DRN-4911136

The complaint

Mr and Mrs G complain that Accelerant Insurance Europe SA/NV (Accelerant) has sought to reduce settlement of a claim made under their landlord's building insurance policy.

Where I've referred to Accelerant, this also includes any communication or action by agents acting on their behalf.

What happened

Mr and Mrs G own a property which is let out to tenants, and they have a landlord's building insurance policy underwritten by Accelerant.

In February 2023 Mr and Mrs G discovered malicious damage had been caused to the property by unknown individuals (not the tenant), so they made a claim to Accelerant.

Accelerant looked into things, and they concluded Mr and Mrs G were underinsured as the rebuilding cost declared was significantly lower than what they say it should have been. As a result, Accelerant referred to the policy, which said that in the event of underinsurance, a claims settlement would be reduced based on the percentage insured for. Accelerant had concluded Mr and Mrs G were 53% underinsured, so they said only 47% of the claim would be payable.

As Mr and Mrs G were unhappy with Accelerant's position, they approached the Financial Ombudsman Service.

One of our investigators looked into things and upheld the complaint in part. She said that she didn't think Accelerant had reached the wrong decision when concluding that there had been a misrepresentation regarding the sum insured.

However, the investigator said that Accelerant had unfairly sought to reduce the claim settlement based on the percentage insured. Instead, she said that based on the applicable insurance law, Accelerant should be reducing the settlement based on the percentage of premiums paid – if that was more favourable to Mr and Mrs G.

Accelerant didn't agree so the case was passed to me to decide.

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've reached the same outcome as our investigator.

I'll also explain that my consideration here is in relation to Accelerant's actions as the insurer. Mr and Mrs G raised a separate complaint about the broker, but my consideration in this case is solely in relation to Accelerant.

Mr and Mrs G have a landlord building insurance policy. As the policy is for a property they let out and receive income from, the relevant law which applies here is the Insurance Act 2015 (the Act).

The Act states that Mr and Mrs G were required to make a fair presentation of the risk to Accelerant when taking out (and renewing) their policy. That means disclosing any material information Mr and Mrs G knew, or ought to have known. Or failing that, disclosure which gave the insurer sufficient information to put a prudent insurer on notice to make further enquiries for the purpose of revealing those material circumstances.

If the insured, in this case Mr and Mrs G, fail to make a fair presentation of the risk, the Act makes it clear that the insurer needs to decide whether the breach is a 'qualifying breach'. It is a qualifying breach if, but for the breach of the insured's duty to make a fair presentation, the insurer would not have entered into the contract of insurance at all or would have done so only on different terms. If the insurer decides it is a qualifying breach, it then needs to decide whether it is deliberate or reckless or neither deliberate nor reckless. And this gives the insurer certain remedies depending. I'll consider this further below.

Mr and Mrs G's policy terms also mention the Act, and separately needing to make a fair presentation of the risk and what may happen if they don't:

> *"7. MISREPRESENTATION*
> *You must make a fair presentation of the risk to us. This means you must disclose at inception or variation to this Policy and prior to each renewal every material circumstance which you know or ought to know and not make misrepresentations to us. If you do not make a fair presentation to us, we can:*
>
> 1. *avoid this Policy from inception or renewal if we would not have issued it or continued it knowing the true situation*
> 2. *avoid a variation to this Policy if we would not have accepted it had the true situation been known*
> 3. *alter the terms of this Policy from the date the non-disclosure or misrepresentation was made to those we would have applied had the true situation been known*
> 4. *reduce the payment for a claim*
> 5. *cancel this Policy from the date the non-disclosure or misrepresentation was made.*
>
> *This may result in claims not being paid or not being paid in full"*

And in the statement of fact:

> *"It is your duty to make a fair presentation of the risk to us. This means that you must advise any information that may influence us in the acceptance of this insurance and the terms provided. This applies prior to the start of cover, any alteration during the policy period and prior to each renewal. If you fail to advise us of any incorrect information or omissions your policy may not respond the event of a claim."*

And:

