DRN-5109736

The complaint

L and D's complaint is about a claim they made on their HSB Engineering Insurance Limited ('HSB') construction insurance policy, which HSB declined.

L and D say that HSB treated them unfairly when declining their claim.

L and D is helped by a representative in this complaint, but I shall refer to all submissions as being L and D's own for ease of reference.

What happened

The details of this complaint are well known to both parties, so I won't repeat them again here save to say that L and D made a claim on their construction insurance policy for damage to plant and unpaid hire charges, following a claim against them by the hirer ('the hirer') of that plant. Instead, I'll focus on giving my reasons for my decision, namely whether it was fair for HSB to decline that 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.

Having done so, I agree with the conclusions reached by the investigator for these reasons:

- The policy provides cover for any legal liability by L and D under the terms of the hiring agreement to pay for damage to hired contractors plant and/or continuing hire charges, following damage to hired contractor's plant, provided the liability arises during the period of insurance and whilst situated or in territorial limits. The issue for me to determine is whether it was correct for HSB to reach the conclusion that the legal liability in this case didn't arise under the terms of a hiring agreement.

- HSB determined that at the time of loss there was no valid hiring agreement in place. HSB instructed agents to obtain a statement about the nature of the relationship between L and D and the hirer of the plant. The person who provided the statement for L and D explained that the plant was kept at L and D's site due to the frequency of hire, that a hire fee was only paid for it when it was used by them, and that this was an informal agreement, which was not recorded in writing. The statement also set out that the hirer arranged for the plant to be hired out to others whilst kept at L and D's site, which was collected and returned there as necessary. It was noted that records were only kept of use of the plant as and when L and D were using it.

- On the other hand, L and D say there was a hiring agreement in place. Their representatives have made several arguments about this. They say there was a continuous hire agreement in place two years before the damage to the plant took place, but even if that's not correct, then the agreement was for the periods of hire that related to L and D's use of the equipment. They say there was no requirement for the hirer to be notified of hire before this took place and that they made the hirer aware of their use of

the plant after this and following the plant being damaged.

- Both parties have made detailed submissions to support their respective positions. I won't repeat those here, but I have read and considered everything they've said. I won't be addressing each individual submission which is reflective of the informal nature of The Financial Ombudsman Service. Having considered everything, I'm not satisfied that L and D's legal liability for the damaged plant and unpaid hire charges arises under the terms of a hiring agreement in this case. That's because like, HSB, I'm not persuaded that L and D had a valid hiring agreement in place.

- I accept that there was a written agreement of sorts between L and D and the hirer which was entered into two years before the damage to the plant occurred, but that agreement bore no resemblance to the informal arrangements that were in place between the parties. So, I'm not convinced that this applied in this case, nor that liability arose from it. From the evidence I've seen, the hirer is disputing the way in which L and D conducted itself in relation to the informal arrangement. In particular the Particulars of Claim in the litigation underlying this dispute set out that L and D failed to notify it that the plant had been on sub-hire and taken outside of the country without the hirer's permission and knowledge. This supports the position that the informal agreement was for L and D to do this each and every time it used the equipment. But even if that was not the case, there was no written hire agreement in place to reflect what the terms of hire actually were including when the hirer would be notified of use.

- Whilst I accept that both parties agree there was an informal hire agreement of sorts in place between them, it's clear to me that the terms of that agreement are in dispute. In the absence of a written agreement setting out what those terms were, I don't think it was unfair for HSB to decline L and D's claim because L and D haven't been able to demonstrate that the policy condition has been met. By that I mean that their legal liability arose under the terms of a hiring agreement because it's not clear what the terms of that hiring agreement were. And without any clarity as to what they were, I think it was reasonable for HSB to decline their claim.

- Given the nature of the dispute between L and D and the hirer, I wouldn't be in a position to accept L and D's contentions about the terms of the hire between the parties in any event because these are likely to be determined by a Court. This is relevant because part of the hirer's case is that the plant was used without its permission, and therefore was in breach of agreement. L and D has told us that permission wasn't required, and that invoicing took place after the plant was used as was standard practice. Whatever the case, the matter is not one for me to decide and without clarity in the form of a valid agreement, I don't think it was unfair for HSB to reach the conclusion that there was no valid agreement in place.

- The purpose of the condition HSB are relying on is to provide them with certainty of a policyholder's legal liability and therefore their own. It's not for the Financial Ombudsman Service to determine what risks an insurer wishes to take when drafting their policies. And it's clear that the way in which HSB drafted their policy was only to provide cover in circumstances where a valid hire agreement was in place. In this case the absence of a valid hire agreement setting out what the terms of hire agreement were, I don't think it's fair to require them to cover a claim in those circumstances.

- L and D have said they want HSB to indemnify them under the policy and assume conduct of the claim against it. For the reasons I've set out above, I don't think HSB did anything wrong by turning down L and D's claim. And having considered the policy, the terms don't extend to HSB taking on conduct of L and D's claim, their legal costs in defending it, nor covering the hirer's legal costs, if L and D is ordered to do so.

My final decision

For the reasons set out above, I don't uphold L and D's complaint against HSB Engineering Insurance Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask L and D to accept or reject my decision before 28 January 2025.

Lale Hussein-Venn
Ombudsman