

The complaint

Mr and Mrs H complain as directors of H, a limited company, that its business protection insurance policy was mis-sold by Trust Insurance Services Ltd, leaving H under-insured.

What happened

H operated from rented premises. Following a fire in 2019 that destroyed the premises, H made a claim on its insurance policy. It has had insurance in place for a number of years, with the most recent renewal before the fire in June 2018. H claimed under the property damage section of the policy for damage to tools, equipment and vehicles, and on the business interruption section of the policy for loss of profit as it wasn't able to continue trading after the fire.

The insurer made payments to H but did not pay the business interruption claim in full. It said H was insured for loss of gross profit of around £60,000 per year but its actual gross profit was much higher. So it only paid a proportion of the claim.

Mr and Mrs H complained to the insurer about the amount paid and that complaint is being considered separately. But they said the reason H was under-insured was due to failings by Trust Insurance and brought this complaint about the way the policy was sold to them. They were also unhappy about other aspects of the service provided by Trust Insurance and have raised a number of issues – they say:

- H was under-insured for business interruption cover because Trust Insurance didn't explain to them how loss of profit would be calculated so they didn't understand it would be based on gross profit rather than net profit;
- Trust Insurance failed to visit the premises and, had it done so, it would have had a better understanding of their business;
- H was under insured for mechanics' tool boxes;
- H was not insured for loss of use of an MOT bay at the premises;
- the cover for motor vehicles was increased for no reason;
- they were never told H could have had cover for building improvements; and
- a security system wasn't added to the policy, which would have reduced the premium.

Our investigator didn't think Trust Insurance was at fault in respect of most of these issues. But he thought the complaint should be upheld in respect of the under-insurance for business interruption cover. He said Trust Insurance failed to take reasonable care when renewing the policy in 2018 to explain what was required in relation to the business interruption cover. He recommended that Trust Insurance pay the difference between the amount paid by the insurer for business interruption (around £49,000) and the total loss (around £140,000) less any additional premium that would have been paid if the right amount of cover had been in place.

Mr and Mrs H didn't agree with all of the investigator's findings on the points that had not been upheld. They said they relied on Trust Insurance as professionals to advise them properly on the cover needed for H.

Trust Insurance said it had specifically asked Mr and Mrs H to estimate H's gross profit, referring back to a breakdown of figures provided the previous year, had to chase several times for a reply and was then told by Mrs H that (apart from some vehicle changes) everything was correct.

The investigator thought Trust Insurance should have provided more detailed information, as it had done the previous year. But Trust Insurance disagreed, saying there was no need when Mr and Mrs H said the figures were the same as the year before.

As no agreement had been reached the complaint was passed to me to decide.

I issued a provisional decision on the complaint. In the provisional decision I said:

Business interruption cover

I will deal with this issue first as it the key point of the complaint, with the most at stake for H. The insurer only paid 35% of the claim, on the basis that H was under-insured. There doesn't seem to be any dispute that it was under-insured, but Mr and Mrs H say this was because Trust Insurance didn't advise them properly about how loss of profit would be defined or that they needed to disclose H's gross profit rather than its net profit.

This was a commercial policy. Under the relevant law (the Insurance Act 2015) H had a legal duty to make a fair presentation of the risk. This means H – or Mr and Mrs H on its behalf – had to disclose either

- everything they knew, or ought to have known, that would influence the insurer's judgment in deciding whether to insure the risk and on what terms; or*
- enough information to put the insurer on notice that it needed to make further enquiries about potentially material circumstances.*

The Insurance Act says the policyholder "ought to know" what should reasonably have been revealed by a reasonable search of information available to them. So the policyholder should take reasonable steps to check any information available to them and consider if there's anything they ought to disclose.

The policy was originally taken out some years ago and renewed each year up to 2018. From 2016 this duty to give a fair presentation applied each time the policy was renewed.

