DRN-5015498

Financial Ombudsman Service

The complaint

A limited company, which I will refer to as B, complains about the decision of Society of Lloyd's avoid its commercial insurance policy.

What happened

The following is intended only as a brief summary of events. Additionally, for the sake of simplicity, I have only referred to B and Society of Lloyd's even where others have taken action on their behalf. Any reference to Society of Lloyd's includes its underwriters and administrators.

B operates a restaurant and had a commercial insurance policy underwritten by Society of Lloyd's. The policy provides cover for a number of areas, including tenants' improvements, contents, and business interruption. B did not take out any buildings insurance cover though, as it is not the freeholder of the premises it occupies.

In October 2023, there was a fire at B's premises causing damage. B contacted Society of Lloyd's to claim under the policy. On investigating the claim, Society of Lloyd's discovered that part of the property had a flat roof. The policy had been taken out with "no" given as an answer to the following question:

> "Is the roof of non-standard construction or partially/entirely flat?"

Society of Lloyd's said that this information provided from B at the point of sale was incorrect and that, had it been given correct information, Society of Lloyd's would not have provided the policy. So, it voided the policy from inception and declined the claim.

B brought its complaint to the Financial Ombudsman Service. Following inquiries by our Investigator, Society of Lloyd's said that its underwriting criteria would not actually have led to the policy not being sold. And instead, given the proportion of the flat roof at the property, it would have increased the premium. Society of Lloyd's therefore offered to reinstate the policy, based on a higher premium being payable, and to reconsider the claim on the basis of this policy. It said that any claim settlement that is ultimately payable, would be reduced proportionately in line with the difference in premium. Society of Lloyd's also offered to pay £300 in compensation for the inconvenience it had caused B.

B did not accept this offer. Our Investigator thought it was generally fair and reasonable, but that a slightly higher award of £400 compensation ought to be made. B still did not accept this outcome. As a result, B's 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 have reached the same conclusions as our Investigator. I'll explain why.

The first thing that is necessary is to set out B's obligations at the point in time the policy was

sold.

As a commercial customer, B's policy and its sale falls under the Insurance Act 2015 (the Act). B has made reference to a number of legal concepts and insurance principles that do still exist to an extent. However, the exact wording and application of these has changed following the introduction of the Act.

The Act essentially requires a commercial customer to disclose every material circumstance which they know or ought to know. This is known as the duty of fair presentation. Something is material if it would influence the judgement of a prudent insurer in determining whether to take the risk and, if so, on what terms. B has referred to this last point as meaning Society of Lloyd's can decide what is material. However, the test above is an objective one and considers what insurers generally would consider material, rather than what this specific insurer considers material.

That said, the construction of a property, including the extent of flat roof that the property has, is likely to be something a prudent insurer of that property would consider material. There are going to be a number of specific concerns relating to such a roof that would have an impact on the likelihood and size of a claim. This is true regardless of the fact the policy B took out was not insuring the overall building. That this information is material is borne out by the presence of a specific question in the statement of fact for this policy, and the fact that such questions/statements are present in the majority of such policies with other insurers.

The policy was taken out through a broker, so Society of Lloyd's is not responsible for this part of the process specifically. And it isn't clear what the broker said to B around this point. If B is unhappy with the sales process, it is likely this will need to be raised with the broker.

However, the inclusion of the above question and answer in the statement of fact shows that this was information Society of Lloyd's wanted to know. And, regardless of whether a broker was used, it was B's responsibility to provide Society of Lloyd's with accurate information here.

B has said that the question is ambiguous. But I think the question is clear, fair and not misleading. Additionally, even if B did not fully understand what was being asked, its responsibilities as a commercial customer mean it still ought to have disclosed the fact the property had a partially flat roof. I am also not persuaded that B could reasonably interpret this question to only refer to the roof at the top floor of the building, when there was another area of roof over a ground floor area that B occupied. And even if I was persuaded, B's answer would still be incorrect.

Looking at images and descriptions of the property in question, it clearly has areas of flat roof. Part of the ground floor kitchen it covered by a flat roof. This is the only area of the building B occupied that was directly under a roof. And it either knew or ought to have known that this area was a flat roof. Additionally, the rear section of the overall building also consists of a flat roof. Society of Lloyd's has not provided details of how much of the roof it considers to be flat. However, based on the images I have seen, this appears to be almost half of the building's roofing.

