DRN-4504752

The complaint

Mr O is complaining on behalf of IA – a limited company – that Falcon Underwriting Ltd ('Falcon') failed to give accurate information to the insurance company that provided IA's property owners indemnity insurance policy.

What happened

Around February 2021 Mr O took out a property owners indemnity insurance policy through Falcon – a broker – to insure three buy to let properties IA owned. The policy renewed in February 2022. However, shortly after renewal one of the properties suffered significant damage following an explosion. So Mr O contacted the insurer to claim for the damage.

It became apparent that the explosion occurred when one of the tenants was using butane gas to convert a cannabis plant into cannabis oil. The insurer initially considered the claim as a malicious damage claim, but later said it was accidental damage. However, shortly after this it avoided IA's insurance policy. It said Falcon had told it that the tenants were professional workers, but they were being rented out through a social housing scheme. And it said it wouldn't have insured the properties had it known this.

Mr O complained to Falcon as he said he'd explained as part of the initial sales process that the properties were managed by a third party company who arranged for social housing tenants. So he wanted Falcon to cover IA's losses. Falcon acknowledged it had made an error in setting up the policy, but didn't agree to cover IA's losses. So Mr O referred IA's complaint to this Service.

I issued a provisional decision upholding this complaint and I said the following:

"The relevant law in this case is the Insurance Act 2015. This required the policy applicant to make a fair presentation of the risk to the insurer, so that it had enough information to assess the level of risk it was willing to provide and on what terms.

And if the applicant fails to do this, the insurer has certain remedies provided the failure is – what the Insurance Act describes – as a qualifying breach. For it to be a qualifying breach the insurer has to show it would have offered the policy on different terms or not at all if the consumer hadn't made the breach.

The insurer has avoided the insurance policy because it says there was a qualifying breach and it wouldn't have insured IA had it been given the true facts. The insurer is not a party to this complaint so I won't comment on whether anything the insurer has done is fair or not. My role in this decision is to consider whether Falcon has acted fairly in fulfilling its responsibility towards IA as its broker.

As IA's broker, Falcon was required to make this presentation on IA's behalf. So it needed to ensure it had all the relevant information the insurer required to give a fair presentation of the risk.

All parties agree that Falcon has made an error in the information it presented to the insurer.

Mr O had explained he had a tenancy agreement with a third party company who, in turn, arranged for third party tenants to reside in the property under a social housing scheme. But Falcon had incorrectly told the insurer that the tenants were classified as professional workers. So Falcon has failed in its duty to IA. The issue I have to consider is whether it is ultimately responsible for the loss IA has suffered from the policy's avoidance.

As I said, Falcon has acknowledged its error, but it has also set out that Mr O – on behalf of IA – had a responsibility to check the information set out on the statement of facts and also in the pre-renewal report it sent him. I agree that Mr O needed to check the information contained within these documents, but I also have to think about what's the underlying and fundamental cause of the loss.

Mr O clearly explained to Falcon the tenancy arrangement for the properties he was looking to insure. And he was entitled to assume it would present this information to the insurer. But, further to this, I can also see that in the pre-renewal report (which is essentially a summary of the fact find it carried out), while Falcon recorded the tenants as professional workers, it has also given a clear and accurate description of the tenancy relationship. So, I'm not persuaded it would have been clearly apparent to Mr O that Falcon hadn't correctly presented the information he'd given as part of the initial application to the insurer.

With all this in mind, I'm not persuaded I can reasonably say there is anything Mr O may or may not have done that means Falcon isn't ultimately responsible for the insurer avoiding the insurance policy. So I think it should put IA in the position it would have been in, had it presented the risk to the insurer correctly.

Had it carried out a fair presentation of the risk, the insurer would have immediately said it wouldn't provide insurance on this basis. IA would have then had an opportunity to arrange insurance with an insurer which did cover this type of arrangement. So it would have had a valid insurance policy that would have covered this loss. And it follows, therefore, that there would have been a valid insurance policy to cover the claim. I don't think Falcon disputes this.

Firstly, I think Falcon should write a letter to IA confirming it was responsible for the policy being avoided and explain that IA doesn't need to disclose this to future insurers going forward.

I also think Falcon should take over and handle the claim as if it was the insurer of the policy. I recognise the terms of the insurance policy it arranged wouldn't have been the actual terms in place if everything had been done as it should have done. However, we naturally can't know for certain what the terms would have said, but I don't think it's likely they would have been materially different. So I think Falcon should use the terms and conditions of the insurance policy it did arrange to consider the claim (including any claim for loss of rent).

I'm also conscious that Falcon has said, if it was to do this, it would treat the claim as malicious damage. But the insurer made it clear, before it avoided the insurance policy, that it would have considered the claim as accidental damage. And, given the circumstances that led to the damage occurring, I think that's fair. So I don't think Falcon can fairly limit the claim to the malicious damage policy limit.

