

The complaint

K, a limited company, complains that Accelerant Insurance Europe SA/NV (Accelerant) has voided its commercial property insurance policy and declined the claims it made.

What happened

In June 2021 K took out a commercial property insurance policy to cover a hotel it had purchased. The policy is underwritten by Accelerant.

In March 2022, K contacted Accelerant to make several claims for losses which had occurred over the previous seven months.

During the claim validation, Accelerant said that K's hotel had a tenant who was in receipt of housing benefits in situ when the policy was taken out, but K hadn't declared this. Accelerant said that if they had known about this, then they wouldn't have offered a policy.

So, Accelerant voided K's policy (treated it as if it never existed), refunded the premiums and declined the claims K had made. K disputed the tenant was in receipt of housing benefit, and also argued that regardless of this, it had no bearing on the losses that had given rise to the claims it was trying to make.

Accelerant maintained their position. As K remained dissatisfied, it approached this service.

Our investigator initially agreed with Accelerant that K had failed to disclose that it had a tenant in receipt of housing benefit when taking out the policy, so she said the actions Accelerant had taken were fair.

K responded disagreeing, and the investigator revisited things. Her view changed slightly as a result. She said that it wouldn't be fair for Accelerant to void the policy as she wasn't satisfied they had evidenced the tenant in situ was in receipt of housing benefit at inception. But she said Accelerant would have cancelled the policy when another tenant moved in later, as they were in receipt of housing benefit.

So, whilst the investigator said it wasn't reasonable for Accelerant to void the policy, she said it would have been cancelled in any event, so the end position was the same. Consequently, the investigator remained of the view the complaint shouldn't be upheld and Accelerant didn't need to do anything further.

K didn't agree and asked for a final decision from an ombudsman.

I reached a slightly different outcome to our investigator. Therefore, I issued a provisional decision to give both parties an opportunity to comment on my initial findings, before I reached my final decision.

What I provisionally decided – and why

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.

I'm issuing a provisional decision. I've reached a slightly different outcome to that reached by our investigator. Therefore, I'm issuing a provisional decision, to give both parties an opportunity to comment on my initial findings before I reach my final decision.

The policy voidance

Accelerant has voided K's policy as they say it failed to make a fair presentation of the risk when taking out the policy. K has a commercial insurance policy, so the relevant law which applies here is the Insurance Act 2015.

Under the Insurance Act 2015, the insured has a duty to make a fair presentation of risk to an insurer when taking out a policy. Accelerant says K failed to tell them when taking out the policy it had a tenant in situ who was in receipt of housing benefit. So, they say K didn't make a fair presentation of risk. Accelerant say if K had disclosed this, they wouldn't have offered it a policy. So, they've voided the policy, declined the claims and returned the premiums. Accelerant says this is the relevant remedy under the Insurance Act 2015.

The Insurance Act 2015 places an obligation on the insured to provide a fair presentation of the risk to the insurer. In summary, K had a duty to make a fair presentation of risk and this includes disclosing every material circumstance which the insured knows, or ought to know. Or failing that, disclosure which gives the insurer sufficient information to put a prudent insurer on notice to make further enquiries for the purpose of revealing those material circumstances. And the circumstance or facts are material if it would influence the judgement of a prudent insurer in determining whether to take on the risk.

If there hasn't been a fair presentation of risk, the Insurance Act 2015 then goes on to consider whether there has been a qualifying breach. This means if the insured had made a fair presentation of risk, would the insurer have acted differently by not offering a policy, or offering it on different terms.

And if there has been a qualifying breach, the Insurance Act 2015 allows the insurer a number of remedies and this depends on whether the qualifying breach was deliberate or reckless or not.

Accelerant has said there was a qualifying breach, but they aren't treating it as deliberate or reckless. Under the Insurance Act 2015, where there has been a qualifying breach which isn't deliberate or reckless, this gives an insurer several remedies. And of relevance here, where a policy wouldn't have been offered:

"If, in the absence of the qualifying breach, the insurer would not have entered into the contract on any terms, the insurer may avoid the contract and refuse all claims, but must in that event return the premiums paid."

