

The complaint

F, a limited company, is unhappy The Salvation Army General Insurance Corporation Ltd (SAGIC) voided its commercial combined policy meaning a claim made relating to a fire wasn't paid.

What happened

F has a commercial combined policy with SAGIC with a commencement date of 25 November 2019. A Statement of Fact contained within the quote provided by its broker included the wording *"you comply with all statutory requirements in respect of your business"*.

In August 2020 there was a fire at F's business premises. It made a claim on its policy for damage to equipment, stock, premises and business interruption. An investigation report looked at CCTV on the day of the fire and found evidence of operatives smoking. It concluded there was little doubt the fire had started in the area around a hopper and this was *"either as a result of the ignition of lint due to frictional heating in the hopper's mechanism or as a result of carelessly discarded smoker's materials."*

SAGIC declined the claim. It thought F was in breach of the provisions of the Health Act 2006 in relation to smoking at work. So it hadn't complied with *"all statutory requirements in respect of your business"*. And if it had been aware of this it wouldn't have agreed to provide cover. It said it would be voiding the policy from the outset. It also said the policy contained a term requiring F to *"take all reasonable precautions to prevent damage to the insured property"*. It didn't think F had taken reasonable steps to prevent smoking on the premises which had increased the risk of a fire and related loss occurring. So even if the policy hadn't been voided it would have relied on this to turn down the claim.

Our investigator accepted the CCTV footage showed operatives smoking on the day of the fire. But she didn't think that meant F was aware this was happening or that it knew about this when it took out the policy. F's directors said they hadn't seen evidence of smoking and had provided evidence of steps they'd taken to prevent this. She didn't think SAGIC acted fairly in saying F hadn't complied with statutory requirements. And she didn't think any other non-compliance with the policy condition had increased the risk of the loss that actually occurred. She said SAGIC should reconsider the claim under the remaining policy terms.

F agreed with her outcome. SAGIC didn't agree. In summary it said:

- It didn't agree F had complied with the Health and Safety Act and the Statement of Fact. and said the evidence it had provided predated both the loss and the period of cover.
- It drew attention to evidence which it believed showed there was a blatant disregard for health and safety culture at F's premises which supported its view that the smoking observed on CCTV wasn't a one off event.

- It reiterated that F was in breach of the policy terms in relation to taking reasonable precautions to prevent damage to the insured property. It thought its behaviour and culture on the day of the incident increased the risk of the loss occurring.

So I need to reach a final decision.

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.

The relevant rules and industry guidelines say SAGIC has a responsibility to handle claims promptly and fairly. It shouldn't reject a claim unreasonably.

In this case SAGIC's position is that no cover is available under the policy for the claim F made because it didn't make a fair presentation of risk at the outset. And if it had done then it wouldn't have provided cover. In relation to that it's relied on the Statement of Fact and in particular the wording as it relates to compliance with "*all statutory requirements in respect of your business*" which it believes F was in breach of.

F says it didn't see the Statement of Fact. I can see information about it was contained in a quote from its broker and the wording of that section says "*a copy of this Statement of Fact must be given to the Insured*". If the broker was acting for F in arranging this policy and didn't pass that information on, that would be something it was responsible for. But I don't think that's material to the outcome of the complaint against SAGIC. That's because regardless of whether the Statement of Fact was provided to F or not I don't think SAGIC are correct to say F didn't comply with it.

The key issue here is whether, at the point it took the policy out, F was meeting the statutory requirements which applied to its business. SAGIC has argued it didn't meet the requirements of the Health Act 2006. I've reviewed the provisions of that Act. It requires a business to make sure no smoking signs are displayed in their premises and imposes a duty on "*any person who controls or is concerned in the management of smoke-free premises to cause a person smoking there to stop smoking*".

The Act says it is an offence not to comply with that duty but defences include that a person "*did not know, and could not reasonably have been expected to know, that the person in question was smoking*". And where a defence is raised a court must assume the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.

In this case there was some initial dispute over whether a no smoking sign was displayed at F's premises. But on further investigation SAGIC's investigations established that was the case. So there's been no breach of that part of the Act. However, I think it's accepted the CCTV from the date of the fire shows smoking was taking place on the premises on that day. And SAGIC has provided evidence which it believes shows there was a poor health and safety culture at F's premises.

