

The complaint

AS is complaining that U K Insurance Limited – trading as NIG – has declined a claim it made on its commercial property insurance policy.

AS and NIG have both been represented by legal firms in the handling of this complaint. For ease of reference, I shall refer to any statement made by the legal firms as being said by AS and NIG respectively.

What happened

The facts of this complaint are well known to all parties so I won't set them out in detail. But, in summary, in June 2022 a fire occurred on AS's commercial premises causing a significant amount of damage. So AS contacted NIG to claim for the damage on its commercial property insurance policy. NIG instructed a loss adjustor to act on its behalf, who in turn, instructed an expert engineer to investigate the cause of the fire.

It transpired that the fire started in a waste bin which was assumed to have been initiated from an oily rag that had been hit by sparks earlier during a welding process being carried out by one of AS's employees. NIG later wrote to AS to say it was intending to decline the claim to breaches of the following condition precedents:

- *It is a condition precedent to the liability of the Company whenever welding or flame cutting equipment is used that all welding be carried out in a well ventilated area well away from any item containing flammable substances; and a thorough examination is made in and about the area in the work has been undertaken immediately after each period of work to ensure that there is no smouldering or damaged combustible material*
- *It is a condition precedent to the liability of the Company that all oily and/or dirty waste and greasy cloths be kept in metal receptacles, with metal lids and removed outside the buildings every night and completely removed at least once a week*

NIG set out that AS's employee did the following in breach of the policy conditions:

- Welding was carried out other than well away from any item containing flammable substances – i.e. it said welding took place near the oily (flammable) rag;
- After the welding, there was no thorough examination to ensure that there was no smouldering combustible material.
- The employee didn't dispose of the oily and/or dirty waste and greasy cloths in metal receptacles, with metal lids;
- The receptacles that the rags were placed in were not removed from the premises overnight;

So it said AS had breached a number of condition precedents under the policy which it said meant there wasn't any cover under the policy for any loss or damage arising from the fire.

AS thought NIG was being unfair and, in summary, raised the following:

- It took all necessary steps to ensure that the Company, including the activities of its employees, complied not only with the relevant policy conditions, but also with all relevant health and safety standards and regulations.
- It had provided a metal receptacle for the deposit of oily and/or dirty waste, including greasy cloths. It had briefed its employees that all such waste was to be deposited in the metal receptacle and that it was to be removed from the premises overnight. AS said it was unaware of any non-compliance with this instruction and suspects that, regrettably, the only instance of non-compliance was on the day of the fire.
- It said its employees have received all necessary training to qualify them to undertake hot work and welding safely.
- Its practice and procedures included requiring a second employee to be watching over the employee who was performing the welding. This requirement was being adhered to but it said, unfortunately, it appears that at two potentially crucial moments Employee B who was watching Employee A welding, missed the fact that sparks had landed on the rag and had been put out by Employee A. It was Employee B who, unaware of these events, then put the rag in the bin across the other side of the workshop.
- It believes appropriate practices and procedures had been put in place by the director on behalf of the Company, that they fully addressed the risks relating to welding. And it said it ensured that its employees were fully trained and aware of those practices/procedures and the requirement to comply with them.
- It said if, in the event that a court or this Service thought that its procedures fell short of compliance with the relevant policy conditions, then it thought it would be entitled to rely on the Non-Invalidation Clause to secure cover under the Policy which said:
 - cover under the Policy "*shall not be invalidated by any act or omission...whereby the risk of Damage is increased unknown to or beyond the control of the Insured, provided that the Insured immediately they become aware thereof shall give notice to the Company and pay an additional premium if required by the Company*".
- It said that it could not have reasonably known that the policy condition wasn't being complied with. It said case law had set out that insurers can't reasonably decline a claim where any breach of policy condition was unknown to the insured or beyond its control which increases the risk of damage.

NIG still maintained it could rely on the breach of the policy's condition precedents. So AS referred its complaint to this Service.

Our investigator didn't uphold this complaint. She acknowledged AS's comments that it had a number of practices in place, but she said the policy was specific about what needed to be done. And she said she thought NIG had fairly said AS had breached the policy's condition precedents. So she didn't think NIG had acted unfairly in declining the claim.

AS disagreed with the investigator and, in summary, said the following:

- There's no irrefutable evidence to show that the rag was the cause of the fire, or that, had the employee opened the rag before putting it in the inside bin, it would have been smouldering.
- All reasonable care was taken by the management of the Company to ensure that its employees comply with the policy conditions.
- NIG carried out a survey of the premises but didn't raise any issues relating to the fire precautions or the bin, being inside the garage and not having a metal lid. And it said the surveyor didn't investigate whether there existed a metal receptacle outside the garage for oily rags.
- It set out that the survey report highlighted the relevant bin had been placed outside at the time of the inspection which it said demonstrated this was its normal practices – i.e. the failing in this case was an isolated incident.

- It thinks it's unfair it's losing out so significantly due to the failings of a junior employee to follow specific practices set out by AS's director. And it thinks relying on such a breach as NIG is doing is creating an unfair outcome.
- It maintained that the non-invalidating clause applied here and was unhappy the investigator said it didn't.
- Finally it said it's not for this Service to formulate legal arguments and responses. It said it's for this Service to solely consider the individual facts of an individual case and identify what is fair and reasonable in all the circumstances of the case.

