DRN-3721932

The complaint

L complains about the offer made by Aviva Insurance Limited to settle a claim made under their commercial property insurance policy.

What happened

L is a company which owns a commercial property insured with Aviva. They made a claim in February 2020 after a fire at the property.

The background to this complaint is well known to both parties, so I'll only give a very brief summary of events here.

In short, Aviva offered to settle the claim by paying a reduced proportion (41%) of the total claim value.

They said this was because L had made a careless misrepresentation when taking out the policy. In effect, Aviva say L told them a tenant was about to move into the property at the time. Whereas in fact, the tenant didn't move in – or at least never paid rent – causing L to re-purpose the building and rent only part of it to other clients.

Aviva said that if they'd known the facts at the outset, they would have required a significantly increased premium to provide more limited cover. By their calculations, L had paid 41% of that notional higher premium and so were entitled to only 41% of the claim value in settlement of the claim.

L made a complaint to Aviva, saying that Aviva should pay the full claim value because there was no misrepresentation – they had in fact struck an agreement with a tenant at the time, which is what they told Aviva. And circumstances changed only after they'd bought the policy.

Aviva maintained their stance, so L brought their complaint to us. Our investigator looked into and agreed with L that there was no misrepresentation at the time the policy was bought.

He said Aviva couldn't settle the claim on the basis they'd suggested and couldn't regard what L told them as a misrepresentation. And he asked Aviva to re-consider the claim in line with the remaining terms and conditions of the policy.

Aviva disagreed and asked for a final decision from an ombudsman.

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.

There's no dispute here that, because this is insurance of a commercial property by a company, the applicable law in this case is the Insurance Act 2015.

This Act says that a commercial policyholder, when buying a policy, has a duty to make a "fair presentation" of the risk to the insurer.

This means they have to disclose everything they know – or ought to know – that would influence the judgement of the insurer in deciding whether to provide cover and, if so, on what basis. Or enough information to put the insurer on notice that they might need to make further enquiries.

The Act also says the policyholder "ought to know" what should reasonably have been revealed by a reasonable search of information available to them. So, in effect, the policyholder should take reasonable steps to check any information available to them and consider If there's anything they ought to disclose.

In this case, L's broker told Aviva – when the policy was bought – that the tenants of the property would be a government body and that the property was to be used for the storage of data and scanned documents.

They said the building would be occupied "*from inception, once works are complete and certainly within one week if not*".

And the statement of fact they then agreed said that none of the premises was unfurnished, unused or unoccupied.

When Aviva sent investigators to inspect the building after the fire, they found it had been split into five separate units, only two of which were occupied by tenants.

L said the prospective tenants – at the time they'd taken out the policy – had agreed to move into the building rent-free for three months, whilst they carried out their own work on the building to make it fit for their purposes.

However, after beginning those works, and before the three month period was complete, they disappeared and couldn't be contacted again. At that point, L decided to split the property and seek tenants for the five separate units. L admit that the draft agreement between themselves and the original prospective tenants was drawn up but never signed.

Aviva have said that they believe L was "*duped*" by "*bogus tenants*" (Aviva's words). They say essentially that L told them – when the policy was bought – that the prospective tenants *were* going to move in, and the building wouldn't be unoccupied. And L ought to have known, if they'd conducted any effective due diligence, that the tenants were unlikely to move in and/or pay rent.

It's worth stressing here that Aviva aren't suggesting that L did in fact know that the prospective tenants were dubious. They're saying L *ought to have* known that, if they'd carried out reasonable steps to check the information reasonably available to them.

I can understand Aviva's frustration in this case and I can certainly understand their arguments, but on balance – and I should stress this is a very finely balanced case – I agree with our investigator that they aren't entitled to regard the information provided to them by L as a misrepresentation (careless or otherwise) – at least not on the basis of the information available to them at present.

I'll explain why – and I bear in mind of course that it is for Aviva to demonstrate that there has been a careless misrepresentation if they are to rely on the remedies set out in the Insurance Act – which is what they're seeking to do by applying a proportional reduction to the claim value in the proposed settlement.

I note, first of all, that L's broker didn't tell Aviva that L had tenants who had signed a contract or paid a deposit. And it was clear to Aviva from the information provided that the tenant had not yet moved into the premises.

At the time – and Aviva aren't disputing this – L *believed* they had a legitimate client who was about to move in. And the broker was clear that the tenant wasn't in the building yet and needed to make alterations to the building before it was fit for their purpose.

It's arguable then that L provided sufficient information to, in the terms of the Insurance Act, put Aviva on notice that they might need to make further enquiries. For example, Aviva might have asked L – at that point – whether a contract had been signed and/or any payment taken etc.

Aviva might justifiably regard L's business practices as slightly odd. But L would say that odd or not, the tenant did actually move in and begin the renovation work. And there's no real evidence that we've seen that suggests the tenant was in fact involved in any kind of plan to defraud L or anyone else. So, it remains open to question whether the tenant was in fact attempting to "dupe" L.

Aviva haven't as yet suggested precisely what information L *ought to have known* at the point of inception of the policy and which wasn't disclosed to Aviva. And on balance it would be slightly odd to suggest that L should have known – and disclosed – that they were being "duped".

On this point, I bear in mind that the Insurance Act says prospective policyholders *ought to know* what would be revealed by a reasonable search of information available to them, not what would be revealed by an in-depth investigation.

On balance than, I can't reasonably conclude that L made a careless misrepresentation when buying the policy.

I am aware that Aviva believe that even if there was no misrepresentation, L should have told them - in line with the terms of the policy - when it became clear that the original prospective tenant had disappeared and the building was re-purposed.

This appears, on the face of it, to have meant that some of the building was unoccupied for a period of time up to and including the date of the fire.

I'm also aware that L, on the other hand, regard this as immaterial to the question of whether the claim should be settled at full claim value.

That is an entirely different matter and one which I'm not considering in this decision. It was also the reason our investigator asked Aviva to re-consider the claim in line with the remaining terms of the policy rather than simply settle at full claim value.

It would be entirely unfair to pre-empt that argument when neither of the parties has had the chance to put forward evidence, information or arguments specifically on that point.

Putting things right

As outlined above, I'm satisfied on balance that Aviva can't conclude that L made a misrepresentation to them at the time the policy was bought.

That being the case, Aviva must re-consider the claim in line with the remaining terms and conditions of the policy.

My final decision

For the reasons set out above, I'm upholding L's complaint.

Aviva Insurance Limited must re-consider L's claim in line with the remaining terms and conditions of the policy.

Under the rules of the Financial Ombudsman Service, I'm required to ask L to accept or reject my decision before 30 November 2022.

Neil Marshall
Ombudsman