DRN-5123612

The complaint

E, a limited company, complains that Accelerant Insurance Europe SA/NV UK Branch ("Accelerant") declined a claim made under its commercial property insurance policy.

E is being represented in this complaint by its director. Accelerant are the insurers of E's policy. Part of this complaint concerns the actions of an agent. So any reference to Accelerant includes the actions of the agent.

What happened

E had a motor trade commercial insurance policy underwritten by Accelerant to cover its premises. There was a theft at E's premises where numerous tools were stolen, so E made a claim. The claim was declined on the basis E had misrepresented when taking out the policy. Accelerant said the intruders gained entry into the business adjacent to E – and situated in the same building. They explained, once inside the building, the thieves used a pickaxe to break through a chipboard stud wall and into E's unit. Accelerant said they understand that the wall separating E's unit from the neighbouring business was constructed of chipboard and timber stud only. They said this material did not meet the requirements of the policy and the definition of a wall of standard construction or provide adequate separation for fire and security. Accelerant said, had the material fact that the wall separating E's unit was constructed of chipboard and timber stud only been advised to them, they wouldn't have offered coverage for the risk. So, E complained about Accelerant's decision to decline the claim.

Accelerant responded and explained, during their investigation, it came to light that the intruders had gained access to E's premises through a wall with a neighbouring unit that was not a full fire-separating wall, but rather a wooden partition which appeared to be a proper wall. Accelerant said E admitted it was unaware of this being the case, so in turn this wasn't disclosed at the point of sale of the policy. Accelerant said they'd obtained a copy of the proposal document completed by E at renewal in which it confirmed that the property was attached and that there was a full fire separation in place between the properties. Accelerant said they'd also taken into account that it would be E's responsibility when taking the lease for the property to have it adequately surveyed to ensure that it is clear on its construction and any other details which might be needed for the purposes of arranging insurance cover or to meet any necessary regulations for E's industry. Accelerant said, as they wouldn't have covered E for theft had they been aware of how this wall was constructed, they agreed with the decision to decline the claim.

After considering all of the evidence, I initially issued a provisional decision on this complaint to E and Accelerant on 17 October 2024. Accelerant subsequently responded and provided further information which changed my decision. So, I issued a further provisional decision on 21 October 2024. In this provisional decision I said as follows:

> **"***E is a commercial customer. This means that the relevant law which applies is the Insurance Act 2015 ("the Act"). This states that E was required to make a fair presentation of the risk to Accelerant. That means disclosing any material information*

E knew, or ought to have known. Or failing that, disclosure which gives the insurer sufficient information to put a prudent insurer on notice to make further enquiries for the purpose of revealing those material circumstances.

If the insured, in this case E, fails to make a fair presentation of the risk, the Act makes it clear that the insurer needs to decide whether the breach is a 'qualifying breach'. It is a qualifying breach if, but for the breach of the insured's duty to make a fair presentation, the insurer would not have entered into the contract of insurance at all or would have done so only on different terms. If the insurer decides it is a qualifying breach, it then needs to decide whether it is deliberate or reckless or neither deliberate nor reckless. And this then gives the insurer certain remedies. I'll consider this further below.

<u>Was there a misrepresentation by E and did it breach its duty to make a fair presentation of the risk?</u>

Accelerant say that E breached its duty to make a fair presentation of the risk.

Accelerant say the broker provided a presentation of the risk and this was accepted and converted into the Statement of Fact. I've seen the Statement of Fact and this says, under a heading 'Important Note',

"This Statement of Fact contains the information notified to us and facts assumed about you. It should be read in conjunction with the other documentation provided as together these form the basis of your insurance contract. The information contained within these has been used to calculate the premiums, terms and conditions of the quotation.

All material facts must be disclosed. A material fact is something which could influence the insurer in their assessment or acceptance of the risk. If you are in any doubt as to whether a fact is material then it should be disclosed.

Please check everything in this Statement of Fact document thoroughly and contact us immediately if anything has been omitted or if any of the information is incorrect. Failure to do so may mean that your insurance policy is not valid and the insurer may not be liable to pay out on any potential claims."

The Statement of Fact sets out the following questions, "Is there full fire separation" and "Building is of standard construction [walls made of brick or stone walls with a roof made of slate or tile]" – both of these questions have been answered 'Yes'.

Accelerant refer to the policy wording for standard construction as, "Brick, stone or concrete built and roofed with slates, tiles, metal, concrete or sheets or slabs composed entirely of incombustible mineral ingredients and plastic roof lights. Metal panels and sandwich panels insulated with materials other than polystyrene will be regarded as standard construction."

