

The complaint

A, a restaurant business, complains that Hubener Versicherungs AG (Hubener) declined a claim made under its commercial insurance policy.

Where I've referred to Hubener, this also includes any actions or communication by agents acting on their behalf.

What happened

A has an insurance policy for its restaurant business, underwritten by Hubener. The policy includes cover for, amongst other things, material damage to property. In January 2023, A's kitchen floor sunk and collapsed, so A made a claim to Hubener.

The claim was initially declined by Hubener on the basis that the damage was thought to have been caused gradually over time by the lack of a moisture membrane in the flooring. Hubener said gradual and rot damage is excluded under the terms of A's policy.

A arranged for another contractor to carry out an inspection. They discovered a fractured pipe had been leaking underneath the flooring, which they concluded had resulted in the floor collapsing.

Whilst it was concluded that the cause of the damage was different, Hubener maintained the claim declination based on the same policy exclusions.

As A remained unhappy, it approached the Financial Ombudsman Service.

One of our investigators looked into things and upheld the complaint. She said that she recognised gradual and rot damage are excluded under the policy. But she said the cause of this was a fractured and leaking pipe, A couldn't have been aware of this prior to the floor collapse and contacted Hubener as soon as it was aware. So, she didn't think it was fair for Hubener to rely on the exclusions they had to decline the claim.

The investigator recommended Hubener should reconsider A's claim in line with the policy terms, pay 8% simple interest on top of any settlement due, and she said Hubener should also pay A £350 compensation.

Hubener didn't agree and asked for a final decision from 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.

Having done so, I've reached the same outcome as our investigator.

A has an 'all risks' type insurance policy. The policy terms outline:

“COVER

In the event of accidental Damage to the property insured described in the Schedule which occurs at the Premises during the Period of Insurance by any accidental cause not otherwise excluded We will pay You the value of the property at the time of Damage or the amount of the Damage or, at Our option, replace or reinstate the property.”

And damage is defined as:

“Damage

Loss destruction or damage.”

This means the policy provides cover for damage (as defined) caused to the premises, unless otherwise specifically excluded. Therefore, A needs to show damage has occurred, and Hubener would then need to deal with the damage claim, unless they could show an exclusion applied.

The kitchen flooring at A’s restaurant sunk and collapsed, so A has shown damage (as defined) has been caused. A arranged for its own contractor to investigate the collapse of the kitchen floor. The contractor said they thought a lack of a moisture membrane being present in the construction of the floor caused it to deteriorate over a long period of time, ultimately resulting in the collapse.

So, whilst A had shown damage had been caused and it had a potential claim under the policy, Hubener declined the claim on the basis of the following policy exclusions:

“We will not pay in respect of:

3 Damage caused by or consisting of

(a) wear and tear; frost; wet or dry rot; dampness or dryness; or any other gradually operating cause;

...

(e) inherent vice; latent defect; faulty or defective design or materials

(f) faulty or defective workmanship; operational error or omission on Your part or the part of any of Your employees”

Following the claim decline, A subsequently arranged for another contractor to investigate what had happened to the floor and caused the collapse. They concluded:

“Following our initial survey, the wash water drainage pipe was seen to be fractured and seeping water into the sub-floor. In our opinion this is the root cause of the timber floor failing.”

And the contractor provided videos to support there was a leaking pipe found under the floor. They also later said it was a ‘recent leak’.

However, whilst the cause of damage was concluded to be different to that originally thought (a lack of membrane), Hubener’s claim decline decision overall remained the same as they said the same exclusions for gradual damage and rot still applied.

I agree it’s most likely that the damage would have occurred gradually as a result of the leaking pipe. And I think it is likely that it is the escape of water from the pipe that then caused the rot to occur, rather than there just being rot present, without the escape of water. I say this as nothing conclusive has been provided which persuades me the rot has occurred

solely for another reason, rather than due to the leaking pipe which has been evidenced. But as Hubener says, there are exclusions in the policy for both gradual damage and damage caused by rot. So contractually under the policy terms, by strict application of the exclusions, the claim would be excluded.

However, the Financial Ombudsman Service has a longstanding approach to complaints relating to gradual damage (and rot damage) exclusions. Hubener, should already be aware of our approach, but I'll summarise it here for the benefit of both parties.

Most insurance policies cover insured 'perils'. These are specific insured events, such as fire, flood and theft. If this was the type of policy A held (rather than all-risks), the most likely insured 'peril' here would be escape of water, given it is water escaping from a fractured pipe which has caused the damage (and subsequent rot). And in perils policies, gradual damage, and damage caused by rot, are frequently excluded too.

