DRN-4897210

The complaint

A limited company, that I will refer to as T, complains about the settlement of its commercial insurance, business interruption claim by Zurich Insurance PLC.

What happened

The following is intended only as a brief summary of the circumstances. Additionally, whilst other parties have been involved in correspondence, I have largely just referred to T and Zurich for the sake of simplicity.

T operates as an optometrist and property owner, and held a commercial insurance policy underwritten, as far as is relevant, by Zurich. In 2019, its premises were damaged due to a fire, and it claimed for its losses under the policy. The current dispute relates to the settlement of the business interruption losses T sustained during the period of repairs.

A previous complaint relating to this matter has been brought to the Ombudsman Service. It related to whether it was fair and reasonable for Zurich to adjust the claim settlement based on T being underinsured. A final decision was issued on that complaint in August 2023, and I will not be addressing any of the issues determined by that complaint.

The current complaint is, largely speaking, focussed on whether Zurich has reached an appropriate settlement offer in relation to the other aspects of this calculation, and whether the indemnity period has been appropriately set.

Zurich's loss adjuster thought that an appropriate settlement was £383,498, having been adjusted for underinsurance. This covered the period from the day after the fire to the end of January 2021, however it did not include the period T was closed as a result of the COVID-19 pandemic and also included other adjustments to take into account the impact of the pandemic.

T was unhappy with the offer and so Zurich instructed a forensic accountant, who assessed the claim, based on Zurich's instructions. These instructions included that T was not covered under the policy for any period of enforced closure and any negative impacts on trade due to COVID-19 and national lockdowns.

It seems Zurich did not consider the impact of the pandemic was something that the policy covered, and effectively has taken the position that, as T would have been impacted because of the pandemic even if it had not been for the fire, Zurich needs to take this into account when thinking about the loss caused by the fire.

The accountant, who I will refer to as L, proposed three scenarios for the loss and how this could reasonably be calculated. Ultimately, L gave a range of loss between £366,526 and £384,540.

T remained unhappy with Zurich's offer, and brought its complaint to the Ombudsman Service. Our Investigator initially thought that the period of indemnity ought to be increased to take into account February 2021. However, Zurich explained that the calculations already

included a period for T to re-establish its business. But that it was not reasonable for this to start at the point T had actually started fully trading, as the repair timeline had been extended as a result of T carrying out additional works to the premises that went beyond reinstatement. Our Investigator altered his position on this and agreed that it was reasonable for Zurich to only meet the claim up until the end of January 2021.

In terms of the calculation of the claim itself, the Investigator considered that Zurich was entitled to rely on the findings of L in the circumstances. However, he thought that Zurich should use the highest of these to settle the claim. So, the Investigator effectively thought Zurich's settlement offer should be increased to £384,540.

No assessment was made by the Investigator of whether it was fair and reasonable to deduct from the settlement losses sustained during periods of national lockdown relating to the pandemic. This was not a complaint point that T has specifically raised. The Investigator did though comment on the fact that the policy did not include a trend clause, nor a specific period that ought to be used to define income. And so felt the standard principle of indemnity should apply.

Zurich accepted this outcome, but T remained unsatisfied. As a result, this complaint was passed to me for a decision. I issued my provisional decision on 5 April 2024. The following is an extract from that decision:

> "Before setting out my reasoning, I will just note that the calculation of business interruption claim settlements is often complex. There are numerous factors that play into such calculations, and many of these are hypotheticals. And it is likely that in most scenarios it is not possible to determine precisely what the loss is.
>
> I should also make it clear that it is not the role of the Ombudsman Service to carry out an actual assessment of the loss. My role is to determine whether or not Zurich has acted fairly and reasonably in terms of settling T's claim.
>
> It is also worthwhile noting that insurers themselves will usually not be experts in calculating business interruption losses. And so, they will often instruct other parties to carry out the required assessment. That is what happened here. So, I need to consider whether this was appropriately done in the circumstances, and whether Zurich acted appropriately in relying on the conclusions of those third parties.
>
> Zurich initially instructed a loss adjuster, who calculated the estimated losses as above. When these were challenged by T, Zurich instructed a more specialist forensic accountant. I consider these actions to be reasonable in the circumstances. Given the disparity in figures between T and Zurich, and the size of the claim, getting an expert opinion was appropriate.
>
> However, it is important to note that the instructions provided to experts need to be correct.
>
> <u>The impact of COVID-19</u>
>
> Zurich instructed L, effectively, to calculate the claim on the basis that any impact of COVID-19 should be excluded from the settlement. This had an impact on the periods of loss included, and whether certain income T did achieve was in effect "clawback".
>
> Whilst it has not been raised as a specific argument by T, I need to consider whether this position is fair and reasonable. I consider this to be required of me as part of my inquisitorial remit and the need to consider each complaint in light of all of the relevant circumstances.
>
> Ultimately, I need to consider whether Zurich's offer to settle T's claim is in line with the policy wording, and is fair and reasonable in all the circumstances. This includes

whether the wording allows Zurich to reduce T's settlement to take account of losses it might have incurred due to COVID-19 and the Government's response to the pandemic.