> *"YOUR STATEMENT OF FACT*
>
> - *Please check your Statement of Fact to ensure all details are accurate and correct and that you have advised all important or relevant information which may influence our decision to accept this insurance.*
>
> - *If any information in this Statement of Fact is incorrect or incomplete, please contact your Insurance Agent as soon as possible*
>
> - *If any information declared on your Statement of Fact or Schedule is incorrect or incomplete, we may:*
>   - *cancel or void your policy*
>   - *change the terms of your policy*
>   - *refuse to deal with all or part of any claim or reduce the amount of any claim payment"*

Was there a misrepresentation by Mr and Mrs G and did they breach their duty to make a fair presentation of the risk?

When Mr and Mrs G's policy was renewed with Accelerant, the sum insured (which had been index linked and increased from previous years) was declared as £92,306. Accelerant says that when asked, Mr and Mrs G didn't declare an accurate rebuild value of the property to be insured.

The following was reflected in their policy documents:

What is the total rebuilding cost?	£92306

Directly underneath this on the documents, it explained what was meant by rebuild cost:

> *"The full rebuilding cost of your buildings means the cost of rebuilding if the buildings were completely destroyed. This is not necessarily the market value of the property."*

When validating the claim, Accelerant estimated the rebuild value should have been, at the least, £195,000. Whilst this was at the date of loss rather than the most recent renewal date, it was within the same policy period. So, on balance, I find this is likely to have been a more reasonable estimate than the £100,000 less that was actually declared on the policy at renewal. And I haven't seen any other valuations or estimates which supports that lower amount either.

It was Mr and Mrs G's responsibility to provide a rebuild value to Accelerant (or correct what was declared at renewal if it wasn't sufficient). This is outlined in Mr and Mrs G's policy documents:

> *"Declared Sums Insured*
> *Correct values at risk must be advised to us. If the sums insured you request are not adequate this will result in the amount we pay in the event of a claim being reduced. You should review your sums insured and levels of cover regularly to ensure these remain adequate."*

Mr and Mrs G have said they think Accelerant should be determining the rebuild value for them, however, the duty was on them to make a fair presentation to Accelerant.

The renewal documents highlighted the importance of the correct rebuild value, what may happen if this was incorrect, and also gave direction of how Mr and Mrs G may be able to obtain this:

> *"Adequacy of Insurance Values*
> *It is the responsibility of the insured to ensure that all sums insured & policy limits are adequate. It is strongly recommended that an appropriate professional (e.g.surveyor/accountant) be consulted to ensure the sums insured & limits under the policy are suitable."*

I can't reasonably conclude that Mr and Mrs G made a fair presentation of the risk as it seems they, wrongly, assumed Accelerant would determine the rebuild value for them, and therefore didn't attempt to establish what an accurate rebuild sum insured should be. So, I'm of the view that Mr and Mrs G breached their duty to make a fair presentation of the risk.

Was the breach qualifying?

Under the Act, there are certain remedies available to insurers in the event of a breach of the duty of fair presentation. But only where the insurer can demonstrate that, but for the breach, it:

- would not have entered into the contract of insurance at all, or
- would have done so only on different terms.

A breach for which the insurer has a remedy against the insured is referred to as a qualifying breach.

Accelerant confirmed that had a more accurate rebuild sum been provided, they would have charged more for the policy. They haven't calculated exactly what that would have been for the year in question, but when they updated the current policy year, this resulted in a significant uplift in premiums, so on balance there would also have been a significant uplift the year before too. And given the amount underinsured, the rise was reflective of that.

Whilst I haven't been given the exact figures as they haven't been calculated yet, I'm persuaded that there is a qualifying breach because Accelerant would have acted differently by charging higher premiums (exact amount to be calculated) if the rebuild sum declared was more reasonable.

Was the breach deliberate of reckless, or neither deliberate nor reckless?

The remedies available to Accelerant under the Act depend on whether they consider the breach of the duty was deliberate or reckless, or neither. And it is for Accelerant (as the insurer) to show that the breach was deliberate or reckless.

