DRN-4796850

The complaint

A limited company, which I will refer to as W, complains about the decision of Accelerant Insurance Europe SA/NV to avoid its commercial insurance policy and decline the claim it had made.

What happened

The following is intended only as a brief summary of events. Additionally, whilst both parties are represented and a number of individuals have been involved in the correspondence, I have largely just referred to W and Accelerant for the sake of simplicity.

W operates a restaurant business and held a commercial insurance policy with Accelerant. In January 2022, W suffered a fire at its premises. It contacted Accelerant to claim. On investigating the claim, Accelerant became aware of information that it had not been made aware of at the time the policy had last renewed in November 2021.

On initially taking out the policy, W had declared that a previous company that its directors had also been directors of had gone into liquidation. A declaration to this effect was contained in the statement of facts relevant to the policy that renewed in November 2021. For the sake of anonymity, I have slightly amended this declaration, but its content is known by the parties and largely read as follows:

> "Two of the current Directors of [X] were directors of a 2018 liquidated company ([L]) which operated a [restaurant] franchise. The following statement has been confirmed as accurate by the client … the Inland Revenue sought from the company, back tax and corporation tax from 2005. This was impossible given that the company had only been incorporated in 2009. On …2018 a Winding-Up petition was issued resulting in the company being wound up on the … 2018. The staff, property rates and rent were all paid up to date by the … 2018 The only debts being the alleged £440,000 (which included penalty charges and interest) from the Inland Revenue Liquidators were appointed on the … 2019 and we understand that by this time there were some additional debts (including around £25,000 owed to [the franchisor]) which would have been no more than £75,000"

No further comments on this were either sought by Accelerant or provided by W in or around November 2021.

However, on investigating the claim, Accelerant became aware that, in August 2021, the liquidators for L had sent the directors of W a pre-action letter. This made a number of allegations relating to the directors' actions in relation L, including allegations of misfeasance. W had responded to this letter on 1 November 2021, which was prior to the renewal of the contract of insurance with Accelerant.

Essentially, Accelerant said the failure of W to disclose this information was a breach of the duty of fair presentation. Accelerant said that the fact that the liquidator had made these allegations, with a view to commencing legal proceedings, was a material circumstance that the W knew of. And that, had this information been disclosed, Accelerant would not have

agreed to provide W with cover. So, Accelerant avoided the policy, and declined the claim on this basis. It also said that it considered the breach to be deliberate or reckless, so it did not refund the policy premium.

W complained about this, ultimately bringing its complaint to the Ombudsman Service. It said that the allegations were untrue and were ultimately settled without the admission of liability. As they were untrue, W did not consider this was a fact that it needed to disclose. W also said that the declaration it had made ought to have put Accelerant on notice that it might need to ask further questions around this, but that it had not. And that the specific questions Accelerant had asked in the statement of fact meant that it was reasonable to consider Accelerant didn't need to be told about the pre-action letter – as this was not something specifically asked about. W also said that it was not satisfied that Accelerant would not have provided cover even if this letter had been disclosed.

Our Investigator did not recommend W's complaint should be upheld though. He thought there had been a breach of the duty of fair presentation, and that W ought reasonably to have disclosed the letter and allegations. And that this could be considered a deliberate or reckless breach. He was also satisfied that Accelerant would not have offered the policy had it been made aware of the letter and allegations. Overall, he considered Accelerant had acted appropriately when avoiding the policy and declining the claim.

W remained unsatisfied and its complaint 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 not upholding this complaint. I'll explain why.

I should firstly repeat that the above is only intended as a brief summary of the events and submissions from the parties. Both parties have made lengthy and details submissions. I have considered all of these, but I will not be commenting on each point. Instead, as befits the Ombudsman Service's role as an informal dispute resolution service, I will be focussing on what I consider to be the key points.

W has said that is does not consider the letter from the liquidators or the allegations therein were material circumstances that needed to be disclosed. However, it is clear that allegations were being made and the existence of these allegations was itself factual (regardless of whether allegations themselves were factually accurate). It is also clear that W was aware of these at the time the policy was renewed; not only were the allegations made several months prior to the renewal, W responded to them only a couple of days prior to the renewal date. So, I don't think there can be any dispute that there was a fact that W was aware of.

The question is whether the existence of these allegations was a material circumstance. Under the Insurance Act 2015, which applies in the circumstances of this case, a customer is required to disclose communication made to or information received by them about something that would influence the judgement of a prudent insurer in determining whether to take on this risk and, if so, on what terms.