Income is defined in the policy as:

> "The money paid or payable to you in the course of your business at the premises for services provided."

And the policy says claims will be settled as follows:

> "We will pay:
>
> - the difference between the income you would have received during the indemnity period if there had been no damage and the income you actually received during that period
> - extra expenses incurred during the indemnity period
> - professional accountant's charges reasonably incurred for producing details that we require for any claim.
>
> We will take into account in calculating the payment:
>
> - any savings during the indemnity period from business expenses payable out of income which stop or are reduced as a result of the damage
> - any income you earn from conducting the business elsewhere during the indemnity period."
>
> The policy has an indemnity period of 24 months.

It's generally accepted in insurance that if there are two equally effective causes of a policyholder's loss and one is covered by the policy and the other is not, the policy will cover the loss unless one of the causes is expressly excluded under the policy.

This can be contrasted with the situation where there are two proximate causes of loss, where one is insured and one is expressly excluded from cover under the policy. In such a situation, although it will depend on how the provisions are drafted, the exclusion will generally prevail and the loss will not be covered.

In this case, T's claim arises from the fire which caused damage and an interruption to T's business (the insured cause) and is covered under the policy. Closure due to COVID-19 or the Government's regulations (the uninsured cause) isn't something that's covered by the policy. However, it's also not expressly excluded either.

At this point it is useful to refer to the Supreme Court judgment in The Financial Conduct Authority & Ors v Arch Insurance (UK) Ltd & Ors [2021] UKSC 1 (the FCA test case).

The Supreme Court set out some general principles of construction in the FCA test case:

> "The core principle is that an insurance policy, like any other contract, must be interpreted objectively by asking what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean. Evidence about what the parties subjectively intended or understood the contract to mean is not relevant to the court's task" (para. 47).
>
> "…the overriding question is how the words of the contract would be understood by a reasonable person. In case of an insurance policy of the present kind, sold principally to SMEs, the person to whom the document

> should be taken to be addressed is not a pedantic lawyer who will subject the entire policy wording to a minute textual analysis (cf Jumbo King Lts v Faithful Properties Ltd (1999) 2 HKCFAR 279, para 59). It is an ordinary policyholder who, on entering into the contract, is taken to have read through the policy conscientiously in order to understand what cover they were getting" (para. 77).

I also think those parts of the FCA test case judgment where trends clauses are considered, largely paragraphs 251 to 288, are useful in considering this matter.

[I then quoted paragraphs 260-264 of the judgment.]

The loss of income clause in the policy doesn't refer to 'trends' or 'other circumstances' and therefore I think it is quantification wording rather than a trends clause. I do not consider a reasonable person, with the relevant background knowledge, would have interpreted this wording as a trends clause.

And I think that the above paragraphs support that the "quantification machinery" should not be construed so as to take away cover for losses covered by an insuring clause on the basis of concurrent causes of those losses, where the uninsured cause is not excluded. To do so would effectively transform that "quantification machinery" into an exclusion.

I note that these two causes (the fire and the pandemic) did not arise at the same time, but I do consider they would be concurrent causes of the loss in question. I believe reference to a concurrent cause refers to a situation where, during the period of the loss, there are two (or more) causes of loss. These may be in existence at the start of the period of loss (i.e. originating concurrent causes) or may occur at different times during the period of loss (sequential concurrency). Concurrency can also operate in parallel.

Therefore, the fact that the Government's regulations as a result of COVID-19 did not occur until almost a year after the initial damage to the property does not mean they cannot be a concurrent cause. It occurred during the period of loss of income and was a causative factor in T's income being reduced.

I have considered whether or not the losses from the two causes can be separated. "Riley on Business Interruption Insurance (11th edition)" says, at 13.6:

> "The Supreme Court findings on concurrent causation suggest that if they cannot, then in the absence of any other argument, there is cover in full for all periods where both are proximate causes".

But in thinking about this, I consider it is first necessary to distinguish between the loss caused by the full and then partial interruption of T's business (loss A), with the loss from the interruption of that part of the business that had recommenced (loss B).

