

DETERMINATION

Case number: 203219

Small Business – fire – extent of cover

SUMMARY OF FACTS

1. The applicant company held business insurance cover with the FSP (Financial Services Provider). The policy provided cover for business interruption, burglary, fire and other damage for the risk address, and cover for contents and stock.
2. On 20 April 2009 one of the company directors' contacted the FSP and lodged a claim against the policy following a fire at the business premises.
3. The FSP arranged for an assessor to inspect the nature and extent of the damage.
4. During the investigations into the loss, it was discovered that the business insured by the FSP was not the owner of the builder, rather the company director was the owner, and the business operated out of the premises.
5. The FSP accepted the claim and advised that it would indemnify the business for the loss of stock, cash and business interruption, however it would not cover damage to the building, removal of debris costs or engineers fees on the basis that as the business did not own the premises, there was no cover for damage to the premises.
6. The solicitor acting for the applicant submits that the determination of the FSP is incorrect that the building is specified as being insured on the schedule and the FSP has indemnified the applicant business for damage to the building in prior claims.

ISSUES IN DISPUTE

7. Whether the FSP is required to indemnify the applicant for the damage to the building under the terms and conditions of the policy.

RELEVANT POLICY PROVISIONS

"Part C

Your Business Insurance Policy

- Based upon the information provided by you and subject to the premium being paid, we agree to insure you during the period of insurance as set out in this policy.
- The policy provides insurance only for the parties shown on the schedule unless otherwise stated in individual policy sections.
- You are insured under those policy sections that are shown as insured on the schedule. Those policy sections then form part of your policy.
- The policy, the schedule and any endorsements should be read as if they are one document.
- We will not pay any more than the sum insured or limit of liability for each policy section that is shown on your schedule.

- The general conditions, general definitions, general claims conditions, and general exclusions form part of this policy. These apply to each of the policy sections, including any additional benefits or optional insurances in those policy sections.
- Specific conditions, definitions and exclusions also apply to individual policy sections and any additional benefits or optional insurances in those policy sections.
- Your period of insurance starts on the date shown on your schedule and finishes at 4:00pm on the expiry date shown on your schedule.

General definitions

Unless defined differently in individual policy sections, these definitions apply to and should be read in conjunction with all policy sections.

...

15 property insured means

The property as described on the schedule in respect of each policy section

16. schedule means

The record of the particulars of your insurance which forms part of this policy. The schedule is issued when we have accepted your insurance. At each renewal of your policy, the renewal schedule becomes your current schedule. Updated schedules or endorsements may also be sent to you showing alternations to your policy.

17. situation means

The places listed in the schedule at which and from which you operate your business. The situation includes buildings and land within the legal boundaries.

...

Policy Section 1: Fire and other damage

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Your Insurance

We will insure you for loss or damage to buildings, business contents or stock at the situation arising from any insured event during your period of insurance. You only have insurance for buildings, business contents or stock, if shown on the schedule.

...

Insured events

1. Fire

...

Additional benefits

We will also provide the following additional benefits in this policy section.

...

2. Removal of debris

If you are insured under this policy section for loss or damage, we will pay the reasonable costs of removal, storage and disposal of debris or the demolition, dismantling, shoring up, propping, underpinning or other temporary repairs and temporary protection incurred by you.

3. Professional fees

If you are insured under this policy section for loss or damage, we will pay the reasonable costs of surveyors', architects' and other professional fees for estimates, plans, specifications, quantities, tenders and supervision, incurred in the repair or replacement of buildings."

REASONS FOR DECISION

8. The Panel is satisfied that a full exchange of information has taken place between each party and that each party has had the opportunity to address any issues raised.

The Applicant's Submission

9. The applicant's solicitor refutes that the FSP has made the correct determination to refuse liability for the damage to the building under the terms and conditions of the policy.
10. The solicitor submits that the policy schedule clearly shows that cover has been provided for the following:
 - a) Fire and other damage

Building(s)	\$300,000
Stock	\$300,000
Business Contents	\$50,000
 - b) Business Interruption \$250,000
 - c) Burglary

Stock	\$50,000
Electronic Equipment	\$10,000
 - d) Money \$5,000
 - e) Products Liability \$5,000,000
11. The solicitor submits that the FSP has continued to accept premiums from the applicant based on the above coverage since the inception of the Policy, and therefore it is incorrect to determine once a claim has been lodged that the building is not covered as the company was not the owner of the building.
12. Further the solicitor submits that in December 2003, November 2006 and December 2008, the FSP accepted liability for claims in instances where damage occurred to the building under the terms and conditions of the policy.
13. The solicitor submits that the FSP has provided the representation by virtue of its policy schedule and acceptance of prior claims that cover the building for fire and damage was covered by the policy.
14. That the applicant had a genuine belief based on the policy schedule and actions of the FSP that he was adequately covered for fire and damage to the building.
15. That the FSP through its own actions is estopped from denying insurance cover with respect to the building.

The FSP's Submission

16. The FSP does not refute that it paid three minor claims for building damage in error under the terms and conditions of the policy.
17. However the FSP submits that this does not prevent it from denying liability in this instance now it is established that the business was not the owner of the building.
18. The FSP states that in its opinion, the business does not have an insurable or vested interest in the building, and therefore the policy in this instance does not respond to damage to the building as a result of the fire.
19. The FSP states that there is no evidence that the company was liable for the building. The FSP notes that such evidence could be in the form of a lease

agreement between the owner and business or other such formal documentation.

