DRN-4745104

The complaint

P, a limited company, complains that American International Group UK Limited trading as AIG UK declined a claim made under its commercial shop insurance cover and avoided the policy.

P is being represented in this complaint by its director. Where I've referred to AIG throughout, this also includes any action and correspondence by agents acting on their behalf.

What happened

P had a commercial insurance policy underwritten by AIG to cover its retail shop business, including cover for contents and stock. In April 2023, P's retail premises was broken into causing damage to the external glass, and stock was stolen. P made a claim to AIG.

Ultimately AIG avoided P's policy (treated it like it never existed) and declined the claim. AIG said that P had misrepresented when taking out the policy. AIG said that if P had told them the retail premises was predominantly made of glass, and that P had an unresolved County Court Judgement (CCJ) against it, then AIG wouldn't have been able to provide cover.

P was unhappy with the policy avoidance and declinature of its claim, so it approached the Financial Ombudsman Service.

One of our investigators looked into things but he didn't uphold the complaint. He said that AIG had acted fairly, and in accordance with the relevant insurance law, when avoiding P's policy and declining its claim, so he didn't recommend AIG do anything further.

P didn't agree and asked for a final decision from an ombudsman.

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.

P has said that it told its broker relevant information when taking out the policy, but P says the broker failed to tell AIG about this. However, my consideration here is regarding AIG's decision to avoid P's policy and decline the claim as the insurer of the policy, based on the information it had been provided.

AIG has confirmed that the broker was acting independently of them and in a broker capacity for P when selling and arranging its policy. As explained to P by our investigator, if P is unhappy with its broker's actions, and believes the broker is at fault for what happened, P would need to raise this with its broker as a separate complaint.

I'll now go on to consider AIG's actions as the insurer of P's policy.

P is a commercial customer. This means that the relevant law which applies is the Insurance Act 2015 (the Act). This states that P was required to make a fair presentation of the risk to AIG. That means disclosing any material information P knew, or ought to have known. Or failing that, disclosure which gives 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 P, fails 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.

Was there a misrepresentation by P and did it breach its duty to make a fair presentation of the risk?

AIG says that P breached its duty to make a fair presentation of the risk. AIG says that when asked, P didn't tell it about a previous unresolved CCJ or about the true construction of the premises that was being insured. AIG referred to the policy schedule P was provided after taking out the policy. This confirmed:

> *"This document is a summary of the insurance you've bought. It includes information you or anyone acting on your behalf provided before we agreed to insure you. This includes details of the cover given, cover limits, the excesses and any changes to the standard policy wording which are specific to your own circumstances.*
>
> *Please remember that your cover is based on the information that you've given us. We need to ensure you have the right cover now and throughout your cover, so please tell us if anything changes. If you need to make a claim and any of the details you've given us are incorrect, you may not be covered.*
>
> *References to "You" of "Your" include anyone involved in running the business. (e.g. family members and business partners)."*

And:

> *"Statements of fact*
>
> *Please review the facts shown below. You provided this information when requesting your insurance.*
>
> *If any of these facts are not correct, you might find you're not covered if you have to make a claim."*

In the schedule, this included a section which had the following questions and answers that had been provided to AIG:

Your business building, warehouse or industrial unit has walls made of brick, stone or concrete and a roof made of slate, tile, concrete or profile metal	I agree

And:

You haven't received a court judgement regarding debt (either as an individual or in connection with a business).	I agree

And the policy defines you/your as:

> *"You/your means the person(s) or company detailed as the Insured in the Schedule."*

And the schedule named P as the insured.

After P made the claim, and during the claim validation, AIG discovered that P had an unresolved CCJ against it from 2018. This differs to the statement above which indicates P had answered that it agreed it hadn't received a court judgement regarding a debt.

AIG's loss adjuster visited the premises following the claim being made, and they noted the construction of the premises as:

> *"The risk address is a nonstandard 1 storey property built in 2017. Construction comprises of toughened glass and metal."*

The photos taken support what the loss adjuster said about the construction of the premises being glass with a metal frame. This differs to the statement above which indicates P had answered that it agreed the building was made of brick, stone or concrete, with a roof made of slate, tile, concrete of profile metal.

It was P's duty to make a fair presentation of the risk when taking out the policy. And I think that P should reasonably have been aware of the CCJ and the construction of the premises it was insuring. AIG indicated on the documents the answers that they had been provided when P took out the policy. And this showed the answers that they had been provided about the construction and unresolved CCJ were incorrect. P also didn't correct this. So, I'm of the view that P breached its 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.

AIG has provided this service with their underwriting guide. I can't share this with P as it is commercially sensitive. But I've reviewed this to see what AIG would have done, had it been aware of the true construction of the insured premises, and the unresolved CCJ.

Having considered this, I'm not entirely persuaded the construction of the premises would have, with certainty, resulted in P not offering a policy on this basis alone. But I've also looked at what would have happened if AIG was aware of the unresolved CCJ. And I'm satisfied that AIG wouldn't have offered cover if they had been aware of the CCJ, regardless of the construction of the property.

Therefore, I'm satisfied that there is a qualifying breach because AIG would have acted differently by not offering the policy had they been aware of the CCJ.

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

The remedies available to AIG under the Act depend on whether they consider the breach of the duty was deliberate or reckless, or neither. And it is for AIG (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

Although AIG said it potentially could have followed the above actions, instead AIG avoided the policy (and declined the claim) but refunded the premiums – which is a remedy available for breaches which are neither deliberate nor reckless. So based on the actions AIG took, I think it's reasonable to conclude that they ultimately consider the breach to be neither deliberate nor reckless. As the remedy for a breach that is neither deliberate nor reckless is clearly more favourable for P, I don't think AIG treated it unfairly in considering the breach as such.

Taking everything into account, I'm satisfied that the actions taken by AIG, in avoiding P's policy back to inception, and returning the relevant premium, was in line with the remedies under the Insurance Act 2015 for a qualifying breach of the duty which was neither deliberate nor reckless. I also consider that adherence to the Insurance Act 2015 delivers a fair and reasonable outcome in the circumstances of this claim and complaint.

As AIG has fairly avoided P's policy, this means there was no policy in place at the time of the theft, so it follows that it's not unreasonable for AIG to decline P's claim.

My final decision

It's my final decision that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask P to accept or reject my decision before 14 May 2024.

Callum Milne
Ombudsman