

The complaint

Miss P is a sole trader. She has complained about the impact of China Taiping Insurance (UK) Co Ltd incorrectly declining her business interruption insurance claim and about the amount they paid after applying an average clause.

What happened

Miss P held business interruption insurance with China Taiping. She claimed on her policy after her business was impacted by Covid-19 and the Government's response to the pandemic.

China Taiping declined Miss P's claim as they didn't think there was cover under the policy. Unhappy with China Taiping's response, Miss P brought her complaint to our service. Miss P said that as a result of China Taiping incorrectly declining her claim she had to relinquish her successful business and has been left without an income.

Miss P said that prior to the pandemic, she had intended to run her business for another five years before selling it. She said that, at that time, the business had been valued between £300,000 and £350,000. However, she said that she had now had to give the business away, with an agreement from the purchaser that it would pay her £150,000 after three years if the business generated enough income.

While we were looking into things, China Taiping reviewed Miss P's claim following the Supreme Court judgment in the Financial Conduct Authority's (FCA) Business Interruption Insurance 'test case'.

In light of that judgment, China Taiping accepted the policy provided cover but, after calculating her losses, said that Miss P was underinsured. They said that Miss P's sum insured was £53,950 but, based on the previous 12 months, it should have been around £180,000. Therefore, China Taiping reduced Miss P's claim proportionately and offered her £20,526.68.

Our investigator looked into Miss P's complaint. He thought China Taiping had offered a fair amount to settle her claim but thought they should have done so sooner. He also thought the delay in settling the claim had caused Miss P distress and inconvenience, although he didn't think he'd seen enough to conclude that the loss of her business was due to China Taiping not paying her claim. Therefore, he recommended China Taiping add interest to the settlement amount at 8% simple and pay Miss P an additional £750 for her distress and inconvenience.

Miss P didn't think this was enough to compensate her for her losses.

China Taiping didn't think they should pay interest from the start of the claim due to having waited for the outcome of the test case. They also said Miss P could have accepted the settlement in June 2021 so didn't think they should pay interest past that date.

As neither party agreed, the complaint was been passed to me for a decision.

I issued a provisional decision on this complaint on 24 October 2022 partly upholding this complaint. I said:

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

Miss P has made a number of detailed points. I have considered them all, but I don't intend to address them all in this decision and will instead focus on what I consider to be the central issues to this complaint. This reflects the informal nature of our service.

Underinsurance

China Taiping have said that Miss P was underinsured, as the sum insured under her policy was significantly less than the true amount. Because of this, they applied the average clause in the policy which says that where the value of property is found to be more than the sum insured, a policyholder is only entitled to claim a proportion of the sum insured. I have therefore considered whether it's fair and reasonable for China Taiping to apply the average clause. In doing so, I will take account of the relevant law as well as what is fair and reasonable in all the circumstances.

China Taiping said that they based the sum insured in March 2020 on the previous year's sum insured, with some additional amount due to index linking.

Miss P's policy is a commercial one so the law that applies here is the Insurance Act 2015 (the Act). When considering a complaint where underinsurance is alleged, before considering the policy terms, I must first consider the Act. Under the Act a commercial customer has a duty to make a fair presentation of the risk to the insurer. In order to fulfil a fair presentation of risk, the Act says a commercial policyholder must disclose everything they know, or ought to know, that would influence the judgment of an insurer in deciding whether to insure the risk and on what terms. If it is found that they didn't fulfil this duty then in order to say there has been a qualifying breach, the insurer needs to show that it would have either not offered the policy at all, or offered it on different terms.

So, I've first considered whether Miss P made a fair presentation of the risk. The policy schedule sets out that Miss P's sum insured is £53,950.

China Taiping's analysis of Miss P's accounts indicate that she should have insured a sum of £180,000. I've reviewed China Taiping's calculations and they look reasonable and I haven't seen anything to indicate there was an error in how they were calculated. I have also noted that Miss P said her loss of turnover for the time her business was closed exceeded the sum insured by around £20,000.

When asked why she'd given a sum insured of £53,950 Miss P was unsure. She said her broker provided the sums to the insurer and this must have come from previous years when the sum she needed to insure was lower.

As Miss P's sum insured wasn't adequate I don't think she made a fair presentation of the risk. Therefore, I've considered what China Taiping would have done differently if she had.

China Taiping have confirmed that if Miss P had made a fair presentation of the risk they would have charged £270 for the business interruption cover on the policy instead of £80.92. As they would have done something differently, Miss P has made what's known as a qualifying breach. I've seen nothing to persuade me that Miss P deliberately or recklessly didn't make a fair presentation of the risk so, under the Act, China Taiping would be able to reduce Miss P's claim proportionately to the amount she'd underpaid on her policy.