A qualifying breach is deliberate or reckless if the insured –

- knew that it was a breach of the duty of fair presentation, or
- did not care whether or not it was in breach of that duty.

The remedies available for a breach that is deliberate or reckless state the insurer –

- may avoid the contract and refuse all claims, and
- need not return any premiums

Accelerant has neither sought to avoid the policy or refuse the claim. Instead, it's sought to reduce the claim settlement. So based on the actions Accelerant took, I think it's reasonable to conclude that they ultimately considered the breach to be neither deliberate nor reckless. And this is more favourable than treating it as deliberate or reckless, so I think Accelerant has acted fairly by doing so.

The available remedies

Under the Act, where the qualifying breach is neither deliberate or reckless, and an insurer would have charged higher premiums, they can proportionately settle the claim based on the percentage of premiums paid against what should have been had there been a fair presentation.

However, Accelerant has sought to rely on a policy term to reduce the claim settlement in a different way, based on the percentage of the sum Mr and Mrs G were insured for, which was calculated to be 47%, rather than the percentage of premiums paid. On the face of it, this is contrary to the relevant law.

Contracting out

The Act does contain a 'contracting out' section. This means that an insurer can choose to include and rely on policy terms which aren't consistent with the Act.

Accelerant seeks to rely on the following term in the statement of fact to reduce the claim settlement:

> *"If you make a claim and your sum insured is not enough we will only be able to settle claims at the percentage you are insured for. For example if the buildings sum insured only represents 70 % of the full rebuilding cost then we will not pay more than 70 % of your claim. The full rebuilding cost of your buildings means the cost of rebuilding if the buildings were completely destroyed. This is not necessarily the market value of the property."*

This is different to the remedy in the Act as the calculation is based on the percentage insured for, rather than the percentage of premiums paid.

Whilst the Act does include a section which means an insurer can 'contract out', to be able to do so it needs to meet the 'transparency requirements'. These are:

- The policy term must be clear and unambiguous in its effect
- The insurer must take sufficient steps to draw to the attention of the insured the disadvantageous policy term

The term itself is in the policy statement of fact and does appear clear and unambiguous in my view. But having said that, it's not actually in the full policy terms and conditions. However, it should also be sufficiently drawn to Mr and Mrs G's attention. Whilst the term is in the statement of fact, I don't think it has been sufficiently drawn to Mr and Mrs G's attention that this term may be disadvantageous, or that they are entering into a contract with agreement that claims would be settled relying on average, rather than the Act, which could be disadvantageous to them.

Therefore, in principle, I'm not satisfied the 'transparency requirements' have been met to be able to 'contract out', or consequently, that Accelerant has acted fairly by applying this term rather than the remedies under the Act, which would be proportionate based on the premiums. So that's how I'd expect Accelerant to settle the claim – unless acting outside of the Act treats Mr and Mrs G more favourably than the Act requires.

However, our investigator asked Accelerant what the premium would have been had a more reasonable estimate of the rebuild sum insured been declared at renewal 2022. But despite requesting confirmation, Accelerant hasn't provided this. Therefore, I can't be certain that applying average in line with the terms actually disadvantages Mr and Mrs G more than the proportionate settlement remedy outlined in the Act.

Therefore, if the proportionate remedy in the Act puts Mr and Mrs G into a better position than applying average, this is how Accelerant will need to settle their claim. If not, it's existing offer will treat them fairly. So, if Mr and Mrs G accept my final decision, Accelerant will need to calculate what the premiums should have been and settle the claim in whichever way is more favourable to Mr and Mrs G.

My final decision

It's my final decision that I uphold this complaint in part and direct Accelerant Insurance Europe SA/NV to:

- Calculate what the premium would've been at the 2022 renewal based on what the rebuild sum insured ought reasonably to have been estimated as at that time.
- If applying the proportionate remedy under the Insurance Act 2015 is more favourable to Mr and Mrs G than applying average, Accelerant will need to settle the claim in this way instead.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G and Mrs G to accept or reject my decision before 13 August 2024.

Callum Milne
Ombudsman