DRN-3672333

The complaint

A company I'll refer to as D has complained that Amicus Insurance Solutions Limited didn't highlight a significant exclusion that was added to its commercial insurance policy.

Mr L, a director of D, has brought the complaint on D's behalf, although Mrs A is acting as a representative in this complaint. Both D and Amicus have also appointed solicitors to act as representatives. For ease of reading, I will refer to any actions or comments of the representatives as being those of D or Amicus.

What happened

D took out a commercial insurance policy in January 2019 through Amicus who are a broker. In August 2019, Amicus contacted D as the proposal form for the policy hadn't been signed. D let Amicus know that it had moved to different premises. One of these premises I will refer to as B. Due to the location of B, the insurer decided to remove cover for flooding for B's premises.

In November 2019, B was flooded with significant loss of property. D claimed on its policy, but the insurer said the cover for flooding had been removed from the policy when B was added.

D complained to Amicus. It said they should have highlighted that the cover for flooding had been removed from the policy and if they had done this, it would have bought appropriate cover elsewhere.

Amicus said D had completed a proposal form which said that its premises weren't on the bank of a river, so it thought D was responsible for any incorrect information. They said they had sent D the proposal form to check and it was only at that point D told Amicus it had moved premises to B. Amicus said D had signed the proposal form to confirm it was correct and, following the changes to the insured premises, the updated documents provided made it clear that flooding wasn't covered by the policy.

Unhappy with Amicus's response, D brought its complaint to the Financial Ombudsman Service. It said it had never been told that cover for flooding had been removed, and that Amicus's terms of business specifically say they will inform a policyholder of any changes. D explained the financial impact that the claim was having on it as a family business.

Amicus said that D had failed to engage with the sales process on a number of occasions, such as not returning the proposal form and then returning it incomplete. They said D had misrepresented its premises on the proposal form and they wouldn't have known about the new premises if they hadn't chased for the proposal form to be returned. Amicus said that even if the policy had provided cover, D had indicated losses of £250,000 which meant that D was underinsured (as the policy only provided cover for £40,000 of stock and £82,585 for plant, stock machinery and other contents) and as such an average would be applied to any settlement. Amicus added that they had told D to check the policy documents carefully to ensure they continued to meet its needs due to the changes that had been made.

Our investigator looked into D's complaint but didn't recommend it be upheld. He found that the updated documents made it clear enough that flooding wasn't a risk covered by the policy.

D said it had no reason to know there were any changes to the policy. It said a new contract hadn't been issued as it was the same policy number as the old one. It reiterated that Amicus's terms of business say a policyholder will be informed of any changes. D said Amicus's agent forwarded the policy documents from their phone and didn't inform D of any changes or say that D needed to check it.

Mrs A asked to speak with me before I reached a final decision. She said the proposal form had been completed by Amicus in a face-to-face meeting at the office so D wasn't responsible for any incorrect information which had been provided. Mrs A said D moved premises in early August 2019, so it hadn't failed to update Amicus about the change of premises. Mrs A said that if D had known cover for flood was excluded it would either have bought a different policy or not used the premises. To demonstrate this, D provided quotes from other insurers. As I'd spoken with Mrs A I gave Amicus the opportunity to also speak with me although they chose not to.

I issued a provisional decision on this complaint on 11 May 2022 where I explained that I intended to uphold the complaint and set out what I thought Amicus should do to put things right.

In my provisional decision, I didn't think that Amicus had provided clear information to D when the policy was amended and as such I said Amicus should make an offer of compensation to the value of the amount D would have received under the terms and conditions of the policy it would have held if flood cover hadn't been removed. I said the offer should include compensation for any consequential losses suffered by D as a result of Amicus's error as well as interest on the part of the offer which relates to the value of the claim at a rate of 8% per year from 8 February 2020 until the date Amicus makes payment.

I said that for Amicus to make an offer D would need to provide them with further information about the losses which includes details of the items lost, the value of the items, evidence of the loss and details of what happened to the items afterwards. I said Amicus may wish to appoint a loss adjuster to support them in establishing the value of the claim to come up with an offer of compensation.

Both D and Amicus provided further comments in response to my provisional decision.
In summary Amicus said:

- D's insurance schedule lists three separate companies as being insured but two of these companies are now dissolved. Amicus think they should only be responsible for paying for the items and loss specifically relating to D and not the other companies.

- Credit should be given for any applicable excesses under the policy.

- Credit should be given for any increase in premium D would have incurred in buying the new policy

- Amicus should be able to take underinsurance into account when calculating the settlement by applying an average.

- They don't think it's reasonable to include consequential losses in the offer.

- 8% interest is too high and a more appropriate rate would be 1% above base rate.

D said:

- The other companies listed on the insurance policy were dormant companies that had never traded. While the group trading name was used on some invoices, these items were paid for and owned by D and not the other company.

- D would have received some premium refund if it had cancelled the existing policy and it's unfair for Amicus to benefit from any additional expenses D would have incurred.

- It had never claimed for £200,000 worth of customer's stock and thought this was a misunderstanding.

- Amicus were responsible for its consequential losses which flowed from the claim not being paid and the company being unable to recover outstanding debts.

I issued a second provisional decision on this complaint on 11 August 2022. In that I said:

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I've asked both D and Amicus about what happened at the sale of the policy in January 2019. D said a representative from Amicus came to the premises which was on the same site as B. D said Amicus's representative filled out the proposal form.

