

## **The complaint**

Mr F1, Mr F2 and Mrs F trade as a business that I'll refer to as F. They complained that Aviva Insurance Limited undervalued their business interruption insurance claim.

Mr F1, Mr F2 and Mrs F have complained through a representative. For ease of reading, I'll refer to F throughout.

## **What happened**

F held commercial insurance with Aviva for two premises which I'll refer to as B and C. F claimed on its policy for its losses after C was broken into on 9 February 2020.

Aviva settled F's claim for loss of stock and material damage. They also accepted F's claim for business interruption and paid £8,282.43.

F thought that the claim for loss of stock and material damage had been settled fairly. However, it thought it should have been paid more to settle its BI claim.

Aviva said they had reduced the claim settlement by applying an average to the claim due to C being underinsured. Aviva also said that, as F had closed on 23 March 2020 due to the restrictions put in place as a result of Covid-19, they had established F's losses up to that point.

F didn't think it was underinsured. It said the premises had one till and it was impossible to split the turnover between them, so it didn't know how Aviva had established it was underinsured.

Aviva said they had based the calculation on the profit and loss information provided by F in support of its claim. They added that they had also applied an average to previous claims made by F and had made it clear during those claims that F was underinsured.

F also didn't think Aviva had considered that its internet sales were likely to have increased during lockdown if it had the stock available. It made it clear that it wasn't claiming for losses as a result of the store being closed due to Covid-19.

Aviva said F would have found it difficult to restock due to Covid-19. However, F said that the production of the type of stock it sold was always limited and therefore it wouldn't have been able to restock irrespective of Covid-19.

I issued a provisional decision on this complaint on 6 January 2023. 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.*

### *Underinsurance*

*Aviva have said that F was underinsured as the sum insured for C was less than it should*

have been. Because of this they applied a clause in the policy which says that where the sum insured is less than the annual income, a policyholder will be considered to be its own insurer for the difference and bear a rateable share of the loss. As such, Aviva paid F a proportionate settlement.

The starting point is therefore for me to consider whether C was underinsured. Having done so, I don't think it was. I'll explain why.

The accounts provided indicate that the total sum which should have been insured for the two premises was £1.35 million. I understand that Aviva based their view that F was underinsured on the accounts that F provided to Aviva to demonstrate the losses to C. However, it seems to me that there was misunderstanding as the information F provided related to the accounts for both B and C, rather than only C.

F has been consistent throughout its complaint that there was only one till and that the stock moves between B and C which are treated as one premises. I have been provided with an email from F's accountant which says that "to the best of my knowledge there was only one till which generated the invoicing and information for the quarterly VAT returns".

F indicated a sum insured of £1 million for each premise. The overall sum insured is therefore adequate and even if 70% of the stock was in C, the sum insured would have been adequate. On balance, I think it's likely that the sum insured for each premises was adequate and therefore F wasn't underinsured.

I have considered Aviva's point that there had been previous instances of underinsurance and, in light of this, I think F could have done more to explain how the premises were linked so Aviva knew what risk they were covering. However, Aviva have been unable to show whether they would have done anything differently even if they had known this at the time, so I don't think it would be fair and reasonable for me to allow Aviva to make any reduction to the settlement for this.

Therefore, I intend to require Aviva to pay F the difference between what they should have paid without making any deduction for underinsurance and what they did pay to settle the claim. As F has been without money it should have had, Aviva should add interest to that amount at our usual rate of 8% simple from the date they paid the rest of the settlement to the date they make payment.

#### *Internet sales*

The basis of settlement section of F's policy says that the policy will pay the amount by which F's income falls short of the amount it would have received during the indemnity period if not for the damage – which in this case was the theft.

Income is defined as, "The money paid or payable to You for goods sold and delivered and for services rendered less the purchase cost of stock or materials."

I understand that Aviva applied a negative trend to the settlement due to trend of the business. Although that doesn't form part of this complaint and therefore I have not considered it.

F has been clear that it's not claiming for losses due to Covid-19, so I also haven't considered that when reaching an outcome. However, F believes that the level of internet sales should be taken into account as these would likely have increased during lockdown. However, Aviva didn't think F had sufficiently demonstrated the split of sales or that the theft was the proximate cause of the loss. Aviva also said that the policy

*doesn't have a departmental clause.*

*I recognise that the policy doesn't have a departmental clause, but when looking to work out what F's income would have been without the damage, it seems to me that there were unusual circumstances at the time of F's loss. While the premises were required to close from 23 March 2020, in my experience, many people were shopping on the internet during the lockdown period. And in my view, the figures F has provided from its system support that its internet sales increased. I think that the unusual circumstances at the time of the losses meant that it was very difficult for F or Aviva to find an accurate trading period for comparison and I do think that F's online business would continue to have been impacted after 23 March 2020.*

