

## **The complaint**

A limited company, which I'll call G, has complained that Brightside Insurance Services Limited mis-sold its 'Commercial Combined' business insurance policy to it.

Mrs B, as one of the directors of G, has brought the complaint on G's behalf.

## **What happened**

In March 2020, G contacted its insurer to make a claim under the policy for business interruption losses caused by the Covid-19 pandemic. After an initial delay, the insurer agreed to meet the claim but it said G was underinsured, as G had applied for cover for loss of gross profit of approximately £1,860,000, when it should have been £3.6million over a 36 month indemnity period. The insurer therefore paid a proportional settlement of just over half the settlement amount, to reflect the underinsurance based on an 'average' clause set out in the policy.

Mrs B is very unhappy with this and said the policy was mis-sold, as she was told by Brightside during a phone call before setting up the policy to calculate the cover required based on G's net profit. Mrs B says she was diligent in completing the proposal form and asked Brightside for clarification of the figures to use; she asked how she should calculate gross profit and was told to use net profit plus wage roll and non-negotiable sums. Mrs B says she questioned the use of net profit three times and was misled. Mrs B says that as Brightside failed to advise her properly, it should pay the shortfall in the settlement received from the insurer (approximately £175,000).

Brightside says that G completed the policy proposal form (for the policy year June 2019 – June 2020) which clearly asked for a gross profit figure. Mrs B selected cover for loss of gross profit and selected a 36 month policy and loss of gross profit cover of £620,000 per year. Therefore, it provided the policy cover requested, with cover for £1,860,000 over a 36 months indemnity period.

Brightside said its representative said in the call that Mrs B should put in the total gross figure of net profit plus expenses, so the total figure. As gross profit is the larger figure and is essentially the total profit figure, prior to any outgoings, it says it did nothing wrong and did not cause G to being underinsured. Brightside says it put in place the cover G asked for and G should have known the difference between net and gross profit. Brightside did however, offer £100 compensation for delay in dealing with the complaint.

One of our Investigators looked into the matter. The Investigator thought that Brightside had provided advice during the phone call to use net profit plus some fixed business costs to put in the gross profit figure on the proposal form and this was misleading. He was satisfied that if clear advice had been given in the phone call, Mrs B would have put the correct gross profit figure and would not have been underinsured. The investigator therefore recommended that Brightside should pay the shortfall of the claim settlement, less the cost of any additional premium that the insurer might have charged if it had known the correct level of cover required, together with interest.

Brightside did not accept the Investigator's assessment. It has made a number of points in response. I've considered everything it has said and summarised the main points below:

- G completed the proposal form on 30th May 2019, the day after the call with its representative. Question 42a of the proposal form clearly asked G to provide its gross profit figure.
- G had a responsibility to make a fair presentation of the risk it was asking the insurer to cover. This responsibility is not confined to answering the specific questions listed on the proposal form or asked by Brightside. All material circumstances should be disclosed, regardless of whether or not the insurer has asked for the information.
- Ms B, as company director for more than 17 years ought to have full knowledge of what is meant by gross and net profit.
- G is responsible for knowing the performance of the business and what the impact would be, should it need to make a claim.

Brightside also pointed out that the insurer had calculated the underinsurance based on an average clause in the policy but that it should have done the calculation based on the provisions of the Insurance Act 2015, using a formula based on the difference in premium it would have charged G if it had known the actual gross profit figure.

Another Investigator contacted the insurer who agreed to review the claim settlement. Having done so, the insurer agreed to pay G an additional £142,525.05 plus interest from the date of the loss. As a result of this, the shortfall of the claim is now £32,091.09, less the additional premium that G would have had to pay had the insurer known the correct gross profit figure, which was £1,036.32. So the Investigator calculated that the loss to G as a result of the mis-sale is now £31,054.77, together with interest from the date G received the first interim payment from the insurer to the date of payment by Brightside. The Investigator didn't think that interest was due for any time between the claim being made and the first interim payment, as that period was not due to anything that Brightside had done wrong. Brightside does not accept the Investigator's assessment, as it still does not consider it is responsible for any of the claim shortfall.

Mrs B is unhappy with interest amount and compensation recommended.

