

The complaint

A limited company that I will refer to as C complains about the handling of its business interruption insurance claim, made as a result of the COVID-19 pandemic, by Society of Lloyd's.

What happened

The following is intended only as a brief summary of events. Any reference to Lloyd's includes Society of Lloyd's, its underwriters, and its agents.

C operates as a travel agency and held a policy underwritten by Lloyd's. In March 2020, C's business was impacted by the COVID-19 pandemic and it contacted Lloyd's to claim for its losses. At that time, Lloyd's declined the claim.

Soon after, the process began relating to the Financial Conduct Authority (FCA) test case¹. The Supreme Court issued its judgment on this in early 2021, and in February 2021 Lloyd's confirmed it would reconsider C's claim. The investigation and consideration of the claim took some time. Interim payments were made, but it was not until November 2021 that the final settlement payment was made by Lloyd's.

C initially complained about a number of points, including the level of claim settlement. Ultimately though, the remaining points of issue are limited to the delays in accepting and then considering the claim, and what the consequences of this were. C pursued its complaint about this through the Financial Ombudsman Service.

Our Investigator recommended the complaint be upheld. He thought that C had a valid claim and that, by not meeting it when it was originally made, Lloyd's had caused C to be without money it otherwise would have had. So, he recommended Lloyd's add interest to the settlement for the period C was without these funds.

In respect of the disputed points, Lloyd's said the relevant FCA guidance indicated claims would be paused while the test case was running. And that requiring interest to be paid in relation to this period of pause would penalise Lloyd's for acting in line with the FCA's guidance. Lloyd's said that the position should be to calculate interest from the point after the test case and after the claim had been reassessed.

Lloyd's pointed to a footnote to the test case Framework Agreement, which said that the FCA would not retrospectively apply the judgment. And Lloyd's said this was included as insurers were mindful of possible claims for late payment under section 13A of the Insurance Act 2015 and to ensure initial claims decisions should not be held against insurers when judging the reasonableness of their conduct.

Lloyd's also pointed to the judgment in *Quadra Commodities SA v XL Insurance Company SE & Ors* [2023] EWCA Civ 432 (Quadra). And said that this judgment confirmed that

¹ *The Financial Conduct Authority & Ors v Arch Insurance (UK) Ltd & Ors* [2021] UKSC 1 and the related judgment in the court at first instance

insurers were entitled to a reasonable period of time to investigate a claim and just because covered was initially disputed it did not mean insurers had acted unreasonably. And that the Financial Ombudsman Service needed to take this judgment into account and explain why it does not affect the outcome of the complaint.

Lloyd's said that the test case had changed the legal position, so when C's claim was initially made it was not valid. And hence it is unfair to say that Lloyd's should have settled the claim at that point.

Lloyd's also said that the timescales of claim investigation and submission of evidence to its loss adjuster to have been reasonable.

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

Firstly, I note Lloyd's has also questioned whether the issue of the delay in making the settlement was a complaint that C had raised. As mentioned, the initial complaint was originally about a number of points that primarily related to the level of settlement – including certain deductions, such as 'furlough' payments that C had received. These were ultimately resolved, but the complaint also related to the claims process.

C's complaint letter to Lloyd's in July 2022 began:

"We remain dissatisfied with the handling, assessment, calculation and outcome of our BII claim."

Whilst this may not specifically refer to "delays", I consider that consideration of "the handling of a claim" will involve thinking about how long that process took. So, I consider the time taken for the claim to be met is a matter that I am able to consider. We would not necessarily expect a complainant to fully articulate their complaint points and an Ombudsman's inquisitorial remit means I need to consider the whole picture – as should a respondent.

I would also add that, in C's initial submissions to the Ombudsman Service, it said:

"The insurers created a delay of 11 months before accepting the claim... The claim process, methodology and delay caused us immense concern and involved a great deal of time and correspondence. Delaying the claim acceptance and issue of the Guidelines did not allow us to manage the company efficiently."

And our initial request for Lloyd's case file specifically stated that the complaint was, at that time, about "the delay and the value of the claim." Lloyd's provided its file and did not challenge the inclusion of the first of these until after the Investigator had issued his recommendations. Whilst this does not impact the jurisdiction or my ability to consider this complaint point, I do not consider that to be good practice.

Ultimately, I consider Lloyd's had the appropriate opportunity to consider issues of delay both before C brought its complaint to the Ombudsman Service. And I consider this is a complaint that I am able, and required, to make a decision on.

In terms of the time the claim took, there are effectively two periods. The first is the period from March 2020 up until Lloyd's accepted there was a valid claim. And the second is the

period from this point until the claim was settled.

Much of Lloyd's argument has focussed on the first of these. Effectively, it has said that the decision it made in March 2020 was correct at that time. So, it should not be penalised for this decision being changed later. However, it is not my role to penalise financial businesses – including Lloyd's.