When we consider gradual (and subsequent rot) damage complaints under 'perils' policies and an insured peril has occurred, whilst contractually an insurer could decline the claim based on the strict application of this type of exclusion, this service wouldn't always consider it is fair or reasonable for an insurer to do so.

Instead, we'd likely say it was fair for an insurer to apply this type of exclusion if the policyholder was (or ought reasonably to have been) aware of the damage happening gradually as a result of an insured peril before later making a claim. This is because they should have known, but then hadn't acted on it, and if they had done then they could have done more to prevent the damage being caused or made worse, such as subsequent rot setting in. So, in this situation we would likely say it was fair and reasonable to apply an exclusion for gradual damage (and consequential rot damage).

However, if we think a policyholder wasn't (or couldn't reasonably have been) aware of the damage happening gradually (or subsequent rot setting in) as a result of an insured peril, and they made the claim or took reasonable actions as soon as they were aware, then we'd likely say that it isn't fair or reasonable for an insurer to rely on this type of exclusion to decline the claim. This is because the policyholder wouldn't have known damage was being caused, so were prevented from noticing the damage, contacting the insurer or doing anything to stop it getting worse. So, as the policyholder couldn't have done anything more, generally in this situation we wouldn't think it was fair or reasonable for them to lose out because of this type of exclusion.

Whilst A has an 'all-risks' type of policy, rather than specific insured perils, we wouldn't expect a policyholder to be in a worse position than if they had a 'perils' policy, if they couldn't have been aware of the damage being caused, contacted the insurer and/or took reasonable actions as soon as they were, and it would have been something which was covered under a 'perils' based policy – here, escape of water damage.

Having considered all the information, it doesn't appear A was aware, or could have been aware, of any issues or gradual damage (or subsequent rot occurring) to the floor prior to its collapse. The flooring was tiles laid on top of concrete, laid on top of wood. And it wasn't until it collapsed, and investigations were carried out, that it was discovered there was a fractured leaking pipe under the floor causing damage gradually, which had then resulted in some consequential rot damage too.

As A reported the damage and issue as soon as it became aware, and nothing has been provided which shows A was, or could reasonably have been, aware before this, I don't think it's fair or reasonable for Hubener to apply the exclusions it has done to decline the claim. I do recognise that it is impossible to say when exactly the pipe started leaking, causing damage and subsequent rot to occur. But the floor collapsed when Hubener was on cover, and it was at that point where the damage and issue became evident. The fact it was still leaking after the collapse and discovered when being investigated, it's likely that damage was caused when Hubener was on risk for the policy either way, and there is no evidence to support that it would solely have been caused pre Hubener providing cover.

Therefore, I'll be directing Hubener to reconsider A's claim in line with the remaining policy terms. 8% simple interest should also be added to any cash settlement due, from one month from when the claim was made (to allow Hubener a reasonable amount of time to have considered the claim) to the date of settlement.

I should also clarify here that when our investigator recommended the same as I'm directing as a settlement to the complaint, Hubener responded disagreeing. They said that gradual damage is an uninsurable peril and as an insurer they aren't able to price cover for this, and this underlines the general principles of insurance. They also said they didn't think it was within the Financial Ombudsman Service's remit or legal ability to force provision of cover which was never intended to be provided.

However, Hubener should already be aware of the role and remit of the Financial Ombudsman Service. Whilst we do take into account policy terms and conditions, our remit also extends to what we consider fair and reasonable in all the circumstances of a case. This means we can direct a business to do something outside of the strict application of the policy terms, if we consider it is fair and reasonable in all the circumstances of the case to do so. That is what I'm doing here. And I'm following a longstanding approach of this service to this type of case. That is, I accept there are exclusions in the policy, and by strict application Hubener could apply them. But I don't think it's fair and reasonable in all the circumstances of the case to do so, for the reasons explained above.

I think unfairly declining the claim has also caused A additional inconvenience which included arranging works in order to resume trading. And in addition to reconsidering the claim in line with the remaining policy terms (and paying 8% simple interest on any cash settlement due), I also agree with our investigator that Hubener also needs to pay A £350 compensation.

My final decision

It's my final decision that I uphold this complaint and direct Hubener Versicherungs AG to:

- Reconsider A's claim in line with the remaining policy terms
- Add 8% simple interest to any cash settlement due from one month from when the claim was made to the date of settlement
- Pay A £350 compensation

*If Hubener Versicherungs AG considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell A how much it's taken off. It should also give A 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 A to accept or reject my decision before 27 February 2024.

Callum Milne
Ombudsman