

The complaint

P, a limited company, complains that The National Farmers' Union Mutual Insurance Society Limited ("NFU Mutual") declined a claim on its business protection insurance policy.

What happened

P owns and operates a hydro-electric plant, which generates power by taking water from a river through a generator house and turbine. P took out insurance with NFU Mutual which includes cover for damage and breakdown to plant.

During a routine inspection, engineers noted a high level of distress and noise coming from the gearbox and drive shaft components. A few weeks later there was a further inspection by engineers from the manufacturer. They provided a report confirming there was evidence of damage and recommended the gearbox should not be used until some of the parts had been replaced.

P obtained another report which said the damage was due to a misalignment in the equipment.

P made a claim on the policy for costs relating to investigating and repairing the hydro plant, together with loss of profit caused by having to shut the plant when repairs were needed.

NFU Mutual appointed loss adjusters to consider the claim but after considering their advice, declined the claim on the basis there was no cover for the type of damage that had occurred.

P challenged the decision and said the expert advice, together with legal advice it had obtained, showed the claim should be paid. P said there had been sudden and unforeseen damage, as required by the policy terms. NFU Mutual didn't change its decision, which it said was made after considering expert evidence and obtaining its own legal advice. So P referred the complaint to this Service.

Our investigator didn't think the complaint should be upheld. He said NFU Mutual had made its decision after reviewing all the expert evidence and taking legal advice, and its decision was fair.

P disagreed and requested an ombudsman's decision.

P is represented by solicitors who made a number of points, including:

- NFU Mutual declined the claim relying on exclusions without any evidence those exclusions apply
- it provided no technical reports in support of its position and nothing to contradict the expert reports P obtained, which show there was damage due to suddenly occurring breakage caused by the weakening of materials by their normal use
- there's no evidence of wear and tear, or that the damage was due to a fault with the installation of the equipment as claimed by NFU Mutual.

I issued a provisional decision saying I didn't intend to uphold the complaint. I'll summarise

the key points from the provisional decision as follows:

- The relevant industry rules and guidance say insurers must deal with claims promptly and fairly; provide reasonable guidance to help a policyholder make a claim and appropriate information on its progress; and not unreasonably reject a claim.
- The relevant section of the policy for this claim provides cover for

“SUDDEN AND UNFORESEEN DAMAGE, including BREAKDOWN, to PLANT YOU own or are responsible for...”

- Damage is defined in the policy as “Accidental physical loss, destruction or damage”.
- Sudden and unforeseen damage is defined as *“Sudden and unforeseen DAMAGE to PLANT which necessitates immediate repair or replacement to enable normal working to continue.”*
- So to make a claim, P must show:
 - there was accidental physical loss, destruction or damage;
 - this was sudden and unforeseen; and
 - as a result, immediate repair or replacement was needed to enable normal working to continue.
- The expert evidence shows the damage was likely caused by a misalignment.
- The gearbox didn’t break down or stop working and was in use for around seven weeks after the initial inspection until the recommendation was made to stop using it until repairs were done.
- P’s case is that the damage was the cracking and sudden loss of small pieces of the gear teeth, and each time this happened it was sudden and unforeseen. P obtained legal advice in support of this argument.
- P’s barrister set out the legal position on how policy terms should be interpreted, with reference to caselaw. NFU Mutual’s barrister explained where he took a different view.
- In general terms, the following principles are relevant when interpreting policy terms:
 - the words of the policy must be given their ordinary meaning and reflect the intention of the parties and the commercial sense of the agreement
 - a key point is how the words would be understood by a reasonable person – in other words, the ordinary policyholder
 - a literal construction that leads to an absurd result or one obviously contrary to the parties’ intention should be rejected, if an alternative more reasonable construction can be adopted
 - where there’s ambiguity, the construction which is more favourable to the insured should be adopted
 - the insuring clause and any exclusions should be read together.
- NFU Mutual’s position is that
 - when the policy was taken out, there wasn’t simply a risk of damage happening, it was bound to happen due to the misalignment
 - the damage ultimately relied on to make the claim wasn’t unforeseen – the engineers knew something was wrong but the plant continued to operate for another seven weeks

- the damage wasn't sudden, the plant hadn't failed and it didn't require immediate repairs for it to continue working
 - the machine was taken out of use to avoid further progressive damage, not because immediate repairs were needed to enable it to work.
- Taking the ordinary meaning of the words in the policy terms, the ordinary policyholder would understand the insuring clause refers to a sudden, one-off event where some damage happens quickly without warning, causes the plant to stop working and requires it to be repaired before it can be used normally.
- There wasn't a sudden, one-off event which caused damage that had to be repaired straightaway. The damage was progressive over a period of time, during which time the plant continued to be used without repairs.
- P's view was that the policy term could be interpreted to say the multiple occurrences of damage taken together necessitated immediate repair or replacement. But it was reasonable for NFU Mutual to take the approach it did; the expert reports make clear this wasn't one sudden and unexpected event but a series of events that caused damage to happen gradually over a period of time.
- It's also relevant what risks the insurer has agreed to cover. The policy terms show what NFU Mutual agreed to cover is the risk of plant being damaged by a sudden incident that requires immediate repairs.
- There's an exclusion for damage "*resulting from the gradual deterioration of materials owing to their usage, but this will not exclude DAMAGE which results from suddenly occurring breakage caused by the weakening of materials by their normal use...*"
- This is consistent with the insuring clause in that the damage needs to happen suddenly rather than through a gradual deterioration. In this case, there was a gradual deterioration. And this wasn't due to normal usage, but to the misalignment; something that wasn't normal. The damage would not have happened if the plant had not been misaligned and had been operating normally.
- There's an exclusion for damage "*resulting from the initial installation, erection, testing or commissioning of PLANT...*"
- The reason given for the failure was the misalignment, which happened due to the way it was installed. So the damage resulted from the installation of the gearbox. That means this exclusion would apply.
- I need to take account of any relevant law but I'm not required to apply the law strictly in the way that a court would or provide a detailed, legalistic analysis of my reasons for departing from the law, if I decide to do so. What I have to do is decide what's fair and reasonable taking into account all the circumstances.
- NFU Mutual considered the position put forward by P, obtained its own legal advice and followed that advice. That opinion addressed the points put forward on P's behalf.
- Taken together, I think the insuring clause and the exclusions mean cover is provided where there's a sudden incident which causes accidental damage and as a result, the plant can't work normally without immediate repairs. NFU Mutual's conclusion that this is not what happened here was reasonable and its decision was fair.

Replies to the provisional decision

Neither party has replied to the 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 no further comments have been provided by either party, there's nothing further for me to consider.

In the absence of any new evidence there's no reason to change my provisional decision. It remains my view that NFU Mutual's decision was fair.

My final decision

My final decision is that I don't uphold the complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask P to accept or reject my decision before 19 February 2024.

Peter Whiteley
Ombudsman