DRN-3846532

The complaint

A limited company, which I will call R, has complained about the handling of a business interruption claim under its policy with certain underwriters at Society of Lloyd's.

Mr C, as a director of R, has brought the complaint on its behalf.

What happened

I issued a provisional decision on this matter in November 2022, the main parts of which are copied below:

"R made a claim under the policy after its business was affected by the Government's response to the Covid-19 pandemic. The underwriters initially turned down R's claim as they didn't think the policy provided cover for the circumstances of the claim. However, following the Supreme Court judgment in the Financial Conduct Authority's ("FCA") Business Interruption Insurance 'test case' it accepted that the policy provided cover and asked for further details to validate R's claim.

The underwriters made an offer in May 2021 having deducted an amount in respect of furlough payments R's staff had received. R complained about the amount deducted for furlough payments and the delay in settling the claim. I understand an agreed settlement of £79,000 was paid in June 2021 but R still complained about the delay, which had a significant impact on the business.

The underwriters said it was not possible to proceed with the claim until after the Supreme Court judgement had been made and so any delay was outside its control. However, the underwriter did acknowledge that there was a delay in calculating the settlement figure after R had provide documentation in support of the claim. The underwriters offered £200 compensation for this.

One of our investigators looked into R's complaint. He concluded that the underwriters were entitled to deduct the furlough payments but that the underwriters should have applied interest on the settlement payment.

R has accepted the Investigator's assessment but the underwriters have not.

The underwriters said that it didn't think it should be required to make any interest payment for the period prior to the Supreme Court judgment, given that it said the FCA had given insurers permission to await the outcome of the test case before deciding liability and settling any claims. It says unless interest is not applied to the period of time waiting for the test case to be decided, it is being penalised for acting in accordance with the FCA's guidance.

As the Investigator has been unable to resolve the complaint, it has been referred to me.

In the meantime, R has told us it took a 'bounce-back loan' ("BBL") of £20,000 in February 2021, due to the delay in receiving settlement of the claim. R says it took a payment holiday, which meant it did not have to start repaying the loan until 18 February 2022. The loan was

at 0% interest until the first anniversary of the loan in February 2022, when it accrued at 2.5% per annum.

What I've provisionally 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.

The only issue remaining for me to determine is whether R suffered a further loss due to the delay in dealing with the claim.

My role is to consider what a business might or might not have done wrong and to decide on compensation if things didn't happen as they should have, that is fair and reasonable in all the circumstances.

Whilst I appreciate the difficulties insurers faced with claims of this nature, the clarity provided by the courts in the test case does not alter the fact that R had a valid claim and that the underwriter's decision to decline this in 2020 and was incorrect.

Our rules allow me to make, amongst other things, a money and interest award for what I consider to be fair compensation if a complaint is determined in the favour of the complainant. In this case, my decision is based on what I think is fair compensation to put R back in the position it would have been in if the underwriters hadn't made an error in turning down its claim. As an incorrect decision was made on the claim, I think it is reasonable to say that this should not have happened, and that R's claim should instead have been met at the time it was made.

In addition, the [Supreme Court] judgement was made in January 2021 and settlement not paid until June 2021. By that stage, the losses had been crystalised, so I consider it would be reasonable to have taken around a month to settle a claim of this nature. Therefore I think there was a further delay that could have been avoided.

Because the claim was not met when it should have been, the underwriters have been in possession of the claim amount and R has been left without these funds that it otherwise would have had. As R has been without this money, I believe that it is fair and reasonable to consider this to be a financial loss that R has incurred as a result of the incorrect rejection of the claim.

I've noted the underwriter's point regarding the FCA guidance, but I am unaware of any guidance from the FCA that indicates that interest should not be added to the settlement of a valid claim in circumstances such as this.

For the reasons set out above, I think there was a financial loss as a result of the delay in paying the claim. In order to put that right, I consider that interest should be calculated on the sums that were due to R.

R first made the claim in March 2020 before the losses had been incurred. If the underwriters had accepted the claim as I think it should have done, I think it would have been reasonable for them to have made interim payments starting a month after the claim was first made and on a monthly basis, as the claim would have been ongoing. So, interest at our usual rate should be paid from one month after each month's loss until February 2021.

In February 2021, R took out a loan for £20,000 at 0% interest. As R had taken this loan to cover the settlement the underwriters should have paid, R wasn't without that amount of money during that time. So I think the interest the underwriters should pay should continue

on the full claim amount less the value of the loan (so approximately £59,000) until the date of settlement in June 2021. As R received £20,000 no interest is payable on this amount from the date it was received. And R could have repaid the loan once it did receive settlement from the underwriters, which was before the interest started to accrue on the loan.

For the avoidance of doubt, this is in addition to the £200 the underwriters have already offered.