Amicus and D dispute the reason as to why the proposal form hadn't been signed before August 2019. D said it hadn't been given the form and Amicus said they had left the form with D to be signed and returned. However, I don't think that matters to the outcome of this complaint because the central issue to this complaint concerns what happened after the form was amended.

Amicus contacted D on 2 August to ask for the proposal form to be signed. In an email a few days later, Amicus said they had completed the proposal form on D's behalf to save them time.

In response, on 7 August, D said it was "no longer at either of the depots" and would send over the details of where it was "currently" operating from. In its complaint letter of January 2020 D said it moved premises on 16 August 2019. There are some inconsistencies in the date D said it moved to B. However, I've been provided with an email from 9 August 2020 where D says it has moved some things to B and will start moving stock over 'next week'. So, I think it's most likely D was in the process of moving into B when Amicus got in touch. D should have informed Amicus of any change in address as early as possible to avoid being uninsured at its new address. However, D did let Amicus know about the change in premises within a few days and the policy was amended to reflect this.

I've seen a copy of the updated proposal form which includes the details of the updated premises. The proposal form asked if the premises were in the immediate vicinity of a riverbank. 'No' is ticked. Amicus said it had completed the form and asked D to check the form and return it. In an email dated 29 August 2019, one of D's managers confirmed they were happy with the signature on the form and "it was all correct".

I appreciate D said that Amicus knew only directors should be approving any insurance details, but I think D also had a responsibility to ensure its employees didn't carry out any activities that they aren't authorised to. I can also see that the employee copied in one of D's owners to the email approving the form. So, I don't hold Amicus responsible for accepting a form approved by one of D's employees.

While D did approve the incorrect information in the form, the insurer still noticed that the new address was in a high flood risk area and removed flood cover from the policy meaning that any error in completing the form had been rectified.

On 9 August the insurer specifically told Amicus that B was in a high flood risk area and so wouldn't be offering cover for flooding. As the proposal form hadn't been returned at this point by D, I think this should have alerted Amicus to check the proposal form was correct, given they had completed it.

Amicus's terms of business say that a policyholder will be notified of any changes made during the term of the policy. I think the removal of flooding is significant and something D would have wanted to know about, particularly given its location. As such, I think Amicus should have specifically told D about the removal of cover for flooding as good industry practice.

New documents were issued to D on 17 September 2019. These were forwarded from Amicus without any covering email. Amicus sent the documents again on 18 September, this time with a covering email which said to check the documents carefully, noting any terms, warranties and conditions that apply.

D said it didn't receive this email, but I've seen a copy of it which seems to be sent to the same email address as the other documents D did receive. I've thought about the fact that D is a limited company and therefore has a responsibility to check its documents to ensure that it is appropriately covered. However, in this case the new documents were 27 pages long and the exclusion was towards the end of the document. While I do think D bears some responsibility for checking the documents, I think Amicus should have done more to highlight that there was no cover for flooding, which was a significant change, particularly given the insurer had specifically told them the cover was being removed.

On 30 September 2019, Amicus sent D a separate document as D had requested a condensed version to send to a client. Amicus sent this in an email and said it only included the 'relevant' pages. This was a shorter, 10 page document, which included the schedules for each policy. The exclusion for flood was on the second page of the schedule for this property.

D told me this document was sent to an employee to forward to a client rather than to a senior member of staff to check the cover was appropriate. The email requesting the document came from a senior person at D, but they asked for the documents to be sent to a separate member of staff and didn't indicate that the request was motivated by a need to review the cover provided. Therefore, while I accept that this shorter document did include the exclusion in a more prominent place, I still don't think this meant Amicus did enough to highlight the exclusion, particularly as its purpose was to be forwarded to a client and not for D to be checking the terms of the policy.

I don't think that Amicus did enough to highlight the exclusion and therefore didn't provide information in a way that was clear, fair and not misleading given that the insurer had specifically let it know D was in a high flood risk area.

I think Amicus made an error so I've considered what would have happened if that error

hadn't occurred. I've spoken to D who said either it would have looked for a different policy or if one wasn't available due to B being in a high flood risk area it would have moved to different premises.

It's difficult to know exactly what other policies D could have bought in August 2019 however D has provided a quote from an insurer which indicates that flood cover could have been provided for B as long as there was no history of flood issues at B. D has confirmed that there had been no history of flood issues at B so I think it's more likely than not that D would have been able to get flood cover for B, and would have taken out a new policy if Amicus had made it clear that cover for flooding had been removed from its policy for this premises.

I therefore think Amicus's error caused D a loss it wouldn't have otherwise had – i.e. it didn't receive a payment in response to a claim. So I've thought about what Amicus need to do to put things right. As a general principle, if a policyholder has experienced a loss due to a claim not being paid out due to a broker's error I would require the broker to compensate the policyholder to the amount they would have received from the insurer if the broker hadn't made the error.

The claim

To estimate D's losses caused by the error, I asked D to provide me with a detailed breakdown of its losses under each section of the policy. As with any claim, it's for the insured to show that it's suffered a loss the policy covers.

It's clear that D would have suffered losses as a result of the flood. However, while D has provided me with numerous invoices and other pieces of information, it hasn't presented its losses in a way which enables me to reasonably establish its losses and therefore to enable me to decide what is a fair and reasonable amount to require Amicus to pay in compensation.

