 2019, I haven't seen HDI has ever needed to know who the tenants were for the insured properties, but rather, it only needed to know the use of the insured properties. Equally, in February 2020, HDI didn't ask if there had been a change of tenant. HDI asked if there had been a change of occupancy, which as per the policy schedule, was referring to the use of the properties. I accept the Act doesn't give consideration to whether the insurer asked clear questions when deciding whether the insured made a fair presentation of the risk. However, in the circumstances that I have described, I'm not persuaded it can reasonably be said Mr B ought to have known the change of tenant was in itself a material circumstance (given that the new tenant was continuing to use the property as a 'garage').

On balance, I'm more persuaded that Mr B gave sufficient information to put HDI on notice it needed to make further enquiries, than Mr B failed to disclose a circumstance he ought to have known was material. So, I intend to decide HDI should now consider Mr B's claim in accordance with the remaining policy terms.

As I understand it, Mr B's policy wasn't avoided following the claim declinature (with cover continuing for the other insured properties). However, if the policy was avoided, HDI will need to reinstate it. In addition, HDI will need to amend its records and any central databases so any record of the avoidance is removed.

If HDI does go on to settle Mr B's claim and he's unhappy with its approach – or the amount it offers for financial loss or in respect of distress and inconvenience – he can make a new complaint to the Financial Ombudsman Service if he wishes to do so.

For the avoidance of doubt, I've not considered whether Mr B has suffered financial loss or distress and inconvenience – because HDI hasn't, to date, settled the claim. My intended decision is HDI should reinstate the policy (if it was avoided) and consider the claim in accordance with the remaining policy terms."

In my provisional decision, I also said:

"My provisional decision is HDI Global SE should:

- *reinstate Mr B's policy if it was avoided, and remove any record of the avoidance from its records and any central databases; and*

- *consider Mr B's claim in accordance with the remaining policy terms.*

If my final decision remains the same as my provisional decision, this will be a direction and not a money award. However, the effect of this direction is that Mr B's policy will be subject to the £355,000 limit on a money award in relation to this claim. If, having considered this claim, HDI decides it's appropriate to settle it, the £355,000 limit will apply to the amount payable."

HDI disagreed with my provisional decision. To summarise, HDI said:

- The policy was issued based on Mr B's statement of fact. He was required to check the information was correct and complete. It was also highlighted to him that if any of the information was incorrect, he should notify his broker and obtain a revised statement of fact and/or policy schedule.

- Mr B was asked to set out the occupation of the insured properties and the type of businesses undertaken at those premises. For the building in question, Mr B confirmed the occupation to be 'motor accessories manufacturer'.

- Mr B was informed of the following:

    - He had to tell HDI about any material circumstances which affect his insurance.

    - A circumstance is material if it would influence HDI's judgement in determining whether to provide cover or the terms of the cover.

    - If he's unsure whether a circumstance is material, he should ask his insurance advisor.

    - If he fails to tell HDI about a material circumstance it could affect the extent of cover provided under the policy,

- The policy contains the following 'alteration in risk' condition: "*This policy shall be avoided with effect from the date the event occurs if after commencement of this insurance: … there has been any alteration to the Property Insured and/or the Premises and/or the Business after the effective date of this insurance which increases a risk of loss, destruction, damage, accident or injury."*

- The policy also contains a 'non-disclosure, misrepresentation, and misdescription' condition. I won't repeat that condition, but it's in-line with the Act I set out in my provisional decision.

- The premises in question was being operated as a motor accessories manufacturer until August 2019, when they were taken over by a business whose trade was described as a MOT station and tyre fitting service.

- This change of trade and occupation wasn't advised to HDI at the time of the change or subsequently at renewal in March 2020. The Act applies to the fair presentation of the risk on renewal. HDI pointed towards sections 3 (3) and 3 (4) of the Act, which set out the fair presentation of risk requirements that I detailed in my provisional decision.

