DRN-4876087

The complaint

A company, which I'll refer to as K, complains that Royal & Sun Alliance Insurance Limited (RSA) declined its claim for fire damage and voided its policy from inception.

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, K took out a Properties insurance policy. In June 2022, K made a claim under its policy following a fire incident at its property.

RSA appointed a loss adjuster to investigate the claim. The loss adjuster found that the roof to K's property was a flat roof. On further inspection by a roofer, it was identified that the roof construction was timber with a felt covering. RSA referred to the statement of fact completed when the policy was incepted which contained a statement about the construction of the building and roof. RSA said K failed to fairly present the risk at inception because it had told RSA that the roof was of 'standard construction'. RSA said K's roof didn't fall within the definition of 'standard construction' as per the statement of fact.

RSA explained that K had a duty to ensure it made a fair presentation of risk. RSA said that in this instance, incorrect information provided on the statement of fact led them to provide cover. RSA's underwriter confirmed they wouldn't have accepted the risk and cover wouldn't have been provided, if they had been aware that the roof was constructed of timber with a felt covering

RSA concluded that K had made a qualifying breach of the duty of fair presentation. And, in line with the remedies available to RSA under the Insurance Act 2015 (the Act), they voided the policy from inception, effectively treating it as if it never existed, and declined K's claim. RSA didn't treat the breach as deliberate or reckless and therefore they refunded the premium paid by K.

K disputed RSA's decision to decline its claim and void its policy. It said it wasn't aware the roof was constructed from felt on timber. K said had it been aware, it would've disclosed this information to RSA because it had no reason not to. K also explained that neither RSA nor the loss adjuster were able to identify the construction of the roof until further inspections were carried out by K's roofer. The inspection involved photos being taken from above the roof and lifting the felt covering to reveal the timber underneath. K therefore thinks it's unfair to expect it to have known the construction of the roof without lifting the felt to identify the material underneath.

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

My first provisional decision

On 13 March 2024 I issued a provisional decision. I said that I was intending to reach a different outcome to the Investigator and was thinking about upholding the complaint.

In summary, I explained that under the 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 Act says disclosure needs to be made of every material circumstance which the insured knows or ought to know. 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.

RSA said K didn't inform them the roof was constructed from timber with a felt covering. It therefore concluded that K didn't make a fair presentation of the risk. K said it thought the submission was correct based on the information it had when incepting the policy.

I was satisfied it was K's responsibility to ensure that it provided a fair presentation of the risk to RSA when the policy was taken out. But explained that I was minded to consider it was not fair or reasonable for RSA to conclude that K breached this duty. I said this because in order to establish the construction of the roof, the felt had to be lifted to inspect the material underneath. I hadn't seen anything to persuade me that K ought to have known the flat roof was felt with timber construction underneath. I didn't think it was reasonable to expect K to have carried out such extensive investigation when taking out the policy. I therefore provisionally concluded that K did make a fair presentation of the risk.

Responses to my first provisional decision

K responded to say that in addition to the award recommended, RSA should also pay the fee of its representative, as well as the cost of the additional premium it incurred due the voidance of its policy.

RSA also responded. They said don't agree with the provisional decision, and in summary said the following:

- When submitting the online proposal for insurance, K's broker didn't indicate that any of the assumptions on the statement of fact were incorrect. Had K made RSA aware that a proportion of its property had a flat roof, with felt on timber, it wouldn't have provided cover.
- The roof was flat felt and that should have alerted K that it wasn't of the 'standard construction' as per the assumption made on the statement of fact. And even if the felt was over material other than timber, K was aware it was flat so should've clarified this to its broker so further enquiries could be made.
- As a commercial customer who operates a business of significant size, K would have access to resource and expertise that a consumer wouldn't otherwise have, such as a buildings surveyor should this have been necessary. K would have also had access to documents relating to the premises, including previous surveys, assessments, repair records etc, which RSA expects would have highlighted the construction of the roof.
- K also employed the services of a roofer and while RSA might not have expected an unduly invasive examination of the roof, an experienced roofer should be able to identify whether the felt covering was over timber or not.

Following the above responses, I asked both parties for further information.

I asked K for a copy of any building surveys carried out on the property i.e., at the time of purchase in 2014, or later if applicable. As well as any information on whether the roof had repairs or maintenance work carried out since K obtained the property in 2014. K said that a

survey wasn't carried out at the time of purchase, and there hasn't been any repairs or reported issues with the roof since purchase either.