T's business had been, at least partially, interrupted for a number of months before the lockdown occurred and irrespective of COVID-19. This level of interruption would have continued until early 2021, as the necessary repairs had not been completed until then.

Therefore, if Zurich didn't indemnify T for the losses it incurred by having part of its business interrupted during this period Zurich would be saving money that it would otherwise have needed to pay.

I think it would be extremely difficult to separate loss A into that caused by the property damage, which left T unable to trade in its usual way, with that caused by the impact of the pandemic, which also left T unable to trade. Therefore, I believe that COVID-19 and the Government restrictions were a concurrent cause of T's loss.

That isn't to say that loss B should be covered. It would not be reasonable for me to

direct Zurich to meet any losses above what would have been suffered had it not been for the pandemic. At the time of the first national lockdown, T was partially open – operating out of temporary premises. The lockdown meant that this income was reduced (loss B), and as the impact of the pandemic itself is not covered under the policy, it would not be fair to require Zurich to include this reduction in its settlement.

However, I do consider it fair and reasonable that Zurich continue to meet the reduction in income that T was already experiencing as a result of the fire (loss A).

I recognise that if T's business had not been interrupted due to the damage, it would have been impacted by COVID-19 and the Government's regulations. However, the loss of income clause in the policy isn't a trends clause. And for the reasons set out above, I don't think this circumvents the position that the uninsured cause doesn't prevent cover for the insured cause where the uninsured cause is not excluded.

Whether COVID-19 and the Government's regulations had occurred or not, T's income would have been impacted by the damage to its premises until the end of the relevant indemnity period (which I will comment on below).

I think that paragraphs 232 and 260 to 264 of the FCA test case support that the "quantification machinery" in a policy (in this case as set out above) should not be construed so as to take away cover for losses covered by an insuring clause on the basis of concurrent causes of those losses, where the uninsured cause is not excluded. To do so would effectively transform that "quantification machinery" into an exclusion.

I do however accept that the legal position on this point is not definitive. I recognise that the Supreme Court in the FCA test case wasn't asked to consider this type of quantification wording, it was dealing with cases which had concurrent causes or losses from the same underlying cause. Whereas, in this case, the two causes are not from the same underlying cause. It is therefore possible that my decision would be a departure from the law.

However, I'm required to reach a decision based on what I think is fair and reasonable in all the circumstances.

So, even if I'm wrong about the legal position, given that T's policy did not explicitly exclude cover in the circumstances of COVID-19 and the Government's related actions, I think it would be unfair for Zurich to remove cover on the basis of this as an intervening cause.

If Zurich is able to adjust the amount of T's claim for loss of income Zurich would be benefiting hugely from the impact of COVID-19 as this is the amount it would have had to pay for the damage. The impact of the property damage existed throughout the claim period and would have done so even if COVID-19 hadn't occurred.

At the point of lockdown in March 2020, T wasn't able to fully open for at least ten months. And, Zurich hasn't indicated that COVID-19 caused any delay in the repairs. So, I don't think COVID-19 will have caused Zurich any additional loss that it wasn't already liable for in this case.

As I have also set out above, the policy doesn't include a trends clause and I don't think a reasonable policyholder would interpret it in the way that Zurich apparently considers that it should work. Therefore, I don't think it would be fair and reasonable for Zurich to adjust the settlement as though there were a trends clause. And, I believe the fair and reasonable outcome is for Zurich to indemnify T for its losses without making any adjustment for the impact of COVID-19 and the Government's regulations.

The indemnity period

> Zurich has said that the indemnity period should run until the end of January 2021. T has argued that whilst it was able to reopen fully by this point, its business was still impacted as it built up trade – and so the indemnity period should be extended to the end of February 2021.
>
> I note T's comments and agree that including such a "run-off" period is appropriate. However, I also note that Zurich has already included such a period in its calculations.
>
> However, it considers that this should commence prior to the date T was able to fully reopen, on the basis that some of the works T carried out amounted to more than mere reinstatement – and hence the repairs took longer than they would have had T been putting the premises back in the condition they were previously.
>
> I consider Zurich's position here to be fair and reasonable. And I am persuaded that an appropriate end to the indemnity period is the end of January 2021."

As a result, I said I was minded to direct Zurich to reconsider T's claim without making any adjustment for the impact of the COVID-19 pandemic and/or the related Government regulations. But that it was fair and reasonable for this to only cover the period from 16 July 2019 to 31 January 2021. I also referred to the financial limits relating to awards or directions I am able to make.

I invited both parties to provide any additional comments or evidence they wanted me to consider. T asked some questions over the next steps, but ultimately said it accepted the provisional decision. Zurich did not accept it though.

