

The complaint

A company, which I'll refer to as C, complains that HCC International Insurance Company Plc trading as Tokio Marine HCC (HCC) unfairly declined its theft claim.

What happened

The details of this complaint are well known to both parties, so I won't repeat them in detail here. To briefly summarise, C took out a Restaurants, Wine Bars and Public Houses insurance policy. In September 2021 a theft occurred at C's premises. C reported that thieves climbed up to its roof from the roadside, dismantled and stole an extractor fan which could be seen from the roadside. It also said that during the theft the condenser unit and wiring to the internal freezer/refrigeration unit were also damaged. There was no forced entry into the premises during this incident.

HCC appointed a loss adjuster to investigate the claim. The loss adjuster found that C didn't have an operational alarm system at its premises at the time of the theft. HCC therefore declined C's claim on the basis that the premises wasn't protected by an alarm monitoring system. HCC referred to the statement of fact completed when the policy was inception. On this statement of fact, there was a specific question which asked whether there was an alarm system at the premises, C answered this question as 'yes' and went on to say the alarm system, was provided by 'Redcare'. HCC explained that C had a duty to ensure it made a fair presentation of risk. HCC said that in this instance, incorrect information provided on the statement of fact led them to provide cover, but if they had been aware that the premises did not have an operational alarm system in place, they would have entered into the contract of insurance on different terms.

HCC concluded that C made a qualifying breach and in line with the remedies available to HCC under the Insurance Act 2015, they amended the terms of the policy to include an alarm condition which states that damage caused by theft or attempted theft is not covered unless an alarm monitoring system is installed at the premises and complies with the terms within the said condition.

C disputed HCC's decision to decline its claim. In summary, it said that although the statement of fact mentions an alarm, there was no alarm warranty on the policy.

Our Investigator considered the complaint and thought that HCC had acted fairly and reasonably in declining C's claim on the basis of C's failure to make a fair presentation of the risk. C didn't agree with the Investigator and asked for an ombudsman's decision.

Upon reviewing the case, I shared my initial thoughts with both parties via email. In brief, I explained that while HCC said there was a breach of the duty of fair presentation of risk and a qualifying breach was made by C, the alarm condition they said they would have applied if C presented the risk fairly, didn't increase the risk of loss because no entry was gained into the premises by the thieves and so the alarm wouldn't have been triggered in any event. Under these circumstances, I wasn't satisfied that if HCC had offered the policy to C on different terms, including the alarm condition, the loss in question wouldn't have been covered. For this reason, I explained that I was intending to uphold the complaint and

required HCC to reconsider the claim under the remaining terms of the policy.

C didn't respond to my email. HCC said that they had followed the Insurance Act, theft cover would only have been provided if C had a Redcare alarm system. HCC maintained that because C didn't present the risk fairly, their underwriters amended the cover according to the provision of the Insurance Act and as such the theft claim wouldn't be covered.

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 considered the matter carefully, I uphold this complaint and I'll explain why.

Both parties have provided detailed submissions to support their position. I want to assure them I've read and carefully considered everything they've said, but I won't comment on everything.

The crux of this complaint centres on HCC's decision to decline C's theft claim.

When considering whether HCC acted fairly, the starting point is the Insurance Act 2015. Under this Act, commercial policyholders have a duty to make a fair presentation of the risk to the insurer when taking out and renewing a policy.

The Insurance Act says disclosure needs to be made as follows:

- *disclosure of every material circumstance which the insured knows or ought to know, or*
- *failing that, disclosure which gives the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances.*

For HCC to take any action at all they need to show C didn't do this and that it made what's known as a qualifying breach.

Under the Act a qualifying breach is a breach for which the insurer has a remedy against the customer because they would either not have sold them the policy, or would have done so on different terms, if there had not been a breach of the duty of fair presentation.

The statement of fact that was completed by C at inception of the policy, included the following statements:

“Does the security at the premises meet the minimum standard of security?

Is there an intruder alarm fitted to the premises which is in working order and is under your sole control?

Is the alarm NACOSS (NSI)/SSAIB approved and maintained?”

These questions were answered 'yes' by C.

The following question was also asked:

“What is the method of signalling?”

C stated it was 'Redcare'.