As AS didn't agree with the investigator's opinion, the complaint's been 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.

I've decided to not uphold this complaint and I'll now explain why.

I should first set out that I acknowledge I've summarised AS's complaint in a lot less detail than both it and NIG have presented it. NIG and AS has raised a number of points and submissions setting out their respective positions. I've not commented on each and every point they've raised but, instead, I've focussed on what I consider to be the key points I need to think about. I don't mean any discourtesy about this, but it simply reflects the informal nature of this service. I assure both NIG and AS, however, that I have read and considered everything they've provided.

I note AS's comments that it's not for this Service to create and formulate legal arguments, but we're to consider everything both parties have presented and decide what we think is fair and reasonable. I agree with AS that this Service will always decide and consider what we think is fair and reasonable in resolving a dispute. But, as part of considering what's fair and reasonable, we will always be minded by what the law says and what a Court might say in thinking about specific legal arguments. And in this complaint both parties have submitted numerous legal arguments in support of their respective positions. So it is for this Service to, in deciding what's fair and reasonable, consider all arguments raised.

NIG's said that AS has breached a number of condition precedents. And it says this means there's no cover under the relevant terms of the policy. So, I think the simple questions for me to answer here are:

1. Has NIG demonstrated that there are condition precedents that are relevant in the consideration of its liability under the terms of the insurance policy; if so,
2. Has NIG demonstrated that AS has breached some or all of these condition precedents and this breach was material to increasing its liability towards the claim; and finally
3. Is there any other reason why NIG is not entitled to rely on the condition precedents?

NIG has referred to three condition precedents as I set out above and I think they're all relevant to the claim. I don't think that's in dispute. What is in dispute is whether AS has breached them or not.

For the avoidance of doubt, I should set out that NIG only has to demonstrate that AS has breached one condition and that that breach was material to the loss. I've considered all the conditions referred to, but I think the key condition that's most relevant here is the following:

"It is a condition precedent to the liability of the Company that all oily and/or dirty waste and

greasy cloths be kept in metal receptacles, with metal lids and removed outside the buildings every night and completely removed at least once a week."

The simple inescapable fact is that didn't happen. And it also cannot be disputed that this was material to the loss. Had the receptacle that AS's employee put the oily rag in question into been taken outside and had a metal lid put on top of it, then I think it's highly unlikely that the extent of damage that occurred would have happened. So I'm satisfied that the incident would have, either not occurred or NIG's liability would have been significantly less.

I recognise and have considered AS's comment that they think it's unfair for NIG to rely on this because it has shown this isn't normal practice for AS and it's said it's normal business practice to remove the receptacles. But, critically, the condition precedent doesn't simply require AS to have procedures to ensure that the receptacles are kept outside, but it specifically requires the receptacles to be kept outside. And it makes it clear that there's no cover for material damage where this happens.

I've considered AS's comments that this additional risk wasn't highlighted to AS when NIG carried out a survey, despite other risks being highlighted. But, also by its own admission, AS has said it was aware of the condition precedent in question. So, even if NIG needed to make this clearer during the survey – which I should say I don't think it needed to – I fail to see what difference this would make. And this is what I would need to think about if I thought there was a failing in the survey. AS's argument as to why the reliance on the condition precedent is unfair is that it was aware of the condition, but the employee mistakenly didn't follow business practices, as opposed to the fact it didn't know about the condition. So, by AS's submissions, even if everything had been commented on and highlighted in the survey, the situation would still be the same. So I can't reasonably say this is a reason why NIG can't rely on the breach.

I fully appreciate the severe financial impact this has had on AS. And I recognise this may be down to the actions of an employee failing to adequately follow business guidelines. But what's happened is precisely the reason why NIG includes such a condition in its policy terms. I've considered AS's comments surrounding this, but I can't reasonably say it was unfair for NIG to say AS had breached this condition precedent.

There is no cover for material damage where NIG can show that it's entitled to rely upon a breach of the above condition precedent. AS has also referred to the following policy term:

"This insurance shall not be invalidated by any act or omission or by any alteration, whereby the risk of Damage is increased unknown to or beyond the control of the Insured, provided that the Insured immediately they become aware thereof shall give notice to the Company and pay an additional premium if required by the Company."

NIG says this doesn't apply in this case as it says this refers to AS's requirement to make a fair presentation of the risk. I think that's fair. Crucially this term refers to not being allowed to "invalidate" the insurance policy. At no point has NIG declared the policy invalid, but has said that a breach of a condition precedent has meant that there isn't cover under the policy section. I don't think a reasonable interpretation of this clause would mean it applies to a failure to comply with a policy condition. So, it follows, that I don't think the term means NIG can't fairly rely on the condition precedent.

Ultimately, I'm satisfied that NIG has fairly demonstrated that AS has breached a condition precedent which means that there's no cover for material damage – which is the section on the policy AS is seeking to claim under. I'm aware that NIG has referred to two other condition breaches, but, given I think NIG can fairly rely on the one I've referred to, I don't need to make a finding on the other alleged breaches.

My final decision

For the reasons I've set out above, 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 AS to accept or reject my decision before 15 January 2024.

Guy Mitchell
Ombudsman