I also asked RSA for evidence from its underwriter that it wouldn't have accepted cover had it been aware that roof was constructed of 100% timber. In summary, RSA explained this is an online traded risk and as such the product rules are applied automatically by the system. There is no manual intervention by an actual underwriter. RSA provided evidence of the product rules.

My second provisional decision

On 13 June 2024, I issued a second provision decision. I said the following:

"While I appreciate this will come as a disappointment to K, having given careful consideration to both parties' submissions, I am minded to change my decision and not uphold this complaint. I will explain why.

The issue for me to decide in this instance is whether or not it is fair and reasonable for RSA to avoid K's policy and decline its claim on the basis they have set out in their final response to K's complaint.

RSA made the decision to avoid K's policy on the basis of a breach of the duty of fair presentation made by K when taking out the policy. RSA said K provided incorrect information. When considering whether RSA acted fairly, the starting point is the Act. Under the Act, commercial policyholders, such as H, have a duty to make a fair presentation of the risk to the insurer when taking out a policy. This means they have to disclose either:

- *everything they know, or ought to know, that would influence the judgment of an insurer in deciding whether to insure the risk and on what terms; or*
- *enough information to put an insurer on notice that it needs to make further enquiries about potentially material circumstances.*

The Act requires K to make a 'fair presentation of the risk' when taking out the policy and in doing so, the information provided needs to be accurate.

Where there has been a failure to fairly present the risks to an insurer by giving incorrect information, and this gives the insurer a right to a remedy under the Act, this is called 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 K at inception of the policy, included the following statement:

> *"The premises are built of rock, stone or concrete with slate, tiles, concrete, metal or asbestos roof".*

The statement of fact also stated that K had a duty to make a fair presentation of risk and that RSA's acceptance of the risk is based on the information provided by K prior to the commencement of the policy.

It's not in dispute that the above statement was marked as 'yes' by K, and it maintains that the answer provided to the above statement was accurate based on the information it had

when incepting the policy.

RSA says there is a breach and they have confirmed that if accurate information had been provided in relation to the construction of the roof, cover would not have been provided.

I remain satisfied that it was K's responsibility to ensure that it accurately provided a fair presentation of the risk to RSA when the policy was taken out. What I also have to consider is whether it was fair for RSA to conclude that K breached its duty, in the circumstances of this case, to make a fair presentation of the risk about the roof.

There has been lots of argument about whether K ought to have known the construction of the roof or whether it should have taken additional steps to find out. I have thought about this very carefully, along with whether K should have disclosed the roof was flat with a felt covering.

I note that K says it didn't know the construction of the roof and therefore thought that the submission it made was correct. The Act says the policyholder "ought to know" what should reasonably have been revealed by a reasonable search of information available to them. So, the policyholder should take reasonable steps to check any information available to them and consider if there's anything they ought to disclose.

I'm satisfied that as an owner of a commercial property, a reasonable search of the information available should, at the very least, reveal some information about the construction of the roof. I haven't seen any evidence that K attempted to carry out any checks to ensure it was disclosing information it ought to have known accurately. K said no survey was carried out at the time of purchasing the property. Whilst it is possible no official survey was carried out, I'm not persuaded that a property of this size and value would be purchased without any due diligence being carried out on its structural integrity and maintenance issues.

Even I was to accept that K purchased the property without carrying out a survey, and that it had no other information available about the construction of the roof, I'm not persuaded by K's argument that it made a fair presentation based on what it ought to have known. I think at the very least, it should have disclosed that the roof was flat with a felt covering. I say this because I agree with RSA that the assumption made about the construction of the roof didn't mention a flat roof with a felt covering. It's clear from the photographs that the roof is a flat one with a felt covering, and as the owner of the property, K ought to have known this. I'm satisfied that if K had disclosed this, it would've have put RSA on notice to make further enquiries. By not disclosing the flat roof and agreeing to the assumption made, which was not accurate, K breached its duty to make a fair presentation of the risk under the Act.

I'm not satisfied that K took reasonable steps to disclose everything it knew, or ought to have known, that would influence the judgement of RSA in deciding whether to insure the risk. I therefore consider there has been a breach and from what I have seen, I am satisfied that RSA wouldn't have offered the policy based on the breach.

The Act says where there has been a breach and the insurer wouldn't have provided a policy, the insurer is entitled to avoid it. RSA hasn't treated the breach as deliberate or reckless and therefore I'm satisfied it was fair and reasonable for RSA to avoid the policy, refuse any claims and return the premiums. This remedy puts K back in the position it would have been in had the duty of fair presentation not been breached. This is in line with the actions prescribed in the Act and I see no reason to depart from this approach.

