

## **The complaint**

Mr W and Mr B have complained about their let property insurer, U K Insurance Limited because it avoided their policy (treated it as though it hadn't existed) and, by association, declined their claim.

Mr W and Mr B jointly own a property, I'll refer to as 12-14. It was covered by a policy with UKI ref "POW...518", of which they were joint policyholders. Mr W has mainly represented himself and Mr B during the claim and complaint. For ease of reading, I'll mainly refer only to Mr W in the body of my decision. When referencing liability of policyholders, whilst I may refer only to Mr W by name, unless I say otherwise, I'll mean Mr B too.

## **What happened**

Mr W became joint owner of 12-14 in 2020. A policy for the property, provided by UKI, began in May 2021. When the policy was arranged Mr W was asked if the property was "in a good state of repair and shall be so maintained". Mr W answered "yes".

In August 2022 a metal balustrade from a balcony of 12-14's property fell to the street below. There were reportedly injuries caused. An injured party made a claim against Mr W's policy with UKI.

UKI began considering the matter, with solicitors appointed. An email sent to Mr W in October 2022 referenced UKI being prepared to cover the loss. However, UKI says a further email a few hours later confirmed the situation was still under review and rights were reserved. UKI subsequently said it was avoiding the policy and, by association, it would be declining the claim. It said the property had not been in good condition in 2021, which it felt the policyholders had known about when the policy was arranged. UKI felt a fair presentation had not been made to it when it was told the property was in a good state of repair.

Mr W did not agree with UKI's findings. He disputed an expert report UKI had obtained; arguing it mainly showed the condition of the neighbouring property (16). He felt the expert was inaccurate at best and unprofessional, possibly biased, at worst. Regarding reference UKI had made to a dilapidations report from 2018, Mr W said the property had been re-let regardless and some work had been done in 2019, with nothing further of note or concern raised by the tenant. He said the Covid-19 pandemic had then made things difficult.

UKI issued two final response letters to Mr W, in February 2024 and March 2024 respectively. UKI drew attention to photos 21 and 27 from the expert report, dated 2015 and 2021 respectively, both showing a break in 12-14's balustrade. With UKI additionally referring to images it had found of the same break, dated 2019 and 2020, showing the break progressively getting worse. UKI reviewed photos Mr W had provided – but didn't think they changed its view. It said the dilapidations report highlights several areas which needed attention and it felt were not in a good state of repair. UKI said it didn't think that some work having been done in 2019, or a surveyor reportedly agreeing the property could be re-let, detracted from this. It said the policyholders had acted either deliberately, or at the very least recklessly, when they said 'yes' – when arranging the policy in 2021 – that the property was in a good state of repair.

Mr W complained to the Financial Ombudsman Service. He said the balcony had since been opened up and the timbers were not rotten or water-soaked, which they felt showed the incident hadn't occurred due to wear and tear or the property not being maintained. Mr W said leases for 12-14 required the tenant to maintain decorative repair. He said they had not deliberately misled UKI when they arranged the policy. Mr W said the policy should be un-voided and the claim accepted by UKI.

Our Investigator considered the expert report from UKI. She was persuaded by the report that the property had not been in a good state of repair and/or had not been maintained. She noted work detailed in the dilapidations report had not been done and said she wasn't persuaded that the Covid-19 pandemic changed the fact the policyholders needed to maintain the building. Our Investigator noted the relevant legislation, the Insurance Act 2015, and that UKI had shown it wouldn't have offered cover if it had been told the property was not in a good state of repair. She further noted that the legislation allowed avoidance in that instance. She thought UKI had acted fairly and reasonably in line with the legislation.

Mr W was unhappy with the findings. Across several emails, with attachments, he explained the flaws in the expert report, provided evidence of work undertaken in 2019 and explained that some work found necessary in 2018 had not been done but that the relevant parts were still in an ok condition. Mr W said they had not been aware of the break in the balustrade above 12-14 until after the incident in 2022. He doesn't dispute this break is clearly evidenced in UKI's expert's report at photo 27. He said it had been very difficult in the years prior to the incident occurring to undertake normal activities due to the Covid-19 pandemic.