20. Therefore the FSP submits that it has made the correct determination in this instance to deny liability for damage to the building and other associated costs.

Consideration of each party's submission

21. The Panel has considered both parties' submissions in accordance with the terms and conditions of the policy.
22. The Panel notes that cover is provided for fire and other damage to buildings in instances where the policy schedule states that cover has been provided.
23. The applicant's solicitor has not refuted that the applicant company was not the owner of the building and that the owner was in fact one of the company's directors.
24. However the applicant's solicitor has stated that the policy schedule clearly shows that the building is insured for \$300,000 under this policy, and it is reasonable for the applicant company and its Directors to assume that the building was covered for loss or damage caused by an insured event.
25. Further the applicant's solicitor has submitted that as the FSP previously paid three building claims under the policy, it has provided the representation to its clients that the building was covered.
26. A Case Manager from FOS contacted the FSP in relation to the fact that the building was specifically noted as being insured for \$300,000 on the policy schedule.
27. Whilst the FSP does not deny the fact that it is so noted, the FSP continued to submit that it's the obligation of the applicant to provide substantive evidence that the company was liable for the building.
28. In making this submission, the FSP submitted that had a lease been provided noting the liability of the company for the building, this may have been sufficient evidence for the damage to the building being covered in this instance under the policy.
29. The Panel notes that the applicants have noted that such a lease was in place at the time of the loss; however any paperwork pertaining to the lease was destroyed as a result of the fire.
30. It is noted that the applicant did not provide a Statutory Declaration with respect to the issue of the lease during the dispute; however it is noted in the file notes that the FSP informed FOS that it would not have accepted a Statutory Declaration as sufficient proof in this instance.
31. It is noted in the transcript of interview that both company director's confirmed that the mortgage payments for the building was paid for from the business account.
32. Having carefully read the terms and conditions of the policy, the Panel notes that there is no requirement on an insured to establish on the balance of probabilities that it is liable for the building where the business is trading from, in order for building insurance to be applicable where it is noted on the policy schedule.

33. It is fair and reasonable for an insured to have the belief that they are insured for what is shown on the policy schedule and the amount that they are insured for.
34. In this instance, the Panel accepts that the applicant would have had the genuine belief that the building was insured under this particular policy for \$300,000 and therefore there was no need to take out additional insurance under another policy.
35. This belief, the Panel believes, would have been further verified by virtue of the fact that the FSP previously paid three claims for damage to the building under the insurance policy.
36. The Panel is of the opinion that an FSP cannot calculate a premium based on areas such as building insurance, accept a premium which reflects insurance for all areas, provide notice on an insurance schedule that cover is provided for loss and damage as a result of an insured event, and then at a later date note that an error has been made and a portion of the schedule is incorrect and not covered by the policy.
37. The Panel is of the opinion that it is not fair and reasonable for the FSP to expect an insured to accept that an error has been made and for a claim to be denied on the basis of this error.
38. The Panel accepts that the business is not the owner of the building and the policy as it currently stands, being only in the business name, should not provide cover for a building that it is not liable for. At inception, the owner of the building, the company director, should have been named on the policy, in addition with the company name, for cover to have been correctly applied to the building.
39. However, in this instance, this did not occur, and the error has not been identified by the FSP until this significant claim was lodged against the policy.
40. Whilst an error has occurred, the Panel does not believe that the applicant should be prejudiced as a result of his genuine belief that the building was covered by the policy. Additionally the Panel notes the FSP has confirmed to the Service that provision of the lease agreement, binding the applicant company and the building owner, would have been highly persuasive in mandating policy response by the FSP. In this regard, the Panel notes the applicant has been unable to provide such physical evidence, alleging the lease was destroyed in the fire. In these circumstances, Section 54 of the Insurance Contracts Act 1984, concerning an 'act', in this case an omission, not being the act that caused the loss, would operate to the applicant's advantage; the omission, that is the failure to provide the lease, occurring as it has after the contract's inception; in these circumstances, Section 54 only permits the FSP, by reference to this omission to reduce its liability by the amount it has been prejudiced by said omission. As the FSP was always in receipt of a level of premium reflective of policy coverage for \$300,000 for 'Fire and Other Damage' to the subject building, the Panel determines the FSP has suffered no prejudice.
41. Finally, the Panel is of the opinion that the clear commercial intent of the policy included cover for the building in the sum of \$300,000. Putting the issue of proof of lease aside, it would be unfair for the FSP to rely on a technical defect

to avoid the policy. Such a result would also ignore the applicant's clear equitable interest in the property.

CONCLUSION

42. Therefore the Panel determines that the FSP is required to indemnify the applicant for the damage to the building in accordance with the terms and conditions of the policy. However, as the FOS' ceiling on awards is limited to \$280,000, absent waiver by the FSP which was not forthcoming in this instance, the Panel determines the FSP must indemnify the applicant in the sum of \$280,000.
43. Further it is determined that the FSP is required to pay the applicant's professional costs in accordance with the terms and conditions of the policy, including any reasonable legal professional fees that have been incurred as a result of this dispute.
44. Finally it is determined that the FSP is required to pay interest to the applicant from the date of the IDR letter until such time as this determination is resolved.