I therefore think that the fair and reasonable outcome to this particular complaint is for me to require Amicus to make D an offer of compensation to the value of the amount D would have received under the terms and conditions of the policy it held if flood cover hadn't been removed.

For Amicus to make an offer, D will need to provide Amicus with further evidence of its losses, including details of the items lost, the value of the items, evidence of the loss and details of what happened to the items afterwards. Amicus may wish to appoint a loss adjuster to support it in establishing the value of the claim to reach an offer of compensation. For clarity, the offer should also include losses for D's business interruption.

Amicus have asked D to provide details of any other insurance policies covering the items they were holding. I think this is a fair and reasonable request in order to [allow] *Amicus to determine the amount of compensation they need to pay.*

I also think it's fair and reasonable for D to supply proof of ownership for the items claimed for in order to show that it, rather than the dissolved companies, has an insurable interest in them.

Underinsurance

Amicus believe that D was underinsured and that this should be taken into account when working out what offer it should make in respect of the claim. This is because in an email to us regarding the value of the claim D said, "with all of our personal storage possessions together with clients products in storage alone the value would be around 250k without the

cross dock products…". I understand that D believes that this is a misunderstanding and it has never claimed this amount.

I recognise that this has been a difficult time for D's directors, but the information D has provided in support of its claim makes it difficult for me to determine whether it was underinsured.

When considering D's complaint, I asked D to provide me with its estimated losses under each section of the policy. D provided a number of invoices but didn't initially provide any specific figures. It did, however, say that in relation to one of its customers (that I'll refer to as H) that its "stock increased to circa £50,000".

After I issued my provisional decision, D said it only held stock of £43,000 which was the stock of two customers, including H. D then provided information to show that H's stock holding in its annual accounts was around £28,000.

Given the inconsistency in the information provided by D I haven't seen enough to conclude that D wasn't underinsured. I therefore think that in order for Amicus to make an offer, D will need to provide evidence of its stock to enable Amicus (or their loss adjuster) to determine if they were underinsured.

As the policy includes an average clause, I think it's fair and reasonable for Amicus to apply the clause in this particular case when working out what to offer, if they determine that D was underinsured.

Consequential losses

I've considered the information D has provided. While I recognise that its business has been severely affected by the flood, I haven't seen enough for me to conclude that these losses were caused by Amicus's error.

D has said that once it became known that the insurer wasn't going to pay D's business interruption insurance claim it began to lose staff. D has also said that it was unable to find new premises to trade from because landlords were reluctant to enter into an agreement without confirmation that D's insurer would pay the business interruption insurance claim. D said that as it wasn't able to fulfil orders or compensate its clients for damaged goods, its clients took advantage of the company's situation and refused to pay invoices of around £183,000. D said that as it no longer had a credit control department it couldn't take action to collect the outstanding amount and that this led to bankruptcy procedures being triggered.

I don't think I can hold Amicus responsible for D's clients refusing to pay outstanding invoices and it seems to me that D would always have incurred the loss of the damaged items which it would have been responsible for and weren't insured under its insurance policy. Therefore, I don't think the losses D has experienced is solely down to Amicus's error and as such I don't intend to require Amicus to compensate D for any consequential losses.

Deductions from the settlement amount

If D had claimed on a new policy, it would need to pay an excess. I can see that the policy D could have bought has an excess for £250. Therefore, I think it's fair and reasonable for Amicus to deduct the £250 D would have paid as an excess under its new policy.

I also think it's fair and reasonable for Amicus to deduct the amount D would have needed to pay in premium for its new policy, as this is a cost it would have incurred for the policy. For the policy which it appears would have covered D's claim, it was quoted

£5,632.77. I recognise that D doesn't think it would be fair for Amicus to benefit from any additional cost which D would have incurred, but my role here is to put D back in the position it would have been in if Amicus hadn't made an error. And, as D would always have had to buy a new policy, I think it's fair for Amicus to take that into account.

I don't think it would be fair and reasonable for Amicus to deduct the whole £5,632.77 though, because I think D would also have been able to receive some premium refund for the policy it held through Amicus. It's very difficult to know exactly what would have happened at that time and, as that policy covered two other premises and D had the benefit of cover for those premises for the duration of the policy, I don't think it would be fair and reasonable for me to find that a pro rata refund of the whole policy for the remaining five months should be applied. However, I think it's fair and reasonable to say that D would roughly have received a third of the premium back on a pro rata basis. The original cost of the policy was £5,424.39 which means that I think £753.39 should be deducted from £5,632.77 a new policy would have cost. Therefore, I think it's fair and reasonable for Amicus to deduct [£4,671 – corrected figure] *from the settlement offer to reflect what a new policy would have cost D.*

Interest

Given my finding above that Amicus should make an offer to compensate D to the value of its claim, I've considered what interest Amicus should add to this amount to compensate D for the period it was without these funds.

I've noted Amicus's points regarding interest and that they think my award might be inconsistent with what a court might award given that this is a commercial contract. While I accept that a court might reach a different outcome, I'm required to make a decision based on what I think is fair and reasonable in all the circumstances.

Our usual approach is to apply a simple interest rate of 8% broadly to reflect the opportunity cost of being without the funds.

