

The complaint

B, a company, complains about the settlement paid by Folgate Insurance Company Ltd after making a claim under their commercial insurance policy.

B is represented by Mr and Mrs S.

What happened

B holds a commercial policy with Folgate that was arranged by a broker. The cover started in October 2022, and was arranged with a sum insured of £450,000.

Following an escape of water at the property a few months later, Mr and Mrs S made a claim to Folgate. Whilst assessing the claim, Folgate calculated the rebuild cost of the property to be £967,953.39 (though this was later reduced to £939,420.86). Folgate concluded that B had only paid 65.7% of the correct premium and that B would need to contribute the remaining 34.3% for the repairs.

Mr and Mrs S told Folgate they thought their broker had been responsible for the underinsurance. The broker informed Folgate they had made an error and the sum insured ought to have been £500,000. Folgate told the broker that if the premium had been paid for £500,000 worth of cover, then the claim settlement would have been 68.9%.

Mr and Mrs S agreed to pay their contribution of 34.3% towards the repairs, but wanted Folgate's contractor to do the repairs. Folgate also made cash settlement payments (including business interruption) but deducted 34.3% from those payments. Mr and Mrs S complained to Folgate about the length of time it had taken for the repairs to start.

Folgate issued a final response on the matter on 23 May 2023. It said there were some complications due to the property's rebuild sum insured, but accepted that this shouldn't have prolonged the claim to the extent Mr and Mrs S had experienced. It paid them £500 compensation for this, and also confirmed it would cover the business interruption claim and costs incurred to dry the property up to 18 April 2023 (when progress started to be made with the claim) without any proportionate reductions. Folgate also said it had no reason to doubt the accuracy of the rebuild cost provided by its expert.

Mr and Mrs S brought a complaint to the Financial Ombudsman Service on B's behalf. They said they hadn't been able to trade because of the delay with the repairs.

Our investigator recommended the complaint be partly upheld. She thought Folgate ought to have dealt with the claim as if the sum insured had been £500,000.

I issued a provisional decision on 5 February 2024. Here's what I said:

'B has a complaint against the broker, which I'm considering under a different reference. This decision focuses solely on B's complaint about Folgate.'

Although Mr and Mrs S didn't complain to Folgate about the proportionate approach it

applied to the claim, I do have inquisitorial jurisdiction and have therefore considered this.

B is a commercial customer, and the law I need to take into account is the Insurance Act 2015. This says that B was required to make a fair presentation of the risk to Folgate. That meant disclosing any material information it knew, or ought to have known.

The policy was sold by a broker, so I can't take into account what questions or guidance the broker asked Mr and Mrs S.

Folgate and the broker have confirmed that Folgate asked about the sum insured for the 'Buildings, including landlords fixtures and fittings'. So Folgate is saying that Mr and Mrs S didn't make a fair presentation of risk regarding the sum insured. However, the sum insured doesn't need to be the rebuild cost, it can mean a number of things and is open to interpretation.

Folgate says it wanted to know how much it would cost for the property to be demolished and rebuilt in its entirety. That might have been what Folgate wanted to know, but it only asked about the sum insured. I haven't seen anything from Folgate to show that it wanted the broker to treat the sum insured as the rebuild cost. So I don't think it would be fair here for Folgate to treat the sum insured and rebuild cost as the same thing.

It therefore follows that Folgate hasn't shown that B failed in its duty to make a fair presentation of the risk. That means Folgate has no remedy against B, and wasn't entitled to reduce the claim settlement by 34.3%.

Though I also need to take into account that the broker made an error when arranging the sum insured as this should have been £500,000 rather than £450,000. I'm intending to require the broker to pay 3.2% of the claim settlement. Folgate should therefore cover the remaining 31.1%.

Mr and Mrs S complained about the delays to the repairs starting. It's clear Mr and Mrs S were anxious for the underinsurance issue not to hold up repairs, so they could reopen their business as soon as possible, but there were unnecessary delays whilst Folgate considered the potential underinsurance. However, I'm satisfied the £500 compensation paid by Folgate was appropriate here for the delays as this recognised the inconvenience caused to B, and I don't require it to pay a further amount for this.'

I asked both parties for any further comments they wanted to make before I made a final decision.

Mr and Mrs S didn't have any further comments to make.

Folgate responded to say it strongly disagrees with my provisional findings. It made the following main points:

- Mr and Mrs S haven't complained that they misunderstood the basis of their insurance in respect of the building sum insured.
- It is the role of the broker, as the agent for the insured, to fully explain the need to ensure the sum insured is adequate to cover a total loss scenario.
- The broker would have understood that Folgate wanted an accurate rebuild value of the property. The term 'sum insured' is used predominantly within the insurance market, and is well understood by brokers and commercial customers.
- B accurately insured the other sections of cover (ie contents/stock) which indicates that Mr and Mrs S intended to insure the property/business for its full value. However, the buildings sum insured just wasn't adequate. If there was some confusion between the rebuild and market value of the property, then it thinks the market value would be even higher.
- In the first page of the Statement of Fact, it says that if the level of cover isn't adequate, then this may result in the amount Folgate pays the insured being reduced in the event of a claim.

