DRN-4596250

The complaint

Mr M complains that ERGO Versicherung Aktiengesellschaft trading as ERGO UK Branch would not pay the full amount of his insurance claim.

What happened

Mr M entered into an agreement with a developer (which I will call “”V”). Under the terms of the agreement, he agreed to pay £160,650 to buy a leasehold of a flat in a new development, with V to carry out the development and build the property. Mr M paid a deposit of around £43,000.

ERGO provided an insurance policy in relation to the development which included Mr M as a policyholder and provided cover under which if, due to insolvency or fraud, the developer didn’t complete the building ERGO would repay his deposit up to a maximum of 10% of the purchase price or £100,000, whichever is lower.

V set up a subsidiary company (which I will call “T”) to build the development.

A final date was set for the development to be completed in June 2021 and if it had not been completed by that date, purchasers would be entitled to their deposits back.

T was placed in administration and the development wasn’t completed by the due date. After purchasers starting requesting their money back V went into liquidation, with a winding up order being made against it in January 2022.

Mr M then made a claim on the policy but ERGO said the claim wasn’t covered, because cover would only be available where the development wasn’t completed due to the insolvency of V and that wasn’t what had happened here – V was only made insolvent later on. But ERGO made a goodwill offer to pay 50% of the amount Mr M could have claimed.

Mr M didn’t accept the offer and complained but ERGO didn’t change its position.

When Mr M referred the complaint to this Service, our investigator said ERGO should pay the full amount of the claim. He said:

- V had significant control of the subsidiary company, which would therefore be considered an asset of V, so the requirements under the policy for insolvency were met; and
- there were other elements which indicate insolvency to have been the reason behind the build not commencing rather than simply buyers asking for their deposits back.

ERGO disagreed and requested an ombudsman’s decision. It said the policy defines the circumstances in which a claim can be made and those circumstances have not arisen so the policy simply does not respond. But it made an offer in view of its responsibility to treat customers fairly, bearing in mind that purchasers like Mr M had lost money on the development.

I issued a provisional decision saying I thought the offer ERGO had made was a fair way to

settle the complaint. I set out my reasons as follows:

As ERGO says, the policy doesn't provide cover for deposits simply because the development is not completed – it's not a form of guarantee. Cover is only provided in certain, limited circumstances as follows:

If due to Insolvency or Fraud the Developer does not commence work on a Residential Property the Insurer will refund the deposit paid by the Policyholder.

If due to Insolvency or Fraud the Developer fails to complete the Residential Property after work has commenced the Insurer will at its sole option:

1) *pay the additional cost required to complete the Residential Property;*
   Or
2) *refund the loss of money paid by the Policyholder to the Developer as a deposit for the construction of the Residential Property;*

Provided that the Insurer is only liable under this Section in respect of monies paid by the Policyholder to the Developer subject to a maximum of 10% of the original purchase price… or £100,000 whichever is the lesser

The policy defines "Developer" as

Either; Any person, sole trader, partnership or company with whom the Policyholder has entered into an agreement or contract to purchase the Residential Property on either a freehold or leasehold basis, or;
Any person, sole trader, partnership or company that constructs the Residential Property and with whom the Policyholder has entered into an agreement or contract to purchase on either a freehold, leasehold or Scottish title or common hold interest.

The company Mr M entered into a contract with to buy the property is V. On this basis, I'm satisfied the Developer as defined in the policy is V.

There's no evidence of fraud and Mr M's claim is based on insolvency.

Mr M could only claim if V did not carry out the work due to insolvency. And the way "Developer" is defined in the policy, it only relates to V – not to any other company. The policy terms say:

"*The Definition of Developer under this section shall only include the Builder if the Developer and Builder are one and the same legal entity for the New Development. For the avoidance of any doubt the definition of Developer does not include any sub-contractor or sub-consultant employed at the New Development; it covers the Developer and the Builder if they are one and the same only."*

The policy makes it clear that cover only applies where the property is not built as a result of V becoming insolvent. The definition of insolvency in the policy terms does include where "*A liquidator, trustee, administrator, administrative receiver, manager, trustee in bankruptcy or similar official is appointed over the whole or any part of the assets of the Developer*". So I've considered whether T could be considered an asset of V.

When T was placed in administration and an administrative receiver was appointed, they were only dealing with any assets T owned. Those assets did not belong to V. The receiver was not appointed to act in relation to any of V's assets. While V owned the shares in T, the administrators had no control over the shares.

I appreciate that V and T are connected. But I don't think T can be considered an asset of V and clearly they are not "*one and the same*" so don't meet the definition in the policy.

ERGO has limited its risk to V becoming insolvent and specifically said the policy does not extend to another company. While V did become insolvent at a later date, that was after the deadline for building the development had passed and after purchasers had starting make claims for the return of their deposits. It wasn't the cause of the property not being built.

While both companies appear to have been in some sort of difficulty by 2021, the criteria for making a payment set out the policy terms are clear and those criteria were not met in this case.

ERGO has made an offer to pay 5% of the purchase price (50% of the limit of liability under the policy) as a goodwill gesture, taking into account its duty to treat customers fairly and the fact purchasers had lost money. I appreciate Mr M's loss was more than that and was very distressing for him. But the policy terms are clear and in the circumstances I think the offer is fair.

On this basis, my provisional decision was that ERGO Versicherung Aktiengesellschaft trading as ERGO UK Branch should pay 5% of the purchase price of the property.

Replies to the provisional decision

Mr M has replied to say that, while disappointed with the outcome, he accepts the provisional decision.

ERGO hasn't provided any further comments.

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 set out in the provisional decision why I thought the offer from ERGO was fair. Mr M has accepted that and I have no further comments to consider. In the circumstances there's no reason to change my provisional decision. It remains my view that the offer is fair and ERGO should pay what it has offered.

My final decision

ERGO Versicherung Aktiengesellschaft trading as ERGO UK Branch has already made an offer to pay 5% of the purchase price of the property to settle the complaint and I think this offer is fair in all the circumstances.

So my decision is that ERGO Versicherung Aktiengesellschaft trading as ERGO UK Branch should pay 5% of the purchase price of the property.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 1 March 2024.

Peter Whiteley
Ombudsman