The complaint was referred to me for an Ombudsman's decision. Having reviewed the complaint, I also felt UKI had acted fairly and reasonably. But I noted that Mr W had provided substantial replies to our Investigator's view. So I issued a provisional decision to share my views on the complaint having taken all the available evidence into account.

*"I'll explain at the outset of my findings that ours is an informal service. As such, I trust the parties will understand that I won't be commenting on every piece of evidence presented or answering every query raised. Rather I will focus on the points most relevant to my findings about the heart of the complaint – UKI's avoidance."*

#### The legislation

*UKI said:*

*"The evidence is clear in showing No12-14 was not in a good state of repair as declared in the Statements of Fact".*

*And:*

*"Thus, the last knowledge you had of the state of the property was the dilapidations report which indicated the property was in want of repair. I am therefore satisfied that at the very least you acted recklessly when declaring the property was in a good state of repair".*

*Further:*

*"Therefore, it is [UKI's] position that the policy for 12-14 was correctly voided as previously indicated and that decision is not changed".*

*In the above comments, where UKI is referring to "recklessly" and "voided", it is talking about whether or not Mr W made a fair presentation to it when the policy was arranged. And what it is entitled to do in the event, as UKI believes, a fair presentation was not given. The rights and obligation of both parties in this respect are set out in the Insurance Act 2015.*

*The Insurance Act 2015 (the Act) applies to commercial contracts of insurance, as Mr W had with UKI. The Act says the prospective policyholder(s) must make a fair presentation of the*

risk they present to the insurer. With “fair presentation” meaning the prospective policyholder must tell the insurer:

- everything they know, or ought to know, that would influence the judgment of an insurer in deciding whether to insure the risk and on what terms; or
- enough information to put an insurer on notice that it needs to make further enquiries about potentially material circumstances.

It's worth noting here that the Act explains that the phrase “ought to know” encompasses anything the prospective policyholder could find out by undertaking a reasonable search of available information. Given what the Act requires the prospective policyholder to do, the insurer does not have to ask questions regarding matters it wants to know about. But if it does ask questions then what is asked, and the answer given, can be taken into account when considering if a fair presentation was made.

In 2021, UKI was told the property was in a good state of repair. UKI thinks that was incorrect – that it was not in a good condition, and that the prospective policyholders knew that, or ought reasonably to have known that. UKI has shown that if it had been told that the property was not in a good state of repair, it would not have offered cover.

UKI not offering cover in that instance is important in respect of the remedies the Act allows for where a breach of fair presentation is established. The Act says that if a fair presentation was not made and the insurer can show it would otherwise not have offered cover, it can avoid the policy.

The Act also says that a failure to make a fair presentation will either be:

- deliberate or reckless;

Or;

- neither deliberate nor reckless.

The Act further says, if it can be shown that the failure was deliberate or reckless, then the insurer can withhold any premium which has been paid. The Act gives a specific definition in this respect:

“A qualifying breach is deliberate or reckless if the insured —

(a)knew that it was in breach of the duty of fair presentation, or

(b)did not care whether or not it was in breach of that duty.

It is for the insurer to show that a qualifying breach was deliberate or reckless”.

Was the property most likely in a good state of repair in 2021?

Mr W seems to contend that either the property was in a good state of repair in 2021, or if it wasn't, the policyholders couldn't reasonably have known that, not least due to the restrictions imposed during the Covid-19 pandemic. With that noted I've considered what the available evidence shows about the condition of the property.

*The dilapidations report from 2018 details a number of necessary repairs. As I understand it the tenant at that time was leaving and the owners of the property (Mr W not becoming joint owner until 2020), were seeking to have the tenant complete repairs. Seemingly the tenant did not complete repairs. Mr W reports that a chartered surveyor said the 'dilapidations' identified were relatively minor and they wouldn't stop the property being let. Mr W said, when it was let to a new tenant, a leak on the flat roof (which forms the 'floor' of the balcony behind the balustrade) was found. The new tenant, under agreement with the property owners, completed repairs. Mr W says it was assumed they had been done to a good standard and no reference was made to other repairs needing to be completed.*