Where a term in the policy puts a policyholder in a worse position than they would have been under the Act, I would usually go on to consider whether the insurer made that sufficiently clear at the time it sold the policy. However, in this case Miss P has not been put in a worse position by China Taiping applying the average clause. By either remedy, Miss P would receive 30% of the settlement. This is because Miss P paid 30% of the premium she should have paid and insured 30% of the sum she should have insured. So in this case I think it's fair for China Taiping to apply the average clause and I'm not going to require them to increase the amount they paid on the claim.

Consequential losses

Miss P has explained that she had to give away her business as she was in debt due to China Taiping not paying her claim and I can see from emails sent at the time that Miss P said she needed the claim to be paid to settle her debts. I understand that Miss P has received some money for her business, and she may receive more after three years.

If China Taiping had paid Miss P what they should have done in 2020 she would have been able to pay just under half of the debts she's referred to. Miss P has demonstrated that her son would have been able to lend her some more money, but I'm not persuaded that this means she wouldn't have gone on to sell her business. I note that the area in which Miss P's business was based suffered a second lockdown shortly after the first which I think would have impacted her business.

Given the level of underinsurance and the effects of the pandemic in general, I haven't seen enough to persuade me that the loss of Miss P's business was primarily as a result of China Taiping's error, or that the loss of around £150,000 which she believes China Taiping are responsible for couldn't have been mitigated further. Therefore, I don't intend to make an award for this.

I do, however, think that China Taiping should have paid Miss P's claim sooner. Whilst I appreciate the difficulties insurers faced with claims of this nature, the clarity provided by the courts in the test case has shown that Miss P had a valid claim and that China Taiping's decision to decline this in 2020 was incorrect.

My role is to consider what a business might or might not have done wrong and to put a customer back in the position they would have been in had things happened as they should have. Because China Taiping turned down Miss P's claim, she was without funds that she should have had, and I believe that it is fair and reasonable to compensate her for that financial loss by adding interest to the settlement.

In relation to an ongoing claim of this nature, it is reasonable that an insurer waits for losses to accrue before making settlement. However, it is not necessarily reasonable that an insurer waits for the end of an indemnity period before making settlement. Generally speaking, I would expect regular monthly payments to be made.

It is also reasonable that an insurer will need some time to assess any claim and make a settlement. I consider a reasonable time to do this on a claim of this nature would be around a month from when Miss P made her claim on 3 April 2020.

China Taiping clearly set out their offer of around £20,000 and the reasons for this in a letter to Miss P dated 24 June 2021. As I think this amount was a fair settlement offer, I don't think it would be fair and reasonable for me to require China Taiping to pay interest past that date, as Miss P could have accepted the money at that time and didn't need to incur a further loss.

Therefore, I think it would be fair and reasonable for China Taiping to add interest at our usual rate of 8% simple per annum for the first month's loss from one month after the claim was made (3 April 2020), the second month's loss from two months after the claim was made and so on until 24 June 2021.

Distress and inconvenience

Miss P's claim being declined and then an incorrect settlement applied has clearly had a significant impact on Miss P. She had the worry that her claim wasn't going to be paid while facing significant business debts. Miss P told our service that this made her physically unwell and impacted her mental health. As such, I think it would be fair and reasonable for China Taiping to compensate her for this.

I understand that Miss P doesn't think £750 is enough given the impact of this on her and the fact that she's had to give up her business. However, as explained above, I'm not persuaded that the loss of Miss P's business was due to China Taiping not paying her claim sooner. I also have to bear in mind that the underinsurance and other losses caused by the pandemic would have contributed to Miss P's distress and inconvenience during this time. With that in mind, I think £750 is a fair and reasonable amount for China Taiping to pay Miss P for her distress and inconvenience.

Both Miss P and China Taiping accepted my provisional decision.

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.

As both parties accepted my decision I see no reason to depart from my provisional findings.

Putting things right

It remains that the fair and reasonable outcome to this complaint is for China Taiping to pay Miss P:

- £20,526.68 to settle her claim if they haven't already done so.
- Interest on the settlement at 8% simple per annum for the first month's loss from one month after the claim was made (3 April 2020), the second month's loss from two months after the claim was made and so on until 24 June 2021 to compensate for Miss P's financial loss.
- £750 for her distress and inconvenience.

My final decision

For the reasons set out above, and in my provisional decision, my final decision is that I uphold this complaint and require China Taiping Insurance (UK) Co Ltd to pay Miss P as set out in the 'Putting things right' section above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss P to accept or reject my decision before 28 November 2022.

Sarann Taylor
Ombudsman