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

### **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.

Brightside sold the policy to G and set it up. Those selling insurance have a responsibility to provide clear and fair information about the cover provided, so that customers can make an informed decision about whether or not to buy it. If the seller is also recommending the policy, they also have to take steps to ensure the suitability of its advice.

This renewal in 2019 was carried out on an advised basis, so Brightside had a responsibility to ensure it was providing suitable advice. This would include that the policy provided an appropriate level of cover.

Brightside says it provided a policy based on the level of gross profit cover G asked for; it says the proposal form was clear and it was G's responsibility to provide an accurate figure for its gross profit.

The proposal form completed by G says:

*"Sums to be insured ...*

*Loss of gross profit (Please circle your requirements below)*

*Indemnity Period required 12/24/36 months"*

Mrs B had highlighted 36 months and specified sum insured of £620,000 per year. However, Mrs B says she put this figure because she was advised by Brightside in a phone call the day before to use the net profit figure (plus wages and some costs) on the form.

I have listened to the call. During the phone call Mrs B refers to a problem with previous insurance due to failure to disclose information and wanted to be absolutely certain that G had the correct cover in place.

Mrs B didn't previously have business interruption cover and the representative explained that it would cover loss of income as a result of certain incidents.

Mrs B and the representative discuss the indemnity period and he suggested she opt for longer than 12 months. Mrs B opted for 36 months.

I have set out below the part of the call during which Mrs B queried the figures she needed to provide for the business interruption cover:

Brightside: *"So yeah. Then Yeah. With the figure then for that, to calculate that. That is your actual profit itself."*

Mrs B: *What's that? Sorry? The loss of money?*

Brightside: *No, sorry for the loss of gross profit.*

Mrs B: *Yeah for the figure*

Brightside: *Yeah for the figure. Yeah. So it's the actual profit that you make, just...*

Mrs B: *The net profit?*

Brightside: *Yep. So actual profit.*

Mrs B: *Net Profit? Okay.*

Brightside: *Yeah. Plus wage roll. Plus any non negotiable sums. So for example, if you still have to pay business rates, water rates, anything like that, that's non negotiable for that time period.*

Mrs B: *Gosh, this is quite a working out, isn't it?*

Brightside: *Yeah.*

Mrs B: *No, I didn't get this last time. Right. But anyway, I'm gonna make sure that everything's in this one. Net profit plus wage plus non [negotiables] because I can work that out."*

Mrs B says she was not clear what non-negotiable sums would be included, as she was not sure what she could negotiate if an incident happened that led to business interruption.

There were further phone calls between Mrs B and Brightside discussing this and how to calculate projected sales again after the call quoted above. Mrs B called back to discuss

some matters further. In that call she asked again about how to calculate gross profit and it was confirmed this would be net profit plus wages and non-negotiable costs such as rent. Mrs B again said she was unsure what would be non-negotiable costs in the event of a claim. Mrs B also asked if this was the basis on which she should calculate G's projected figures of what G was expecting to make in the coming insurance year and Brightside confirmed it was. Nothing said in this or any of the other calls between Mrs B and Brightside, that have been provided to me, provided a different explanation of how to calculate gross profit.

G's policy defines gross profit as being.

*"Gross Profit*

*The amount by which:*

*a) the sum of the amount of the turnover and the amounts of the closing Stock and work in progress shall exceed;*

*b) the sum of the amount of the opening Stock and work in progress and the amount of the uninsured Working Expenses."*

This is clearly very different from what Mrs B was told during the phone calls with Brightside.

It is evident to me from listening to the calls between Mrs B and Brightside, that Mrs B was anxious to ensure the policy was set up correctly, that she disclosed everything required and had appropriate cover for the business, given G had a claim declined previously. It is also evident to me that she was not sure what figure to enter for the business interruption cover. Mrs B says she didn't previously have this cover and it was explained to her in general terms. She wasn't sure what figure should be entered for the business interruption cover and questioned several times the suggestion that it start with net profit, plus some business expenses. Brightside told Mrs B more than once that gross profit would be net profit plus wages plus business rates, water rates and anything like that and did not tell her the policy definition.

Having considered everything, I consider Brightside gave Mrs B incorrect information and it should have told her the policy definition of gross profit. This means Brightside did not comply with its responsibilities when arranging the insurance. I have to now consider what impact this has had on G.

