DRN-5098743

The complaint

H complains HCC International Insurance Company Plc trading as Tokio Marine HCC ("TM") unfairly declined a claim it made on its commercial property insurance following a fire.

H is made up of two flats, its director has consented to a complaint being brought by Mr S, who is the owner of the affected property covered by H's policy.

Mr S has, at times, been represented by solicitors. But for ease I've referred to all actions and comments as being his own.

Any reference to TM also means its appointed agents, including the agent which arranged the policy on its behalf.

What happened

H took out insurance, with TM being the underwriter of the policy. In May 2022, Mr S said he intended to carry out a loft conversion on the insured property. A new policy schedule was issued on 9 May 2022. It included an endorsement titled *"HCC23 minor works"* which said amongst other things:

"we will not pay:
…the first £500 of any claim arising out of or as a consequence of the building work;"

The cost of the works had also been noted on the schedule to be £16,000.

Having received the updated schedule Mr S said the wrong risk address had been listed as unoccupied on the document. Mr S also said the works would actually cost £160,000. An amended policy schedule was provided to reflect the costs. An extra premium was charged and a further endorsement was added to the policy which said:

"HCC07- Contractor's clause
We will not pay for any loss, damage, or liability arising out of the activities of any contractor."

In October 2022, whilst the work was ongoing, a fire broke out in the upper floors of the building. It was first discovered at around 7pm, with the contractor having left around 5pm. Mr S, on behalf of H, made a claim for the resultant damage under the policy.

TM declined the claim in December 2022. It said evidence it had gathered suggested that the fire was caused by activities associated with the works being carried out by the contractor. It said forensic analysis showed a bag of sawdust left by the contractors was the likely cause of the fire. It said due to the *'contractor's clause'* added to the policy, it wasn't responsible for putting right the damage caused by the fire.

Mr S complained, he said that there was no proof the fire was caused due to the contractor's activities. Further he said even if this could be shown, the endorsement couldn't be relied on by TM, because the other endorsement, relating to *'minor works'* contradicts the *'contractor's clause'* endorsement, and so the policy is ambiguous. So he thought due to the ambiguity, the legal principles of "contra preferentum" should apply, meaning that any ambiguity should be read in his favour, and the claim paid.

TM didn't agree to change its position and so Mr S brought his complaint to the Financial Ombudsman Service for an independent review. Our Investigator was satisfied TM could rely on the findings of the forensic expert to say the contractor's actions had most likely caused the fire. He also thought the *'contractor's clause'* was clear and the presence of the *'minor works'* clause didn't mean the claim should be met.

Mr S didn't accept the outcome of the Investigator, he made the following points:

- He accepts that the fire was caused by the negligence of the contractors, and this isn't in dispute.
- Whilst the insurance is in the name of a limited company, it is a consumer insurance and he asks that that the complaint is treated as a complaint by a consumer.
- There is a general condition of the policy that says the insured must notify TM of any building work over £50,000 in value. It says failure to do so may result in any loss directly or indirectly caused to the building work not to be covered by this insurance. So he argues by implication that, as he did notify TM of the work, then losses relating to that building work, should be covered.
- The clauses, when read separately, are clear. But they must be read together, and when done so, they are not. The *'minor works'* clause does cover loss or damage caused to the property, the *'contractor's clause'*, does not cover it.
- There was no extra premium charged when the *'minor works'* clause was added. But the premium was increased when the *'contractor's clause'* was added. Which means, TM's interpretation is correct, Mr S was paying more for significantly reduced cover. This goes against TM encouraging policyholders to notify it of renovation works taking place in the property.

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.

As this is an informal service, I haven't commented on every point made or piece of evidence referred to by both parties. Instead, I've focussed on what I consider to be key to the outcome I've reached.

Mr S says he accepts the fire was as a result of the contractor's actions. I understand H's also been able to secure some pay-out from them, albeit not enough to recover its full losses relating to the claim. However, as it's not in dispute that the contractor's actions caused the fire – by leaving a bag of likely smouldering sawdust at the property – I haven't assessed this as part of my decision.