Zurich provided a detailed response. I do not intend to repeat its contents in full, but have tried to summarise the key points as follows:

- Taking into account comments in Riley and the Supreme Court judgment in the FCA Test Case, Zurich said that if an uninsured cause of loss is unconnected to the insured cause of loss, an adjustment should be made to account for the impact of this uninsured cause.
- It is possible to separate the loss caused by the fire and the loss cause by the pandemic.
- That, if the claim calculation is made without adjusting for the pandemic, this would remove both the negative and positive adjustments.
- If these adjustments are removed, T would largely be left in the same position.

Zurich also provided some further commentary on the calculations and trend adjustment.

I would like to thank both parties for their patience whilst I have been considering this complaint.

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.

Having done so, I am upholding this complaint. I have already set out the majority of my reasoning in my provisional decision, as above.

I have received nothing to indicate either party disagrees with the position on the indemnity period, and my conclusions on this point remain unchanged.

It is however necessary to deal with the issue over how the impact of the pandemic ought to be considered.

I note Zurich's comments on whether the two causes leading to loss need to be connected to the same underlying cause in order for it not to be appropriate to adjust the settlement to take into account the uninsured loss. However, having considered the available evidence, I consider this only applies where it is possible to separate the loss resulting from the two causes.

I also note the comments in the Test Case judgment, including those at paragraph 236, to which Zurich has referred. These say that difficulties in proving what loss arose from the different causes of loss does not mean the effects should be ignored. But I think there is a difference between a difficulty and a practical impossibility. This is not a situation where, had one of the causes not existed, there would have been some income in terms of loss A. Both the fire and the pandemic would have caused the full loss.

Zurich has said that it is possible to separate out the loss resulting from the two causes. But seemingly relies on the income from the temporary premises to do this. Zurich has said:

> "…given that we have historical trading data prior to Covid-19 and post Covid-19, during which the Insured traded out of the [temporary premises], such a calculation does seem to be possible outside of lockdown. During lockdown the differentiation is simple - but for the fire, the Insured would have been closed and thus not able to trade from the [temporary premises], due to the Covid-19 lockdown and the enforced closure of businesses. Therefore any lockdown losses relate to Covid-19 and would have occurred but for the fire.
>
> [L]'s instructions were to make this distinction, and to quantify the loss suffered as result of only the fire. In other words, to continue to meet the reduction in income that the Insured was experiencing as a result of the fire, but not to provide additional indemnity for the additional loss caused by Covid-19."

But this is effectively what I have referred to in my provisional decision in regard to distinguishing between "loss A" and "loss B".

It might be more helpful if I refer to these as "income A" and "income B". Income A is the income that T could have otherwise been able to generate from its normal premises, which is in effect the total expected income less any income from the temporary premises. Income B is the income that T could otherwise have expected to generate from the temporary premises.

(I should point out that income B was likely impacted by the pandemic. So, in referring to income A as the total expected income less any income from the temporary premises, this would need to be considered essentially as a percentage of the total income prior to the impact of the pandemic. Some other adjustments may be required to accurately calculate the income that T would otherwise have generated, and I do not intend this to be a strict definition; I merely suggest that taking this as a starting point would quantify the insured loss and remove any adjustment for the pandemic. I will comment below further on income B.)

Had it not been for the pandemic, loss of income A would always have occurred. During the periods of lockdown, loss of income A would also have occurred due to the pandemic. But this is one loss and I do not consider it is possible to distinguish between the causes of this loss in order to make a fair and reasonable settlement. I do not consider it is enough to say that because the pandemic would have caused this loss (during the periods of lockdown) and as this is an uninsured cause, this loss is not covered. The loss is covered by an insured cause that was a proximate cause with equal efficacy. And I consider it is this loss that

should be covered in full, with no adjustment made in relation to the effects of the pandemic.

In terms of income B, which is effectively T's income from the temporary premises, the situation is more complicated.

The amount of expected income relating to the temporary premises is, largely speaking, quantifiable by the income that was actually received prior to the pandemic. Again, adjustments may be required to this. But it should be possible, as Zurich has itself argued, to separate out the impact on this income from the pandemic.

So, it is possible to separate out the consequences of the pandemic on income B from the situation as it existed when this arose. And the reduction in this income was a result of an uninsured cause. This means, the reduction of this income would not be something Zurich would fairly and reasonably be required to meet.

The issue is that whilst loss of income B as a result of the pandemic is not insured under T's policy, this was income that T received during the indemnity period relating to the fire. Income that is received during the indemnity period will normally act to reduce the settlement of a claim; it reduces the loss the policyholder has experienced. Essentially, income B would reduce the loss of income A. And, normally, a loss of this income B would increase the loss of income A.