This is what Accelerant has done here. So, I need to consider whether Accelerant has acted in line with the Insurance Act 2015, and if this is fair and reasonable in all the circumstances.

Accelerant says that when taking out the policy, K failed to declare that it had a tenant in situ who was in receipt of housing benefit. Accelerant say the incorrect answer K gave is reflected on its policy schedule:

"Is accommodation let to Students, Asylum Seekers, Refugees or persons who receive Housing Benefit directly or indirectly?"

The schedule shows this was answered No. Accelerant say this should have been answered Yes by K.

Accelerant has provided this service with a copy of their underwriting criteria (in confidence) and I'm satisfied they have shown they are unable to offer a policy to hotels providing accommodation for local authority and DSS tenants. So, if this had been answered Yes I'm satisfied Accelerant wouldn't have provided a policy.

However, having considered all the information provided by both parties, I don't think the avoidance was in line with the Insurance Act 2015 or fair or reasonable in the circumstances. I'll explain why.

Before I do though, I should outline that Accelerant has voided the policy solely on the basis of the tenant in situ allegedly being in receipt of housing benefit. However, Accelerant has also raised concerns that there are a number of other differences which also should have been disclosed, or answered differently, by K when taking out the policy. This includes:

- The buildings sum insured is inadequate*
- K had said the property didn't have a wood burning stove, but in fact there is one, (and K is unable to confirm when the flue was last swept) - which is different to the answer provided and reflected on K's policy schedule*
- K doesn't have an electrical installation certificate to show it was tested in the last five years - which is different to the answer provided and reflected on K's policy schedule*
- K said that the hotel complies with the minimum-security requirements outlined on the policy documents - but the locks do not comply with the minimum requirements*
- K had said that there had been no previous incidents, losses or claims (including for the partners and directors of K) in the last five years - but a director had a break in claim in 2018*

However, as Accelerant has solely relied on the tenant being in receipt of housing benefit to void the policy, and hasn't relied on the other points noted above (and instead has put K on notice of potential concerns) I'll only be considering whether it was fair to void on the reason Accelerant has relied on – the tenant at inception.

I've considered all the information and arguments provided by both parties including K's explanation why it didn't tell Accelerant the tenant was in receipt of housing benefit.

In summary, K has explained that there was nothing to show the tenant was in receipt of housing benefit, and they didn't provide K with anything to support that. Instead, when K purchased the hotel, the tenant was already residing there. The tenant then wouldn't pay the bill owed to K. Ultimately K says it was able to retrieve the keys and withhold the tenants' possessions under the relevant Innkeepers Act. And K later managed to obtain a partial contribution toward the outstanding bill from the local council. But prior to this, the housing wasn't being paid for by the council, or housing benefit – including at policy inception.

I've considered everything both parties have provided and I don't think Accelerant has demonstrated the tenant was in receipt of housing benefit when the policy was taken out. Accelerant hasn't provided anything which sufficiently persuades me this was the case, or consequently, that K should have declared this when taking out the policy. Therefore, I'm not minded to conclude K answered the question asked about tenants incorrectly at inception.

So, unless anything changes as a result of the responses to my provisional decision, I'm not minded to conclude K has failed to make a fair presentation of the risk when taking out the policy. Consequently, this means Accelerant can't rely on the Insurance Act 2015 to void K's policy from inception.

Therefore, unless anything changes as a result of the responses to my provisional decision, I'll be directing Accelerant to reinstate the policy (subject to receiving the premiums which were refunded previously), and to remove any internal and external records of the voidance.

However, there are further considerations here about what this then means for K's policy, and the claims it tried to make. I'll consider this further below.

K's policy if it wasn't voided

Accelerant says that even if there isn't enough evidence to support the voidance (which I'm minded to agree with for the reasons outlined), then they would have backdated the cancellation instead to the point the risk was no longer acceptable to them. They outlined this to K in their final response, but maintained voidance was the correct way to proceed at that time.

I'm minded to conclude backdating cancellation is reasonable in the circumstances – like our investigator concluded when reconsidering matters. However, I'm not in agreement with our investigator (or Accelerant) that this means Accelerant don't need to do anything further. I'll explain why.

