

The complaint

E, a limited company, is complaining about Hubener Versicherungs AG's (Hubener) decision to decline a claim made under their commercial insurance policy.

Any references to Hubener include their agents. E is being represented by Mr M.

What happened

In April 2023, there was a fire at a takeaway shop owned by E. A claim was made to Hubener. Various inspections were undertaken of the property, including of the ductwork where the fire was believed to have started.

Hubener declined the claim, saying E had breached three policy condition precedents. In particular Hubener said E had breached condition precedents requiring the cooking materials to be free from contact with combustible materials, extraction ducts to be regularly cleaned and maintained and that where ducts passed through combustible material this needed to be cut away at a certain distance.

E disagreed with this and raised a complaint, but Hubener didn't change the claim outcome, though did concede there were no longer concerns about the cleaning and maintenance of the extraction ducts. Mr M referred E's concerns to this service. He said to put things right, E wanted the claim to be covered and for loss of income to be considered.

These concerns were considered by one of our investigators who said the forensic reports led him to believe two of the condition precedents had been breached. However, the forensic reports confirmed the fire was limited to the extraction duct and our investigator considered the damage would largely have been the same if the condition precedents had not been breached. Our investigator said the claim for damage, and that for loss of income, should be accepted subject to the remaining terms and simple interest should be paid on any claim settlement awarded under the policy.

E accepted the investigators conclusions. Hubener didn't agree, saying they had relied on the condition precedents fairly, and these were accepted by E when they took out the policy. As our investigator didn't change his mind, this case has 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 only included a brief summary of what's happened. I'd like to reassure both sides that while I've summarised the background to this complaint and the submissions to us, I've carefully considered all that's been said and sent. In this decision though, I haven't commented on each point that's been made and nor do our rules require me to. Instead, I've focused on what I think are the key issues.

In saying E breached the policy terms, Hubener is relying on the following endorsement which was set out in the policy schedule:

“702: Frying and Cooking Equipment Condition 1...

It is a condition precedent to liability under all sections of this policy that:-

b) All frying and other cooking ranges, equipment, flues and exhaust ducting will be kept securely fixed and free from contact with combustible materials;

d) All extraction ducts will be cleaned regularly and maintained and checked at least once annually by a specialist contractor

j) Where ducts pass through any combustible material, it should be cut away for a distance of at least 150mm from the duct and the space filled with non-combustible insulation.”

Hubener say they are no longer relying on condition precedent d) when declining the claim, so I won't comment on this any further in the decision. Instead, I've considered condition precedents b) and j) to decide if Hubener can show these have been breached, and if it's fair to rely on these when declining the claim.

I've started by considering the forensic reports. One has been provided by a company who I'll refer to as H. H's report makes the finding the extraction duct had been installed but the majority of it was not in close proximity to combustible materials. However, there were some areas where timber was in direct contact with the extraction duct. H's report said the timber was charred as a result of the fire. I consider this supports Hubener's conclusion E was in breach of condition precedent b) and j), given the photographic evidence in H's report showing timber planks in contact with the extraction duct.

E arranged for their own forensic report to be compiled, and I've considered this too. The report refers to combustible materials burning outside the extraction duct and notes it's possible there may have been combustible materials in the ceiling void which might have burned as a result of the heat from the extraction duct. So, both reports identify combustible material in direct contact with the extraction duct, with the report provided by E noting there could also have been combustible material in the ceiling void.

The Insurance Act 2015 applies to commercial policies. Section 11 essentially says than an insurer can't rely on a breach of a policy term if the breach didn't increase the risk of the loss which actually occurred.

Whilst I accept Hubener has demonstrated the condition precedents were breached I'm not persuaded it would be fair and reasonable in the circumstances of this complaint for me to accept these breaches alone as a reason to decline to provide cover. I say this because both forensic reports make the finding the fire was largely confined to the extraction duct. So, whilst I accept there was a breach of condition precedents, I consider it more likely than not that the damage to the property would have been the same, had the condition precedents not been breached, given the consistent findings of both forensic reports that the fire was largely contained by the extraction duct.

I appreciate the arguments Hubener has made about why the condition precedents were in place as part of the policy terms E agreed to when taking out the policy. They are in place to limit the risk of further damage being caused if the condition precedents are not complied with. However, given the findings about the fire being largely contained to the extraction duct, I don't consider Hubener has been prejudiced by the condition precedents being breached, or that it was fair for Hubener to rely on these breaches to decline cover.

I'm requiring Hubener to accept and deal with the damage caused as a result of the fire, subject to the remaining policy terms. Hubener should also consider E's claim for loss of income given they've not been able to trade since the fire. Again, this part of the claim is subject to the remaining policy terms. On any payment made, Hubener should pay simple interest at 8% per annum from the date the claim was declined until the date of settlement.

My final decision

My final decision is that I uphold E's complaint against Hubener Versicherungs AG, and to put things right I require Hubener Versicherungs AG to:

- Accept and deal with the claim for fire damage and loss of income, subject to the remaining policy terms.
- Pay simple interest at 8% per annum from the date the claim was declined until the date of settlement *.

* If Hubener Versicherungs AG considers that it's required by HM Revenue & Customs to deduct income tax from any interest paid, it should tell E how much it's taken off. If requested, Hubener Versicherungs AG should also provide E with a certificate showing the amount deducted, so they can reclaim it from HM Revenue & Customs if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask E to accept or reject my decision before 7 November 2024.

Emma Hawkins

Ombudsman