

The complaint

A sole trader I'll refer to as "S" complains Accelerant Insurance Europe SA/NV unfairly declined to assist with a claim under a Commercial Combined insurance policy.

What happened

S runs a children's soft play centre. In 2022, a claim was raised against it after it was alleged an incident took place on its premises resulting in injury. S asked Accelerant to assist with defending the claim under the Public and Products Liability section of the policy. So, Accelerant appointed a loss adjuster.

They visited S's premises in December 2022 and reported, broadly, that the area in which the incident was said to have occurred had no defects, and S had a reasonable system for maintenance and inspection in place. The loss adjuster also reported a policy condition hadn't been met regarding annual inspections by an appropriate body.

Accelerant considered this and declined to assist S with the claim. It said it hadn't complied with a policy condition important for risk management. In the meantime, however, the loss adjuster contacted the representatives of the third-party to deny liability based on their findings.

S told Accelerant it wasn't happy with the claim decision. It said its failure to comply with the condition wasn't material to the incident. And the loss adjuster confirmed it had a reasonable system for maintenance and inspection in place. Accelerant didn't change its decision, so S asked our Service for an impartial review.

I issued a provisional decision on 28 November 2023 which set out the following:

'What I've provisionally 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.

The policy schedule, under 'Children's Play Centre Condition', sets out the following condition applicable under section 6 – Public and Products liability:

'(I) an inspection has been undertaken by a Register of Play Inspectors International (RPPI) approved play specialist or The Royal Society for the Prevention of Accidents (RoSPA) and the inspection is undertaken at least once in every 12 month period thereafter and a completion certificate is issued to You.'

The schedule goes on to say:

'No claim under Section 6 – Public and Products Liability shall be payable unless the terms of this Condition has been complied with where non-compliance has increased the risk of a loss which actually occurred in the circumstances in which it occurred, and any payment on account of a claim already made shall be repaid to Us'.

S says it wasn't aware of the requirement for these inspections, but I'm satisfied the policy clearly sets this out. So, I've gone on to consider whether I'm satisfied Accelerant acted fairly and reasonably when declining to assist S due to its failure to comply with this condition.

To be clear, the policy says no claim will be met when a failure to comply with the condition has increased the risk of a loss which actually occurred in the circumstances in which it occurred. So, Accelerant must demonstrate the risk has been increased due to S's failure to comply with the condition. I'm not satisfied it's done this here and I'll explain why.

A loss adjuster visited S's premises in December 2022 to validate the claim. They provided a report thereafter. The loss adjuster concluded, broadly, that the incident location was not defective, and S had a reasonable system of maintenance and inspection in place. They wrote to the representatives of the third-party to explain the same.

Within their report, they set out their findings which led them to conclude they would advocate for Accelerant to deny the third-party claim. And that any issues with the incident area would have been picked up during S's system of inspections and, again, the area was not defective.

I acknowledge the loss adjuster concluded it would be a matter for Accelerant to consider given the policy condition cited above hadn't been met. And had the condition been complied with, it would have supported the denial of the third-party claim, aided a more robust defence, and the absence of an annual inspection would dilute the defence. Therefore, Accelerant could argue its outlay for indemnifying S could be more than what it otherwise would have been had S complied with the condition. I'll return to this point later.

I don't find the loss adjuster's report supports that S's failure to comply with the condition increased the risk. In fact, the loss adjuster's findings demonstrate S's failure to comply with the condition made no material difference here. I say this because, as mentioned above, they found no defects and a reasonable system for maintenance and inspection was in place. A system that would have picked up any issues with the incident area.

Further, Accelerant accept it had enough information – shortly after declining to assist S – to defend the claim. So, it seems unlikely S's failure to comply with the policy condition prevented it from indemnifying S. Accelerant ultimately say it couldn't assist S here solely on the basis the condition wasn't complied with. I don't think that's fair and reasonable.

It's for an insurer to show a policyholder's failure to comply with a policy condition has prejudiced its position. And, in this case, show a failure to comply with the condition above increased the risk. Accelerant could do that here by, for example, providing supporting evidence to show the lack of inspection increased the risk. Or, that S's failure to comply with the condition prejudiced its position or, to my earlier point, caused further costs it otherwise wouldn't have paid had the condition been met. I'm not satisfied it has done that here.

Therefore, it follows, I currently intend to require Accelerant to consider S's claim in line with the remaining policy terms.

My provisional decision

My provisional decision is I uphold the complaint. I currently intend to require Accelerant Insurance Europe SA/NV to reconsider S's claim in line with the remaining policy terms.'

Responses to my provisional decision

S accepted my provisional decision, but Accelerant didn't. It said the policy is there to be

read and considered by a policyholder, and S ought reasonably to have been aware of the condition. Having received a response from all parties, I'll now move on to set out my final decision on the matter.

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 not been persuaded to deviate from the outcome I provisionally reached in November 2023. I say this because while I acknowledge the policy terms clearly set out the condition – and S ought reasonably to have been aware of it – I'm not satisfied, on balance, that S's failure to comply with the condition increased the risk. Nor has Accelerant demonstrated it incurred costs it otherwise wouldn't have done had the condition been complied with. It still would have needed to deal with the claim.

The loss adjuster considered the incident location and found no defects. Rather, S had a reasonable system in place for maintenance and inspections – inspections that would have picked up any issues with the incident location.

The policy clearly says no claim would be payable under section six unless the condition was complied with where non-compliance increased the risk of a loss that actually occurred. I don't find it would be fair or reasonable to conclude, based on the specific circumstances of this case, that S's failure to comply with the condition increased the risk, based on the loss adjuster's findings.

Putting things right

For the reasons I've mentioned above, Accelerant should reconsider S's claim in line with the remaining policy terms.

My final decision

For the reasons I've given above, my final decision is I uphold the complaint. I now require Accelerant Insurance Europe SA/NV to settle S's complaint in line with my instructions above.

Under the rules of the Financial Ombudsman Service, I'm required to ask S to accept or reject my decision before 30 January 2024.

Liam Hickey
Ombudsman