

complaint

A, a hotel business, has complained about the advice it received from RCC Insurance Brokers Plc in respect of the sums to be insured under its commercial insurance policy. This complaint arises following a claim for fire damage when it was discovered that A was significantly underinsured for all aspects of cover. As a result it had to accept a much lower settlement than it otherwise would have done.

background

In 2005 A appointed RCC to arrange insurance on its behalf. It duly arranged a policy which provided cover for buildings, trade contents and business interruption. The policy continued on the same terms for the following year. In 2007 RCC arranged cover with different insurers. The completed proposal form listed the same sums to be insured as the previous policy, which then renewed on the same terms in 2008.

In December 2008 there was a fire at A's premises. After submitting a claim to the insurer it was discovered that A was significantly underinsured for all parts of the cover. The final settlement included a reduction of over £260,000 for the underinsurance.

A made a complaint to RCC, saying that it had not been advised adequately concerning neither the appropriate amount of cover nor the need to increase that cover over four years. RCC did not accept liability for the underinsurance and A referred the complaint to this service.

Our adjudicator carried out an adjudication recommending that the complaint be upheld. He found that RCC's terms of business included "*Advising you on your insurance needs and acting on your behalf to arrange your insurances*". As part of that he found no evidence that RCC had advised A about the proper sums to be insured for buildings, contents and business interruption ("BI") especially as these sums had remained static for four years and were not subject to any automatic increase. He recommended that RCC settle the complaints by paying the amounts lost through underinsurance. This applied to the buildings, contents and BI payments. He was not satisfied that RCC could be held responsible for the reductions made for a cash settlement, nor any BI beyond the two year policy limit. He recommended that the parties negotiate over the actual amounts to be paid.

RCC did not agree with the adjudication. Its essential points are that:

- The claim should not have been reduced for alleged underinsurance. The policy allowed for such reduction ('averaging') only when the property was insured for less than 85% of its reinstatement value. Here it was 87%. By accepting such a reduction A's advisers were negligent and it should not bear the cost of that.
- It advised A correctly on the amounts to be covered for business interruption, based on its accounts. A figure of £800,000 in the original proposal in 2005 was neither put forward by A nor suggested by its adviser.
- There was no underinsurance for the contents.
- This service should obtain and investigate in full the insurer's and its loss adjuster's files. It feels that A put forward figures as to its trading position to the insurer which differed from its audited accounts.

- A had made two previous claims which included business interruption so it should have known about the sort of figures to apply under this cover
- There was an out of date fire certificate. The insurer did not accept liability on this point but decided to settle. Any settlement was not therefore under the claim but was an ex gratia payment.
- A is likely to be insolvent following repossession by the bank.
- A's intention had been all along to redevelop the property rather than reinstate it. A asked for a cash settlement which reduced the amount paid still further. It does not accept that A asked for this because it could not afford to reinstate.

A argued that it did intend to reinstate and that the only reason it asked for a cash settlement was because the sum received after deduction for underinsurance was simply not enough to reinstate. It disputes that the property was overvalued at the claim stage. It also has asked for its legal costs, necessary to pursue the complaint and increased by RCC's attitude to the claim.

my findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

I think it fair to concentrate initially on RCC's liability for its advice to A. That does not mean to say that liability and the amount paid out on the claim are not linked, and I do intend in this decision to deal with both issues.

The property was purchased in 2005. At that time RCC gave an insurance quotation to A. There is some dispute as to how the figures were put forward, particularly in respect of a report on title document which RCC says it did not see. In the key facts document accompanying the quotation the following box was ticked:

"You will not receive advice or a recommendation from us. We may ask some questions to narrow down the selection of products that we will provide details on. You will then need to make your own choice about how to proceed"

The policy was renewed in 2006. The documents sent included a new business agreement. This included a statement *"We will advise and make a recommendation for you after we have assessed your needs"*. In 2007 the policy was moved to a new insurer. The figures for buildings, trade contents and business interruption remained the same as at the 2005 quotation. The policy renewed on the same terms in 2008.

The figures therefore date back to the original proposal form and the meeting with A's representatives. First of all I do not find the two directors of A to be sophisticated consumers, experienced in insurance. They were therefore very much reliant on RCC to guide them in this respect. The exact process of obtaining the figures to complete that proposal form is now a bit hazy. There is some question as to how a figure for business interruption based on gross profit was considerably reduced from the report on title. I do not find that this was as suggested an error in reading the adviser's handwriting.

From the 2006 renewal onwards I find that the policy was sold fully advised. This means that if RCC thought that the figures for the three areas of insurance did not need to be increased, it should have told A so. It is insufficient in my view to rely on the documents sent out with the policy schedule just to ask the customer to check. I also do not find that the directors of A should have been expected to know whether they needed to increase the business interruption figure merely because they had made a couple of claims under that cover. On the face of it I would have thought that these figures should have increased year on year.

In summary, if the claim was settled short of the full figure because of underinsurance, then I think that RCC should be responsible for making good any losses suffered by A because of that.