Given the building had extensive areas of flat roof, it is clear that answering "no" to the above question was incorrect. In doing so, B gave a material representation to a matter of fact that was not substantially correct. This would be considered a breach of the duty of fair presentation.

Where a customer has breached the duty of fair presentation, the remedies available an insurer depend on what the insurer would have done had the breach not taken place. In the

current circumstances, this is what Society of Lloyd’s would have done had B disclosed the flat roof.

Society of Lloyd's initial decision was to avoid the policy. If it would not have entered the policy at all, had there been no breach, Society of Lloyd's would be entitled to do this. However, having been provided with the appropriate part of Society of Lloyd's underwriting criteria relevant to this policy, it is clear that a policy would have been provided – albeit on different terms.

This means Society of Lloyd's should not have avoided the policy. And in doing so, it acted unfairly and unreasonably. This has caused a detriment to B, and I shall return to this below.

The underwriting criteria does make it clear that Society of Lloyd's would have offered the policy, but would have charged a higher premium. Having seen the criteria, the increase Society of Lloyd's has applied to B’s premium is in line with what would have happened had the flat roof been disclosed. Due to its commercially sensitive nature, I am unable to share a copy of this criteria with B. But I am satisfied with its content. And I consider Society of Lloyd's is entitled to apply this to B’s policy.

In accordance with the Act, this means that the settlement of a claim made under the policy can be reduced proportionately. Effectively, the claim is settled on the same percentage as the premium charged vs the premium that should have been charged. Based on the information Society of Lloyd's currently has, it has said that B only paid 83.33% of the premium it ought to have, and so will settle any claim that is payable on this basis also.

I will add that the actual settlement of the claim is not something that forms part of this complaint. Society of Lloyd's will need to complete its investigation into the claim, etc. This may also involve identifying other breaches of the duty of fair presentation, and it is possible the above percentage could change – or even that the policy could be avoided. However, based on the current known circumstances I consider it is fair and reasonable for Society of Lloyd's to increase the premium and to only pay 83.33% of any claim settlement that is due.

In summary, Society of Lloyd's should not have avoided the policy. And it is appropriate that this be reinstated. However, Society of Lloyd's is also entitled to charge a higher premium and reduce any claim settlement proportionately.

It isn’t clear how Society of Lloyd's made the error and avoided the policy. The underwriting criteria is clear on what ought to have happened. Whilst I have not seen anything that persuades me this was a deliberate or cynical/dishonest act – as has been suggested by B – this is nonetheless a significant failing. It is not the role of the Financial Ombudsman Service to punish respondent firms though. Where something has gone wrong, my role is to try to put the parties back in the position they would otherwise have been in or, where this is not possible, to have the respondent business compensate the complainant for the impact they’ve experienced as a result of the error.

In terms of the impact the avoidance of the policy had on B, this would no doubt have been significant. I do however need to bear in mind that the complainant in this case is a limited company. As a limited company, B has a legal identity of its own. B can experience inconvenience, but cannot in itself experience distress. So, whilst I note and am sorry to hear about the impact of this situation on B’s director and other staff, I am unable to take this into account directly. They are not, directly, the customer of Society of Lloyd’s.

B itself has suffered a great deal of inconvenience though. It has apparently had to obtain alternative sources of finance and has had to arrange for the repairs to its premises without

the support of its insurer. However, until the claim itself has been resolved, it is unclear what the extent of this impact is. If, for some reason, no settlement of the claim is ultimately payable, largely speaking this inconvenience is something B would always have experienced even if the policy had not been incorrectly avoided. As a result, at this point, I consider that £400 is an appropriate level of compensation to take into account the inconvenience B has experienced.

If a settlement is due under the policy, business interruption cover that B has means that any extended period of repairs that B experienced – including missing its peak business period – would be included in the claim settlement.

I should stress though that if a claim settlement is made, and B is unhappy either with the level of this settlement, or the time taken to make it, it ought to be able to make a complaint about this. Whilst the policy terms will largely dictate whether a settlement is made and how large, I encourage Society of Lloyd's to consider the overall time taken to make any such settlement.

Putting things right

Society of Lloyd's should put things right by reinstating B's policy with the appropriate premium and considering B's claim under the terms of that policy.

Society of Lloyd's should also pay B £400 compensation.

My final decision

My final decision is that I uphold this complaint. Society of Lloyd's should put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask B to accept or reject my decision before 25 October 2024.

Sam Thomas
Ombudsman