Amicus say that requiring them to pay 8% simple interest on this amount is too high and that 1% above base rate would be a fairer amount. On the other hand, D has explained to us that the lack of funds has severely impacted its business.

I have considered the submissions from both parties. But I think the relevant issue here is the opportunity cost of the lost funds to D. In this case, I cannot be certain about the cost to D of being deprived of the money because it might have used the funds in a variety of ways.

Without any compelling reason to depart from our usual approach, I consider it fair and reasonable that Amicus pay D simple interest at 8% per annum on what it offers in settlement.

I've considered Amicus's point that it would most likely have taken the insurer longer than three months to settle the claim. It's very difficult to know how long it would have taken the insurer to settle the claim, so I need to decide on what I think is fair and reasonable. I have taken into consideration that the insurer may have appointed a loss adjuster (depending on the claim value) and would likely have been able to get the information from D more quickly. Without anything persuasive to the contrary, I think 8 February 2020 is a fair and reasonable date to use.

Therefore, interest on the offer of compensation to reflect the claim settlement should be calculated at a rate of 8% simple per year from 8 February 2020 to the date Amicus makes settlement. I recognise that D will need to provide Amicus with information to enable it to

make an offer and I don't think it's fair and reasonable for me to require Amicus to pay interest during this period. Therefore, I don't intend to require Amicus to pay interest during any period where they are waiting for D to provide information or from the date when Amicus have made a settlement offer to the date D accepts it.

Inconvenience

I understand that the losses D has suffered have had a considerable impact on D's director and members of the family. However, as D is the eligible complainant in this complaint I can only consider the losses of D and not those of the Director or family members. As I haven't been able to establish D's losses I haven't been able to establish the impact of Amicus's error on D. So, I don't think it is appropriate for me to make any award of compensation for inconvenience.

Amicus provided further comments in response to interest. In summary they believe that D would not have been able to provide the required information to the insurer within three months and the insurer would have taken much longer than this to settle D's claim. In particular, they referred to my comments that D hadn't provided the relevant information for me to decide the financial losses. Amicus said they were waiting for D to provide information to support its losses and shouldn't be required to pay interest until that information has been provided.

D also provided further comments. It said:

- The flood and subsequent claim had a significant effect on the health of Mrs A.
- It had already provided proof of ownership for the items claimed for.
- The lost items were washed away in the flood or scrapped up in the clean-up. Nothing was salvageable and this is supported by the loss adjuster who visited the premises.
- The only other insurance held by D was for motor vehicles.
- Amicus held stock of £28,000 for one customer and £5,000 - £17,000 for another. All other stock of £200,000 was cross docked stock and insured by customers separately.
- It would like me to set Amicus a deadline for making an offer in order to reach a resolution as quickly as possible.
- With regard to consequential losses, it was unable to compensate customers for the stock it was insured for, this did not include the stock insured elsewhere. Other companies refused to pay invoices due to the insurer not paying D's claim. D holds Amicus responsible for this as the error created a chain of events which ultimately meant D couldn't operate.
- A deduction for a new policy shouldn't be allowed as it had paid Amicus for a policy which wasn't fit for purpose.
- With regard to my decision not to award inconvenience, D said Amicus was responsible for the collapse of its business and the losses that flowed from that.
- D provided an email from a representative which said that if I'd decided that the material damage section was covered then it followed that business interruption

(consequential losses) would also be covered.

As a result of the further representations from both parties and because the information provided by D made it difficult for me to assess its losses I asked Amicus to appoint a loss adjuster to calculate the amount D would have received from its insurer. Amicus and D agreed to this and in April 2023 Amicus made D an offer of £250,000 to settle its complaint. It did not provide D, or our service, with a copy of a loss adjuster's report, as it said the reasoning for the business interruption insurance estimate was given over the phone and by email due to being validated after the meeting using D's profit and loss accounts.

D did not think £250,000 was enough and appointed its own loss adjuster, who I will refer to as L. L said that all of D's trading had been moved to B prior to November 2019 and therefore the overall policy limit of £600,000 for business interruption should apply rather than the £300,000 premises limit. L said that D's insured loss as a result of the flood was £796,991.

I sent both parties an email on 18 August 2023 setting out changes to the decision that I intended to reach following the receipt of the reports and any other new information received after my provisional decision issued on 11 August 2022. In that I said:

It is impossible for me to know exactly what D's losses were as a result of Amicus's error. However, I have to make a decision based on what I think is fair and reasonable in all of the circumstances. I will deal with each section of the policy in turn:

Machinery, stock, computers and hand tools

Amicus has offered to compensate D £74,361 for loss of machinery. I have not seen anything from D which persuades me that this this amount is not fair and it is also the declared value on the policy which indicates to me that it is likely to be the value of the loss. Therefore, I think Amicus has made a reasonable offer and Amicus should pay D £74,361 for its loss of machinery.

Amicus has offered to compensate D £40,000 under the heading of stock. As this is the policy limit I think that is a fair and reasonable offer and, as such, Amicus should pay D £40,000 for its loss of stock.

Amicus has offered to compensate D £8,223.18 under the heading of computers. D claimed £10,571 and Amicus's loss adjuster said this amount was evidenced in its report. The policy limit for computers was £9,458 meaning that D was underinsured as it had only insured 77.79% of the total value. As the policy has a clause which allows the insurer to apply an average, I think it is fair and reasonable for Amicus to apply a proportionate deduction of 77.79% in this particular case. Therefore, I am persuaded that Amicus's offer of £8,223.18 is fair and Amicus should pay D this amount.

