DRN-5337102

The complaint

A limited company, which I will refer to as H, complains about the handling and settlement of its commercial property insurance claim by MS Amlin Insurance SE.

What happened

Both parties are aware of the circumstances of this complaint, so the following is intended only as a brief summary. Additionally, although various third parties have been involved in the claim and complaint process, for the sake of simplicity, I have largely just referred to H and MS Amlin.

H is a property owner and held a commercial property insurance policy underwritten by MS Amlin. The property was rented out in two parts, with the upper floors rented as residential property and the lower floor for the storage of building materials. H had an intention to redevelop the property, but this process had not commenced at the time in question.

In early September 2022, H discovered that there had been a break-in at the property when the residential tenant had been away. There had been the theft of lead from the roof, internal piping and cabling, and kitchen fittings. This had also resulted in water damage to the property. H contacted MS Amlin to claim under the policy.

The process of the claim took some time. But ultimately, MS Amlin accepted the claim and offered H a settlement. The settlement was reduced on the basis that MS Amlin considered H to be underinsured. The settlement also did not include a number of losses H thought should be included – either as part of the claim or as a result of the time taken to offer the settlement. H complained about this, bringing its complaint to the Financial Ombudsman Service.

Our Investigator thought MS Amlin was entitled to reduce the settlement on the basis that H was underinsured. However, she thought that the way this was calculated wasn't correct. She also considered that MS Amlin ought to have dealt with the claim quicker than it did, and that there was around two months of avoidable delay relating to this.

MS Amlin did not agree that its method of calculating the settlement reduction was inappropriate. It did though say that its valuation of H's property had also been incorrect, though the correct valuation also showed H was underinsured. MS Amlin made an offer to increase the settlement to reflect this.

H did not accept this offer. It also considered that MS Amlin had waived its right to reduce the settlement on this basis. H also argued that the policy was not clear on what ought to have been declared as the value of the property when the policy was taken out, so did not think it was appropriate to consider it underinsured. H also said that it should be compensated for loss of rent and for having to pay business rates.

As our Investigator was unable to resolve this complaint, it was passed to me for a decision. I issued my provisional decision on 3 January 2025. The following is an extract from that

decision:

> "I should firstly say that both parties have provided detailed submissions covering a number of points. I have considered all of these, but I do not intend to comment on each aspect. Instead, I will be focussing on what I consider to be the key issues. This is not meant as a discourtesy, but rather reflects the informal nature of the Ombudsman Service.
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> Underinsurance
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> The first key issue that I will address is whether MS Amlin is entitled to reduce the settlement based on the value of the property that H provided when the policy was taken out. And, if so, on what basis this reduction should be made.
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> MS Amlin has relied upon a term of the policy to make this reduction; the average clause. The average clause essentially says that where a customer declares a value for the property that does not cover its full value, the customer is considered to be the insurer for [the undeclared] percentage of the property. And claim settlements will be reduced on a proportionate basis.
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> H declared a value of the property as being £400,000. Based on its most recent offer, MS Amlin considers the correct declared value ought to have been £892,444. As the actual declared value is 44.8% of this, MS Amlin's offer is to cover 44.8% percent of H's claim.
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> Whilst I note that this is potentially in line with the wording of the policy, I need to bear in mind the wider legal framework. As this is a commercial policy, the Insurance Act 2015 (the Act) is a relevant consideration.
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> The Act says, in part, that a customer has a duty of fair presentation when taking out a commercial policy. The customer needs to disclose everything that they know about, or ought to know about, which would influence the judgement of a prudent insurer in determining whether to take the risk and, if so, on what terms. Failing that, a customer needs to disclose information that puts the insurer on notice that it needs to make further enquiries. The disclosure of a matter of fact needs to be substantially correct, and the disclosure of a matter of expectation or belief needs to be made in good faith.
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> Potentially, the average clause might allow MS Amlin to apply the terms of the policy rather than those of the Act. However, in order for this to happen an insurer would need to have contracted out of the requirements of this Act. And to do so MS Amlin would have needed to take sufficient steps to draw the disadvantageous term to H's attention before the contract was entered into. I have not been provided with evidence that this happened. So, I do not consider MS Amlin can rely on the average clause in a situation where this is disadvantageous to H.
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> MS Amlin has argued that this contracting out requirement under the Act does not relate to section 8 of the Act – which deals with the remedies for a breach of the duty of fair presentation. However, I think MS Amlin is mistakenly considering the reference in section 16(2) to "Parts 2, 3, or 4" as being a reference to "Sections 2, 3 or 4". Section 8 falls within Part 2 of the Act, and so the contracting out requirements do apply to the current circumstances.
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> I consider the contracting out requirements do apply, and that they have not been met. So, if H was in breach of the duty of fair presentation, the appropriate remedy to