Having considered everything very carefully, I think RSA acted fairly and reasonably in avoiding the policy and declining K's claim."

Responses to my second provisional decision

RSA didn't respond.

K responded, and in summary said its profession isn't one of a builder or property expert. It was RSA who suggested that K instruct a roofer to inspect the material because they were not sure of the construction either. K said the roof appeared to be of standard construction. It's not been necessary to have any work carried out to the roof. If K had been aware of the construction, it would have disclosed it.

K also pointed out that the construction of the roof did not cause or increase the risk of the fire.

K referred to various case law in support of the following arguments:

- For an insurer to rely on misrepresentation to void a policy, the misrepresentation must be material to the risk being insured. K believes that it was not because the construction of the roof didn't impact the risk of the fire or the claim itself.
- Insured must have acted with deliberate recklessness or failed to disclose facts they knew or ought to have known were material. K said that given the construction of the roof wasn't easily discoverable, they acted in good faith.
- Roof's construction was not the proximate cause of the fire.

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.

If there's something I've not mentioned, it isn't because I've ignored it. I haven't. I'm satisfied I don't need to comment on every individual argument to be able to reach what I think is the right outcome. This is not intended as a discourtesy, but a reflection of the informal nature of the Financial Ombudsman Service.

I have carefully considered the representations made by K in response to my most recent provisional decision, however I remain satisfied that RSA acted fairly and reasonably when declining K's claim for fire damage and avoiding its policy. I know this will come as a disappointment to K, but I will explain why.

I appreciate K doesn't specialise in building work or the construction of properties, and I don't think it would be fair to require K to be an expert in those areas. But as I said above, as an owner of a commercial property, a reasonable search of the information available should, at the very least, reveal some information about the construction of the roof. I don't think this requires expert knowledge in building work or properties. At the very least, I would expect to see that K carried out reasonable checks to find out more information, but I haven't seen any evidence that K attempted to carry out any checks to ensure it was disclosing information it ought to have known accurately.

K said the construction of the roof was not the proximate cause of the damage and that the construction wasn't easily identifiable, so it acted in good faith. As I said above, I haven't seen any evidence that K took reasonable steps to ensure the information was accurate. When considering the duty of a fair presentation of risk for commercial policyholders, the relevant consideration is the Insurance Act 2015 (the Act). The Act doesn't require for proximate cause to be a relevant consideration if RSA can demonstrate that it wouldn't have offered the policy in the first place. I'm satisfied that RSA have demonstrated this and so I

don’t need to consider this any further.

Under the 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 Act says disclosure needs to be made of every material circumstance which the insured knows or ought to have known. 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.

K said the misrepresentation must be material to the risk being insured and it doesn’t think it was because the construction of the roof didn’t impact the risk of the fire or the claim itself. As I’ve explained above, proximate cause isn’t a relevant consideration here because RSA wouldn’t have offered the policy to K. What’s relevant is whether the information about the construction of the roof was material to RSA’s decision in accepting the risk.

It's not in dispute that the Statement of Fact made a number of assumptions, including information about the construction of K’s roof. K said it was correct. The statement of fact also stated the following:

> *“IMPORTANT NOTICE CONCERNING YOUR DUTY TO MAKE A FAIR PRESENANTION OF THE RISK*
>
> *Before Your Policy takes effect You have a duty to make a fair presentation of the risk to be insured under Your Policy.*
>
> *Our acceptance of this risk is based on the information presented to Us prior to the commencement of the Policy, and at subsequent stages in respect of mid-term changes and renewal. Provided the on-line questions have been completed accurately and in good faith, and assumptions generated on the Statement of Fact checked. We will accept this as being a fair presentation of the risk.*
>
> *The information recorded in this document has been material to Our assessment of*
>
> *1. Your eligibility for this insurance Policy*
> *2. The terms and conditions to apply to Your Policy*
> *3. Your insurance premium.”*

I think it’s clear from the wording in the statement of fact that this information was material in RSA accepting the risk. Furthermore, RSA have demonstrated that they wouldn’t have provided cover if this information had been disclosed.

I remain satisfied that it was K’s responsibility (either directly or through its broker) to ensure that it provided a fair presentation of the risk to RSA. As it didn’t do that in this instance, I am satisfied that it didn’t make a fair presentation of the risk.

Taking everything into account, I don’t think RSA acted unfairly in avoiding K’s policy, refunding the premium paid and declining the claim in question for not making a fair presentation of the risk.

My final decision

My final decision is that I don’t uphold this complaint.

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

Ankita Patel
Ombudsman