Policy cancellation

As explained, I'm minded to conclude that it wasn't reasonable to void K's policy, so it would need to be reinstated (subject to the premiums being repaid by K). However, on 29 July 2021, another tenant moved into the hotel, and their stay was funded by the local council. K doesn't dispute that it was housing this tenant paid for by the local council. And when this was put to K by Accelerant during claim validation, K said:

"We had a guest here paid by (Name) Borough Housing in about September for a couple of months yes. So What? We do what we can to help. We are nice people."

And although K said September here, and Accelerant also said they thought it was from 2 August 2021, having looked at the invoices K sent to the council for payment for the tenants stay, this was actually from 29 July 2021. So, I'm satisfied a council funded tenant resided at K's hotel from 29 July 2021, around six weeks after the policy was taken out.

In previous communication, K also told the council that it was happy to take on this type of tenant more regularly:

"We are also happy to help you with the housing needs of other homeless people you may need to accommodate and in that regard we look forward to working with you. We have worked with (Name) Council on a couple of cases."

The tenant remained at the hotel for a number of months. However, from the communication with the council, K was unhappy with the tenant due to them begging, smoking in their room, stealing items, and not following rules in place by the hotel despite a number of warnings. Consequently, K refused to house them any longer.

Whilst K doesn't dispute it has taken tenants housed by the council and in receipt of housing benefit, it has said it doesn't think it should be an issue as the claims were unrelated to the type of tenants. However, what is important here is whether Accelerant would have offered a policy, had they been aware. And as I've outlined above, I'm satisfied Accelerant has shown this type of tenant is outside their risk appetite - so they wouldn't have provided cover.

Accelerant says that K should have told them about this tenant when they moved in, and they would then consider if the risk was still acceptable, based on the following in K's policy terms:

"Keeping the Insurer Informed

The insured must notify the Insurer, or the Insured's Insurance Advisor:

- a) Without delay if the Insured becomes aware that information the Insured has given the Insurer is inaccurate;*
- b) Within fourteen (14) days of the Insured becoming aware about any changes in the information the Insured has provided to the Insurer which happens before or during the period of insurance;*

When the Insurer is notified that information the Insured previously provided is inaccurate, or of any changes to that information, the Insurer will tell the Insured if this affects the Insured's insurance. For example, the Insurer may amend the terms of the Insured's insurance or require the Insured to pay more for the Insured's insurance or cancel the Insured's insurance in accordance with the "Cancellation" section.

If the Insured fail to notify the Insurer that the information the Insured has provided is inaccurate, or the Insured fail to notify the Insurer of any changes, this insurance may not pay the Insured's claim or any payment could be reduced."

And:

"3) Alteration

This policy shall cease to be in force from the date of alteration if

- a) any alteration is made either in the Business or at the Premises or to any Property insured after the commencement of the insurance that increases the risk of loss destruction damage or injury or*

...

unless the insurer has agreed in writing to accept such alteration"

I'm minded to agree with what Accelerant says here. That there was an alteration when K housed the tenant in July 2021. And I'm satisfied that the fact Accelerant asked K about tenants receiving benefits when taking out the policy shows this is something they needed to know about when assessing the risk. So, I'm also satisfied that K should have been aware that it needed to notify Accelerant about the tenant who moved in at the end of July. And in line with these terms, K needed to tell Accelerant about this within 14 days - but didn't do so.

I'm satisfied that if K had told Accelerant in line with the terms, then they would have cancelled the policy as it no longer met their risk criteria. Therefore, I don't think it is unreasonable for Accelerant to back date cancellation rather than voiding the policy. But the question I need to consider is when that cancellation would have occurred. This is important due to the points the losses and claims occurred, and whether they were before, or after, cancellation. The policy terms explain:

"Cancellation by the Insurer

ii. Cancellation for any other reason

The Insurer may cancel the Policy or any section or endorsement by giving 30 days' notice in writing by letter to the Insured at the Insured's last known address or to their insurance agent

The Insurer does not have to give a reason for the cancellation although potential reasons for doing so may include but are not limited to the following

....

- Where an alteration is made to the Business the Premises or the Property or where the Insured's interest ceases unless agreed by the Insurer as detailed in General Condition 3) Alteration

.....