Basing the calculation on the method Brightside told her led Mrs B to calculate that for the year ending 2017 (which was the last year of made-up accounts at the time) the gross profit figure was £548,496. Mrs B increased this to £620,000, as G was anticipating growth, but even allowing for growth to was considerably less than the actual gross profit figure.

Mrs B has provided detailed calculations of the figures that would have applied if using the policy definition for gross profit. For the year ending 2017, this provides the same figure as G's statement of accounts, £833,554 (and for 2016 it was £817,527).

Brightside says Mrs B might have given this figure even if she had known the policy definition of gross profit, in which case would still have been underinsured.

Mrs B says she'd have put £1.2 million on the proposal, rather than £833,554 because the business was growing and she had calculated G's expected figures for the policy year.

It is impossible for me to be certain what Mrs B would have done, had she been given clear information and instructions about how to calculate the gross profit figure needed for the proposal form. I have to therefore consider what I think is most likely to have happened.

Mrs B might have given the £833,554 figure. However, I note that Mrs B has provided calculations that show that as of January 2019 using the policy definition for gross profit, the figure was £1,206,575. Mrs B may not have had all those figures at the time she applied for this insurance but she would have had some of the figures that would have allowed her to calculate this and she knew that the figures had increased since 2017 and had discussed G's projected growth as a result of G obtaining some large contracts. Mrs B had also increased the cover from the £548,496 figure to £620,000 to allow for some growth, so it seems reasonable to assume, she'd have increased any previous figures again in a similar way.

Having considered everything and again while I cannot be certain. I think on balance that it is likely Mrs B would have applied for cover for £1.2million, if she had not been misled by Brightside about how to calculate G's gross profit.

Brightside has also referred to G's obligations to make a fair representation of the risk it was seeking to insure and suggests that it failed to do so.

The Insurance Act 2015 imposes obligations on commercial insurance customers to make a fair representation of risk and sets out remedies available to an insurer if they have not done so. The insurer has now settled the claim in accordance with the Act.

Brightside also makes much of G's obligation to examine the contract and satisfy itself of the cover provided and says it should have been well aware of the difference between gross and net profit and provided the correct figures.

Of course there is some responsibility on customers to understand what they are buying. However, those selling insurance have a greater responsibility to give a customer appropriate information about a policy, such that the customer can make an informed decision about the arrangements proposed and which might affect their decision to buy the policy. Whether the customer is a commercial business or not, they are entitled to rely on the advice given to them by their broker, as the expert in insurance matters. Brightside had an obligation to ensure the suitability of its advice and to provide clear, fair and not misleading information.

It was clear in the telephone call that Mrs B wasn't sure what figures to put in the proposal form and Brightside gave an explanation that was misleading and ambiguous. Brightside could have referred her, within the call, to the policy definition of gross profit. And having given her an incorrect explanation of how to calculate gross profit in the phone calls that took place, I do not think it is reasonable to have expected Mrs B to have to examine the policy definition to discover that she had been mis-led about this. She was entitled to rely on the advice given to her.

Ultimately, it was for Brightside to propose a policy that was consistent with G's demands and needs, and it needed to take reasonable steps to ensure the suitability of its advice to G. If it had given an accurate explanation of what gross profit meant in the context of this policy, I have no reason to doubt that Mrs B would have given a figure closer to the £1.2million. If she had done so, there would not have been any underinsurance deduction made by G's insurer.

If Brightside had not made this error, G would have received the additional £31,054.77 from the insurer with the other claim payments. I therefore think it's reasonable to require Brightside to pay interest on this amount from the date the insurer made the first claim payment to the date Brightside makes payment. I do not think that Brightside is responsible for any period before the first payment by the insurer, as it was not responsible for any delay in the insurer considering and accepting the claim.

G says the first claim payment was made in July 2021 but I've also seen reference to April 2022. The correct date will need to be confirmed between the parties.

### **My final decision**

For the reasons set out above, I uphold this complaint and require Brightside Insurance Services Limited to pay G the sum of £31,054.77, together with interest at 8% simple per annum, from the date G received the first part settlement of its claim from its insurer to the date of payment by Brightside. This is in addition to the £100 Brightside already offered.

Under the rules of the Financial Ombudsman Service, I'm required to ask G to accept or reject my decision before 16 October 2023.

Harriet McCarthy  
**Ombudsman**