apply is that set out in the Act. This effectively says that where an insurer would have charged a different premium for the policy had there been no breach, it is the difference in premiums that should be applied to create the proportionate settlement. MS Amlin has said that, had H given a declared value of £892,444 it would have charged H more for the policy. And that H only paid 46.33% of the premium that it otherwise would have. So, if H was in breach of the duty, MS Amlin should only be required to meet 46.33% of the claim.

H has disputed that £892,444 is the accurate reinstatement value. However, MS Amlin has provided a BCIS report setting this cost out. H's concern appears to relate to the size of the property. However, the figures MS Amlin has used match those set out in the lease agreement H had with its tenants. H has not provided evidence that these figures are incorrect. So, I consider it is fair and reasonable for MS Amlin to rely on them.

The remaining question is, was H in breach of the duty of fair presentation?

I consider it is reasonable that an insurer of property would consider the value of that property as influencing its judgement in determining whether to accept a risk and, if so, on what terms. So, I consider H ought to have disclosed the value of the property. The value of a property is a matter of belief, rather than fact. So, H needed to make a disclosure in good faith. I consider this means H needed to have held an honest belief that its disclosure was accurate, and I consider this would have required H to have had some basis for its valuation.

It isn't clear why H considered the reinstatement value of its property was only £400,000. But I consider this to be significantly out of sync with the actual value. Even H's own, post-claim, assessment of the value has this as being close to £800,000. So, I don't consider it is more likely than not that H had a reasonable basis for its valuation at the time the contract was entered.

H has argued that the policy does not make it clear what the term "declared value" means, and that the inclusion of "sum insured" means this is unclear. However, the policy wording includes a definition of "declared value". And I think it ought to have been clear to H, which is a commercial customer that was using a broker to take out the policy, that it needed to accurately declare the cost of reinstating the property. I do appreciate that the policy also uses the term "sum insured" and that this is not defined. But I do not consider this means the policy was unclear as to the meaning of "declared value" or that H ought not to have declared the accurate reinstatement cost of the property when the policy was taken out.

H has also argued that by not raising the issue of underinsurance/average until late in the claim process, MS Amlin waived its right to apply this to the claim. I appreciate that it would have been better had this issue been dealt with earlier in the claim process – and will return to this point below – but I have seen nothing to suggest that MS Amlin indicated it would not be applying such a proportionate reduction. In fact, MS Amlin seems to have been clear that much of its discussion during the claim process was on a without prejudice basis. So, I am not persuaded that it wouldn't be fair or reasonable for MS Amlin to reduce the claim settlement.

So, I consider that H was in breach of the duty of fair presentation. And that it is fair and reasonable that MS Amlin apply the remedies available under the Insurance Act 2015. This means that MS Amlin ought to settle H's claim on a 46.33% proportional basis – i.e. that it needs only to meet 46.33% of H's insured losses.

Delays and consequential losses

H made its claim in mid-September 2022 and it was not until mid-August 2023 that MS Amlin provided its settlement offer. This is a lengthy period.

As our Investigator has set out, the claim itself was reasonably complex and there were a number of factors that needed to be considered. However, it is also clear that MS Amlin did not progress matters as it ought to have. Our Investigator has said that this led to delays of around eight weeks. But I think this period was much longer than this.

For example, in addition to the periods of time our Investigator has referred to, MS Amlin appears to have disputed the basis on which the claim was made. It considered the claim was initially presented as being an external theft and resultant ingress of water, but that this then changed to include further internal damage/theft following a break-in. MS Amlin discussed this issue, both internally and with H, over a lengthy period in the summer of 2023. This may even have been the substantial reason that a surveyor was appointed to attend the property and assess the scope of works.

However, it is clear that H had made MS Amlin aware of the multiple points of loss/damage by the end of September 2022. So, rather than H having amended the detail of its original claim, the issue appears to be MS Amlin having mistakenly categorised it. Had this error not taken place, I consider a period of almost two months could have been avoided.

Similarly, whilst I do not consider it would be fair or reasonable to say that MS Amlin waived its right to apply a proportionate reduction to the claim settlement, it did not really consider this issue until the summer of 2023. This was despite the issue of the property value first being noted in January 2023. Had this issue been addressed in the first part of the year, again, I consider the delays over the summer could have been avoided.