At each renewal, Mr and Mrs H were asked to provide information about H and to check that all the documents were correct. They were sent renewal documents in advance of the renewal date. The documents included a warning that they had to provide a fair presentation of the risk and explained what that meant. Trust Insurance also warned that failure to provide accurate information could lead to the policy being invalid or claims not being paid.

At the 2018 renewal Trust Insurance provided a breakdown of the figures that had been used the previous year and asked if they were correct or if anything had changed. Initially there was no reply and Trust Insurance sent several reminders. Shortly before the renewal date Mrs H contacted Trust Insurance to say that, apart from a change in respect of the vehicles, everything else was the same.

It's now clear that wasn't correct and as a result H was under-insured; the business interruption cover was for gross profit of £60,000 per year but its actual gross profit was much higher. Mr and Mrs H say they relied on Trust Insurance to advise them on what was needed. I appreciate this was an advised sale. That meant Trust Insurance would be expected to review H's needs, review the policies available and make sure the policy it

recommended was suitable for H. Its terms of business confirm that it will make a recommendation after assessing the customer's needs. But that doesn't change the fact that H had a duty to provide accurate information about the risk to be insured.

I'm satisfied the documents show that the cover was based on gross profit, not net profit. And it was for Mr and Mrs H to tell Trust Insurance what H's gross profit was. As the directors of the company, it's reasonable to expect them to know what H's gross profit was. If they weren't sure what it was, it was for them to take reasonable steps to check any information available to them. They could have obtained this information from H's accounts of, if they still weren't sure, by asking their accountants. Trust Insurance's terms of business also say if they were in doubt about what information to provide they should contact it immediately. So if it wasn't clear to Mr and Mrs H what they were being asked to provide they could have checked.

Trust Insurance has explained that it had used a calculator to check the level of cover needed in 2017 but, as it was told nothing had changed in 2018, didn't see the need to do that again. I think that was reasonable and it was reasonable to rely on the information from H.

Taking into account the warnings in the documents about disclosing information relevant to the insurer's assessment of risk, and the legal duty H had to disclose anything that would influence the insurer's decision about offering cover, my judgment is that H should have provided details of the gross profit. By failing to provide accurate information, Mr and Mrs H misrepresented the risk that was to be taken on and failed to meet the duty to provide a fair presentation of risk on behalf of H.

On this basis, I don't think any under-insurance happened as a result of failings by Trust Insurance. So I don't intend to uphold this part of the complaint.

Trust Insurance failed to visit the premises and, had it done so, it would have had a better understanding of their business

Mr and Mrs H say that since the claim they have spoken to other brokers who have said they would visit a client's premises and if Trust Insurance had done that, it would have had a better understanding of their insurance needs, for example by seeing what stock was on the premises. While that might be helpful, there's no requirement on a broker to do this. What the broker is expected to do is to assess the customer's needs and advise on a policy that's suitable for those needs. And in the first instance, it's for the customer to give a fair presentation of those needs.

H was under insured for mechanics' tool boxes

Mr and Mrs H say they believed employees' tools were fully insured for more than £1,000. The policy terms say there's cover for tools, tool boxes and cabinets belonging to H's directors (in this case, Mr and Mrs H) and employees, up to the limit set out in the policy schedule. But the schedule also says the limit is £1,000 for any one director or employee. I'm satisfied the limit was made clear. If Mr and Mrs H thought a higher limit was needed they could have raised this when making their presentation of the risks to be covered.

H was not insured for loss of use of an MOT bay at the premises

Mr and Mrs H say they were told the policy could include cover for loss of use/income relating to the MOT bay but, although this was discussed and a figure of £25,000 was used as a starting point, Trust Insurance never proceeded with this. It's not clear what happened in relation to this. But if H was unable to carry out MOTs, any loss of income would be

covered in any event by the business interruption cover. And for the reasons given above, my view is that Mr and Mrs H failed to give a fair presentation in relation to that. So if H has suffered a loss here which is not covered under the policy, that would not be due to failings by Trust Insurance.