D claimed £2,500 for hand tools and this is the amount that Amicus has offered to compensate it for. As it was the amount claimed I have no reason to believe this offer is not fair and reasonable. Therefore, Amicus should pay D £2,500 to compensate D under this part of the policy.

Business interruption

The terms of D's policy say that the sum insured for total gross profit is £600,000 and the sum insured for the premises max gross profit is £300,000. The relevant part of the policy says that the cover for loss for estimated gross profit is limited to the loss of gross profit due to a reduction in turnover. The policy says that "Turnover" is the sum produced by applying

the rate of gross profit to the amount by which the insured's turnover during the indemnity period fell short of the standard turnover in consequence of the damage. Standard turnover is the turnover during the 12 months prior to the damage which corresponds with the indemnity period.

Amicus has offered D £115,000 compensation under the business interruption section of the policy. It has noted that the premises limit for the policy is £300,000.

Amicus's loss adjuster said he was unable to properly assess D's business interruption losses due to the monthly sales data being destroyed. However, he said that the profit and loss accounts indicated a downward trajectory and estimated the losses to be between £110,000 and £120,000. He said he had calculated the loss by taking D's Net/Profit Loss for 2019 (being the 12 months immediately before the loss) and deducting the savings.

D has disputed that its business was on a downward trend. It said its expected turnover in the 12 months post flood was £2,212,067 and it had taken on new premises to accommodate new contracts. It said its gross profit margin was 81.36% and when deducting savings of £1,029,826 resulted in a net loss of £769,991.

L said that D had moved all of its work into B as of August 2016 and therefore the £600,000 overall policy limit for business interruption insurance should apply to this claim rather than the individual limit of £300,000. I assume that 2016 is a typo and should be 2019 as that is the date D moved into B. However, I find the comment that all work had been moved into B contradictory with the information previously provided by D.

When completing the proposal form in August 2019 D listed three warehouses to be insured and I have not seen any mention from D at that time that all work had been moved to B. In September 2019, D sent an email to Amicus asking for confirmation for a client that two of their warehouses were covered and in an email to our service D described B as its "main" hub which indicates to me that the other warehouses were also operational. In another email to our service D said, "as we could not compensate the clients we lost the turnover from the other sites, this also forming part of our claim for consequential loss".

Given the inconsistency of this comment, I find L's report less persuasive. It also indicates to me that the figures used in L's report are for the entirety of D's business and not just those which took place at B. As only B was flooded, I do not think it is fair and reasonable to use the figures for the entire company.

Amicus's loss adjuster has explained how he calculated the figure in line with the terms and conditions of the policy; and in the absence of more persuasive information from D, I am of the view that the offer of £115,000 by Amicus is fair and reasonable.

For completeness, I am of the view that it remains that there is a premises limit of £300,000 for business interruption insurance which is set out on the policy schedule.

Deductions

There was a typo in my findings where I said D's new policy would have cost D £5,6632.77, so it would be fair and reasonable for Amicus to deduct £4,8979.39. These figures should have read £5,632.77 for a new policy so it is fair and reasonable for Amicus to deduct £4,671 when taking into account a return of premium of £753.39.

Total compensation under the policy

In summary I have calculated the amount Amicus should pay for the losses incurred under the policy as:

- *Machinery - £74,361*
- *Stock - £40,000*
- *Computers - £8,223.18*
- *Hand tools - £2,500*
- *Business interruption - £115,000*

Subtotal - £240,084.18

- *Deduction - of £4,921 (£4,671 for the cost of a new policy and £250 excess)*

Total – £235,163.18 to compensate for the losses under the policy.

Interest

Amicus offered to pay interest on the settlement for 50% of the time between February 2020 and April 2023 when it made its offer. I believe that is it fair and reasonable for Amicus to pay interest for 50% of the time. I say this because it was open to Amicus to resolve D's complaint when initially raised and D has been without money it should have had for some time due to its error. However, I have also taken into account that the settlement could have been reached sooner if D had presented its losses more clearly and requested fewer extensions for providing information. I don't think it's fair to cap the interest in April 2023 because I think it was fair for D to have been allowed time to obtain its own loss adjuster's report given the lack of detail provided by Amicus around its loss adjuster's offer. D rounded up its offer to account for interest however, I think the fair and reasonable outcome will be for Amicus to pay D interest on the £235,163.18 at a rate of 8% simple for 50% of the time from 8 February 2020 until the date it makes payment. For example, if Amicus makes payment on 8 October 2023 it should pay interest at 8% simple per annum for 22 months.

Legal fees

D's policy says that it will cover legal fees "necessarily and reasonably incurred in the reinstatement or repair of the property consequent on its Damage but shall not include fees incurred for preparing any claim." While D has appointed legal representative to support it in its claim, the Financial Ombudsman Service is a free service and D could have brought its complaint to us without solicitors. I do not agree that the legal fees D has accrued have been incurred in the reinstatement or repair of its property. It follows that I do not think it is fair and reasonable to require Amicus to reimburse D for its legal fees.

