

## **The complaint**

Mr and Mrs M are complaining that Folgate Insurance Company Ltd has avoided their commercial property insurance policy and declined a claim they made for fire damage.

## **What happened**

In August 2020 Folgate automatically renewed Mr and Mrs M's commercial insurance policy which insured two premises they owned and tenanted out. The policy was initially taken out through a broker. Both premises were tenanted to operate as a business.

In May 2021 a significant fire took place causing extensive damage to one of the properties. So Mr and Mrs M looked to claim for this damage on their insurance policy. However, Folgate subsequently decided to avoid the insurance policy because it said the tenant from the property in question had never traded from the premise and it believed the property had been unoccupied for around three years before this. It said Mr and Mrs M should have explained this when the policy renewed and, had they done so, Folgate said it wouldn't have renewed the insurance policy.

Mr and Mrs M didn't think this was fair. They said the tenants were paying rent, so had no reason to believe they weren't attending the property.

Our investigator didn't uphold this complaint. She said it was Mr and Mrs M's responsibility to tell the insurer everything it needed to know and she said that the statement of fact asked whether the property would be unattended for more than 30 days. And she thought Mr and Mrs M would have been reasonably aware the tenants hadn't been trading. She was satisfied that the insurer wouldn't have renewed the policy had it known this, so she thought it was entitled to avoid the insurance policy.

Mr and Mrs M didn't agree with the investigator. They said it was the tenants' issue if they couldn't trade but reiterated that they were paying rent. As they didn't agree with the investigator, the complaint's been passed to me to decide.

## **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.

I've decided to not uphold this complaint and I'll now explain why.

I should first set out that I acknowledge I've summarised Mr and Mrs M's complaint in a lot less detail than they've presented it. I'm aware a lot more has happened than I've set out above. I've not commented on each and every point they've raised but, instead I've focussed on what I consider to be the key points I need to think about. I don't mean any discourtesy about this, but it simply reflects the informal nature of this service. I assure Mr and Mrs M, however, that I have read and considered everything they've provided.

Folgate says it's entitled to avoid the insurance policy because it says Mr and Mrs M should have told it that the property would be unoccupied. Mr and Mrs M dispute the property wasn't occupied as they say the tenants were still paying rent, so they think this is enough to say the property was occupied.

The relevant law in this case is the Insurance Act 2015 (the Act). This required the policy applicant to make a fair presentation of the risk to the insurer so that it had enough information to assess the level of risk it was willing to provide and on what terms. If the applicant fails to do this, the insurer has certain remedies provided the misrepresentation is – what the Act describes – as a qualifying breach. For it to be a qualifying breach the insurer has to show it would have offered the policy on different terms or not at all if the consumer hadn't made the breach.

If the qualifying breach was reckless or deliberate and an insurer can show it would have at least offered the policy on different terms, it's entitled to avoid the consumer's policy. If the breach wasn't deliberate or reckless, then to avoid the policy, the insurer must show it would not have offered the policy at all if it wasn't for the breach.

If the insurer is entitled to avoid the policy, it means it will not have to deal with any claims under it. If the qualifying breach wasn't deliberate or reckless and the insurer would have charged a higher premium if the consumer had made an actual fair presentation of the risk, it will have to consider the claim and settle it proportionately if it accepts it.

When the policy renewed, the broker sent out the policy documents on Folgate's behalf, including the statement of fact. This set out that Mr and Mrs M needed to check all the information they'd provided was correct and accurate. The statement of fact asked Mr and Mrs M:

*"Can you confirm the buildings, garages and outbuildings are never left unattended for more than 30 consecutive days?"*

Mr and Mrs M said it wasn't. Folgate says this wasn't a fair presentation of the risk and I think that's fair for the following reasons:

- The fire investigator said that he'd spoken with one of the tenants who said that his family had originally rented the property with the ambition of opening it as an antiques shop. However, shortly after they rented the property, his father died and this put their plans on hold. Given this, the shop has never traded. The investigator said the tenant advised he'd last visited the property over a year ago when there was an issue with a break-in and he visited the property at that time with Mr M.
- In March 2020, Mr and Mrs M attended the property with the Police and discovered that the property had previously been used to cultivate cannabis. The machinery had been removed, but there was some evidence of it. The fire investigator said this evidence still remained when the fire started 14 months later.
- Mr and Mrs M confirmed they were aware the gas and electricity were turned off in March 2020, following the discovery of the cannabis production.
- Folgate's loss adjuster looked at online photos of the property and said that this showed the frontage appeared to be in the same condition it was in when the tenants first took over the tenancy.
- Mr M was undertaking renovation work in the flat above the neighbouring property so he would have seen whether there was any change to the property's occupancy during that time.
- In response to the investigator's opinion, Mr M said that he knew the tenant wasn't trading.

Mr and Mrs M have commented that the police didn't instigate any criminal proceedings, so they think it's unfair any implications are arising from the growing of cannabis. But they also suggest that, the fact the property had been used to cultivate cannabis, shows it had been occupied.

I should make clear that the policy hasn't been avoided because of the previous growing of cannabis, but because it was unoccupied. I acknowledge their point that, the fact someone was growing cannabis, suggests it had been occupied. But the cannabis was discovered five months before the policy renewed. From reading the Police report, it seems the production had stopped some time before this. The question asked Mr and Mrs M to confirm that the property wouldn't be unattended for more than 30 days. And, for the reasons I've explained above, I think they ought to have been aware, or were at least on notice, that it was likely it would be unattended for more than 30 days during the policy term. And I think they would have been reasonably aware it hadn't been properly occupied for a long period of time before that.

I note Mr and Mrs M have said it's the tenants' issue if they couldn't trade from the property and they were still receiving rent from the tenants. But it was Mr and Mrs M's responsibility to make a fair presentation of the risk to Folgate. As I said, given the length of time the tenants hadn't been trading, the history of what had happened, the fact that they were aware the gas and electricity had been turned off and the other reasons I set out, Mr and Mrs M were at the very least on notice that it was possible, and in fact likely, that there was going to be periods of time (and potentially extended periods of time) where no one was going to be going in and out of the property. The fact the tenants were paying the rent, doesn't mean it was occupied. And Mr M has confirmed he was aware the tenants weren't trading.

As I said, it was ultimately Mr and Mrs M's responsibility to ensure they were providing Folgate everything it needed to know. The statement of fact shows that Folgate wanted to know whether the policy was going to be unattended for more than 30 days at any point. I think Mr and Mrs M should have made enquiries with the tenant on this if they were unsure. And, ultimately, they have given Folgate incorrect information. Given this, I can't reasonably say Folgate were unfair in saying Mr and Mrs M didn't make a fair presentation of the risk regarding the property's occupancy.

I don't think Mr and Mrs M did this deliberately, but they made a mistake. Under the Act, this would be considered a careless breach. As I said above, to avoid the policy, Folgate must show it wouldn't have offered the policy at all if it wasn't for the breach. Folgate's underwriter has given an explanation of what Folgate would have done had Mr and Mrs M made a fair presentation of the risk. I've reviewed this and I'm satisfied it wouldn't have renewed the policy had it known the true circumstances. So I'm satisfied that it's shown it wouldn't have offered the policy if it wasn't for the breach. It follows, therefore, that I can't say it was unfair that Folgate has avoided Mr and Mrs M's insurance policy. And in doing so, it's entitled to say there is no valid insurance policy to cover the damage arising from the fire.

### **My final decision**

For the reasons I've set out above, it's my final decision that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M and Mrs M to accept or reject my decision before 20 February 2024.

Guy Mitchell  
**Ombudsman**