The cover for motor vehicles was increased for no reason

It seems the level of cover for motor vehicles was increased by £25,000 following the 2018 renewal. I can't see any request on behalf of H for this increase so it does appear to have been done in error. It may have led to an increase in the premium but against that, H would have paid a lower premium due to being under-insured on other aspects of cover. So any loss here needs to be off-set against the saving made elsewhere.

They were never told H could have had cover for building improvements

Mr and Mrs H say Trust Insurance didn't tell them they could cover building improvements. They say they advised Trust Insurance H had taken on a new unit and would need additional cover for this.

Again, I haven't seen anything showing Mr and Mrs H presented the additional works to Trust Insurance as a risk to be covered. As noted above, Trust Insurance asked them to provide updated information about H and the risks to be covered, and asked if anything had changed. So if Mr and Mrs H wanted to add this to the cover they could have told Trust Insurance.

A security system wasn't added to the policy, which would have reduced the premium

Mr and Mrs H say they told Trust Insurance about some security improvements made at the premises, including a monitored alarm and anti-ram bollards but never found out if these measures reduced the premium.

Although the security system might have had an impact on the premium, as H was underinsured in relation to the business interruption insurance and paid a lower premium as a result, I don't think Trust Insurance needs to do anything further in relation to this. In addition, the cost of finance for the alarm system is factored into the calculations for the business interruption cover as a part of the operating costs for H.

Summary

I appreciate that Mr and Mrs H would have relied to some extent on the advice of Trust Insurance, as a broker. But the key point here is that as this was a commercial policy, the policyholder – H – had a duty in law to give a fair presentation of the risks to be insured. Trust Insurance advised Mr and Mrs H of this and reminded them of their duty to provide accurate information and check that everything was correct. Trust Insurance had to chase them for replies and when Mrs H confirmed everything was correct (except for one point) it was reasonable to proceed on that basis. I know that if H has lost out on being able to claim the full extent of its losses that will have a major impact on the business – which Mr and Mrs H spent some years building up – but I don't consider Trust Insurance to be responsible for that.

For these reasons, I said I did not intend to uphold the complaint.

Replies to the provisional decision

Trust Insurance accepted the provisional decision and had no further comments to add. Mr and Mrs H did not accept the decision. They have provided further detailed comments on behalf of H, together with recordings of a number of their phone calls with Trust Insurance.

I won't set out all their comments in full but in summary, they include the following:

- They have never said the policy was mis-sold, just that Trust Insurance failed as a professional adviser – it didn't use due diligence in explaining and helping them as customers to understand things.
- They are professionals in their trade but neither of them has any training or qualifications in insurance. They employed an accountant who defined their profit as the money they took from the business, in other words, their drawings.
- They employed Trust Insurance and expected them to be qualified and competent advisers. They relied on the advice from Trust Insurance.
- Business interruption insurance is difficult to calculate; it requires expertise and training.
- It was never made clear to them they had to give details of gross profit; the documents simply refer to "profit" and this wasn't explained to them. Trust Insurance itself was unsure how it was to be calculated. They were oblivious to the fact it should have been calculated on gross profit.
- There were many aspects of the policy that were never explained to them properly and where Trust Insurance simply got things wrong. It didn't request their accounts or make proper enquiries to help the consumer (whether a private individual or a business) understand what was needed. There was a lack of advice going back over the last few years including, for example, confusion about which vehicles were to be insured.
- Trust Insurance also failed to identify issues regarding the MOT lane and their tools or advise them about these.
- They paid for the insurance under a finance agreement – this means that under the Consumer Credit Act, the finance company would have been held equally liable for any defects in the product (in this case, their insurance policy) so there would have been an additional source of funds for them.

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.

In reply to the provisional decision Mr and Mrs H have raised various issues going back to 2017. They say they haven't complained that the policy was mis-sold, but that Trust Insurance didn't advise them properly and made numerous errors in arranging the policy. I appreciate the points they make but I think the key point is that they say, because of the various errors, the policy didn't provide the cover it should have provided – in other words, it wasn't suitable as the cover didn't meet H's needs. That is in essence a complaint that the policy was mis-sold.