*From this I take it that the items identified in 2018 as in need of repair were not actually repaired. There were a lot of issues identified in 2018, including rust to the balustrade, cracks in render, rotten timbers (although not along the balcony/balustrade) and damp internally. Those sorts of issues, if unrepaired, do not get any better. I'm not persuaded that a property, exhibiting those issues in 2018, which are left unrepaired, would likely be in what might be considered 'a good state of repair' by May 2021.*

*I've also taken note of the photos of 12-14's cracked balustrade. Mr W does not dispute photo 27 from the expert report as being a reliable image of that part of 12-14's balustrade in September 2021. This was after the policy began in May 2021. So by itself it does not show this part of the balustrade was in a poor state of repair when UKI was told otherwise. However, Mr W has also seen and had chance to comment on photo 21 of the report. This photo shows the same area of balustrade as photo 27, but was taken in 2015. The report says it shows some minor bowing, which Mr W disputes. But what I think is also relevant in this photo is that the early signs of the crack, which had become significantly visible by September 2021, can be seen.*

*I bear in mind that in its February 2024 final response UKI included a zoomed in version of photo 27 and two additional photos of the same area of 12-14's balustrade. The two additional photos also showed a close-up shot of the same area of balustrade as captured in photo 27. The additional two photos were dated June 2019 and November 2020. Taking them alongside photos 21 and 27, I think they show the crack progressing and getting worse over time.*

*The image from November 2020 shows the crack is quite advanced. This was just about six months before the policy was arranged in 2021. I'm not convinced that a property, which comprises a balcony with a balustrade which is showing significant signs of disrepair and failure, can reasonably be said to be in 'a good state of repair'. So my answer is, I think it's not most likely that the property was in a good state of repair in May 2021.*

#### *Did Mr W make a fair presentation?*

*Mr W, or at least Mr B, had a copy of the dilapidations report from 2018. Seemingly, following Mr W becoming joint owner, they were both aware that work in respect of the dilapidations had not been completed. Mr W has referenced the restrictions of the Covid-19 pandemic, as well as the tenant being liable for general upkeep of the property and that it was "assumed" that the property was ok. I note Mr W says that neither the roofer, fixing the flat roof/balcony floor in 2019, nor the chartered surveyor, nor the new tenant, drew their attention to any major repair concerns.*

*I think, in respect of the dilapidation report alone, knowing that in 2021 UKI wanted to know if the property was in a good state of repair, Mr W should've been telling UKI about the 2018 report and what occurred in the years after. UKI could then have made its own judgement call about whether or not the property was in a good state of repair. I think it would've concluded, as I've done, that was not most likely, and it wouldn't have offered cover.*

*Turning specifically to the balustrade, I note Mr W says that they were entirely unaware of any issue with it until the incident in 2022. But I bear in mind that the photos from 2019, when Mr B was an owner of 12-14, and November 2020, when Mr W was also an owner, show a significant visible crack in the balustrade. I'm satisfied that if the property had been inspected, even driven past in the run up to the policy being arranged in May 2021, that that substantial repair issue would have been spotted. Even if I thought that driving past might have been a problem given the Covid-19 pandemic restrictions, I bear in mind the evidence of the cracked balustrade was found by UKI having completed a reasonable search of the internet. I think the owners, at the very least, ought to have known about this issue, which should have prompted them to tell UKI the property was not in a good state of repair.*

*I bear in mind, regarding the balustrade, that Mr W might think that the crack in the balustrade alone would not reasonably mean the property, as a whole, should be referred to as not being in a good state of repair. However, in that event, I'd draw Mr W's attention to the second part of the Act's definition about fair presentation. Mr W was under a duty to tell UKI enough information to allow it to make further enquires about material issues. I'm satisfied that UKI would have wanted to be told about the cracked balustrade. Further, that if Mr W had told it about this, and even if he believed the property was in a good state of repair, I think UKI would have come to a different, reasonable view – that it was not in a good state of repair. Which would have meant that UKI would not have offered the policy.*