My provisional decision

For the reasons set out above, I intend to uphold this complaint against Society of Lloyd's and require the underwriters to:

Pay R the following amounts:

1. interest at a rate of 8% simple per annum on the whole settlement amount for the first month's amount from one month after the claim was made, the second month's amount from two months after the claim was made and so on until the date R received the BBL loan amount in February 2021;

2. from the date R received the loan amount in February 2021, the underwriters should pay interest at 8% simple per annum on the amount of the claim settlement, less the amount of the loan, until the date of settlement in June 2021; and

3. pay the £200 compensation already offered, if it has not already been paid.

Responses to my provisional decision

I invited both parties to respond to my provisional decision with any further information or arguments they want considered before I issue my final decision.

R has confirmed it accepts my provisional decision.

The underwriters do not accept my provisional decision. They say that the FCA took steps to ensure that insurers involved in the test case were not penalised for voluntarily taking part. It has quoted a footnote from the "Business Interruption Insurance test case framework agreement between the FAC and the insurers that had agreed to take part, dated 31 May 2020. The underwriters say this was added as insurers were mindful of possible claims for damages for late payment of insurance claims under s13A of the Insurance Act 2015:

"For the avoidance of doubt, the FCA has no intention to 'retrospectively' apply a judgment in the test case. The question of whether an insurer has acted reasonably and fairly and generally in accordance with its regulatory obligations in rejecting claims will be a matter to be judged against the circumstances which existed at the time".

The underwriters also refer to a recent case *Quadra Commodities v XL Insurance & Company SE & Others [2022] EWHC 431 (Comm),* which it says provides that insurers are entitled to reasonable time to investigate a claim and just because an insurer disputed cover and lost, did not make their actions unreasonable.

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 the *Quadra* case, the claimant asked the court to find that their insurance claim should be met and to award damages for late payment of the claim, in accordance with s13A of the Insurance Act 2015.

S13A of the Insurance Act 2015 says:

> *(1) It is an implied term of every contract of insurance that if the insured makes a claim under the contract, the insurer must pay any sums due in respect of the claim within a reasonable time.*
> *(2) A reasonable time includes a reasonable time to investigate and assess the claim.*
> *(3) What is reasonable will depend on all the relevant circumstances … but the following are examples of things which may need to be taken into account*
>
> > *(a) The type of insurance,*
> > *(b) The size and complexity of the claim,*
> > *(c) Compliance with any relevant statutory or regulatory rules or guidance,*
> > *(d) Factors outside the insurer's control.*
>
> *(4) If the insurer shows that there were reasonable grounds for disputing the claim (whether as to the amount of any sum payable, or as to whether anything at all is payable) –*
>
> > *(a) the insurer does not breach the term implied by subsection (1) merely by failing to pay the claim (or the affected part of it) while the dispute is continuing, but*
> > *(b) the conduct of the insurer in handling the claim may be a relevant factor in deciding whether that term was breached and, if so, when."*

The Court in the *Quadra* case determined that the insurer in that case should meet the insurance claim but that it had a defence under s13A (4) of the Insurance Act 2015, above, as it had reasonable grounds to reject the claim initially.

The underwriters of R's policy say they also had reasonable grounds to initially refuse R's claim and waiting until the end of the test case.

However, I do not think the *Quadra* case or the comments in the agreement with the FCA change my provisional findings. I did not propose to award damages, I provisionally determined that interest should be added to the claim amount to reflect the fact that R was without these monies. As stated in my provisional decision, the FCA has not to my knowledge, provided any guidance that interest should not be added to the settlement of a valid claim in circumstances such as this.

And s13A (5) of the Insurance Act states:

> *(5) Remedies (for example, damages) available for breach of the term implied in subsection (1) are in addition to and distinct from –*
>
> *(a) any right to enforce payment of the sums due, and*
> *(b) any right to interest on those sums (whether under the contract, another enactment, at the court's discretion or otherwise)."*

I am required to determine what I think the fair and reasonable outcome to this complaint is, having regard to all the circumstances. Having done so, I consider the interest payment is required to properly indemnify R for its financial loss and put it back in the position it would have been in had the loss not occurred. It is not a penalty for the underwriter but reflects the fact they were in possession of monies which should have been paid to R, regardless of the reasons for the delay in payment.

My final decision

For the reasons set out above, I uphold this complaint against Society of Lloyd's and require the underwriters to pay R the following amounts:

1. interest at a rate of 8% simple per annum on the whole settlement amount for the first month's amount from one month after the claim was made, the second month's amount from two months after the claim was made and so on until the date R received the BBL loan amount in February 2021.

2. From the date R received the loan amount in February 2021, the underwriters should pay interest at 8% simple per annum on the amount of the claim settlement, less the amount of the loan, until the date of settlement in June 2021.

3. Pay the £200 compensation already offered, if it has not already been paid.

Under the rules of the Financial Ombudsman Service, I'm required to ask R to accept or reject my decision before 6 January 2023.

Harriet McCarthy
Ombudsman