DRN-4662766

The complaint

A limited company, which I will refer to as T, has complained that it was mis-sold a business insurance policy by TBO Services Limited trading as The Insurance Octopus.

Mr P, one of the directors of T, has brought this complaint on its behalf.

What happened

In September 2020, TBO sold T a business insurance policy, which provided cover for various events that might impact the business, including £100,000 cover for loss of gross profit business interruption cover.

In April 2021, T's premises were burgled. T made a claim under the policy sold to it by TBO. The claim was settled by the underwriters of the policy but the amount paid for business interruption part of the claim was less than T was expecting.

The underwriters said that the policy definition of gross profit was: "*The difference between the sum of your income, closing stock and work in progress and the sum of your opening stock, work in progress and uninsured working expenses* ". And "*uninsured working expenses"* are defined as: "*Purchases less discounts received, bad debts, rent and any other item described in the schedule*."

Having calculated T's annual gross profit, the insurer said this was £148,123 but it was only covered for £100,000. As a result, it said it was entitled to apply an average clause which meant it reduced the settlement figure by the same proportion as the underinsurance. The insurer paid just under £70,000.

Mr P is very unhappy with this and says that the policy was mis-sold to him by TBO. He says that in the period before the policy started in September 2020, he made enquiries with TBO about the level of cover and the definitions of gross profit and uninsured working expenses. TBO provided him with information that confirmed his understanding that uninsured working expenses would include postage and packaging costs, which is significant as T is an online retailer. Based on this understanding of what uninsured working expenses meant, Mr P says the cover would have been sufficient but based on the insurer's definition, the cover was not adequate. T says that if TBO had provided him with the correct information about this, he'd have arranged adequate cover, so it asks that TBO pay the amount the insurer deducted from the claim settlement.

TBO says that it asked T if it wanted to increase the level of cover for business interruption in July 2020, after T told TBO its turnover was going to exceed the policy threshold but T did not ask it to arrange higher cover. TBO says it provided a link to a guide to how to calculate gross profit, which included an explanation of the usual meaning of uninsured working expenses. It says it also later provided the actual policy definition. TBO says it therefore provided the information T required to be able to determine if the level of cover was suitable for its needs and the policy was renewed in September 2020, with no change to the business interruption level of cover. TBO therefore says it provided the cover T asked for and it is not responsible for any underinsurance.

One of our Investigators looked into the matter. She did not recommend the complaint be upheld, as she did not consider the policy had been mis-sold.

T does not accept the Investigator's assessment. T has made a number of submissions. I have considered everything it has said and have summarised its main points below:

- TBO says it did not give insurance advice but it asked questions about its insurance needs and guided it to only one policy. The distinction is therefore blurred.
- TBO answered its direct question about gross profit and the cover being provided by providing a link to the website. The definition of uninsured working expenses TBO provided on its website ("*costs or specified expenses that vary directly with the level of trading and include postage and packaging, costs and commissions owed*") aligned with its business and its understanding of the term.
- This was then backed up by TBO by the quote from the policy.
- The actual policy definition does not align with the information TBO gave. It was for TBO to pick this up and provide him with appropriate cover for the business. TBO are experts and T only deals with insurance once a year.
- Recordings of telephone calls from that time will also confirm that they settled on the definition from the website.
- An email from TBO to the insurers, dated 14 July 2021, confirms that TBO thought the definition of uninsured working expenses provided by its guidance was the same as the policy definition.
- It therefore follows, that the policy was not the right one for.
- If TBO had told it that its understanding of the meaning of gross profit and uninsured working expenses was wrong, and the guidance on its website should be ignored for its policv, then things might have gone differently.
- If it had been picked up, T could have asked for higher coverage, the policy could have been amended for T's business profile, or got insurance elsewhere with more appropriate cover.

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.

The Insurance Conduct of Business Sourcebook says that those selling insurance have a responsibility to provide clear, fair and not misleading information about the cover being provided, in order to put the customer in a position where they can make an informed choice about the insurance they are buying. This includes providing clear information about the main cover and any significant terms. If the seller is also making a recommendation or advising a customer to take a particular policy, then they should specify the customer's demands and needs and propose a policy that's consistent with them as far as is reasonably possible and take reasonable care to ensure the suitability of its advice.

T had held the same policy before but I am only considering the sale of the policy that started in 2020 in this decision. For the avoidance of doubt, I am also only considering the sale of the policy to TBO. I am not looking into whether there was an underinsurance, whether the insurer was entitled to rely on the average clause, or whether it has calculated the settlement correctly.

Was it an advised sale?

TBO says the sale was a non-advised sale.

Its terms of business say: "*You will not receive advice or a recommendation from us. We may ask some questions to narrow down the selection of products that we will provide details on. You will then need to make your own choice about how to proceed. We may sometimes act as agent of the insurer, we will confirm if this is the case prior to completing the transaction when applicable."*

It also says it only offers products from a limited number of companies.

T disputes this as it says TBO asked questions about his insurance demands and needs and then sourced suitable insurance products based on this. TBO presented and effectively recommended only one policy to it, rather than multiple policies for him to choose from.

While it had to ask questions of the level and type of cover required, I don't think this means TBO was assessing T's insurance demands and needs as part of an advised sale. In addition, I do not think that offering a narrow selection of products, or even just one product, means this was a recommendation. So, while I note T's comments, I accept that this was a non-advised sale.

<u>Was the policy mis-sold?</u>

The policy sold to T provides cover for, among other things, "*Loss of gross profit (including increased costs of working)*" amount insured £100,000, with an indemnity period of 12 months. Which means the annual gross profit of the business should be £100,000 or less.