I can see Accelerant appointed a loss adjuster, and they attended E's premises to investigate the claim. The loss adjuster found that access had been gained into E's premises through "…a timber stud wall separating the [neighbouring unit] from [E's unit]." I've seen the photos taken by the loss adjuster, and this shows one section of the wall contains chipboard, and this is adjacent to a brick wall.

Accelerant say, from an underwriting perspective, the issue is two-fold. They say the risk would have to be considered based on a) there being easy access for thieves

into the premises they're insuring from an adjoining premises, and b) the insured premises does not have full fire separation, so this will place an underwriter on notice of the additional risk of the spread of fire. Accelerant say it is the level of separation between E's premises and the adjoining unit that has been misleading and has not been accurately declared to allow them to review and investigate. They say the construction of a risk is information any prudent underwriter would need to know about when considering a commercial risk as it substantially affects how a risk would be viewed and assessed. They say had the true construction been declared, then no terms would've been offered.

There's no dispute between the parties that part of the wall separating E's premises and the adjoining unit, isn't made of brick or stone – and so the relevant question set out in the Statement of Fact hasn't been answered accurately. E says it was not aware there was a small section of one of the walls that was not brick. E says the section in question is boarded over internally, so there was no reasonable way of ascertaining, without removing the interior boards, whether all of the construction was brick. E says the three other walls to the building are visibly entirely brick and, as E is now aware, 90% of the wall in question is also brick, therefore E had no reason to believe anything other than the entirety of the wall was of brick construction.

E has provided photos, one of which shows the exterior of the wall opposite to the wall in question, and this shows it is entirely of a brick construction. E says this would suggest that its opposite counterpart would be no different. E has provided a further photo which shows a long brick wall running along the same side where, further along, there was the section constructed of chipboard and timber stud. E says it has therefore disclosed every material circumstance which it knew or ought to know, and it wasn't aware there was a section here which wasn't made of brick or stone.

Taking into account all the information in this case, I don't think it's unreasonable for Accelerant to take the view that E hasn't made a fair presentation of the risk. The Statement of Fact sets out a specific question about the construction of the building under a section headed 'Material Damage' – so I think it's fair to say E ought reasonably to have been aware this was an important question. And that being the case, even if I accept E's account that it had reasonable grounds for believing all walls were brick and had therefore made a fair presentation of the risk based on what it knew or ought to have known, I don't believe E provided disclosure which gave Accelerant sufficient information to put them, as a prudent insurer, on notice to make further enquiries for the purpose of revealing those material circumstances.

I say this because the photos clearly show there is a section covered by chipboard. It's adjacent to a brick wall so, on a visual comparison, it's clear it's a different material. Given the importance of the question asked by Accelerant, I think this should reasonably have led E to have looked into why a premises, where the walls are made predominantly of brick, has one section which contains chipboard. E might've chosen to investigate this by removing the interior board, but in any event, it should have made this disclosure to Accelerant to allow them an opportunity to ask further questions. And, having seen Accelerant's underwriting guide, I'm persuaded it's more likely than not this would've led to them asking further questions. So, I'm of the view that E breached its duty to make a fair presentation of the risk.

<u>Was the breach qualifying?</u>

Under the Act, there are certain remedies available to insurers in the event of a breach of the duty of fair presentation. But only where the insurer can demonstrate that, but for the breach, it:

- *would not have entered into the contract of insurance at all, or*
- *would have done so only on different terms.*

A breach for which the insurer has a remedy against the insured is referred to as a qualifying breach.

Accelerant have provided our service with their underwriting guide – and, following my previous provisional decision, additional information which hadn't previously been shared with our service. I can't share this with E as it's commercially sensitive. But I've reviewed this to see what Accelerant would've done, had they been aware of the true construction of the insured premises.

Having considered this, and also being satisfied that Accelerant would've asked further questions about the material used in the wall and also taking into account what E's response would likely have been to those questions, I'm persuaded the construction of that particular wall in question would have resulted in Accelerant making a referral for an underwriting decision to be made. The information also shows, following the referral, what factors would've been assessed as part of the underwriting decision and why the construction of the wall wouldn't have been an acceptable risk for Accelerant. I'm further persuaded this would've led to Accelerant declining to enter into a contract of insurance with E as they've also provided evidence of them declining to offer a policy in a number of other cases involving other commercial customers in similar circumstances to E.

Therefore, I'm satisfied that there is a qualifying breach because Accelerant would likely have acted differently by not offering the policy had they been made aware of the true construction of the wall.

<u>Was the breach deliberate of reckless, or neither deliberate nor reckless?</u>

The remedies available to Accelerant under the Act depend on whether they consider the breach of the duty was deliberate or reckless, or neither. And it is for Accelerant (as the insurer) to show that the breach was deliberate or reckless.