The Insurance will end immediately the 30 days' notice runs out"

However, whilst I'm satisfied K should have told Accelerant about the change, Accelerant wouldn't have offered cover and would then have cancelled, I don't think the policy terms I've referred to above are clear about what happens when there is a change and the policy is then cancelled. They contradict each other. On one hand, they say that in the event of Accelerant cancelling a policy (including for an alteration/change - which is of relevance here - and referring to that condition specially), they will give 30 days' notice and the policy will end at that point. But by contrast, general condition three (alteration) also says there will be no cover from when that change occurs, effectively at odds with the 30 days' notice.

In my view the terms are unclear whether there will be a 30 day period in which to source alternative cover, or if the cover will immediately cease as soon as that change occurs – even though the insured has 14 days to notify Accelerant of that change. So, this further confuses matters if Accelerant intended to cease cover from being told of the change, or retrospectively from when that change occurred – and that's putting aside the further point about 30 days in the cancellation terms.

Given the lack of clarity and conflicting terms, and the significant impact of an immediate cancellation which doesn't appear to be prominently highlighted elsewhere, I think it would be fair and reasonable in the circumstances here to consider the 30 day period for cancellation to be applicable.

So, I agree that K should have told Accelerant that it had a tenant in receipt of housing benefits move into the hotel on 29 July 2021. K had to tell Accelerant, in line with the terms, within 14 days of the change. Therefore, the latest point K should have told Accelerant was 11 August 2021.

Had K told Accelerant at that point, based on what I've outlined above about the cancellation period, 30 days from this would have been 9 September 2021. So, I'm minded to conclude that is when the backdated cancellation should fairly and reasonably take effect from.

Accelerant has treated the policy as void and returned all the premiums. But I don't think that's fair for the reasons I've outlined. So, Accelerant would need to reinstate the policy.

But that would also mean K would need to return the premiums to Accelerant to have the policy in force retrospectively, and then subsequently cancelled. Ordinarily, there would be a pro-rata refund of premiums (in line with the terms) if Accelerant had cancelled rather than voided the policy. So, on the face of it, this could put K in a worse position, as it would need to pay Accelerant money back to have its policy cancelled.

However, I've also considered what impact the cancellation rather than voidance would have on the claims K tried to make. And I don't think this disadvantages K. I'll explain why below.

The claims

As outlined, I'm minded to conclude it would be fair and reasonable to consider the policy cancelled from 9 September 2021. The losses K incurred were:

- 15 August 2021 – a leak from a lead pipe in the first-floor communal shower area
- 13 October 2021 – A leak from a toilet
- 13 October 2021 – A leak from a shower tray
- Multiple points, dates yet to be confirmed – A scissor lift damaged carpet in various areas

Any claims or losses post the backdated cancellation (9 September 2021) wouldn't have been covered, as the policy would no longer have been in force. However, this also means that the 15 August 2021 loss would have been within the period cover was in force and prior to cancellation taking place.

Therefore, I think one loss will at least fall within the period where cover was effectively in force. So Accelerant would need to reconsider that claim.

However, I'll also explain here that I'm not intending to direct Accelerant to pay K's August 2021 claim at this stage. Instead I'm minded to direct Accelerant to reconsider it in line with the remaining policy terms. This is because Accelerant hasn't actually validated that claim as the policy was (wrongly) voided before it got to that stage, so it may still not be covered – but for other reasons.

Accelerant also has a number of other concerns about what was declared during the sale of the policy (putting aside the tenant at point of inception which I don't think they can rely on to void the policy for the reasons I've explained). But Accelerant hasn't yet explored those discrepancies further, and will need to, before establishing if the policy would actually have been in place at inception, and if the August 2021 claim is covered under the remaining terms of the policy.

But I should also highlight, in the event of a claim, there would be no refund of premiums due. So, in order for K to have the August 2021 claim considered, K would need to return the full policy premiums for the year, for a policy which would only have been effectively in force until 9 September 2021. But I don't think that's unfair if K wants to continue with one of the claims. And, if the claim isn't ultimately covered, the pro-rata premium from cancellation would be due to K, in line with the policy terms where a claim hadn't been paid.

