

The complaint

A limited company, which I will refer to as S, complains about the decision of AXIS Specialty Europe SE to avoid its commercial insurance policy and decline its claim for building damage.

What happened

The following is intended only as a brief summary of events. Additionally, whilst other parties have been involved in the correspondence, for the sake of simplicity, I have largely just referred to S and AXIS.

S owns a commercial property and held a commercial insurance policy underwritten by AXIS. The policy had been in place for several years, renewing annually.

S's business is recorded on Companies House as construction of commercial/domestic buildings, though S says this is not an accurate description of what it actually does. It says its sole activity since incorporation has been the holding of the property insured by the policy with AXIS. Having looked at the account information on Companies House, it seems the only asset S holds is this property.

S has said the property was purchased in 2009, at the time the company was incorporated, and was rented out to one of the directors of the company. The property was run as a pub for the next ten years, until the pub ceased operation. Since then, it has been vacant. In 2020, S sought planning permission for its redevelopment into housing. This was granted in early 2022.

My understanding is that the redevelopment plans consist of retaining the main pub building and the adjacent "malthouse", converting these into residential properties, and building a number of additional residential properties on the site. The plans also include demolition of the former "stables", which is currently (at least in part) a service garage operated/owned by a third party.

The policy renewed in August 2022. Prior to this renewal, S was required to make a fair presentation of the risks posed. A statement of facts was produced based on the information S gave. The details of what was included are known to both parties, and I have not produced this in full here. However, I have included a couple of the more relevant details. These are as follows:

"Is the proposer a property developer? No"

"What is the long term intention for the property? To be let"

"Having any structural alterations, or major renovation work affecting load bearing walls or the roof, or are any such works being planned? No"

"Currently having any other building work undertaken or planned within the next 12 months? (including redecoration) Yes"

"Please confirm the total value of this work including the cost of any items being fitted (i.e. kitchens / bathrooms) £50,001 - £75,000"

And:

“Do you wish to provide any other material facts or additional information you feel that we should be aware of and may be relevant to this individual property? Yes

The property was previously occupied as a public house with accommodation for the management. There is also a function room attached. The property is currently vacant and is to be converted into residential accommodation. Plans have been drawn up and change of use granted.”

In April 2023, S's property was damaged by a fire. S contacted AXIS to claim under the policy. However, following some investigation, AXIS avoided the policy and declined the claim.

Essentially, AXIS said that as the planning application included approval for parts of the property to be demolished, this should have been explicitly disclosed. And that the additional information above did not set out that the change in use and conversion involved demolition works. AXIS said that, had this been disclosed, it would not have offered S cover. So, it was avoiding the policy and as a result not covering the claim. AXIS did say that it would refund the premiums paid for the policy.

S complained about this decision. It said that although there was permission to demolish parts of the property there were a number of issues that needed to be resolved before this could take place, and indeed this might not even be possible. One of these issues was that part of the property for which planning permission for demolition had been granted was not even owned by S. S certainly did not consider that any demolition would take place within the policy term.

AXIS did not change its position and S brought its complaint to the Ombudsman Service. Our Investigator thought the complaint should be upheld. He said that he was persuaded that no demolition was realistically expected to take place within the term of the policy. And he thought the lack of S's knowledge about when these might take place means they could be deemed to not be planned. So, he thought the information S had given when the policy renewed in 2022 was accurate and was not a breach of the duty of fair presentation. He was also not satisfied that AXIS had demonstrated that, even if there was a breach, it would not have offered the policy had other information been given.

So, our Investigator recommended that AXIS reinstate the policy, and consider the claim on the basis that there had been no breach of the duty of fair presentation, in respect of the demolition issue, that would have caused the policy not to have been provided.

AXIS disagreed with this. It said that S also should have said that it was a property developer and should have selected “demolition” rather than “to be let” from the relevant drop down. And that the difference in the risk posed included not only those works being carried out within the policy term, but also the fact that, if larger scale works are planned at a later date, the property may well not be maintained in the period leading up to them. So, it maintained its position that it would not have offered cover.

As our Investigator was unable to resolve this complaint, it has been passed to me for a decision.

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 am upholding this complaint. I'll explain why.

I should point out that both parties have made detailed submissions. I have considered all of these, but I am not going to address each of the points made. Instead, as reflects the Ombudsman Service's role as an informal dispute resolution service, I am going to focus on what I consider to be the key issues.

At its core, this complaint comes down to whether S breached the duty of fair presentation, as required by the Insurance Act 2015 (the Act). And, if so, whether AXIS is entitled to avoid the policy as a result.