Inconvenience

I had not previously made an award for inconvenience as I had not been able to establish the loss Amicus caused D. However, as it has been established that D has experienced losses of over £235,000 due to Amicus's error, I am persuaded that Amicus caused D unnecessary inconvenience. As D is a commercial entity, I need to assess the level of disruption Amicus's mistakes caused to D's business operations and consider whether that had financial implications. In deciding on a fair and reasonable amount of compensation, I have taken into account that due to Amicus's error D was left uninsured at a time when the

business had experienced a significant event; and it has spent a considerable amount of time trying to recover its insured losses. I have also taken into account that D has not persuaded me that the loss of its business was due to Amicus's error, and that some of the time taken to reach a settlement has been due to how D's losses have been presented. I also have to take into consideration that D is not trading and therefore hasn't had ongoing inconvenience as an entity. So whilst time and effort was diverted away from usual business activities, I've not been able to say that had financial implications for D during the whole period in question. I recognise this matter has had a significant impact on the director and his family, but D is the eligible complainant - so I am unable to award for their personal inconvenience and distress. Having taken all of the above into consideration, and reflected on the guidance we publish externally about how we approach awards of this type - I intend to require Amicus to pay D an additional £3,500 compensation for the unnecessary inconvenience caused.

Summary

In summary, I intend to require Amicus to pay D:

- *£235,163.18 for its losses which would have been covered by the policy*
- *Interest on that amount at a rate of 8% simple for 50% of the period between 8 February 2020 and the date it makes payment*
- *£3,500 compensation for the inconvenience caused.*

I asked both parties to provide any response to this by 8 September 2023.

In response, D said that it was surprised that I had found L's report less persuasive given that Amicus's loss adjuster's report had not been disclosed. D said that Amicus's loss adjuster had told Mr L, Mrs A and their solicitor that they would be recommending the maximum amount payable under the policy.

D reiterated that all of its trading has been moved to B and the other premises, which I will refer to as M and R, were used for administrative purposes and disposal of stock respectively meaning that no income was generated from them and they were therefore irrelevant for business interruption insurance loss.

D said that Amicus's loss adjuster had admitted that they were unable to properly assess the business interruption insurance loss and that L had also assessed the claim in line with the terms and conditions of the policy. D said as there had been a complete cessation in trading the reasonable way to calculate the loss was by considering the previous annual turnover from the company accounts. D also said that it was incorrect to state that the premises limit was £300,000 as the policy amount is maximised at 133% of the premises limit.

D added that there is nothing to support a negative trend in D's business and to apply a negative trend ignores the trading figures for the previous years. It said the annual turnover figures before the loss show increases of 13.85% for 2017-2018, 19.16% for 2018-2019 and 24% for 2019-2020. D said it had moved to B to accommodate the growth in the business. D asked me to reconsider my findings and award the maximum amount payable.

I asked Amicus for their comments regarding D's recollection that their loss adjuster had commented that he would be recommending the maximum amount payable under the policy. I said that in the absence of alternative information, the recollection of three parties would lead me to believe this was correct.

Amicus provided their loss adjuster's response to D's recollection:

> "*Technically that is correct following validation, quantum and policy terms and conditions which has clearly been misconstrued. They might have also been referring to the stock heading where the payment is up to the sum insured of £40,000.00.*
>
> *I find it hard for the TP to say that I would pay up to the limit on a BI claim which had not been validated and the documentation provided inadequate to make a detailed assessment. I explained on the BI claim that it's the rate of gross profit etc*."

Amicus said their loss adjuster had recommended the maximum amount payable under many of the heads of cover, except business interruption. They said their loss adjuster had requested additional information following the meeting in order to validate the amount and after that was received that he made a recommendation that the business interruption loss would be between £110,000 and £120,000.

I provided D with the loss adjuster's comments and said that based on these comments I did not intend to depart from the findings in my email dated 18 August 2023. I asked for any further comments on this to be provided by 12 September 2023.

Amicus also provided further comments. In summary they said:

- They accepted the amount of £235,163.18 as the amount payable to compensate what D for the amount it would have received under its insurance policy.

- As the business interruption element of the claim was validated after the meeting the rationale was given by telephone and email and therefore there is not a report which sets out the reasoning for the loss adjuster's estimation of the loss.

- It is incorrect to state that Amicus offered to pay interest for 50% of the period between February 2020 and April 2023. However, in the interest of settling the complaint they would agree to paying interest from 8 February 2023.

- 2% interest would be a fairer commercial rate as 8% would be punitive. They pointed to my provisional decision where I'd said that I intended not to require Amicus to pay interest while they were waiting for information from D. They did not believe that it is fair and reasonable for them to be required to pay interest for the period in which D caused delays. And, while they had not provided a loss adjuster's report, they had set out considerable detail around the report and the report had been commissioned at considerable expense due to D not adequately setting out their losses.

- Interest should be payable between 8 February 2023 and 28 April 2023, as the date they made their offer, but at the very latest be limited to 8 September 2023 to prevent further delays in D accepting the payment. Amicus said they would ensure that payment was made expeditiously.

- They do not accept that £3,500 compensation for inconvenience is appropriate given that D is already being compensated by the amount of interest awarded.

D also provided additional comments. In summary, it said:

- It disagrees that it is impossible for me to know exactly what the losses would have been. It believes Amicus's loss adjuster has mis-read or mis-calculated the information provided and not provided all of the information they considered when submitting their report. It does not think that Amicus's loss adjuster referred to the policy document when reaching his conclusion.