#### *Deliberate or reckless, neither deliberate nor reckless*

*I appreciate that Mr W is upset at the suggestion he/he and Mr B acted deliberately by lying to UKI about the condition of the property. I accept that a misunderstanding or oversight may have occurred which led to the failure to make a fair presentation. But, given the definition the Act applies for deliberate or reckless behavior, an oversight could still be deemed as reckless. As UKI has pointed out – the Act doesn't differentiate between deliberate or reckless behavior.*

*In considering this aspect I'm particularly drawn to the second part of the Act's definition "did not care whether or not" there was failure to make a fair presentation. I also bear in mind it was always for Mr W to ensure that any detail provided to UKI was accurate. What I note from everything I have seen is that Mr W seems to acknowledge, as UKI has said, that the property was not fully repaired after 2018, nor checked in the run up to the policy being arranged in 2021. Which means that Mr W gave an answer to UKI's question; either knowing the answer was wrong, or without a care as to whether or not he was actually providing a fair presentation. I think UKI's view that this was, at the least, reckless, is fair and reasonable.*

#### *Summary*

*I appreciate that my view will come as a disappointment to Mr W and Mr B. However, I do think the property was most likely not in a good state of repair in May 2021, which they failed to make a fair presentation about when they told UKI that it was. I'm satisfied that UKI has shown that, if it had known the property was not in a good state of repair, it would not have offered cover. So I'm satisfied that its act to avoid the policy, with the claim falling away by association, was fair and reasonable.*

*I'm also satisfied that when the wrong information was given to UKI that was done with Mr W and/or Mr B either knowing it was wrong, or not caring if it was correct or not. So it's my view that UKI acted fairly and reasonably when it said the failure was either deliberate or reckless, and consequently withheld the policy premium.*

*In light of all that, I don't think UKI did anything wrong. In reaching this conclusion I have taken into account Mr W's concerns about the email he received from UKI's solicitor stating cover would be provided. However, I accept UKI's explanation that this was corrected within a matter of hours. In the circumstances I don't think that initial email reasonably impacts UKI's right to rely on the Act to avoid the policy and, by association, decline the claim. As such, I'm not minded to require UKI to change its position or do anything differently."*

UKI said it accepted my provisional decision. Mr W said they disagreed with it.

Mr W said:

- They thought the property was in a good state of repair, they weren't aware of any structural defects, including joists having been cut, that could have caused the incident.
- The policy for the neighbouring premises, which they also own and which shares the balcony/balustrade, had not been avoided.
- It was insincere of UKI to state it would not have offered cover for 12-14.
- The new tenant saw to some issues, including a recent shop refurbishment (a photo taken a year ago is provided to evidence this). The current lease requires the tenant to make repairs.
- The solicitor's email – which said indemnity would be provided – should be honoured.
- The items in the 2018 dilapidations report couldn't have caused the balustrade to fall.
- The dilapidations report doesn't say the property is in a bad state of repair. Nor does it mention the 'break' in the balustrade which the Ombudsman has said was present in 2015 and getting worse through to renewal in 2021. Which suggests it was not an issue of concern in 2018. And the surveyor, marketing the property for letting in 2018 said the dilapidations were mainly "re-instatement and decorative".
- The tenants were required to resolve the rust and "we believe" they resolved the damp.
- UKI's expert report, regarding items on the dilapidations report, said rust hadn't affected the balustrade's structure and that the external render had only minor hairline cracking.
- UKI's expert report actually said the front elevation of 12-14 was "in relatively good condition" and that is what they believed when they renewed the insurance.
- The expert report says, regarding photo 21, that it shows a 'join' not the start of a break as the Ombudsman had suggested. It also shows 12-14 had recently been painted.
- The wood, seen in photo 21, said by the expert to be 'propping up the balustrade', isn't positioned under the 'join'.
- Their concerns about photo 27 had been set out prior to my provisional decision.
- Regarding the photos of the balustrade from 2019 and 2020 – they did not know a gap at the join was occurring. But they aren't convinced the photos are reliable evidence of this as they are of differing picture quality, angle, scale and zoom ratio.
- The progression of the gap would "almost definitely not have been in a strictly linear relationship with time".
- The join would have appeared different if viewed in person.
- In the break in Covid-19 restrictions in summer 2020, 12-14 was visited. It was closed. The exterior was, therefore, viewed and it seemed in good condition. It was not viewed or visited again before renewal in 2021.
- They refute any allegation they deliberately lied to UKI about the state of the property.
- They also refute the suggestion that they did not care whether or not there was a failure to make a fair presentation.