Both parties are aware of the requirements of the Act, so I have not set these out here in full. It is enough to say that S was required to disclose every circumstance it knew of that would influence the judgement of a prudent insurer in determining whether to take the risk and, if so, on what terms. If S breached this duty, regardless of whether it was reckless or acted deliberately when doing so, and AXIS would not have entered the contract, AXIS would be entitled to treat the contract as if it had not been entered.

It is therefore necessary to consider what S said about the risk at the time the policy was entered, and to compare this to what is now known.

The long-term intention for the site appears to have been to let the properties – both the new builds and the converted existing buildings. Either that, or the properties would have been sold. I don't think it would have been an accurate description of S's long-term intentions to have chosen the "demolition" option. Clearly the long-term plans involved retaining the majority of the insured buildings and converting these. So, I don't agree that S gave an incorrect answer here.

I have set out my understanding of S's business above. Whilst its intentions may have included the development of the property it owned, I do not consider it would accurately be described as a property developer. There is no evidence that it had ever previously developed property or that it had any intentions to do so beyond the works to the insured premises. I have also borne in mind the content of the rest of S's declaration, in which it made clear that it was carrying out works to convert the existing buildings. Given this, AXIS would have been aware that there was some property development planned. And as long as S did not intend to carry out any demolition or to build the new properties within the term of the insurance, I consider it either accurately described its business or gave AXIS enough information to make further enquiries.

I consider that a significant factor is whether the major works were planned within the period of insurance. I am persuaded by the evidence provided by S that it did not plan to commence the major works within the 12 months of the policy period. There were significant obstacles to this taking place, some of which were not within S's control.

It seems that the rebuild cost of the insured property is around £500,000 more than the policy was taken out to cover. So, it seems S is underinsured. Consideration of this point, or the implications of this on any claim settlement, does not form part of this complaint or decision. However, AXIS has referred to S's broker apparently saying that this disparity was to reflect that part of the building was to be demolished, and has inferred that this meant the demolition was planned during the period of insurance. It is not entirely clear what the broker said or why this information was provided.

However, having seen the policy schedules for the preceding years, it seems the level of cover was increasing. And it does not seem that there was any adjustment during this period for any planned demolition. So, I am not persuaded that the apparent comments of the broker have any significant bearing on this complaint.

I have then thought about the other specific questions that were asked. The question over major work did not include any timeframe for these to take place. However, this was immediately followed by a question asking about any other works within the next 12 months. Reading these together, I consider it is reasonable that a customer would have answered both questions based on their intentions for the next 12 months.

Arguably, the lack of a timeframe in relation to this first question distinguishes from the second. And it is possible that a customer ought to have realised that AXIS was seeking information about any planned major works – whether within the next 12 months or not. However, the second question is also distinguished from the first by reference to “other” works. And the first question did not, for example, include wording such as, “at any time, whether within the term of the policy or not”.

It might be difficult for many customers to answer such a broad question in any case. The existence of planning permission in this case does mean that there were some clear future intentions for major works to take place on the site. But, given the framing of the questions here, I consider W acted reasonably when responding to this on the basis that no major works were planned to take place within the next 12 months. This is the term of the policy and this is what a customer would reasonably expect an insurer to be interested in. I consider this answer, given on this basis, was accurate.

This may not have been the information AXIS was seeking here, but I do not consider it was as clear as it could have been. I don’t consider the specific questions AXIS asked were clear enough to mean S’s response to these was inaccurate.

The duty of fair presentation goes beyond merely answering specific questions though. I have considered whether the questions AXIS asked were so specific, and covered the same relevant facts, as to mean S could reasonably consider that in answering them it was giving AXIS all the information it needed. However, even if this was the case, the broad question about any other additional information would likely overcome this. And I consider S could reasonably be expected to give AXIS further information.

The Act does not set out that it is the customer that should know what circumstance would be material. The Act says that the circumstances that need to be disclosed are those that the customer knows about and that a prudent insurer would consider to be material. That said, I have to take into account all of the circumstances of a complaint and consider what is fair and reasonable. This includes taking into account the law. However, where I consider it would not be fair and reasonable to strictly apply the law to the circumstances, I can reach a different conclusion than a court might.

So, whilst I note AXIS’s comments about major works planned for a date beyond the end of the period of insurance being a relevant consideration for its risk assessment – and potentially for similar risk assessments by other prudent insurers, I have thought about whether it is fair and reasonable to expect S to have provided AXIS with this information in the circumstances of this complaint.