The policy defines gross profit as being:

> *"The difference between the sum of your income, closing stock and work in progress and the sum of your opening stock, work in progress and uninsured working expenses".*

Income is defined as: "*The total income of the business*".

Uninsured working expenses are defined as:

> *"Purchases less discounts received, bad debts, rent and any other item described in the schedule."*

Nothing else is described in the schedule.

In July 2020, T asked TBO to increase the turnover threshold on the policy when it renewed in September 2020. In response, TBO asked T "*I can increase the turnover to £250k for you, but can you check the gross profit, as this is down as £100k does this need increasing?"*

In response to this, T asked :

> "*The gross profit amount is that the profit before tax and after ALL costs? OR Is it in my example: Sales revenue less postage costs less selling & payment commissions less stock sold (i.e. sales less all direct costs to get those sales - transaction specific i.e. not monthly fees etc)?*

If it is the second option, then that is likely to be hit somewhere between Oct 2020 and March 2021, but isn't close [at the moment], *but we'll have to look at it at renewal time."*

TBO sent T a link to a guide to calculating business interruption insurance, which said:

"Key factors you'll need to understand

Gross Profit

Understand that for the purposes of Business interruption insurance, the gross profit calculation differs to that you might find in accounting. While in accountancy gross profit is understood to be sales minus cost of production, most business interruption policies will follow the following calculation for gross profit.

Indemnity Period

When calculating business interruption sums insured on an annual basis they must be increased accordingly if an indemnity period greater than 12 months is selected. In most circumstances, a minimum indemnity period of 24 months should be considered for SMEs to take into account site clearance, design and planning applications, rebuild time, replacement of plant and machinery, sourcing stock and rebuilding the customer and supplier base.

Uninsured Working Expenses

Uninsured working expenses are costs or specified expenses that vary directly with the level of trading, i.e. they will decrease in direct proportion to the turnover in the event of a business interruption. As these costs will no longer be incurred as the turnover reduces, there is no need to reimburse them, as such they are called 'uninsured' working expenses. One major uninsured working expense for a small business would be purchases such as components, raw materials and goods for re-sale. Other uninsured working expenses could also include: postage and packaging costs and commissions owed."

T says that this confirmed his understanding that uninsured working expenses would include postage costs and that gross profit would therefore be sales revenue less costs of sale, including postage costs. And that based on this settled understanding he considered the business interruption sum insured of £100,000 was adequate.

I do not agree that this provided a categoric answer to T's question. The guide only says that uninsured working expenses *"<u>could</u> also include: postage and packaging costs and commissions owed"* (My emphasis.) And it does not actually set out how this relates to the calculation of gross profit.

I do not therefore consider that this could reasonably be interpreted as TBO confirming that T's policy would calculate gross profit as being sales revenue less costs of sale, including postage costs, or that it was any confirmation by TBO that the policy cover was sufficient for T.

In any case, T responded to TBO on 16 July 2020 and said there appeared to be some wording missing in the section about gross profit.

The next day, TBO sent an email that said:

> *"On your policy wording, …* [the insurer] *describe it as follows:*
>
> *Gross profit: The difference between the sum of your income, closing stock and work in progress and the sum of your opening stock, work in progress and uninsured working expenses.*
>
> *Uninsured working expenses: Purchases less discounts received, bad debts, rent and any other item described in the schedule."*

So TBO sent T the specific definitions that applied to its policy, several weeks before the policy renewed.

T says this email reaffirmed its understanding based on the guide sent previously, as it was provided without reference to what it had said previously, which meant it was only sending this for reference as confirmation of the settled understanding of the meaning of uninsured working expenses that TBO had previously guided it to.

I do not agree. TBO had no obligation to advise T on the cover being provided, only provide clear and fair information about it. TBO sent T a link to a general guide. I don't think the guide was very helpful and its definition of uninsured working expense seems more akin to reduced costs of working that might result from a claim event but it was clearly a guide and provided a possible definition. TBO then also sent the actual policy definition.

It seems to me that T therefore had the relevant information to determine if the sum insured was adequate.

T also says that TBO believed the policy definitions and its guide to be the same in correspondence to the insurer when it queried TBO's understanding of uninsured working expenses while the claim was being considered.

The email from TBO to the insurer said "*You can also see I gave him a link to our website for Business Interruption, and gave him the definition of Gross profit & Uninsured working expenses as per Hiscox policy wording, which match your definition below*".

I do not agree that this email demonstrates that TBO understood the definition of uninsured working expenses in its guide to be the same as the policy definition. I think the email says TBO gave the definition as per the policy wording which matched the definition the insurer had quoted not that the policy definition matched the website guide.

T has also suggested that the matter may have been discussed on the phone with TBO in July 2022.

TBO has provided copies of nine calls between it and T between 15 May 2020 and 16 September 2022. TBO has said there were no calls between 15 and 17 July 2020.
I have listened to all the call recordings provided. There are discussions about stock level cover and turnover, alarms, the claim and the excess but there is no discussion of the business interruption sum insured in any of the calls.

I can see Mr P was anxious to ensure comprehensive and proper cover for T and that this matter has been extremely stressful for him and has a significant impact on the business. However, having considered everything, I think TBO did enough to provide information that was clear, fair and not misleading, and that allowed T to make its own decision on whether to proceed with the same level of cover, or to increase it. I therefore do not think TBO mis-sold the policy and it is not responsible for the underinsurance.

My final decision

I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask T to accept or reject my decision before 21 May 2024.

Harriet McCarthy
Ombudsman