I note the investigator said that Falcon should pay the premium refund the insurer gave. But I don't agree. Had Falcon given a fair presentation as it should have done, IA would have paid the insurance premium. So, if Falcon has already issued the premium refund, it can deduct this amount from any claim settlement it issues.

Finally, I also note the investigator awarded £500 in compensation. But I have to think about

what inconvenience IA has actually suffered. And I'm aware the terms of the insurance policy Falcon will use to consider the claim covers loss of rent, if the claim is payable. So I think this suitably compensates IA for any inconvenience that Falcon has caused."

Falcon didn't agree with my provisional decision for the following reasons:

- It disagreed that the claim shouldn't be classed as malicious damage. It said the cause of the accident was a butane gas explosion as a result of the tenant producing cannabis resin, which it said was a deliberate illegal act and therefore constitutes malicious damage. It maintained that the cause of the explosion constituted malicious damage because of the underlying illegality.
- It queried why the insurer changed its decision from malicious damage to accidental damage before avoiding the insurance policy and queried if this was following a complaint.
- It said the insurer's approach to illegality is further evidenced by the following exclusion, which may also be engaged in this case, because the incident unarguably related to illegal drugs:
  - *"We will not pay for any claim relating to or resulting from:*
    1. *Assault or violence, malicious falsehood, the manufacture or dealing in alcohol, illegal drugs, indecent or obscene materials or illegal immigration*
    2. *Any offence relating to the Proceeds of Crime Act 2002*"
- It maintained IA should have taken steps to challenge its losses from the insurer and/or recover its losses from the tenant.

Mr O responded and said the following:

- The insurer had classified this claim as an accident and not malicious. He said a malicious damage claim will be when someone intentionally causes a damage, which wasn't the case here.
- He thinks it's wrong that Falcon is going against the initial decision the insurer reached.
- He said the insurer made it clear that the reason it avoided IA's insurance policy was because of the wrong information given by Falcon. He said IA couldn't start asking its solicitor to be appealing the obvious with the insurer.
- He said the tenant wasn't working. IA did make an attempt to recover from the tenant, but it was a waste of time, given the tenant was depending on council benefit. And he set out the claim value was £70,000.

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 come to the same conclusion as I did in my provisional decision and I'll explain why,

Falcon hasn't provided anything to set out it isn't required to indemnify IA, but has largely focussed on the fact I said I don't think it can limit its liability by treating the claim as malicious damage.

The simple inescapable fact is that, before declaring the policy null and void, the insurer set out that it considered the claim to be accidental damage following receipt of the fire and loss adjustor reports. And I can't say that was unfair.

Falcon maintains the claim should be considered under the following term:

"Malicious Damage by Residential Tenants

We will pay You for the Damage caused by the malicious actions of a tenant their family or guests occupying the Buildings or portion of any Building for residential purposes."

The policy doesn't define "malicious" so I've thought about what a reasonable interpretation of this is. And I think a reasonable definition of a malicious act is one where there's an intent to do harm. So I think, to limit the liability to malicious damage, Falcon would need to show the tenant *intended* to cause the damage they did rather than it arose from a simple accident. I don't think it can reasonably be argued the tenant intended to cause the explosion. So I still think it's fair to treat this as accidental damage.

I should make clear that I'm not saying Falcon must pay the claim – merely that it should consider the claim under the accidental damage section of IA's insurance policy. If it can show an exclusion fairly applies to *that* section of the policy then it can rely upon it. I'm not saying that the term Falcon referred to in response to my provisional decision does apply here. But it would need to show it was either a general exclusion or specific to accidental damage claims.

I recognise that Falcon has said a number of times that IA should have challenged the decision reached by the insurer or looked to recover the losses directly from the tenant themselves. But I can't say it was unreasonable for IA to pursue its losses from Falcon directly as it was ultimately responsible for the insurer's decision to avoid the insurance policy.

Ultimately Falcon hasn't raised anything it hasn't raised before or given me anything to think my provisional decision was unfair.

My final decision

For the reasons I've set out above, it's my final decision that I uphold this complaint and I require Falcon Underwriting Ltd to:

1. Write a letter to IA confirming it caused the policy to be avoided and explain that IA doesn't need to disclose this to future insurers going forward;
2. Take over and handle the claim as if it was the insurer of the policy. It should use the terms and conditions of the insurance policy it arranged to consider the claim (including any claim for loss of rent). And it should treat the claim as an "accidental damage" claim. If Falcon has already issued the premium refund, it can deduct this amount from any claim settlement it issues.

Under the rules of the Financial Ombudsman Service, I'm required to ask IA to accept or reject my decision before 15 January 2024.
Guy Mitchell
Ombudsman