W was seeking (to renew) insurance relating to the risks attached to it as a business. And as a limited company, the past behaviour of its directors is relevant to the risks attached to it. This behaviour is potentially indicative of what future behaviour might take place. So I consider that this would be a circumstance that would influence the judgement of a prudent

insurer.

The question posed by the above Act is an objective one about whether a prudent insurer would be interested in such information, but I have also thought about whether W would have known it needed to disclose this information.

I consider that a reasonable person would understand that an insurer considering whether or not to provide cover for a business would want to know about any significant issue which questions the past behaviour of its directors. This is borne out by some of the general questions Accelerant asked at the time of renewal around previous issues with W's directors – these types of questions are common. The allegations relate to the actions of the directors of W in their previous role. Their previous role was seemingly of the same nature as their role with W. And the allegations relate to issue of financial impropriety and misfeasance. These allegations, false or otherwise, indicate the possibility that the previous behaviour of W's directors was inappropriate.

Given I consider a reasonable person would consider that an insurer of the type of policy being taken out would want to know about issues around the past behaviour of its customer's directors, it follows that I consider W ought reasonably to have known Accelerant should be made aware of these allegations.

I have thought about whether the declaration already made, and the lack of further questions around this, means that Accelerant waived its right to be made aware of the allegations. But I am not persuaded by this. The declaration does indicate that there is an outstanding debt. However, the existence of a debt for a company going into liquidation is not surprising or unusual. Allegations of breaches of duties owed by the directors to the liquidated company and of misfeasance, to the extent that court action is being pursued, is on the other hand less common. I do not consider the declaration of a previous liquidation, and the lack of further questions around this, means that Accelerant waived its right to be made aware of the allegations that later arose.

Similarly, I do not consider the nature of the specific questions leading to the statement of fact mean that W could not be expected to declare other relevant information. Whilst some questions are asked around the previous circumstances of the directors, and so might indicate to a customer that the insurer was interested in such matters, I do not consider the nature or form of these meant that other information relating to the previous circumstances did not need to be disclosed.

Having taken all of the arguments and circumstances into account, I consider W ought to have disclosed the letter and allegations received from the liquidator of L. And I consider that the failure to do this was a breach of the fair duty of presentation.

I also consider that W knew about the information it did not disclose, and ought to have known that it needed to be disclosed, so I consider Accelerant treating this as a deliberate or reckless breach to have been fair and reasonable. This means that, if Accelerant acted appropriately when avoiding the policy, it would be entitled to retain the premium W paid for it.

The next issue is to determine what Accelerant would have done had this information been disclosed at the time of renewal.

I do appreciate W's comments over the danger of relying on an underwriter's comments after the fact. There is a recognised danger that a decision made with the benefit of hindsight will be different to that which would have been made at the time. This is especially true in circumstances where the relevant underwriting criteria does not cover the specific situation,

as is the case here. And I have borne this in mind.

However, Accelerant's underwriter has provided a detailed statement, confirming that had W disclosed the allegations, it is most likely the matter would have been referred to the underwriter for consideration. And that ultimately that cover would not have been provided.

From the correspondence that had previously taken place around the existence of the liquidation of L and of the dissolution of other companies W's directors had been involved with, it is evident that the relevant insuring parties already had some concerns with the risk posed. And it is not difficult to see that the additional concerns around issues relating to this would have meant cover would not have been provided by Accelerant. The nature of the allegations, relating as they did to the moral hazards posed by the directors (whether accurate or not), is something that I consider would have led all insurers to act with caution.

Parts of Accelerant's underwriting criteria have been provided. These do not cover the specific circumstances here. But they do show that where a director has, for example, been charged with fraud cover would be declined. As I say, this is not the same as the current circumstances, but I consider it is indicative of the considerations and conclusions Accelerant would have had.

W has suggested that it is necessary to have examples of other cases where Accelerant had declined to offer cover that match the circumstances of W's case. Whilst this would be useful, I have considered the information that is available.

Ultimately, I consider that it is more likely than not that, had W disclosed prior to renewal the existence of the letter and allegations from L's liquidator, Accelerant would have declined to offer cover. The application of the Insurance Act 2015, and of the other relevant considerations, means that I consider Accelerant acted appropriately when avoiding W's policy and declining the claim as a result. It follows that I cannot fairly and reasonably require Accelerant to do anything more.

My final decision

My final decision is that I do not uphold this complaint.

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

Sam Thomas
Ombudsman