Mr and Mrs H have referred to various issues and I have considered everything they have said carefully. The crux of the matter is whether this policy met H's needs and whether H lost out on a claim because it didn't have the correct level of cover. So I have focused on this. While I haven't listened to all of the call recordings I have listened to the relevant calls, particularly those at the time of the renewals in 2017 and 2018.

Business interruption cover

The most important point is the fact that H was under-insured for business interruption cover. Mr and Mrs H's main point on this is that Trust Insurance didn't explain to them how the level of cover should be calculated and specifically they weren't made aware it would be based on gross profit.

They point out that the policy schedule says "*Insured Profit Sum £60,000*". But immediately below that is a sentence that says:

"Full allowance must be made for growth and inflation both during the Period of Insurance and the Maximum Indemnity Period when setting your sum insured for Gross Profit."

So it does make it clear the cover is based on gross profit. And other references in the policy documents confirm that the figures are to be based on gross profit.

When Mrs H spoke to Trust Insurance in May 2017, the adviser told her the cover was for gross profit of £40,000, based on turnover of £70,000 but due to the growth in the business the figures needed to be much higher (since turnover was heading towards £500,000). Again, this specifically refers to gross profit. The discussion also covered other areas that needed to be reviewed, such as plant and tools, and hand tools. Mrs H said she would review these with Mr H and they would get back to Trust Insurance with figures. It wouldn't have been possible for Trust Insurance to make any changes during that call – it needed to wait for Mr and Mrs H to review the figures and go back with up to date information.

Based on this, I'm satisfied Mr and Mrs H were made aware the figure was to be based on gross profit.

Mr and Mrs H say they are not experts in business interruption insurance and wouldn't understand how the level of cover should be calculated. But they didn't need to understand this or know how to calculate the level of cover. Their legal duty was to make a fair presentation of risk. What they had to do was simply tell Trust Insurance what H's gross profit was. As directors of the business, they ought to have been able to do that. I think it's reasonable to expect the directors of a business to know what its turnover, gross profit and net profit are. And if they weren't sure, to have checked rather than just giving their 'best guess'. That doesn't require any understanding of insurance or any specialist knowledge; it simply requires them to know their own business.

Mr and Mrs H have referred to consumer protection laws, saying they should be protected under the Consumer Credit Act. This was a commercial policy entered into for their business, so consumer protection laws would not apply. As I explained in the provisional decision, the relevant law in this case is the Insurance Act. In the circumstances of this case, taking into account the size of H as a business (with turnover in excess of £400,000) there's no reason for me to depart from the law or to treat H as if it were a consumer rather than a business.

H was under insured for mechanics' tool boxes

Mr and Mrs H say Trust Insurance's adviser failed to identify whether staff members may have their own tools or advise on increasing the sums insured for hand tools and tool boxes. They also say if the adviser had looked into this it may have become apparent to him that director and employees tool boxes were only insured up to £1,000 each. But the policy schedule sets out a list of what's covered in each section and any limits on the cover. It says:

"Directors' and Employees' Tools Maximum any one director or Employee £1,000"

The policy had been in place a number of years and it was made clear in the information provided to H each year what the limit on cover was. If Mr and Mrs H considered this wasn't enough they could have asked for it to be increased when making the presentation of risk.

Mr and Mrs H say there were lots of areas where H didn't have the cover it should have had including for example, wages insurance, key person insurance, documents and data storage. I appreciate there was some mention of things like changes to personnel. But ultimately, Trust Insurance sent details of what was covered and asked if H wanted to change anything. Mrs H confirmed that apart from a change in respect of the vehicles, everything else was the same; there was no request to increase the level of cover. The cover provided was what was requested, based on the presentation of risk that Mr and Mrs H gave on behalf of H.

My final decision

My final decision is that I don't uphold the complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask H to accept or reject my decision before 13 May 2021.

Peter Whiteley
Ombudsman