*Therefore, I asked F to provide further information about its estimated sales to consider what it would likely have made if the stock was available.*

*In response, F said its margin is the same online as it is instore. It provided a breakdown of the proportion of goods it thought it would sell at full price and the proportion it would sell at a discounted price. F said it would have sold all the stolen stock, but some of it would have been sold at a discount. However, I don't think it has substantiated these figures – either the proportion of each stock line which would have been discounted, the level of the discount or that all stock would have sold.*

*F has provided information on the split of sales between store and online in the period leading up to the store being closed due to the Government restrictions and afterwards, but I don't think that is enough to substantiate what the sales would likely have been. I asked F for further information about the amounts it thought it would sell items for and it said that it had used its knowledge of the brands and many years of previous experience to reach a figure.*

*However, I don't consider that this is sufficient to demonstrate its loss for this claim. It is for F to demonstrate its losses and I don't think it sufficiently did that either during the claim process with Aviva or when asked for further information. As such I don't intend to require Aviva to pay anything further for this part of the claim.*

*Aviva accepted my provisional decision. F accepted the decision in relation to underinsurance but not my findings on the internet sales. F provided further information from its accountant for me to consider.*

*On 9 February 2023 I sent an email to both F and Aviva via our investigator. In that email I recognised Aviva's point that there isn't a departmental clause in the policy and that they should only be required to pay what is covered under the policy. However, I said that in usual circumstances the store would have remained open and the loss from the theft would have been more readily apparent as the other income and outgoings would have remained broadly similar, save for any trends in the business. I said that by considering F's losses in the way that they did, I didn't think Aviva had treated F fairly or reasonably in the unusual circumstances of the time. This is because the way they considered the losses did not fairly reflect the amount by which the business's income fell short of the amount it would have received during the indemnity period if not for the theft.*

*I said that at the time of my provisional decision I did not think that F had sufficiently demonstrated its losses. However, I changed my mind in light of the further information F provided. I provided Aviva with a copy of the information F provided.*

*I said that, with regard to being able to restock the items which were stolen, F had explained: "there are two buying seasons; Summer Season – buying carried June to September, and Winter Season – buying December to February. The Ratio of Winter to Summer Purchases*

*is 65% Winter, 35% Summer. As the theft took place in February there was no time to replace the winter stock purchased previously, as end of season. Given the high end nature of designer stock sold, there is no chance of replacing this, Winter stock is also more expensive (relates to coats etc). This is a well-known fact within the designer clothes industry, and can easily be verified."*

I said that this sounded plausible and, in the absence of information to persuade me otherwise, I was persuaded by this. I believed that the proximate cause of the loss of income was the theft and not the inability to restock due to Covid-19.

I said that F had already provided a split of the store's sales which occurred at the premises and those which occurred online. I thought that these figures supported that F's online sales increased from March 2020 and I said it was likely that there would have been a significant increase in online sales during the lockdown period. I said that it was impossible to know exactly what would have happened if F's business hadn't experienced the theft but my role is to consider what is fair and reasonable in all of the circumstances. I didn't believe that it was fair or reasonable for Aviva to limit the claim to 23 March 2020 on the basis that the store closed due to Covid-19.

F had estimated its businesses losses to be £74,362 and provided information from its accountant as well as sales invoices to support that the average mark-up on the items was x2.18.

However, I noticed an error in F's calculation for some of the products stolen. F confirmed this error and restated its loss was £63,372.

I also thought F's calculation over-estimated the loss for the following reasons:

- The theft took place in February, which as F has said is at the end of the winter season. To calculate the average mark-up of x2.18 which F had stated, the accountant had used as the benchmark sales of some of the items from December 2019, and some sales from early January 2020. Given that the majority of these sales were before Christmas, when there is little discounting, I thought this would overstate the average mark-up which would apply in the Spring of 2020 when the stolen stock would have been sold.
- From 23 March 2020 onwards, when the store was closed due to the Covid-19 restrictions, some sales would have transferred online but some would have been lost. Therefore, for the stolen stock to be sold, a higher level of discounting would have been required than usual.
- Some of F's customers in late February - April who would otherwise have bought stolen items will have purchased a different item from the store instead, so the sale wasn't lost but transferred to a different item. If these other items hadn't been sold, it would have been necessary to discount the price of these items to achieve an additional sale.
- The spring of 2020 was generally warm and people were unable to leave their homes so there was reduced demand for winter clothing.

I also took into account that, while the store closed for four months, it would have reopened in July 2020 and, if the stock hadn't already sold online, it would have been available to buy in store at that time.