But even if that is the case I don't see that's directly relevant to the issue here. The question is whether F committed the offence of failing to prevent smoking in a smoke free place (at the time the policy was taken out) meaning it was in breach of statutory requirements. The only evidence directly relevant to that is evidence showing smoking was taking place on the day of the fire. But that was over nine months after the insurance contract was entered into.

And F has provided documentation from prior to that date which includes:

- A notice dated 1 March 2019 warning employees against smoking on the premises and confirming that doing so will result in instant dismissal.
- A statement dated 31 May 2019 and signed by employees acknowledging that there is no smoking on the premises and that doing so will result in dismissal.
- Signed statements from the directors of F saying they hadn't observed smoking inside the building and that they would have disciplined any member of staff who they found doing so.

It is a defence under the Act for a person to show they took reasonable steps to cause a person to stop smoking or that they didn't know or could not reasonably have known the person in question was smoking. And In order for an offence to be committed under the Act it needs to be proved beyond reasonable doubt. Taking that, and the evidence F has provided of the actions it took into account, I don't think SAGIC has shown F didn't make a fair presentation of risk when the policy was taken out. So I don't agree it can void the policy.

I've therefore gone on to consider whether SAGIC can rely on the policy condition it's quoted to turn down the claim F made. That says "*You shall take all reasonable precautions to prevent Damage to the Insured Property*". In support of its argument SAGIC has cited various issues including the fact that smoking was shown on the CCTV coverage, fire safety risk assessments and drills hadn't been completed regularly and health and safety policies were out of date.

I appreciate the CCTV footage does show employees smoking on the day in question. But that doesn't in itself mean that F is in breach of the term because that refers to taking "*all reasonable precautions*" to prevent damage. And I've already identified a number of steps that F had put in place to prevent smoking including employees signing a notice acknowledging that doing so would result in instant dismissal.

SAGIC has argued that other health and safety issues show F was in breach of this clause. But the Insurance Act 2015 says "*If a loss occurs, and the term has not been complied with, the insurer may not rely on the non-compliance to exclude, limit or discharge its liability under the contract for the loss if the insured satisfies subsection (3)*". Subsection 3 says "*The insured satisfies this subsection if it shows that the non-compliance with the term could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred.*"

So any non-compliance with the reasonable precautions clause in the policy would need to have increased the risk of the loss which actually occurred (the fire and resultant damage). SAGIC accepted in its response to us that not all of the comments it had made were relevant to the actual loss. And a report from the time from the fire service identified the main cause as "*fault in equipment or appliance*". I recognise the forensic investigation report into the claim identified discarded smoker's materials as a possible cause of the fire but it also said it could have been caused as a result of the ignition of lint due to frictional heating in the hopper's mechanism. The report didn't indicate which of those it thought was most likely to have been the cause.

I appreciate the hopper itself had been removed when the visit took place but it's clear the investigator was able to examine key components such as shafts, bearings and motors which had been retained. And while a further report did comment on health and safety breaches by F it didn't conclude any of these had contributed to the fire.

So I don't think the evidence does show that any breach of the reasonable precautions clause of the policy has led to or increased the risk of the loss occurring in the circumstances in which it did – the cause of the fire is unclear and there isn't clear evidence to show a link between the possible causes and any non-compliance by F with the "*reasonable precautions*" clause in the policy. As a result I don't agree SAGIC can rely on this to turn down the claim F made.

Putting things right

SAGIC will need to reverse the policy voidance and reinstate F's policy (subject to F paying any relevant premiums). It will need to remove the records of the voidance from any internal and external databases on which it has been recorded. And it will then need to reconsider the claim against the remaining terms and conditions of the policy.

Our investigator also said it should pay interest at 8% simple on any amount that was then payable (from the date it should have been paid until the date it actually was). However, prior to reaching this decision our investigator explained I wouldn't be recommending that.

That's because under our rules interest is only payable on a 'money award' (where we direct a business to pay a specific amount of money). And that isn't the direction I'm making here. I understand why F continues to feel interest should be paid but that isn't something I'm able to do given the direction I'm making in this case.

My final decision

I've decided to uphold this complaint. SAGIC will need to put things right by doing what I've said in this decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask F to accept or reject my decision before 11 August 2023.

James Park
Ombudsman