RCC disputes that it has any liability. I shall deal with its points of dispute:

alleged underinsurance for the building

RCC contends that the claim should not have been reduced for underinsurance. It says that the evidence is that when settled the property was insured at 87% of its value. The policy only allowed for such reduction ('averaging') where the property was insured for less than 85% of its reinstatement value. On the face of it, according to the loss adjuster's final report, this would seem to be right. A's representative says that in the course of negotiations the property was only insured at 76% of its value. It has produced an expert valuation confirming the underinsurance. On the other hand RCC has also got an expert's valuation that says that the sums insured were adequate. As matters stand I am unable to assess whether the property was underinsured enough to trigger the 'averaging' clause. It appears that the agreement was reached after detailed negotiations between A's and the insurer's respective loss adjusters, so it cannot be denied that part of the loss here is due to underinsurance.

underinsurance/the correct amount for BI cover

It is also alleged that the business interruption cover was underinsured. Certainly the pay-out was reduced, again by a substantial sum. RCC says that the correct gross profit figure was put forward in accordance with A's accounts. On the other hand the figure put forward by the insurer's loss adjuster was substantially less than the amount covered.

A figure was put in for BI cover in the insurance proposal for 2005. This was considerably less than the figure suggested by the report on title. The same figure was carried over up until the 2008 policy year. Apart from speculation that the original figure on the proposal form was a mistake, no clear explanation has been put forward as to why the BI cover was not reviewed from year to year. RCC says it was reviewed in 2008, and BI cover was continued as before. Although I can see that renewal documents were sent out, with an up to date service agreement, I have not seen a note of the advice given. I have to bear in mind that the policy was now renewing on the same terms for the fourth year. Whilst RCC now suggests that it was sufficient according to A's gross profit figure, it clearly was not as this element of cover was underinsured by a significant amount. Again as the policy was sold fully advised by RCC, I do think it is responsible for the underinsurance.

the contents

RCC states that there was no underinsurance of the contents. As the adjudicator has already set out this is a much more difficult thing to assess. Nevertheless the figure for contents was reduced for underinsurance. I am not persuaded that any real consideration

was given by RCC in respect of the adequacy of the cover as the figure included stock and did not appear to alter over four years. Again I do think that RCC is responsible for the underinsurance of the contents.

obtaining the insurer's and loss adjuster's files

RCC considers that this service should investigate these files. In particular it alleges that A put forward different figures to the insurer outside its audited accounts. I have not seen any evidence to show that this, an allegation of fraud was the case, apart from a suspicion on the part of RCC. It is not this service's function to carry out speculative investigations into fraud. I have not seen any evidence that the insurer had any such suspicion.

previous claims

I understand that before the fire claim, A had made two previous claims under the BI cover. RCC suggests that this would have alerted A to review its level of cover. I don't accept however that this absolves RCC from responsibility for advising on the amount of BI cover. Clearly it had agreed as part of its continuing service agreement to advise on insurance needs, arrange the appropriate cover and help with any on-going changes. There is nothing to show from the documents that it gave that advice.

out of date fire certificate

I can deal with this quickly. There was a suggestion that the fire certificate was out of date, but from the papers the insurer accepted the position that it was not without too much argument. There is no suggestion that this was an ex gratia payment, but was a payment within the terms of the policy.

A is likely to be insolvent

At present A remains as a company on the register.

the appropriate settlement

Apart from the deductions for underinsurance, A also accepted deductions for a cash settlement, made a BI loss beyond the period of cover and has paid out significant legal costs in pursuing the complaints. I have reviewed these figures. It does also appear that before the fire there was a proposal to redevelop the site. I would think that the fire is likely to have spurred on that proposal rather than there be any real desire to reinstate. I do not think it appropriate to award anything for the cash settlement or the BI loss beyond the period covered under the policy.

As to legal costs, I appreciate that these have been significant. Nevertheless, a good deal of those costs were expended on possible legal proceedings. The matter is complicated by the large amount of documents, but I do not think it was so complicated that A needed legal help in preparing its complaint against RCC. I note also that it is alleged that the legal costs were increased because of RCC's conduct. I cannot criticise RCC for putting forward a robust defence of its position. I do not propose to award legal costs.

Overall I find RCC responsible for the shortfall in the settlement of A's fire claim due to underinsurance. The appropriate procedure would be for both parties to agree the joint appointment of an independent expert to assess the losses due to underinsurance and for

RCC to pay out the agreed figure. This may result in a lower or nil pay-out if the sum insured for the buildings/BI is found to be more than 85% of the reinstatement costs.

my final decision

My final decision is that I uphold the complaint. I direct RCC Insurance Brokers Plc to deal with the balance of A's claim as if it was the insurer in respect of the parts of the claim that were reduced due to underinsurance subject to the terms and conditions of the policy.

Recommendation: As the amount I consider to be fair compensation is likely to exceed £150,000, I recommend that RCC Insurance Brokers Plc pays A the balance.

This recommendation is not part of my determination or award. It does not bind RCC Insurance Brokers Plc. It is unlikely that A can accept my decision and go to court to ask for the balance. A may want to consider getting independent legal advice before deciding whether to accept this decision.

Ray Lawley
ombudsman