Loss of income B due to the pandemic isn't insured though. And not receiving this income due to the pandemic should not act to increase the insured loss of income A that T experienced. Essentially, it should not be considered a reduction in the actual income that T generated during the indemnity period.

However, this also works the other way. It seems, in later months, income B increased as a result of the pandemic, as customers who hadn't been able to have an appointment during the lockdown period booked these, in addition to T's expected bookings over these later months. It would not be reasonable to consider that this increased the actual income that T generated over these months. Doing this would act to reduce the insured loss of income A by reason of the impact of the pandemic. And, to do so, where no adjustment had been made for the reduction in losses over the lockdown period had been made, would not be reasonable.

Arguably, Zurich may be entitled to say that this actual income should act to reduce loss A. However, given the reduction in income from the temporary premises over the preceding months would not (based on the findings above) be considered to increase loss A, I do not consider this would be fair or reasonable. This increase was essentially a result of appointments being deferred. And making this adjustment for only the later impact would not result in a fair outcome.

So, the loss of income A is covered, and the loss of income B from the temporary premises is not covered. But an increase in income B that resulted from the pandemic, i.e. deferred appointments, should not act to decrease the loss of income A.

In essence, Zurich should calculate the loss of income A, which effectively should be the loss of T's entire income, less the income that – but for the pandemic – would have been received through the temporary premises.

It may be that in removing both the positive and negative impacts of the pandemic, T's position is not improved overall in terms of the settlement offered. This is certainly what Zurich has suggested. However, my decision is focussing on making sure the appropriate principles are applied to the calculation, rather than the numbers involved in that calculation.

It is possible that a court would come to a different outcome were it considering the facts of the current complaint. However, whilst I am required to take into account the law, I need to come to a decision thinking about all of the circumstances of this case to determine what is fair and reasonable.

Essentially, this comes down to deciding whether it is fair and reasonable for Zurich to reduce the settlement it otherwise would have made, due to the pandemic, or would they be doing so on a fortuitous basis, in a situation where T would always have been closed, regardless of lockdown? Having thought about this carefully, I consider it would not be fair and reasonable for Zurich to take into account the impact of the pandemic in terms of calculating the loss cause by the fire.

I realise that this in essence only answers part of this complaint, and indeed not the part of the complaint that was raised by T. T is unhappy with the methodology Zurich has used to calculate the claim more generally.

I have carefully considered whether I am able to address these other points as part of this complaint. However, as Zurich will need to recalculate the claim settlement taking into account the points above, I am unable to make any conclusive findings in relation to these other issues.

In an effort to avoid any future complaint relating to this recalculation though, I will say that, other than how the COVID-19 pandemic impacts the calculation, I would be more inclined to agree with the outcome reached by our Investigator. Whilst I do not consider the instructions provided to Zurich's expert to have been entirely appropriate, the other calculations and explanations provided are more persuasive than those provided by T.

These calculations will have to be significantly altered to take into account the above though. So, I am unable to make a finding on the ultimate outcome. And should T be unhappy about the settlement offered once Zurich has made the adjustments required above, it may need to raise a new complaint about this new claim calculation.

Putting things right

Zurich Insurance PLC should put things right by recalculating T's claim. This recalculation should be based on the following:

- The loss of income A should be covered in full (subject to any other policy terms) from 16 July 2019 to 31 January 2021.
- Income A should consist of T's total expected income, less the amount of income B that would have been received had it not been for the pandemic.
- Income B should consist of the income from the temporary premises.
- Loss of income B, as a result of the pandemic, should not be included in the claim settlement. Increases in income B, as a result of the pandemic, should also not be included in the claim calculation.

As this complaint was referred to the Financial Ombudsman Service in January 2023, I can award fair compensation to be paid by Zurich of up to £375,000.

It is possible that a recalculation of T's claim will mean that a balance of more than £375,000 is due to T. This would, in effect, relate to a total claim settlement of over £758,498 (as £383,498 has already been offered). If this is the case, then Zurich should pay T up to a maximum of this amount.

If the amount produced by the calculation of fair compensation is more than £375,000, I

recommend that Zurich pays T the balance.

This recommendation is not part of my determination or award. Zurich doesn't have to do what I recommend. It's unlikely that T can accept my decision and go to court to ask for the balance. T may want to get independent legal advice before deciding whether to accept this decision.

My final decision

My final decision is that I uphold this complaint. Zurich Insurance PLC should put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask T to accept or reject my decision before 6 September 2024.

Sam Thomas
Ombudsman