

The complaint

A (a company), represented by one of its directors Mr P, complains that The New India Assurance Company Limited (New India) has declined its claim for malicious damage to one of its let properties and has voided the policy (treated as if it never existed) back to its start date. And that it has retained the premiums because it says the misrepresentation was deliberate.

What happened

A took out a Buildings policy with New India in 2019. The policy renewed in 2020 and 2021. The one policy covered 17 properties owned by A. In August 2021 the police notified A that one of its premises had been raided and all the fixtures and fittings had been ripped out by the tenant who was using the property as a cannabis factory.

New India appointed loss adjusters who investigated the claim and discovered that no references had been taken up for the tenants, and that 12 months rent and a deposit of one month's rent had been paid in advance at the start of the tenancy. The matter was referred back to New India who declined the claim and voided the whole policy back to its start in 2019, on the basis that A had been in breach of the duty of fair presentation under the Insurance Act 2015. It further said that it regarded the breach as deliberate so wouldn't refund the premiums.

A withdrew the claim but thought it was unfair to void the whole policy which would have affected all the properties in the policy, when only issues covering one property were relevant. It said that the obtaining of references was undertaken by a separate company and on just this one occasion it was unable to show the necessary evidence that it had applied for references. On A's behalf its broker wrote to New India arguing that A had made a fair presentation of the risk to the best of its knowledge so it would be unfair to void the whole policy.

On referral to the Financial Ombudsman Service our Investigator said that it was likely that the breach had been reckless rather than deliberate. But New India was still entitled to retain the premiums. He said the voidance could only be backdated to the renewal in April 2021, as the breach could only be shown to have been made at the time of that renewal.

Mr P didn't agree, he felt that the breach wasn't reckless, and that it was unduly harsh to void the whole policy for one property.

I issued a provisional decision. In it I said that A did breach its duty of fair presentation so it was fair that New India declined the claim. However I didn't think New India had shown that but for the breach, it wouldn't have issued a policy. So I said that it wasn't entitled to void the policy and should reinstate it. I further said that if A had to pay higher premiums on a policy then New India should refund the excess premiums.

New India didn't respond to my provisional findings.

Mr P responded on behalf of A. He said he would be happy to discuss a settlement whereby

New India refund him monies, and don't cover additional insurances he has had to take out. He noted that a company can't suffer distress but pointed out that he personally had suffered distress.

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.

A is a limited company which owns at least 17 properties. In that respect I don't think that A, or Mr P can be regarded as a consumer. So The Insurance Act 2015 (the Act) applies.

Under the terms of the Act the insured has a "duty of fair presentation" when taking out or renewing an insurance policy. In respect of that duty the insured must make:

"(a) disclosure of every material circumstance which the insured knows or ought to know, or

(b) failing that, disclosure which gives the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances."

Here, when taking out the policy in 2019, a representative of A completed a proposal form. In respect of the property, which is the subject of the claim, the question was asked "Are references taken?" The "Yes" box was ticked and the name of the company carrying out the references was inserted.

There's no doubt that references weren't available. Whether this was because they weren't applied for or were mislaid through administrative error, or the reference company was at fault is something I don't have to decide. Ultimately A was responsible for applying for references and ensuring that they are available.

The duty of fair presentation also applies at the time of renewal – here in 2020 and 2021. And I think that the fact that references weren't applied for or weren't available was a material circumstance which the insured ought to have known.

So I think that there was a misrepresentation. A (or Mr P, as director) would have known or ought to have known that it had declared that references were taken and that the subsequent lack of references was likely to affect the risk and apply particularly to this case where the tenant has committed malicious damage, I think it was fair of New India to decline the claim.

However under the Act if the insurer is to have a remedy against the insured, in respect of the insurance contract, Section 8 (1) of the Insurance Act says:

"The insurer has a remedy against the insured for a breach of the duty of fair presentation only if the insurer shows that, but for the breach, the insurer—

(a) would not have entered into the contract of insurance at all, or

(b) would have done so only on different terms."

New India has said it would have declined the proposal for a policy if no references were applied for. It has quoted the following from its underwriting guide: -

"If the tenancy agreement is for a period of less than 6 months the proposal must be

declined.

If the tenancy agreement is for a period of less than 12 months and no references are taken then the proposal is to be declined. If references are taken the proposal can be accepted.

If the tenancy agreement is for a period exceeding 12 months the proposal can be accepted regardless of whether references are taken or not."

Here the tenancy of the property was for 12 months, not less than or more than 12 months. So I don't think that New India has shown that it would have declined the proposal for a policy. And I don't think this is a purely technical point. New India hasn't shown whether the 12 month tenancy would have fallen into the less than 12 months category (requiring references) or more than 12 months (requiring no references).

I don't think that New India has shown that it was entitled to void the policy under the Act. So, it should reinstate the policy. If A has paid higher premiums as a result, then New India should refund the excess premiums for the 2022 renewal, with interest at 8% from the date those premiums were paid until renewal.

Lastly, I have decided not to make an award for compensation for distress and inconvenience. As a limited company, A can't suffer distress. And I think by breaching the duty of fair presentation A was responsible for the claim being declined."

I note Mr P's response. By refunding monies I assume he means the premiums on the policy. If New India hadn't voided the policy it would simply have continued until renewal with the premiums being payable until then. As it's a block policy I think the fair and reasonable thing to do is to reinstate the policy until the first renewal after the claim. I will keep the direction in respect of any new policy - if Mr P still wants to pursue that, he should advise New India. In respect of any policy after the renewal date, I can't tell New India to renew its policy. If Mr P has taken out a policy with another company he should advise that company of this decision.

As for Mr P's distress I have to reiterate that the company, A, is the policyholder and cannot suffer distress. As our Investigator has explained, I can't make an award to Mr P as he is not the policyholder. In certain circumstances a company can suffer inconvenience through its officers. But I think that any inconvenience caused here was because of the breach of the duty of fair presentation by A and wasn't New India's fault. So I don't think it reasonable to make an award in respect of this.

Putting things right

I uphold the complaint and require The New India Assurance Company Limited:

- to reinstate the policy, and remove any record of the policy being voided from any internal or external databases.
- if A has had to pay higher premiums on a policy, then New India should refund such excess premiums (on receiving evidence of the same) until the renewal date and pay 8% interest* from the dates those premiums were paid until reimbursement.

*HM Revenue & Customs may require New India to deduct tax from any award of interest. It must give A a certificate showing how much tax has been taken off if one is asked for.

My final decision

I uphold the complaint and require The New India Assurance Company Limited to provide the remedy set out under “Putting things right” above.

Under the rules of the Financial Ombudsman Service, I’m required to ask A to accept or reject my decision before 19 April 2023.

Ray Lawley
Ombudsman