DRN-6018447

The complaint

A limited complaint, which I will call Y, has complained about the handling of a claim made under its business insurance policy with Accelerant Insurance Europe SA/NV UK Branch.

Mr K, as a director of Y, has brought the complaint on its behalf.

What happened

Y operates restaurants. It opened a new restaurant in late July 2022 but at end of August 2022, there was an escape of water at the premises and the restaurant had to close. Y made a claim under its policy with Accelerant for lost stock, damage to business equipment, tenant's improvements and business interruption. I understand most of the elements of the claim have been settled but Y does not consider that Accelerant has offered enough for its business interruption losses.

Y initially said the business interruption claim, for the period September 2022 to August 2023, was just under £800,000. Later, Y sent a revised claim for just over £900,000 for the same period. Y says this is based on an expected increase in takings of 2% per month for each month in the 12 month indemnity period, as the restaurant would have become more established; and a significant uplift in November and December 2022, when there is a large Christmas market in the street the restaurant was located. Y said the sales in November would have been uplifted by 56% and 160% for December 2022.

There was considerable discussion between Y and the loss adjusters while assessing the claim. In summary, following discussion, Accelerant accepted a rate of gross profit of 65.4% and that it was appropriate to allow an uplift for November and December 2022. It put this at 42.1% and 59.2% respectively. Accelerant did not use the first week's sales figures, as there was a large sporting competition taking place at that time. It used the sales for the rest of the month of August 2022 against the figures provided by other restaurants owned by Y. Accelerant's final offer for the business interruption for September to end August 2023 was £457,602.

Y acknowledges that Accelerant agreed the uplift for November and December 2022 but says this has been offset by Accelerant changing the way it assessed the rest of the loss. It says Accelerant changed the previously agreed basis for calculating future turnover (the 2% per month uplift) and has assumed that for 12 months the restaurant sales would not have increased at all. The monthly sales would however increase each month as the restaurant further established itself at that location. Y complained about this and delays in handling the claim.

Accelerant says its offer of settlement is fair based on the evidence provided. The restaurant had only been open a month, so it only had a month's trading to consider and base its projections on. Accelerant says in this month there was an international sporting event in the location of the restaurant, which would have increased revenue and it had no trading information post loss, as it had not reopened. Its accountants did have access to records from Y's other restaurants and it used this to reach a fair assessment of loss.

However, Accelerant accepts there had been a six-week delay in making an interim payment of over £135,000, This was initially requested at end of June 2023 but was not processed until August, so it offered £800 interest to reflect this delay as well as £200 for the delay in responding to Y's complaint.

Y remained unhappy, so referred the complaint to us. Y says Accelerant's attitude was that it could take it or leave it; this matter has had a significant impact on its ability to recommence trading and has had a significant impact on Mr K personally.

One of our Investigators looked into the matter. He did not recommend the complaint be upheld. The Investigator explained that we cannot assess the value of the claim itself. He did not consider Y had provided persuasive evidence that the uplift applied by Accelerant for the Christmas market was unreasonable, as it was not possible to be sure what impact it would have had. He was also satisfied that Accelerant's forensic accountant's methodology was sound and that Accelerant was entitled to rely on the accountant's assessment.

The investigator also said that much of the time taken was due to the repairs needed to the property, which was not Accelerant's liability and there were no material avoidable delay's on its part. He felt the interest and compensation already offered for the delay in the interim payment was reasonable. The Investigator did not therefore recommend that Accelerant make any further payment.

Y did not accept the Investigator's assessment. Y said that having finally accepted the Christmas market would have increased takings, Accelerant changed the previously agreed method of calculating the loss based on budget. Y says that even based on the turnover calculated by Accelerant (which it considers was too low) the uplift for November and December 2022 would have meant the settlement figure of £544,695. Accelerant revised the basis of the projected monthly sales and based the whole 12 months projection on the sales achieved for 22 days pre-loss trading in August 2022. Mr K says he thinks Accelerant changed the basis of calculation to avoid any uplift in the settlement figure due to it conceding Christmas market argument.

As the Investigator was not able to resolve the matter, it was passed to me.

I issued a provision decision on the matter earlier this month, as I did not agree with the outcome recommended by the Investigator. I provisionally determined that Accelerant should pay an additional amount to Y. I have set out the main part of my provisional decision, explaining why I reached this conclusion, below:

> "Y's policy provides cover for business interruption losses, as a result of an insured event, as follows:
>
> > *"In the event of Damage to Property used by You at the Premises occupied by You for the purposes of the Business for which We have admitted liability under Section 1 of this Policy causing an interruption or interference to the Business which results in a reduction in the Gross Profit We will indemnify You for:*
> >
> > *a. the amount by which the Gross Profit during the Indemnity Period as a result of the Damage falls short of the Gross Profit which would have been received during the Indemnity Period had no Damage occurred;*
> >
> > *b. the Increased Cost of Working for the sole purpose of avoiding or diminishing the reduction in Gross Profit during the Indemnity Period but not more than the loss avoided under (a);*

c. Auditors' Charges

less any sum saved during the Indemnity Period in respect of charges or Business expenses payable out of Gross Profit which cease or are reduced as a result of the Damage."

Indemnity period is defined in the policy as being:

"The Period during which the Business results are affected due to the Damage starting from the date of the Damage lasting no longer than the Maximum Indemnity Period."

And the period of indemnity set out in Y's policy schedule is 12 months.