As above, I have set out that it was reasonable for S to answer the specific question about major works on the basis that AXIS was asking about the following 12 months. As I say, as well as considering how the questions were set out, this is what a customer would expect an insurer to be interested in. I also think the same would apply when S answered the broader question about additional information. S gave an answer to this, on the basis that it related to the following 12 months, that was accurate.

Had S been answering the question on the basis that it was not limited to the following 12 months, I do consider that it ought to have provided more detail about the development. The

construction of new buildings and the demolition of, at least part of, an existing building are clearly things that a prudent insurer would want to know about – and that a reasonable customer would appreciate. And I do agree that this is likely to be the case even where this activity is planned to take place within a reasonable period after the end of the policy term. This is the information that AXIS, and potentially other prudent insurers, would have wanted to know about. So, technically, S was in breach of the duty of fair presentation here.

However, taking all of the circumstances into account, I do not consider it would be fair or reasonable to apply the requirements of the Act too strictly. I consider it was reasonable for S to consider AXIS was only interested in information about its intentions for the following 12 months. And I do not consider it fair or reasonable to conclude that, in the circumstances of this particular complaint, S ought to have declared information that it did not consider AXIS would have considered material, even if in fact this was material to AXIS.

Even if I am wrong about this, I have thought about whether AXIS has demonstrated that it would not have offered the policy to S had further information been provided.

The underwriting criteria AXIS has been able to provide does not cover the exact circumstances here. Underwriting guides from other products provided by AXIS do indicate that where there is an intention to demolish an insured building, cover will not be provided. But it isn't clear what types of policy these are, and one of the guides refers to an immediate intention, which is not the case here.

As mentioned, I can though appreciate AXIS comments that a future intention to demolish will be a relevant consideration in terms of the risks posed. As well as a potential lack of maintenance, a customer might actually choose to allow a building to collapse in order to reduce later costs – and this would pose a number of risks. So, I am satisfied that if S had made AXIS fully aware, the question of whether to provide cover would likely have been passed to an underwriter for individual consideration.

AXIS's underwriter has now said that cover would not have been provided. Whilst I note these comments, and the reasons for them, I need to bear in mind that this assessment is being made with the benefit of hindsight. The fact that other policies AXIS provides cover for would not have provided cover where there was an (immediate) intention to demolish does add some weight to AXIS's stance.

However, I also need to think about the level of demolition that appears to be intended in S's case. Certainly, some of the property to be demolished was not owned by S and so would not be relevant for AXIS's consideration of the risk posed by the property it was insuring. I do consider S's intention to acquire and then demolish property that AXIS was not insuring is not directly relevant to the risk posed to the property it was insuring.

It isn't entirely clear if the intended demolition also included part of the property owned by S. The site is made up of a number of buildings, and my understanding is that S do own part of one of the buildings that had planning permission for demolition. However, it seems the intended demolition would only have – at most – included a small part of the overall property AXIS was insuring.

Whilst this may have been a factor that AXIS would have needed to assess, it is clear that the majority of the buildings it was insuring were intended to be retained. These retained buildings would pose no greater risk than any other 'normal' building. The buildings were unoccupied, but AXIS was aware of this.

So, had full information been disclosed, AXIS would have been aware that there was a likely intention to demolish at least part of one building. But it also would have known that this

building was attached to/formed part of a building owned and used by a third party. And that the majority of the buildings on the site were likely to have been kept in good order, with a view to converting them into residential property.

Potentially, AXIS may have excluded the (part of the) building which was intended to be demolished. Or added endorsements relating to this. However, AXIS has not suggested that this is what it would have done.

The underwriting criteria relevant to S's policy also says that cover is potentially available where the planned structural work does not exceed 50% of the building sum insured. I am not aware of the planned costs of the structural work, but I consider it is likely that the cost of the demolition of the part of the buildings insured by AXIS would not have exceeded this.

So, whilst the underwriting criteria and comments of the underwriter persuade me that an intention to demolish property would have been a material circumstance, I am not persuaded that AXIS has demonstrated that had it considered the full circumstances it would not have provided cover.

It follows that I do not consider it to be fair and reasonable for AXIS to avoid S's policy.

Putting things right

AXIS Specialty Europe SE should reinstate S's policy and consider its claim based on the terms that existed.

My final decision

My final decision is that I uphold this complaint. AXIS Specialty Europe SE should put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask S to accept or reject my decision before 26 July 2024.

Sam Thomas
Ombudsman