

The complaint

S complains that Hubener Versicherungs AG declined its claim on its commercial property insurance policy.

Mr N is a partner of his business - S - and brings the complaint on its behalf.

What happened

Mr N is the partner of the business S - a restaurant in the basement of a building. Mr N had a commercial insurance policy underwritten by Hubener to cover S and its premises. In December 2020 there was a fire at the restaurant and Mr N made a claim.

Hubener declined the claim. It said that Mr N had breached two conditions of the policy that may have led to the fire.

One required him to have all electrical equipment tested by a contractor approved by a particular organisation – I'll refer to them as 'N'. And the other condition required all combustible refuse and waste to be removed from the building each night. It said as the electrical certificates were provided by a contractor approved by a different organisation, these weren't valid under the policy. And there was evidence of waste remaining in bins overnight at the time of the fire, so the second endorsement had also been breached.

Mr N didn't think this was fair. He said that he had provided proof of electrical testing by a contractor that had been certified by a different government approved organisation. So he didn't think it was fair for Hubener to decline his claim on the basis that equipment hadn't been tested. And he said that if the fire was caused by an electrical fault, then the fact the waste hadn't been emptied had no impact on the start or the spread of the fire. So as it wasn't material to the claim it wasn't fair for Hubener to rely on the condition to decline it.

He complained, but Hubener didn't change its position on the claim. So Mr N brought his complaint to this service.

Our investigator recommended the complaint be upheld. She said she didn't think it fair that Hubener relied on the electrical testing condition, as Mr N had demonstrated that he had got the equipment tested and that the contractors were approved by a different, but similar, government approved agency. She also didn't think there was any evidence that the waste had caused the fire to start or spread, so didn't think this contributed to S' losses. And therefore didn't think it fair Hubener relied on that condition either.

To put things right, she thought Hubener should reconsider the claim in line with the remaining policy terms and conditions and reimburse S for its losses. She also thought it should pay 8% simple interest on any amounts paid from the date S paid for the amounts until settlement is made, to make up for S being without the funds.

Mr N accepted our investigator's outcome, however Hubener didn't. It said there was some evidence that the fire started in the waste paper bin, so didn't agree it was unfair for it to rely on the waste removal condition. It asked for the complaint to be reviewed by 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.

When an insurance claim is made, it's first for the insured to show that there is an insured peril – something that's covered under the policy. It's then for the insurer to either accept the claim or show that an exclusion or condition in the policy applies.

At this service, it's for us to decide if the insurer has made a fair and reasonable decision by declining the claim. To do this we will consider the policy terms and conditions. However we'd usually only say it was fair for a business to decline a claim due to the breach of a condition, where we think it most likely that the breach was material to the loss being claimed for. So where if it hadn't been for the breach, then the loss may not have happened, or may have been less. And we decide this based on the balance of probabilities.

Here, as Hubener has relied on two conditions to decline S' claim, I've considered each of these in turn.

Electrical testing

The condition Hubener has relied on is as follows:

'704: Electrical Circuit Maintenance Condition

It is a condition precedent to Our liability that a current and valid electrical certificate has been issued for the Premises and that all electrical circuits will be inspected and tested once every three years by a contractor approved by [N]...

Here, 'N' is an organisation that provides certification to contractors who carry out electrical testing of appliances. N is one of several similar organisations that has the approval of the UK government to carry out these checks.

Mr N has accepted that he didn't have an N approved contractor inspect the electrical appliances. However he has provided Hubener with proof that the appliances were tested in line with the rest of the endorsement. And that the contractor who carried out the testing had the approval of 'K' a different, but similar, certification body that also has approval from the UK government.

So while Mr N didn't have an N approved contractor check the appliances, and therefore didn't meet the requirements of the endorsement, I don't think this was material to the loss. As he did have certification from a K approved contractor. And as K also offers the same kind of certification and is an organisation certified by the UK government, I think it most likely that the contractor would have provided the same level of checks as a contractor certified by N. So I don't see that having the certification provided by an N approved contractor, rather than a K approved contractor would provide any greater protection to S or would have prevented or lessened the loss.

I therefore don't think it fair or reasonable for Hubener to rely on this condition to decline the claim.

Waste removal

The condition Hubener has relied on here is as follows:

'701: Daily Waste Condition

It is a condition precedent to Our liability that all combustible trade waste and refuse is removed from the Buildings every night.'

In the forensic report following the fire, it is noted that there are remains of non-combustible materials in the waste paper bin nearest to the seat of the fire. And there was waste found in other bins at the premises that evening. Based on this, I think it likely that this condition had been breached and waste material hadn't been removed overnight at the time of the fire.

However I also need to consider whether the breach of the condition was material to the loss. And on balance, I don't think it was.

The forensic report speculates that it's possible the fire started from a discarded cigarette end in the waste bin, and states *'Such a mechanism could potentially explain a fire.'* And it goes on to comment that used cigarette butts were found outside the restaurant doors.

However the report also says *'I found no evidence of used smoker's materials on surfaces within the restaurant.'* It isn't unusual for staff members to use external areas to smoke during breaks. However considering smoking indoors is prohibited by law, I don't think it follows that finding cigarette butts outside the building makes it likely that staff members would use or discard these indoors.

Further the report provides no evidence, or conclusion, that this was the case, just speculates that it could explain a fire.

Based on this, I think on balance it is unlikely that the breach of the waste removal endorsement was material to the claim either. There is no evidence to suggest that the fire started within the bin, and as the fire was contained to a small area of the restaurant, there is also no evidence that it cause the fire to spread, increasing S' losses.

For these reasons I don't think it fair or reasonable for Hubener to rely on this condition to decline the claim.

Putting things right

For the reasons described above, I don't think Hubener has acted fairly by declining S' claim. I therefore agree with our investigator that it should re-consider the claim in line with the remaining terms and conditions without applying either the waste removal or electrical testing conditions.

If the claim is accepted under the remaining conditions, it should reimburse S costs it has incurred for repairs and replacements due to damage caused by the fire.

It should also pay 8% simple interest on any amounts paid, from the date S paid for the repairs until the date settlement is made.

My final decision

For the reasons I've given, I uphold S' complaint. I require Hubener Versicherungs AG to:

- Re-consider S' claim in line with the remaining terms and conditions without applying either the waste removal or electrical testing conditions.

- If the claim is accepted under the remaining conditions, it should reimburse S for any work carried out in relation to restoring the premises following the fire.
- Pay 8% simple interest on all amounts paid from the date S originally paid for the work to be completed until Hubener pays the settlement.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr N, on behalf of S, to accept or reject my decision before 18 July 2023.

Sophie Goodyear
Ombudsman