Y has said the restaurant had to be closed for longer than 12 months …

I can see that significant reinstatement work was needed to the property as a result of the water leak. There was a significant amount of work to be carried out by the landlord as well as Y. Accelerant accepted that this meant that Y's business was interrupted for at least the full period of indemnity of 12 months. I have seen no evidence that any uninsured period beyond this was due to anything done wrong by Accelerant. I am therefore satisfied that it is obliged to meet the business interruption losses for 12 months.

It is of course impossible to calculate exactly what the loss of business was, as it is simply an estimate based on previous sales. And in this case, there was only one month of trading before Y's business was interrupted, which makes it even more difficult to accurately estimate the potential future sales. To assist, Y provided financial records from its other restaurants for consideration and Accelerant used these for comparison.

I have to consider whether the assessment made by Accelerant was fair and reasonable, based on the evidence that is available, and in line with the policy terms above.

There was an international sporting event in the location of Y's premises in the first week of August 2022. Accelerant therefore excluded this period from the calculations. I think this is reasonable. I say this because from what I have seen, the takings on average during that first week were almost double the average daily takings for the rest of that month. The sporting event is not a regular event and was not going to recur during the 12-month indemnity period, so I think it was reasonable to disregard that period of trading as it did not represent normal trading.

Accelerant agreed, albeit after some discussions, to allow an uplift for predicted sales during the period of the Christmas market. It based this on the uplift actually experienced by neighbouring restaurants and applied the same percentage uplift as the next-door restaurant saw in 2022. Y argued the uplift should have been more than this but I have not seen any persuasive evidence to support the higher figures. I think it was reasonable to apply the same percentage uplift as was actually experienced by a neighbouring restaurant.

Accelerant had also previously agreed a 2% per month uplift over the 12-month indemnity period to reflect that as the restaurant became established, it was likely to achieve higher sales. However, it has now revised this.

I have considered the most recent report by Accelerant's forensic accountants. The accountants said there were different methodologies to calculate the likely loss to Y. It used several methods in the negotiation stages but ultimately came down to two. One method produced the figure that Accelerant offered Y and one produced a higher figure of £538,769. This is more in line with what Y says should have been the settlement based on a 2% uplift per month. Y has said the accountant's base figures are not correct either, but I have not seen convincing evidence to support that. The accountants said both methodologies can be considered reasonable and suggested a compromise figure of £500,000, given the difficulty to be accurate due to lack of pre-loss trading data.

When asked about this, Accelerant said that the offer of £457,602 has been fully validated, albeit relying on assumptions on future trading, and it represents a fair outcome. Accelerant said the suggested compromise payment of £500,000 would have included an unvalidated nuisance payment, unsupported by financial data.

I do not agree that this reflects what the accountants said in their report. The accountants stated that there are different methodologies that can be considered reasonable. There is nothing to suggest the higher figure would include a "*nuisance payment*". It is a figure reached by Accelerant's own accountants using what they have said is a reasonable method of calculating the business interruption loss.

I see no reason why the methodology chosen by Accelerant is preferable, or should be considered to be more robust than the one that produces the higher figure.

In fact, it seems to me that the second method is more persuasive. I say this because I do not think it is convincing that there would have been constant sales over the first 12 months of the restaurant being open. Y has data from its other restaurants that support there would likely have been an uplift in sales over the first 12 months of trading. It is difficult to assess with any certainty what this uplift would likely have been and whether it would have been consistent. I have not seen anything that would suggest that 2% per month would be unreasonable but this is not certain.

Having considered everything very carefully, I therefore think it would be reasonable for Accelerant to pay the £500,000 figure proposed by its own accountants as an approximate halfway figure between the two outcomes it produced having assessed the figures. As mentioned above, this is not an exact science. This figure allows for some uplift in the 12 months from opening, as well as an uplift for the impact of the Christmas market. I think this is fair overall.

I therefore consider that Accelerant should make an additional payment to Y so that the total settlement for business interruption loss is £500,000. I understand this would mean an additional payment of £42,398. I also consider that interest should be added to this payment, at our usual rate, from 12 January 2024, which I understand is when the first proposal of settlement of the business interruption part of the claim was made. I have also considered the handling of the claim and the business interruption part of the claim in particular.

This was a high value claim, with many different elements. Y says it had a *"take it or leave it"* attitude. I can see Accelerant's agents engaged and carried out extensive assessments, they also met with Y and its representatives. Accelerant then held its position on its offer. However, even though I think it should increase the settlement under the policy, I do not think Accelerant acted unfairly overall. I can see there was a delay in making the first interim payment. I consider the payment of interest on that

sum is appropriate and reasonable. I have not seen any evidence of any other avoidable delays."

Responses to my provisional decision

I invited both partis to respond to my provisional decision with any further information or arguments they want considered.

Y has confirmed that while it was not the outcome it had hoped for, it accepts my provisional decision.

Accelerant does not accept my provisional decision but has confirmed it has nothing more to add.

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 neither party has provided any new information, I see no reason to change my provisional decision. I therefore remain of the opinion that Accelerant should pay Y a total of £500,000 for its business interruption claim. As it has already paid most of this amount, Accelerant should now pay the balance of £42,398, together with interest.

My final decision

I uphold this complaint against Accelerant Insurance Europe SA/NV UK Branch and require it to make an additional payment to Y of £42,398, together with interest at 8% simple per annum, from 12 January 2024 to the date of reimbursement.

Under the rules of the Financial Ombudsman Service, I'm required to ask Y to accept or reject my decision before 12 January 2026.

Harriet McCarthy
Ombudsman