Overall, I said that it was impossible to calculate these effects precisely, but I believed the mark-up applied by F in its calculation of the loss of profit from the stolen stock was too high. I thought that a fair and reasonable reduction in the sales value would be to apply a 20%

reduction to the mark-up rate. I recognised that F could possibly have made more money than that on the items, but equally it could have made less, so I thought a 20% deduction was fair and reasonable in the circumstances. I therefore replaced the mark-up of x2.18 with a mark-up of x1.744 and applied F's calculations on that basis. This showed a loss of income of £36,658.

I said that Aviva had already paid F £8,282.43 for its business interruption losses as part of this claim. As I had calculated F's losses from the loss of income on the stock itself, I said that Aviva could deduct what they had already paid when settling F's claim.

This meant that Aviva should pay F a further £28,375.57 to settle its claim. As F has been without money it should have had, I said that Aviva should add interest at 8% simple to this amount from the date they paid the initial claim to the date they make payment. I said that no deduction to this could be made for underinsurance.

I also said that F had included an invoice from its accountant which includes VAT. The policy says that professional accountant fees are covered by the policy where they are needed to substantiate a claim. Therefore, I thought that the accountant's fees were covered by the policy, so I said that Aviva should reimburse F for this cost. I said that if F is VAT registered Aviva did not need to reimburse it for the VAT element of these fees.

F accepted my decision but Aviva didn't agree.

With regard to underinsurance, Aviva said they had accepted this in order to settle the claim. However, they said F was aware of the underinsurance, which had resulted in a deduction to previous claims, and F had made no effort to rectify or clarify the position.

With regard to the sales, Aviva said that the policy essentially provides cover for the reduction in profit due to the incident over the indemnity period. They said that in only allowing for the profit on the stolen items, I had ignored any profit the business would have received from restocking, or alternative purchases from the store's range. They said that it could be argued that by the end of February, the purchase window for winter stock would have passed so these items would have had to be heavily discounted or sold the following winter. Aviva said that if they were sold the following winter then the loss of profit in the indemnity period would have been reduced. If they were heavily discounted then the loss of profit would have been reduced further.

### **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.

I have considered the points Aviva have made but I'm not persuaded to depart from my provisional findings and email of 9 February 2023.

### *Underinsurance*

For the reasons set out in my provisional decision, I remain of the view that it is not fair or reasonable for Aviva to apply any reduction due to underinsurance. I have considered Aviva's point that F had previously had deductions applied to claims due to underinsurance and did not take steps to rectify or clarify the amount. However, Aviva haven't shown what they would have done differently at the sale of the policy if they had known that the stores were linked, so I don't think it would be fair and reasonable to allow them to make any deduction for this.

### *Internet sales*

As I said in my email of 9 February 2023, it's impossible to know exactly what F's losses are as a result of the theft. This is because of the unusual circumstances which occurred in March 2020 – i.e. the store being required to close as a result of the Government's response to the Covid-19 pandemic. This is why, in this particular case, I think it is fair and reasonable to require Aviva to depart from their usual way of considering the claim value and to consider the profit that F would have made on the stolen stock at that time.

Furthermore, it's impossible to know exactly what profit F would have made on the stolen stock. However, it's my role to reach a decision based on what I consider to be fair and reasonable in all of the circumstances when considering all of the evidence available to me. In the absence of an alternative suggested deduction from Aviva to the mark-up suggested by F, I remain of the view that 20% is a fair and reasonable amount. I believe that this fairly takes into account the circumstances of the time including the closure of the store, the time of year and for alternative sales made by F's store. As set out in my email of 9 February 2023, I believe that F was unable to restock the items so I don't think my decision ignores any profit made from restocking.

Aviva have not commented on reimbursing the accountant's fees so I have not changed my findings on this. F has confirmed it is VAT registered and I can see that the accountant has added VAT to the invoice. Therefore, Aviva do not need to pay the VAT element of the fees.

Therefore, it remains that I think the fair and reasonable outcome to F's complaint is for Aviva to put things right as set out in the section below.

### **Putting things right**

To put things right Aviva should pay Mr F1, Mr F2 and Mrs F (who collectively trade as F):

- £28,375.57 to settle their claim, without making any deduction for underinsurance.
- Interest on this amount at 8% simple per annum to the date from the date Aviva paid the initial claim to the amount they make payment.
- £960 for their accountant's fees.

### **My final decision**

For the reasons set out above, I uphold this complaint and require Aviva Insurance Limited to pay Mr F1, Mr F2 and Mrs F the amounts set out in the 'Putting things right' section above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F1 Mr F2 Mrs F to accept or reject my decision before 23 March 2023.

Sarann Taylor  
**Ombudsman**