HCC's underwriter confirmed that if the above questions had been answered correctly by C, they would have added an alarm condition to the policy.

The condition which HCC says would have been added to the policy states the following:

"Alarm Condition (Single Path Signalling)
Damage caused by theft or attempted theft is not insured unless:
(a) an Intruder Alarm System complying with the undernoted Requirements is installed at Your Premises
(b) the Intruder Alarm System is put into full and effective operation whenever the Premises are closed for business or left unattended..."

I'm satisfied that it was C's responsibility to ensure that it provided a fair presentation of the risk to HCC when the policy was taken out. As it didn't do that in this instance, I'm satisfied that it didn't make a fair presentation of the risk. Based on the evidence I have seen, I'm satisfied that, had the question about the alarm system been answered correctly, HCC would have offered the policy on different terms and the above condition would have been applied. Therefore, I think C made a qualifying breach at inception.

As the policy in question would have been offered on different terms, I have gone on to consider what that means for C in the circumstances of this claim. HCC should have dealt with the claim in line with the policy terms that would have been offered.

HCC says that if the alarm condition had been added to C's policy, the policy wouldn't have responded to the theft claim in question because there wasn't an operational alarm system in place.

We have long-held that it is unfair to refuse a claim for breach of a condition which is immaterial to the loss, or has not caused some prejudice to the insurer. This principle has been set out in various guidance since at least 1997 (the publication of the Association of British Insurers Statement of General Insurance Practice); it is set out in The Financial Conduct Authority rules regarding insurance claims handling (ICOBS 8.1); and is also enshrined in the Insurance Act 2015.

ICOBS 8.1 says:

"An insurer must:

8.1.1 (3) not unreasonably reject a claim ...

8.1.2A (1) Cases in which rejection of a consumer's claim would be unreasonable (in the FCA's view) include ...

(b) where the claim is subject to the Insurance Act 2015 for breach of warranty or term...unless the insurer is able to rely on the relevant provisions of the Insurance Act 2015 ...

(2) The Insurance Act 2015 set out a number of situations in which an insurer may have no obligation to pay. For example ...

(b) Section 11 places restrictions on an insurer's ability to reject a claim for breach of a term where compliance is aimed at reducing certain types of risk."

It seems to me the terms HCC is seeking to rely on fall squarely with (2) (b) above – the

requirement to have an alarm monitoring system in place is specifically aimed at reducing the risk of theft.

Section 11 of the Insurance Act 2015 says:

“(1) This section applies to a term (express or implied) of a contract of insurance, other than a term defining the risk as a whole, if compliance with it would tend to reduce the risk of one or more of the following-

(a) loss of a particular kind, (b) loss at a particular location, (c) loss at a particular time.

(2) If a loss occurs, and the term has not been complied with, the insurer may not rely on the non-compliance to exclude, limit or discharge its liability under the contract for the loss if the insured satisfies subsection (3).

(3) The insured satisfies this subsection if it shows that the non-compliance with the term could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred.”

What this means in relation to C’s claim is that while it is a requirement to have an alarm system in place (to reduce the risk of theft), any failure to do so cannot be reasonably relied on to refuse a claim if the loss would have happened anyway, even if they did have the alarm in place.

In this case, the theft took place as a result of the thieves climbing onto the roof from the roadside, they did not enter the property. It seems likely the theft would have happened regardless of there being an alarm system in place as the circumstances of this theft wouldn’t have triggered the alarm. The failure to comply with the policy term, made no difference, as the theft would still likely have occurred.

In accordance with the Act, HCC is therefore unable to exclude or limit their liability under the policy. HCC has not applied the terms fairly when considering this part of C’s claim. I’m therefore satisfied that it should proceed to reconsider the claim, in accordance with the remaining policy terms, including the ‘Property in the Open’ extension which has been added to C’s policy.

Putting things right

The fair and reasonable outcome to this complaint is for HCC to reconsider C’s claim under the remaining terms of the policy, including the ‘Property in the Open’ extension.

My final decision

My final decision is that I uphold this complaint and require HCC International Insurance Company Plc trading as Tokio Marine HCC to do as set out in the ‘Putting things right’ section above.

Under the rules of the Financial Ombudsman Service, I’m required to ask C to accept or reject my decision before 9 April 2024.

Ankita Patel
Ombudsman