Either way though, I don't think it would be fair or reasonable for the policy to be recorded internally or externally as cancelled by Accelerant. Instead, if a cancellation notice had been issued with 30 days' warning, K would have had an opportunity to cancel the policy before it was actioned by Accelerant – which could affect future insurance policies. So retrospectively cancelling the policy, I think it would be fair and reasonable for it to be recorded as cancelled by K rather than Accelerant from 9 September 2021.

The service received

K has been caused inconvenience by its policy being voided. And it took a number of months to reach that (incorrect) decision. And I'm minded to conclude, that if the policy was cancelled rather than voided, it would have potentially resulted in at least one of K's claims being assessed and potentially covered much sooner. So, in addition to the above, unless anything changes as a result of the responses to my provisional decision, I'll also be directing Accelerant to compensate K £150 for the inconvenience caused."

Therefore, I was minded to uphold the complaint in part and to direct Accelerant to:

- Reverse the policy voidance and reinstate K's policy – subject to K repaying the policy premiums
- Remove the records of the policy voidance from internal and external databases
- Treat the policy as cancelled from 9 September 2021 – but do not record it as cancelled by Accelerant internally or externally
- Reconsider the August 2021 claim in line with the remaining policy terms. If any cash settlement is paid, 8% simple interest would need to be added from date of loss to date of payment
- Pay K £150 compensation

The responses to my provisional decision

Accelerant didn't respond to my provisional decision by the deadline.

K responded via its representative, but K didn't say whether it agreed with the provisional decision or not. Instead, K said that it hadn't actually been offered or given a refund of the premiums yet following the policy voidance. K also said that it noted its position had potentially improved but questioned how positive Accelerant would be for the August 2021 claim given their position throughout.

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, and as neither party has provided anything in response to my provisional decision which has led me to change my view of what is fair and reasonable in all the circumstances of the case, my final decision remains the same as my provisional decision, and for the same reasons.

But to address the points made by K via its representative, Accelerant voided the policy and I said they weren't able to do this based on the reason they'd relied on. Therefore, I also said Accelerant needed to reinstate the policy, subject to K paying the relevant premium, and treat the policy as cancelled from 9 September 2021 instead. This would then mean Accelerant need to reconsider the claim from August 2021. It follows that if the premium hasn't yet been refunded to K and Accelerant still has it, then this doesn't need to be returned by K for Accelerant to reinstate (and cancel the policy with effect from 9 September 2021) and reconsider the August 2021 claim.

This also doesn't change what I said would need to happen if the August 2021 claim was/wasn't then accepted by Accelerant. As outlined in my provisional decision, if the claim is accepted, then Accelerant, as per the terms, is able to retain the policy premiums for the year. And if the claim isn't accepted, in line with the terms, Accelerant would need to provide a pro-rata refund of the premiums post cancellation date of 9 September 2021.

I also note what K has said (via its representative) about the August 2021 claim that Accelerant would need to reconsider and the potential outcome of that claim, but I can't comment on that as that hasn't yet happened. If K remains unhappy with the outcome that is ultimately reached by Accelerant on the August 2021 claim (or if Accelerant void the policy for other reasons), K would need to raise this as a new separate complaint with Accelerant which K then may then be able to bring to our service – subject to our usual rules and timescales.

My final decision

It's my final decision that I uphold this complaint in part and direct Accelerant Insurance Europe SA/NV to:

- Reverse the policy voidance and reinstate K's policy – subject to K repaying the policy premiums (unless they haven't yet been returned to K)
- Remove the records of the policy voidance from internal and external databases
- Treat the policy as cancelled from 9 September 2021 – but do not record it as cancelled by Accelerant internally or externally
- Reconsider the August 2021 claim in line with the remaining policy terms. If any cash settlement is paid, 8% simple interest* would need to be added from date of loss to date of payment
- Pay K £150 compensation

*If Accelerant Insurance Europe SA/NV considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell K how much it's taken off. It should also give K a tax deduction certificate if it asks for one, so it can reclaim the tax from HM Revenue & Customs if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask K to accept or reject my decision before 14 March 2023.

Callum Milne
Ombudsman