- It has not provided contradictory information. It did have two warehouses but only B was used for storing stock.

- That I find Amicus's loss adjuster's comments more persuasive than the recollection of three people, including a solicitor, indicates that I am favouring Amicus.

- The information from the original loss adjuster has been disregarded.

- I do not understand their operation and if it had other warehouses to operate from it would have continued to operate. After the flood it had to cease trading.

- D said that Amicus has also caused delays so it does not agree that 50% interest in payable and requests 8% interest for the entire period.

- D disputes that the loss of its business was not due to Amicus's error. It had previously been a successful business and only had to cease operating due to Amicus's error.

- £3,500 is not sufficient to compensate for the damage to D's reputation. It highlighted the large companies it had previously worked for.

- L is a well-regarded loss adjuster.

- It does not think it is fair to decimate a business and only pay a paltry sum in compensation.

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 carefully considered the points raised by both D and Amicus I'm not persuaded to depart from the outcome set out in my email dated 18 August 2023. As with my provisional decisions, I haven't commented on every point raised by the parties in this decision and will focus on what I consider to be the central issues. This is not intended as a discourtesy to either party but reflects the informal nature of our service.

Claim for machinery, stock, computers and hand tools

These amounts do not appear to be disputed but, even if I'm wrong and they are disputed, I remain of the view that the amounts offered are fair and reasonable for the reasons set out in my email dated 18 August 2023. For completeness, these amounts are Machinery - £74,361, Stock - £40,000, Computers - £8,223.18 and Hand tools - £2,500.

Deductions

I remain of the view that it is fair and reasonable for Amicus to deduct £250 excess and £4,671 as the cost of a new policy, as these amounts would have been payable if the new policy had been in place.

Business interruption insurance

I have considered all of the information D has provided with regard to the amount it believes it would have received for its business interruption insurance losses but I remain of the view that the £115,000 offer made by Amicus in relation to this is fair and reasonable. I'll explain why.

I have taken into account the recollection of Mr L, Mrs A and their solicitor that Amicus's loss adjuster said he would be recommending the maximum amount payable. However, I am more persuaded by the loss adjuster's comments that this would have been based on validation of the information. The loss adjuster asked for information after the meeting which he then used to validate the claim. As he didn't have the relevant information at the time of the meeting, I don't think any indication the loss adjuster gave in that meeting would be confirmed until after he'd received the information. While I said that, without information to the contrary, I thought Mr L, Mrs A and their solicitor's recollection was most likely to be correct, I'm now more persuaded by the loss adjuster's comments that Amicus have now provided i.e. that after considering the information needed to validate the claim the loss adjuster did not recommend the maximum amount payable under the policy.

D maintains that the business interruption loss relates to the entire company because all of the trading stock was held at B. It also said it was not displaying a negative trend and questioned whether I had seen the financial reports Amicus's loss adjuster had based their recommendations on. D also believes that I should view Amicus's offer 'dispositively' as I have not seen its loss adjuster's report.

The Financial Ombudsman Service is an informal dispute resolution service which may resolve complaints quickly and with minimum formality. Both parties have been provided with considerable opportunity to submit evidence for me to consider and I believe that I have sufficient information to reach a decision based on what I consider to be fair and reasonable in all of the circumstances. For completeness, I would add that I have previously been provided with year-end accounts for 2018 and period end accounts from June 2019 by D, however, these are for the entire company and not just the premises at B.

Amicus appointed a qualified loss adjuster and has explained how he reached his offer. Amicus have made an offer based on the loss adjuster's recommendation. Amicus have explained that the recommendation from the loss adjuster was given by telephone and email. I think the commentary Amicus provided along with their offer is sufficient for me to reach a fair and reasonable decision in the circumstances of this complaint.

While D has been consistent that B was its main hub, I remain unpersuaded that all turnover was produced from B's operations. As set out in my email of 18 August 2023 in an email to our service dated 21 April 2022, D told us, *"as we could not compensate the clients we lost the turnover from the other sites, this also forming part of our claim for consequential loss".* In another email to our service dated 26 February 2021 D said, "*At any one time across our depots we held in excess of over £100,000 of products*". The use of the word depots indicates to me that stock was held at more than one depot.

The insurance policy was set up with both stock in trade cover and business interruption insurance cover at B and M and stock in trade at R and I can't see that D indicated that this was not needed. I'm, therefore, not persuaded that it's accurate to use the entire company's turnover when calculating D's business interruption losses.

D has also referred to the turnover of the business increasing each year, but as L's report which sets out the increase is based on the turnover of the whole company, I remain less persuaded by its findings.

I have also considered that the amounts claimed for business interruption during this claim have been inconsistent. When setting out its losses in June 2022, D said that its total loss of gross profit was £687,379 and the premises gross profit was £467,697. This indicates to me that not all turnover was generated from B and, on balance, I do not think it is more likely than not that all turnover was generated from B.

There are also other inconsistencies in the information provided. For example in response to my email dated 18 August 2023 D said, "*This was to accommodate the current and projected business growth as the business required larger premises:* [previous premises] *was 41,000 square feet* [B] *was 63,000 square feet*". But in a letter to the insurer dated July 2020, D said, "*on 16 August 2019 the company moved from* [previous premises] *to* [B], *the latter being 30,000 ft smaller with a significant reduction in stock warehoused at* [B]". In its early complaint information, D told us that the reduction in premium following the move of premises was due to the reduction in stock. This is consistent with it moving to a smaller premises.

