

The complaint

Mr G, a sole trader, has complained about his commercial property insurer Aviva Insurance Limited. Aviva has avoided Mr G's policy (treated it as though it has never existed), by association declining a fire claim. But Aviva has also said it is reserving its right to decline the claim in any event, on policy terms, if its avoidance is found to be unfair or unreasonable.

Whilst I've noted here Aviva's argument about the claim – that only becomes an issue in need of consideration if the avoidance is found to be unfair and unreasonable. As our Investigator explained, this complaint then focuses on the avoidance.

What happened

Mr G has a joinery business. He arranged cover via a broker with Aviva. The broker used an electronic form from Aviva to ask Mr G questions. Mr G has said his broker asked if the construction of the business premises was standard – of brick/stone and roofed with slate/tile. Mr G said it was.

The policy was due to renew in August 2022. The broker sent Mr G policy documents which he was asked to check. They included a 'statement of fact' (SOF). The statement of fact said Mr G had to disclose to Aviva every material fact he knows or ought to know, and warned that he should check the rest of the documents to make sure the risk had been fairly presented in that respect. The SOF set out details, as Aviva understood them, about the business premises – that the buildings were constructed of brick/stone/concrete and roofed with slate/tile/concrete/metal/asbestos. Mr G did not contact his broker or Aviva to say anything else needed to be considered.

In October 2022 there was a fire at the premises. Aviva began considering a claim by Mr G. But quickly noted that there were significant timber features of the business premises. Aviva felt Mr G should have told it about that, certainly at renewal. It said if he had, it wouldn't have continued with the risk in 2022. It told Mr G it was avoiding the policy and refunding the premium.

Mr G felt Aviva was acting unfairly by seeking to avoid the policy. He said he'd been asked, essentially, if the buildings were of standard construction, which he maintained his premises were. He said all buildings contain some elements of timber but it wasn't fair to say his premises was "constructed of timber". He felt Aviva should reasonably have expected some timber features and, as such, he felt he didn't also need to tell it there was timber. Just as he wouldn't need to tell it mortar was used.

Mr G complained to the Financial Ombudsman Service.

Our Investigator felt that Aviva had acted fairly and reasonably in line with relevant legislation. So he didn't uphold the complaint.

Mr G was unhappy. He reiterated some points made previously and provided some further comments. He said it hadn't been shown that Aviva would not have covered this risk, and it

had chosen not to survey the property at renewal. He had trusted the broker to advise him. Mr G said surely commercial insurance is no different to private insurance.

The complaint was referred for an Ombudsman's 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.

Having done so I'm of the same view as our Investigator. And for the same reasons.

I can assure both parties that I'm aware and have considered the wealth of expert evidence and arguments provided by both sides. But as we are an informal service, I must keep my assessment focussed on the main details that I'm satisfied are most relevant to my findings. As such, I won't directly reference every expert or all the reports, or every argument that has been raised and debated.

From reviewing all of the reports there are four key things which are both apparent and that all parties seem to agree on.

- There is an outbuilding fully constructed of timber.
- There is a timber partition wall within the main building of the premises.
- That main building is clad in timber (affixed to concrete blocks).
- The external wall, above the level of the door up to the roof line is entirely timber (it isn't just cladding material at this level).

I note that Aviva has provided evidence from its lead underwriter, and that the lead underwriter also wrote to Mr G's broker. The lead underwriter explains that given the hazardous nature of the business, these timber aspects would have been material to its consideration of the risk. And that if Aviva had been made aware of them, it wouldn't have continued to offer cover to Mr G. With this having come from a lead underwriter – it is compelling evidence about what Aviva would've done if it had been told about the timber.

The questions remain then, should Aviva have expected timber, like this, to be part of the buildings. And, if not, should Mr G ought to have known to tell Aviva about this timber.

Those questions are relevant because the legislation which applies to commercial policies (there is different legislation for 'private' insurance) – the Insurance Act 2015 – places the onus on the policyholder to provide a fair presentation of the risk when applying for cover and at renewal. This means that the policyholder should tell the insurer about any material facts – anything which is important to the insurer's consideration of whether to offer cover – which they either know or ought to know. But they don't have to tell the insurer something which it should already know about.

I don't think it would be reasonable to say Aviva should have expected that a brick/stone or concrete building would most likely be clad in wood. Or that it would have timber only walls at a higher level. Or that having been told the buildings were constructed of brick/stone or concrete, one building would be fully constructed of timber.

So Aviva wasn't, in my view, reasonably aware of timber aspects at the property. But it has shown that, had it been, it wouldn't have renewed the cover. Meaning the timber elements were material to its decision on risk. Therefore, I've considered whether Mr G knew or ought to have known to tell Aviva.

Mr G clearly knew the buildings at his premises contained aspects of timber. I know he thinks these added little risk in terms of insurance because his business involved working with timber. But he knew, even based on what he says the broker asked him, that Aviva wanted to know the buildings were constructed of brick or stone. So I think that reasonably put him on notice that the nature of the buildings was important to Aviva. But I also note that Mr G has said he didn't place much emphasis on this question at the time. He was perhaps more focused on other questions about claims. I think if Mr G had paid attention to the question asked, he, at the least, would have thought about the outbuilding which is entirely of timber construction.

I also think that someone who works cutting wood, should reasonably have thought about additional fire risks. This is the point Aviva's underwriter has made. Wood cutting is hazardous as it creates hot sparks. I think someone working with wood should reasonably have thought to query if wrapping a building in timber, and having walls purely of timber, which arguably might catch fire easily from a spark, would be an additional risk the insurer would want to know about. Additional because, as I've said, timber like that wouldn't reasonably be expected to be present in a brick/stone/concrete building.

Having considered everything, I'm satisfied then that Mr G did not tell Aviva something which he knew or ought to have known. Which means he did not make a fair presentation of the risk when cover renewed. Further, Aviva has satisfied me that if a fair presentation had been made it would have done something differently, ie not continued cover. As such, under the Insurance Act that means Mr G committed a 'qualifying breach'.

When a qualifying breach occurs, the insurer is allowed to act as it would have done had it be given a fair presentation of the risk. Where cover wouldn't have been given that means it can avoid the policy – treat it as though it never existed. Which is what Aviva has done here, also returning the policy premium to Mr G. I appreciate that Aviva's decision is distressing for Mr G, as it will affect not just his business but also arranging insurance in the future, because the avoidance will have to be declared. However, having considered everything, I think that on this occasion, Aviva's decision was fair and reasonable.

I'm aware that Mr G has said his broker wasn't aware Aviva would want to know about the timber, that he was reliant on the broker for advice and that if Aviva had asked the broker if there was timber, the broker would have told Aviva about it. But I can't comment here on any action of the broker. And I've explained above why, based on the details put to him, I'm satisfied that Mr G knew or ought to have known to tell Aviva about the timber aspects of the buildings at his premises.

My final decision

I don't uphold this complaint. I don't make any award against Aviva Insurance Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G to accept or reject my decision before 18 April 2024.

Fiona Robinson
Ombudsman