- There were two breaches of the duty of fair presentation: a) failure to notify a material circumstance of a change of trade/occupation; and b) failure to correct a material representation that become inaccurate by the time of renewal. HDI quoted the following from an insurance contract law book:

- *"material presented to insurers when the risk is first taken out carries over to any renewals, so that if any of the statements made in that original material have altered, then the assured is under a duty to correct those statements and is guilty of implied misrepresentation or non-disclosure if he fails to do so."*

- For the March 2020 renewal, the answer to the question about trade/occupation was inaccurate as the premises was now occupied by a business conducting a different trade. The risk of loss, destruction, damage, accident, or injury would have increased.

- Mr B would have had knowledge of the material change in the trade/occupation at the time of the renewal and this ought to have been disclosed to HDI or his broker. Mr B's duty included disclosure of what he knows or ought to know, and the Act explains knowledge includes what should reasonably have been revealed by a reasonable search of the information available.

- Section 7 (3) states: "*A circumstance or representation is material if it would influence the judgment of a prudent insurer in determining whether to take the risk and, if so, on what terms".* Section 7 (4) gives the following example of a circumstance which may be material: "*anything which those concerned with the class of insurance and field of activity in question would generally understand as being something that should be dealt with in a fair presentation of risks of the type in question."*

- In the circumstances of commercial property owners insurance, trade and occupation of the premises is generally understood as being something that should be dealt with in a fair presentation of risks of the type in question.

- HDI pointed towards the questions asked about the trade/occupancy of the premises when the policy incepted, and it said by reference to the statement of fact, the policy terms, and the declaration, Mr B and the broker can have been under no illusion as to the relevance and materiality of the trade/occupancy of the insured premises.

- HDI also pointed towards its December 2019 underwriting guide which it says states: *"Occupancies not listed above and shown as "declined" in the commercial trade list are illegible trades."* HDI says garages are one such illegible trade.

- HDI says it was induced by Mr B's presentation of the risk, and had he not breached his duty to make a fair presentation of the risk, it would have only renewed the policy with the acceptable trades, and the property in question would have been removed from cover.

Mr B agreed with my provisional decision, but he questioned the award limit. To summarise, he said:

- The claim may fall within £355,000. But if the claim is higher, Mr B accepts he would have to proceed via the court route given the Financial Ombudsman Service's £355,000 award limit for this case.

- Mr B would like HDI to be directed to settle the claim subject to the policy terms and if there's later a dispute over the settlement, Mr B will re-approach this service if the expected settlement if within £355,000 or pursue others routes if the expected settlement exceeds £355,000.

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.

In response to my provisional decision, HDI reiterated the information provided to Mr B at inception and the various renewals. Those circumstances aren't in dispute, so I won't comment further on those points.

HDI points towards the 'alteration in risk' policy condition. I'm mindful the Act allows insurers to 'contract out'. To summarise, an insurer can include policy terms that puts the policyholder in a worse position than the Act, providing certain conditions are met. The insurer must take sufficient steps to draw the disadvantageous term to the attention of the policyholder before the policy is taken out, and the term must be clear and unambiguous as to its effect. Unless those conditions are met, a term which puts the policyholder in a worse position than the provisions of the Act, is of no effect.

I've not seen HDI brought the 'alteration in risk' policy condition to Mr B's attention before he took the policy out. In any event, simply highlighting the condition wouldn't go far enough, in my view. HDI would need to explain the implications, in respect of the condition applying rather than the Act. I also don't find the 'alteration in risk' policy condition to be clear and unambiguous, given the 'non-disclosure, misrepresentation, and misdescription' policy condition follows the approach of the Act. Therefore, I'm satisfied the Act applies here, rather than the 'alteration in risk' policy condition.

I'll now turn to the Act. It's not disputed that Mr B had a duty to make a fair presentation of the risk. In my view, the part of the Act that's relevant to the outcome of this complaint, in respect of Mr B's duty, is:

- Mr B had to disclose every material circumstance which he knew or ought to have known – or failing that, Mr B had to give sufficient information to put a prudent insurer on notice that it needs to make further enquiries.

Prior to my provisional decision, HDI provided information that supports it was declining to cover tyre-based trades from around 2018 onwards. So, I accept tyre fitting was a material circumstance when the new tenant, who was providing tyre fitting services, took over the building in August 2019 and when the policy renewed in March 2020.

In response to my provisional decision, HDI also said its December 2019 underwriting guide shows it wasn't accepting garage trades. I haven't seen a copy of that guide, but I also accept a garage was a material circumstance when the policy renewed in March 2020.