I am conscious that at times MS Amlin was also waiting for responses from H. And that the claim process would always have taken some time to resolve. But, taking things in the round, I consider that MS Amlin's handling of the claim actually led to delays of around four months.

It is necessary to consider the impact of this delay on H.

Had the settlement been made earlier, or even had MS Amlin been clear at an early stage that it would be making a cash settlement (which was necessary as a result of the underinsurance issue) and that this would not cover the full cost of reinstatement, I consider H would most likely have arranged for the property to be repaired earlier than it did. The property was not tenantable. So, I consider the impact of MS Amlin delaying the claim was that H lost out on rent that it otherwise would have received once the repairs had been completed.

H is not covered for loss of rent under the policy. So, it is unable to claim for loss of rent for the entire period of the claim. However, I consider that it is fair and reasonable that MS Amlin pay H compensation for the consequential losses caused by its delay of the claim. And this consequential loss is the loss of rent. H was renting the residential property for £250 per month, and the ground floor for £250 per quarter. So, MS Amlin should pay H for four months of this rent - £1,250.

H has said that had it been renting the property, it would not have been ultimately responsible for business rates. However, the payment of compensation for the loss of rent as set out above would mean that no further compensation is required for this element. The business rate losses would be included within the rental compensation.

I do consider that the handling of the claim overall would have caused H avoidable inconvenience though. H mitigated this to an extent by employing a third party. But I still consider MS Amlin ought to compensate H £300 for the inconvenience caused.

Additionally, the delay in making the settlement it did meant that H was without this money for longer than it ought to have been. So, MS Amlin ought to pay H interest on the sum of its settlement offer for a period of four months. This interest should be 8% simple per annum.

MS Amlin should also pay interest on the difference between its 2023 settlement offer and the increased settlement it needs to pay based on a proportionate settlement of 46.33% as set out above. This interest ought to be calculated from four months prior to the 2023 settlement to the date of ultimate settlement. Again, this interest should be 8% simple per annum."

I asked both parties to provide any additional information or evidence they wanted me to consider. MS Amlin maintained its disagreement with elements of the reasoning of my approach. However, it agreed to the proposed settlement.

H disagreed with the settlement proposal though. H maintained that MS Amlin had waived the right to apply any underinsurance to the claim.

H also said the policy did not provide explicit guidance on how the declared value should be calculated, including not having clear instruction on how to determine the rebuild value. H said that if the average clause can be relied upon at all, it should be based on the full sum insured, rather than the declared value. And referred to previous cases the Ombudsman Service has dealt with to support its argument.

H raised a new argument over the policy wording and the cover for loss of rent. It pointed out that the policy wording stated business interruption cover was automatic, rather than applying only when listed in the schedule. And that this meant H's loss of rent should be covered for the full period of liability.

H also said that business rates ought to be covered for the entire period, as the tenant would have covered these rates had the insured event not occurred. H then provided a copy of an occupier agreement.

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 have come to the same conclusions as set out in my provisional decision, largely for the same reasons. As my reasoning on the majority of this has not changed, I have not repeated my comments above in this section. Instead, I will focus here on the points H has made in response to my provisional decision.

I have already responded to H's argument that MS Amlin waived its right to apply any underinsurance to the claim settlement. I do appreciate that MS Amlin, and its agents, did not refer to any underinsurance until the summer of 2023. And that the period prior to this did

include some conversation around other elements of the claim that were relevant to the settlement. However, I am not persuaded by H's recent comments, or anything else I have considered, that it is fair and reasonable to conclude that MS Amlin had waived its right to reduce the settlement on this basis.

Similarly, I have already addressed much of H's arguments over the use of wording in the policy. H has said that explicit guidance ought to have been provided for H to understand how to calculate the reinstatement cost. Even if I agreed with this generally though, I need to consider the circumstances in this particular case.

H is a commercial property owner. And its directors are also directors in a number of other companies in adjacent markets, including property development and construction companies. Given this background, I am not persuaded that H would not be aware of how to calculate the reinstatement cost of a building.

Additionally, the sale was carried out using a third-party broker. I appreciate that this sale was seemingly on a non-advised basis, and I acknowledge H's comments that the broker merely passed on information and did not provide guidance. But any issues H might have with the clarity of the information given by the broker would need to be taken up with them.