In an insurance claim it is for the insured to demonstrate their loss. And while this is an award of compensation rather than a claim - and my role is to decide what is fair and reasonable in all of the circumstances - in order for me to award the amount requested by D, I would need to be sufficiently satisfied that D's losses as a result of Amicus's error were to the value it seeks. Given the inconsistencies and that I do not find L's report persuasive because it details the losses of the entire company, I do not think that I can fairly require Amicus to pay D the amount it has requested. Amicus have made an offer of £115,000 as compensation for this loss. In the absence of more persuasive evidence from D, I believe that the £115,000 offer made by Amicus is a fair and reasonable amount for Amicus to pay D to compensate for the loss D experienced by not being able to successfully claim for business interruption insurance losses.

I accept D's point that the policy specifies that claims need to not exceed 133.33% of the estimated gross profit. But I do not think this makes a difference to the outcome of my decision as I do not think that Amicus needs to pay more than £300,000 as compensation for business interruption insurance losses.

D has referred to the previous loss adjuster's report being ignored. I have not referred to every piece of information that has been provided, although I have considered it all. The insurer's loss adjuster's report said it did not have the 'financials' to provide an estimate for the business interruption insurance loss and the emails from D's original loss adjuster say that nothing was salvageable. But there is not anything in the emails that I have been provided with which persuades me to increase the amount I am going to require Amicus to pay D in compensation for its error.

Consequential losses

I'm sorry to hear about the significant impact of what happened, but I still have not seen enough to change the conclusions set out on this point in my provisional decision dated 22 May 2022 and to hold Amicus responsible for the loss of D's business. D has told us that it held a large amount of cross-docked stock at B for its customers and this was not stock that was insured under the policy and so would not have been reimbursed by the insurer if the claim had been paid. D has shown that its customers refused to pay outstanding invoices of more than £180,000 which I think would have had a considerable impact on D's business. But I have not been persuaded that it is reasonable to hold Amicus responsible for D's

customers choosing not to pay their invoices as I don't think I can reasonably hold Amicus response for D's customers refusing to pay invoices. Therefore, I am not going to require Amicus to compensate D for any losses other than those insured under the policy.

Fees

I am not going to require Amicus to reimburse D for its legal fees for the reasons set out in my email of 18 August 2023. I am also not going to require Amicus to reimburse D for its loss adjuster fees as the report has not changed the outcome I am reaching.

Interest

Both D and Amicus dispute the amount of interest I intended to award and I have considered all of the points they have made.

I explained why I intended to award 8% simple interest in my provisional decision dated 22 May 2022 and I remain of the same view.

I also remain of the view that it is fair and reasonable to award interest for 50% of the duration between 8 February 2020 and the date Amicus makes payment. This is because there have been delays caused by both parties throughout this complaint. Amicus believes it should not be required to pay interest beyond its offer of 23 April 2023 and while I indicated this would be a fair outcome in my provisional decision, Amicus's refusal to provide a loss adjuster's report led to a further delay while D commissioned its own loss adjuster's report. As I've said, I have to make a decision based on what I think is fair and reasonable and given that it has taken some time to reach a final decision on this complaint due to the actions of both parties, I think it is fair and reasonable for Amicus to pay interest for 50% of the time.

I have explained why I don't think it is fair for the period of interest to end on 23 April 2023 when the offer was made. As both D and Amicus have made further representations which I need to address in my final decision, I do not agree with Amicus's proposal that interest should be payable until 8 September 2023 which was the response date for comments following my email dated 18 August 2023.

I have noted Amicus's concerns that it believes that there might be further delays if D accepts my decision. D has until 19 October 2023 to accept or reject my decision. If D accepts my decision and does not provide the account details Amicus requires to make payment within 14 days of the date it accepts the decision interest will cease to accrue.

I do not think that Amicus being required to appoint a loss adjuster to calculate D's losses means that it should not be required to pay interest at 8% simple for 50% of the time the between 8 February 2020 and the date Amicus makes payment. This is because I am awarding interest to compensate D for being without money it should have had, whereas I asked Amicus to appoint a loss adjuster to help put right its error.

Inconvenience

I have considered that D does not think £3,500 is sufficient to compensate for what went wrong and Amicus think it's too much. However, I remain of the view that this is a fair and reasonable amount of compensation for the reasons set out in my email dated 18 August 2023.

Putting things right

To compensate D for the losses caused by its error I think the fair and reasonable outcome to this complaint is for Amicus to pay D:

- £235,163.18 for its losses which would have been covered by the policy
- Interest on that amount at a rate of 8% simple per annum for 50% of the period between 8 February 2020 and the date it makes payment. If D accepts my decision and does not provide the account details Amicus requires to make payment within 14 days of the date it accepts the decision, interest will cease to accrue.
- £3,500 compensation for the inconvenience caused.

My final decision

My final decision, for the reasons set out above, in my provisional decision and email of 18 August 2023, I uphold this complaint and require Amicus Insurance Solutions Limited to put things right as set out in the 'Putting things right' section above.

Under the rules of the Financial Ombudsman Service, I'm required to ask D to accept or reject my decision before 19 October 2023.

Sarann Taylor
Ombudsman