A qualifying breach is deliberate or reckless if the insured –

- *knew that it was a breach of the duty of fair presentation, or*
- *did not care whether or not it was in breach of that duty.*

In this case, and taking into account the photos and E's testimony, I'm not persuaded that E not disclosing the presence of the chipboard was deliberate or reckless, and Accelerant haven't provided any evidence to show the breach was deliberate or reckless.

The remedy available for a breach that is neither deliberate or reckless – which I believe is the case here – and where, in the absence of the qualifying breach, the insurer would not have entered into a contract on any terms, state the insurer may avoid the contract and refuse all claims, but must in that event return the premiums paid.

In this case, it's therefore not unreasonable for Accelerant to refuse the claim. In line with the remedy available under the Act, Accelerant could have chosen to avoid the policy, but I can see they chose not to and instead maintained the policy on a

restricted cover basis from inception until remedial work had been completed and the construction of the wall met the requirements of the policy. Once the standard construction requirements were met, Accelerant then reinstated the full cover.

Although Accelerant did allow a limited cover version of the policy to be maintained pending E taking steps to construct a full fire separation wall, I've also considered whether I believe this might have been an option had E disclosed the true construction of the wall when taking out the policy. I'm not persuaded the same would've applied at that point. I say this because Accelerant have explained their reasons for allowing E this option rather than avoiding the policy. Those same reasons wouldn't have been applicable when E took out the policy, so I'm more persuaded Accelerant would have, at that point, chosen to decline to offer a contract of insurance rather than imposing a term giving E the opportunity to construct a full fire separation wall. And I believe this would more likely have been the case than not, based on the underwriting guide and evidence of the underwriting decisions taken by Accelerant in cases involving other commercial customers.

Taking everything into account, I think adherence to the Act delivers a fair and reasonable outcome in the circumstances of this claim and complaint. So, I can't say Accelerant have acted unfairly here in declining E's claim."

So, subject to any further comments from E or Accelerant, my provisional decision was that I was minded to not uphold this complaint.

Following my provisional decision, Accelerant haven't responded. E has responded to say firms are expected to ask clear and specific questions, and that didn't happen here. E says the Statement of Fact asked whether the building was of standard construction, and in this case the building is of fully standard construction externally. E says there was no reference made to the internal walls. E also refers to the question asking whether there was full fire separation and say the question didn't make it clear that this needs to be of any specific material and no definition of this was provided. E says, in any event, a fire didn't occur so it's unreasonable for Accelerant to use an unrelated section to decline a claim for theft.

E also say that my provisional decision changed based on 'commercially sensitive' information which had been provided by Accelerant. E say this information wasn't shared with it when it took out the policy and still hasn't been disclosed to E. E also says it has doubts about the authenticity of this information given the delay in Accelerant providing this information to our service.

I can see E has also raised a point that, if the breach of the duty to make a fair presentation of the risk was neither deliberate or reckless, then Accelerant can void the policy and return the premium. E says given that it has taken out cover with Accelerant for several years, it would appear it might have been uninsured during this time and is therefore entitled to a return of the premiums over this period.

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 see no reason to depart from my provisional decision. So, I've decided not to uphold the complaint for the reasons set out in my provisional decision and copied above.

I do acknowledge E's points about the questions on the Statement of Fact, but this doesn't change my view that E didn't meet its requirement to provide disclosure which gave

Accelerant sufficient information to put them, as a prudent insurer, on notice to make further enquiries for the purpose of revealing those material circumstances. I agree the question about the building being of standard construction didn't specify whether it related to external or internal walls, but it did refer to the walls needing to be made of brick or stone. And, for the reasons I've mentioned above, I believe it was reasonably clear there was a wall which wasn't made out of either of these materials. And, had this been disclosed, I'm persuaded it would've led to Accelerant asking further questions.

I acknowledge E's concern about the commercially sensitive information not being disclosed to it. But this information relates to how Accelerant carries out their underwriting decisions and also goes into some detail about the factors Accelerant takes into account as part of that decision. So it's not something which our service would expect an insurer to share with a customer. I acknowledge E has doubts about the authenticity of the information received, but I wish to reassure E that I've carefully considered the information. And while I accept the information which led me to change my provisional decision wasn't provided during the investigation stage of the complaint, there's nothing I've seen which would lead me to doubt its authenticity.

In relation to E's point about the return of the premiums, my decision here only addresses the complaint about Accelerant's decision to decline the claim. If E does wish to raise a separate complaint about the premium which has been paid over previous years, then E will need to raise this with Accelerant in the first instance before our service can consider this.

My final decision

For the reasons I have given, it is my final decision that the complaint is not upheld.

Under the rules of the Financial Ombudsman Service, I'm required to ask E to accept or reject my decision before 4 December 2024.

Paviter Dhaddy
Ombudsman