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.

Although Mr and Mrs S haven't specifically complained that Folgate asked about the sum insured rather than rebuild cost, as I've said, I have inquisitorial jurisdiction and I'm satisfied it's appropriate for me to consider this.

The broker acted on the insured's behalf. Folgate wasn't responsible for the sale of the policy, or any guidance given to Mr and Mrs S during the sale. However, Folgate was responsible for setting out to the broker what information was needed in order to set up the policy.

I appreciate that the level of detail an insurer gives a broker will likely be less than if a consumer were taking out the policy directly. For example, if an insurer asked a broker what the rebuild cost was, then I'd expect a broker to understand what that means, and provide appropriate guidance to the insured about what they need to provide. However, as Folgate only asked the broker for the sum insured, I'm not satisfied that Folgate made it clear to the broker that it wanted to obtain the full rebuild cost from Mr and Mrs S.

Here, the onus is on Folgate to show that an answer provided by the insured didn't amount to a fair presentation of the risk. But Folgate hasn't shown that it wanted to know the rebuild cost, only that it wanted to know a sum insured. I've therefore only considered whether Mr and Mrs S gave a fair presentation of the risk based on this. It might be helpful if I set out more detail about why Mr and Mrs S wanted a sum insured of £500,000 in 2022.

Mr and Mrs S purchased the property in 2013, and say the sum insured chosen at the time was based on what the broker told them was appropriate. We don't have a record of that information, so we don't know what that initial sum insured amount was based on. The sum insured was then increased each year, to take into account inflation (presumably required by the previous insurers).

I don't know if Mr and Mrs S have ever understood that the sum insured should be the full rebuild cost. It may well be the case that they have always thought the sum insured was simply the maximum amount they wanted to be insured for, on the assumption that any claim would likely be less than this, as it is here.

The sum insured of £500,000 (though the application wrongly stated £450,000 due to the broker's error) was chosen in 2022 based on the previous year's sum insured with a different insurer, plus a percentage increase applied by the broker to account for inflation and higher building material costs. So I can understand why Mr and Mrs S agreed to the figure of £500,000.

Taking everything into account, I'm still not persuaded that Folgate acted fairly when concluding that Mr and Mrs S failed to make a fair presentation of risk when it only asked about the sum insured. I recognise that Folgate feels strongly about this, but I remain of the opinion it shouldn't have proportionally settled the claim.

Folgate has referred to the Statement of Fact, which says *'If the level of cover that you have selected is not adequate, this may result in the amount that we pay you being reduced in the event of a claim'*.

I assume this is referring to a term in the policy (the average clause) which says *'If at the time of damage the sum insured is less than the value of the building insured, the amount we will pay will be reduced proportionately'*.

It's not clear if Folgate is seeking to rely on the average clause. If it isn't, then the information in the Statement of Fact doesn't make it clear that Folgate wanted to know the rebuild cost, and so this doesn't change my findings on the matter.

If Folgate *is* seeking to rely on the average clause, then I don't think it would be fair for it to do so. I say that because this would put B in a worse position than provided for under the Insurance Act 2015 ('the Act'). The Act makes it clear that an insurer can only contract out of the Act if it fulfils certain transparency requirements (the term it seeks to rely on must be drawn to the insured's attention before the contract is taken out, and the term must be clear and unambiguous as to its effect).

Folgate hasn't indicated that it thinks it has contracted out of the Act. But even if it had said this, I'm not satisfied it's done enough to fulfil the transparency requirements of the Act in relation to contracting out. So I don't think it would be reasonable for Folgate to rely on the average clause.

As I've found that Mr and Mrs S made a fair presentation of the risk, I remain of the opinion Folgate can't make any deduction to the settlement, and so it should pay 31.1% of the claim (taking into account that I'm requiring the broker to pay the other 3.2%).

My final decision

My final decision is that I uphold this complaint. I require Folgate Insurance Company Ltd to do the following:

- Reimburse Mr and Mrs S 31.1% of the amount they paid towards the repairs. Interest should be added at the rate of 8% simple per annum from the date they made the payment(s) to the date of settlement.*
- Pay Mr and Mrs S 31.1% of the cash settlement payments that were proportionately reduced. Interest should then be added at the rate of 8% simple per annum from the date the payments were made to the date of settlement*.

* If Folgate considers that it's required by HM Revenue & Customs to take off income tax from that interest, it should tell Mr and Mrs S on behalf of B how much it's taken off. It should also give them a certificate showing this if they ask for one, so they can reclaim the tax from HM Revenue & Customs if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs S on behalf of B to accept or reject my decision before 19 March 2024.

Chantelle Hurn-Ryan
Ombudsman