In terms of H's argument over loss of rent for the entire claim period, this effectively comes down to whether or not the policy provided cover for business interruption. I do note that the policy wording refers to this section of cover as being automatic. And I do consider that there is the potential that this might cause some confusion for customers who believe they have taken this cover out.

However, it is notable that the issue over cover for loss of rent has only now been raised. Despite having been told on a number of occasions throughout the claim that loss of rent was not covered, H did not dispute this. H's complaint over loss of rent has always been positioned on the basis that delays have caused this – which I agree with. However, it has not suggested that it had actual insurance cover for this element of loss. This leads me to conclude that H did not consider that it had cover for this element. So, although there was the potential for confusion relating to this, I do not consider this has actually happened in this case.

Additionally, MS Amlin has said that the business interruption cover, as with all covers within the policy, is provided subject to the financial limits insured. And that as no limit was selected for business interruption, no cover can attach where the insured limit is £0. MS Amlin has said this is why the schedule lists this area of cover as being "not insured". MS Amlin has said that it will consider, going forward, whether it would be more appropriate to show the insured limit of £0 in such circumstances.

I can see the sense of MS Amlin's argument. And I would find it difficult to fairly and reasonably conclude that a customer ought to be entitled to claim in circumstances where the policy schedule lists an area of cover as being "not insured". If a claim was made, it would be subject to the policy limit applicable to the section, and as none is listed for business interruption in H's policy, it follows that this would be limited to £0.

I do though think that this has the potential to cause confusion which might impact customers. In this case, that does not appear to have actually happened. So, I make no direction for MS Amlin to do more in relation to this complaint. That said, as well as considering whether to show the insured limit as £0, MS Amlin might consider amending the actual policy wording, so that it does not refer to an area of liability that a customer can effectively choose not to insure as being "automatic".

Lastly, H has referred to the business rates that it says it has had to pay. H has said that these were not part of the rent it received from tenants, and that these would have been payable by tenants in addition to rent. H provided a copy of an agreement that set this out. So, H considers the redress set out above should have the amount of these business rates added to it.

However, the occupiers license that H provided is from June 2021. In June 2022, H entered agreements with different parties for the occupation of the premises and it would be these agreements that would apply at the time of the insured event. The license to occupy entered with the commercial, ground floor occupier in 2022 says that the licensor (H) agrees to pay business rates. The lease agreement with the residential tenant does not make any reference to business rates. This is not surprising, as a residential tenant would not pay business rates. So, it would be H that was actually responsible for paying these rates throughout.

H has referred to the legal position that business rates are the responsibility of the occupier of non-domestic property. Whilst this is true, this does not prevent the occupier and landlord entering into an agreement whereby the landlord charges a rent that includes the amount of the business rates, and then the landlord makes the payment to the local authority. Seemingly, this is what happened in this case when the commercial license to occupy was entered in June 2022. So, the business rates would be included within the consequential loss compensation outlined above.

As well as thinking about whether these rates should be included in the consequential loss element of the settlement, I have also considered the policy coverage in relation to business rates. The policy does provide, as part of the property damage section that H had, that business rates will be covered where they would not have been payable by the policyholder, but the policyholder becomes responsible for them due to the damage.

In this case, H was always responsible for paying the business rates though. It did have an agreement with its commercial tenant, whereby the rent paid seemingly covered or contributed to this cost. But the legal responsibility – by way of the license to occupy – appears to have rested with H to make this payment. As a result, I am unable to fairly and reasonably conclude that this is a cost H became liable for as a result of the damage, nor that MS Amlin should cover this cost.

I appreciate H, and its directors, may remain unsatisfied with the conclusions reached. But hopefully I have clearly explained why I am unable to fairly and reasonably uphold its complaint further than I have.

Putting things right

To put things right, MS Amlin Insurance SE should:

- Recalculate and settle the claim on the basis that 46.33% of the insured loss is covered.
- Pay interest on the 2023 settlement for a period of four months.
- Pay interest on the difference between the new settlement and the 2023 settlement, for a period from four months prior to the 2023 settlement to the date of ultimate settlement.
- Interest should be 8% simple per annum.
- Pay H £1,250 compensation for the loss of rent caused by avoidable delays.
- Pay H £300 compensation for the inconvenience caused by the claim handling issues.

My final decision

My final decision is that I uphold this complaint. MS Amlin Insurance SE should put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask H to accept or reject my decision before 28 March 2025.

Sam Thomas
Ombudsman