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.

Our rules allow me to make, amongst other things, an 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 C back in the position it would have been in if Lloyd's hadn't made an error in turning down C's 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 C's claim should instead have been met at the time it was made.

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 C had a valid claim and that Lloyd's decision to decline this in 2020 was ultimately incorrect. The consequence of this was that C was left without funds that it otherwise would have had.

I've noted Lloyd'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.

I've also taken into account the Quadra judgment, and section 13A of the Insurance Act, which related to damages for late payment of a claim. The Court in this case determined that the insurer did not have to pay damages, as it had reasonable grounds to decline the claim initially – which is a relevant defence under the Act. I note Lloyd's position that it considers that it also had reasonable grounds to decline the claim.

However, I do not think the Quadra judgment or the comments in the Framework Agreement mean that it is not fair or reasonable for Lloyd's to add interest to the settlement amount paid to C on its claim. Such a payment reflects the fact that C was without this settlement. And 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.

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 addition of interest to the claim settlement is required to properly indemnify C 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 on Lloyd's but reflects the fact it was in possession of monies which should have been paid to C, regardless of the reasons for the delay in payment.

In addition, the Supreme Court judgement in the test case was made in January 2021 and settlement not fully paid until November 2021. C's losses had already crystallised by the time of the judgment, and I consider Lloyd's ought reasonably to have settled a claim of this nature within about a month of that. It seems that there was an extended exchange of correspondence, but I am not satisfied by Lloyd's submission that this was unavoidable. The basis of its settlement is a simplified averaging of C's losses over the period Lloyd's has identified as being the indemnity period. And I have seen nothing in the evidence provided that this ought reasonably to have taken more than a month to get to this point. As such, I think there was a further avoidable delay.

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

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 C. I also consider that the appropriate rate of interest is 8% simple per annum.

I consider that in a claim of this nature it is reasonable for an insurer to wait a month for initial losses to crystallise. And then for it to take a further month to assess these and the claim generally. And, from that point, to make monthly interim payments for the duration of the claim.

In C's circumstances, its losses commenced in March 2020, so I think it ought to have received the first monthly interim payment from Lloyd's in May 2020. And that this payment should have covered C's insured losses from March to April 2020. Losses relating to subsequent monthly periods then ought to have been settled in the following months – June, July, and so on.

C did not receive these payments and so Lloyds should pay interest on these sum from the date they ought to have been made – as set out above – to the date they were paid.

It is however fair and reasonable that Lloyd's is able to take into account the fact that C took out a £50,000 bounce back loan in May 2020. It has not been disputed that this was taken out as a result of Lloyd's initial decision to decline the claim. And this loan carried an interest free period, which C was able to benefit from. At the end of this period the interest payable on this amount was 2.5%. So, it is fair and reasonable that Lloyd's does not pay any interest on the initial £50,000 of the claim until this interest free period had ended, and then from that point pay interest at a rate of 2.5%.

It is also fair that Lloyd's take into account that it did make interim payments to C. So, it is entitled to use the dates of these payments as the end date for the interest calculations. The first actual interim payments should be considered as settling the first interim payments that ought to have been made.

Putting things right

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 C. I also consider that the appropriate rate of interest is 8% simple per annum.

I consider that in a claim of this nature it is reasonable for an insurer to wait a month for initial losses to crystallise. And then for it to take a further month to assess these and the claim generally. And, from that point, to make monthly interim payments for the duration of the claim.

In C's circumstances, its losses commenced in March 2020, so I think it ought to have received the first monthly interim payment from Lloyd's in May 2020. And that this payment should have covered C's insured losses from March to April 2020. Losses relating to subsequent monthly periods then ought to have been settled in the following months – May, June, and so on.

C did not receive these payments and so Lloyds should pay interest on these sum from the date they ought to have been made – as set out above – to the date they were paid.

It is however fair and reasonable that Lloyd's is able to take into account the fact that C took out a £50,000 bounce back loan in May 2020. This was taken out as a result of Lloyd's initial decision to decline the claim. And this loan carried an interest free period, which C was able to benefit from. At the end of this period the interest payable on this amount was 2.5%. So, it is fair and reasonable that Lloyd's does not pay any interest on the initial £50,000 of the claim until this interest free period had ended, and then from that point pay interest at a rate of 2.5%, until the point Lloyd's actually settled £50,000 of the claim.

It is also fair that Lloyd's take into account that it did make interim payments to C. So, it is entitled to use the dates of these payments as the end date for the interest calculations. The first actual interim payments should be considered as settling the first interim payments that ought to have been made.

My final decision

My final decision is that I uphold this complaint. Society of Lloyd's should put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask C to accept or reject my decision before 22 December 2023.

Sam Thomas
Ombudsman