### **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'd remind the parties that what I said provisionally about the informal nature of our Service still applies. My focus will remain on the issues and evidence most relevant to my findings about the heart of the complaint – UKI's avoidance.

With that in mind, I'm not reviewing the incident where the balustrade fell to the street or whether or not Mr W and Mr B had knowledge which might have prevented that. Nor the policy for the neighbouring property which is insured separately. And the liabilities of the current tenants, and any work they've recently done are not of relevance here. This is about the provision of the policy, for 12-14, in May 2021.

I've seen evidence of UKI's underwriting criteria. I'm satisfied that if it had been told that 12-14 was not in a good state of repair, which I'm satisfied was most likely the case, it wouldn't have offered cover for 12-14.

I realise Mr W thinks the solicitor's email should be honoured. But, as I said provisionally, this offer was retracted within a matter of hours, so it didn't reasonably preclude UKI from avoiding the policy. I've seen nothing which makes me change my view in that respect.

I note Mr W and Mr B 'believe' the tenant resolved the damp highlighted by the dilapidation report and the rust too. But without evidence of that, I can't reasonably conclude that is most likely what happened. I accept that the report did not note a concern, in 2018, about the gap in the balustrade. But that does not mean it did not become an issue for concern in the following years.

UKI's expert said rust didn't affect the structure of the balustrade, there was only hairline cracking externally and he found the front (and right) elevation was in relatively good condition. But I bear in mind that report was completed in November 2022 and the issue for me is, was the property as a whole, likely in a good state of repair in May 2021?

The fact 12-14 had been painted in around 2015 does not assist with an argument that it was likely in a good state of repair in 2021. I did not suggest provisionally that the expert identified an issue with a crack in the balustrade in photo 21 (which dates to 2015). Rather I explained what I thought photo 21 showed – the beginning of a 'crack' which subsequently progressed and was obvious by September 2021 (noting that September 2021 was after the renewal and then considering how the crack likely appeared prior to renewal in May 2021). It may well be that the 'crack' had formed at a join, with the previously joined parts becoming separated. But I think referring to it as a 'crack' is fair and I remain of the view that photo 21 does show the start of that 'crack' forming. I don't think the wood is of any relevance.

I considered the points Mr W had raised about photo 27 when I reached and issued my provisional decision.

I also considered when reviewing the photos from 2019 and 2020 concerns Mr W had already raised about their quality/qualities. I studied the available photos carefully at the time and have reviewed them again now. I'm satisfied that, by comparing the surrounding parts of the balcony's pattern, the photos satisfactorily evidence a crack progressing in width and length over the passage of time. That progression may well not have been linear or constant but I don't think that makes a difference here. As I said provisionally, the photo from November 2020 alone shows the crack is quite advanced. I'm satisfied it would have been visible had the property been checked after November 2020 in the run up to the policy renewing in May 2021.

I note Mr W has confirmed that the property was not checked, visited or viewed between summer 2020 and renewal in May 2021.

I see that they refute the allegation of deliberately lying to UKI. I explained provisionally that under the relevant legislation there is no differentiation between 'deliberate or reckless' acts. I also explained provisionally why I believed Mr W and Mr B could reasonably, given the definition the Act applies for 'deliberate or reckless' behaviour, be considered to have at least acted recklessly in the detail they gave at renewal in May 2021. I don't intend to go over that again here. Having considered everything said in response to my provisional decision, my view in this respect has not changed.

Overall, having reviewed matters in light of the reply to my provisional decision, my view on the complaint has not changed. As such my provisional findings along with my comments here, are now the findings of this my final decision.

### **My final decision**

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B and Mr W to accept or reject my decision before 24 April 2025.

Fiona Robinson  
**Ombudsman**