I also accept Mr B ought to have been aware of the activities being carried out by the tenant who took over the building in August 2019.

In HDI's response to my provisional decision, it said the building was operating as a motor accessories manufacturer until August 2019. However, as per the information previously provided to our service (which I set out in the background section of both my provisional decision and this final decision), HDI's statement is incorrect.

During the March 2018 and March 2019 renewals, Mr B told HDI the trade/occupation had changed from 'motor accessories manufacturer' to 'garage'. On both occasions, HDI didn't update its records, or ask what services were being provided by the garage. The tenant at that time was providing mechanical servicing. But irrespective of whether HDI updated its records in March 2018 and March 2019, Mr B had disclosed the trade/occupation had changed to 'garage' before the new tenant took over the premises in August 2019.

As I noted in my provisional decision, I'm not persuaded Mr B knew, or ought to have known, the change of use from 'mechanical servicing' to 'MOT station and tyre fitting' was a material circumstance. I'm more persuaded it was reasonable for Mr B to consider both of those trades/occupations to be a garage. So, I find it reasonable that in February 2020, Mr B answered the question *"Any changes to the Risk / Occupancies?"* with *"No change".*

Furthermore, even if the Act required Mr B to disclose every material circumstance, whether or not he knew the circumstance was material, the Act makes it clear it's enough for him to have given sufficient information to have put a prudent insurer on notice it needs to make further enquiries. I'm persuaded Mr B had given sufficient information.

HDI has provided information to show it wasn't covering tyre-based trades when the policy renewed in March 2019. Yet, despite being made aware at that time the building was now being used as a garage, HDI made no enquiries about the services being provided by the garage. It remains my view a prudent insurer would have made such enquiries. Had HDI done so, Mr B would have likely known the change of tenant in August 2019, whilst still a garage, was a material circumstance. Furthermore, HDI also says, irrespective of tyres, garages weren't an acceptable trade when the policy renewed in March 2020. But HDI had previously been told the building was being used as a garage.

I acknowledge that in March 2020, Mr B didn't flag the trade/occupancy was still incorrectly recorded as 'motor accessories manufacturer' rather than 'garage'. I accept that had Mr B done so, HDI may have been prompted to make enquiries. However, *on balance*, I'm not persuaded it would be reasonable to rely on Mr B's oversight in March 2020, given HDI failed to update its records during the previous two renewals when he did flag the trade/occupancy had since changed to 'garage'.

So, in conclusion, I remain of the view HDI hasn't applied the Act in a fair and reasonable manner, bearing in mind the circumstances leading up to the claim. Therefore, my final decision remains the same as my provisional decision.

I'll now turn to our award limits. Any direction I make is subject to our award limits. The applicable award limit for this case is £355,000.

If Mr B accepts my final decision, it becomes legally binding. So, HDI would need to consider the claim subject to the remaining policy terms. If HDI goes on to accept the claim, it would be for HDI to determine the settlement amount. Importantly, my final decision would only bind HDI to pay up to £355,000. As such, if the settlement amount exceeds £355,000, it would be up to HDI whether it paid Mr B more than £355,000.

If there's a dispute about HDI's further claim decision, or the settlement, Mr B is free to bring a new complaint to our service. However, it's unlikely we would be able to direct HDI to pay more than £355,000 in total.

If Mr B accepts my final decision, and HDI limits the settlement to £355,000, he may not be able to go to court to ask for more compensation. If going to court is something Mr B would want to explore in the event HDI limits the settlement to £355,000, he should consider getting independent legal advice before accepting my final decision.

My final decision

For the reasons I've set out above, and in my provisional decision, I uphold this complaint.

My final decision is HDI Global SE should:

- reinstate Mr B's policy *if* it was avoided, and remove any record of the avoidance from its records and any central databases; and

- *consider* Mr B's claim in accordance with the remaining policy terms.

My final decision is a direction, not a money award. However, the effect of this direction is that Mr B's policy will be subject to the £355,000 limit on a money award *in relation to this claim*. So, if having considered this claim, HDI decides it's appropriate to settle it, the £355,000 limit will apply to the amount payable.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 21 December 2022.

Vince Martin
Ombudsman