Firstly, I've considered Mr S' argument that the policy implies that if TM is notified of building works, it will pay any claim that arises as a result. I don't agree with that interpretation. The *'general conditions'* section, I consider, is to put a policyholder on notice of when they should notify TM of any changes that may affect the insurance. It sets out what could happen in the event of non-disclosure of works, but I don't think it can be reasonably implied from this that TM would then cover any works disclosed, including any negligent actions by those carrying out the works. Rather, by being notified, TM is given the chance to assess its appetite for risk related to that work, making any policy changes as necessary. As it did here.

I consider it's a general principle of insurance that when there is a significant change in the risk during the course of the policy term, an insurer is entitled to reassess that risk and (perhaps amongst other things) amend the premium or add endorsements. I don't think the *'general conditions'* section precludes TM from reassessing the risk when building works are disclosed.

Turning to the wording of the endorsements. TM's position is that the *'minor works'* clause is added to any policy where a policyholder advises there is building work due to be undertaken on the property, irrespective of the cost of that building work. It says when it then realised the cost would be £160,000, this triggered an underwriting referral, which resulted in cover still being offered, but also triggered a premium increase and the *'contractor's clause'* to be applied.

It's not clear to me what would have happened if, during that first call, the cost of the works was noted to be £160,000. I don't know if both the *'minor works'* and the *'contactor's clause'* would have both been added. However, based on the comments of the underwriter, I consider it likely they would have been. The *'minor works'* clause sets out (amongst other things) that it would only meet a claim for storm or flood if the building being renovated was wind and weatherproof. So it adds more detail on when insured perils will be paid whilst works are ongoing. The *'contractor's clause'* excludes any loss or damage relating to the actions of the contractor.

Mr S says when you read the terms together, their overall meaning is ambiguous. He says the *'minor works'* endorsement is very wide cover and would extend to the actions of the contractor, including negligent ones. And so when read with the *'contractor's clause'*, it is contradictory, since that seeks to exclude liability for those actions that the aforementioned clause seeks to cover. And given this ambiguity, it should be read in his favour, affording him cover.

However, I don't agree with Mr S' position that the '*minor works'* clause says it will cover any claim caused by the contractor's actions. What it actually says is that it will not pay *"the first £500 of any claim arising out of or as a consequence of the building work".*

I don't think it's reasonable to infer, from this, that claims as a result of the contractor's actions (even negligent ones), would result in a claim being paid under the policy.

I consider the *'contractor's clause'* is clear. It says:

"We will not pay for any loss, damage, or liability arising out of the activities of any contractor."

All parties agree it was the contractor that caused the fire. It was noted it had been sanding a floor and had bagged up sawdust at the end of the day, leaving it in the property. I consider it reasonable to refer to this as an *'activity'* for the purpose of the term. And so, I think TM can fairly rely on this term to decline the claim. And whilst I note Mr S' argument that this should be considered as a 'consumer' policy rather than a commercial one, my findings, in this instance, wouldn't differ whether I was assessing this on the basis of a commercial customer or a consumer.

Mr S says as the premium increased when the *'contractor's clause'* was added, he was in effect paying more, for significantly less cover. I think it's worth setting out that it is largely up to insurers as to how they assess risks, what risks they want to insure and on what terms. I haven't seen anything which suggests TM treated Mr S unfairly be applying a premium increase. In any event I don't think the contractor's clause does limit cover for Mr S. It doesn't say any insured event will not be covered; it only excludes claims arising out of the activities of a contractor.

I understand this leaves H, and Mr S, in a difficult position, as it seems there are losses it can't recover against the contractor. However, having considered matters, I'm not satisfied this means TM has acted unfairly in declining the claim.

My final decision

My final decision is that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask H to accept or reject my decision before 19 November 2024.

Michelle Henderson
Ombudsman