

complaint

C, a business, is dissatisfied with the commercial insurance claim settlement Society of Lloyd's (SOL) made to it after a flood.

background

SOL thought C was under-insured. It gave C a number of options, in the end a negotiated cash settlement, partially based on the second-hand replacement cost of machinery was agreed. But C wasn't happy. C used the settlement to try and get enough repairs and replacements done to ensure the business kept going but was dissatisfied by what had gone on. C complained.

I considered the matter, and felt it should be upheld. I issued a provisional decision explaining that I felt SOL should pay a further £39,705, plus interest. The parties have now responded to my provisional findings (which are set out below) and I've considered what's been said. The comments haven't changed my view so I'm issuing this final decision.

my provisional findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I think that the claim was settled as it was partially because of an error on the part of the loss adjuster but also because C, via its representative, acted unreasonably in respect of SOL's offer to repair some items. I think a fair settlement for this claim would've been an amount for the non-repairable goods, plus the repair cost of those SOL was satisfied could be restored. I think the loss adjuster's error effectively prevented this reasonable settlement from being made. If it had settled on this basis, C would likely still have been unhappy with the idea of repair but that wouldn't have made the settlement unfair.

The loss adjuster's error was in respect of under-insurance. He felt that C was massively under-insured. SOL said that this meant that any settlement for new replacement goods would be paid on a pro-rata basis only. I don't think that the loss adjuster calculated replacement sums in an appropriate way. This means I don't think that the figures he gave were a true representation of what it would cost C to replace its goods on a like-for-like basis. Therefore, the threat of a drastically reduced settlement was unfair.

However, I also note that the policy doesn't give any allowance for reinstatement settlements to be made on a pro-rate basis. The policy does allow 'average' values to be applied to settlements but only where it is stated that this is the case. The policy doesn't say that reinstatement for material damage claims are, where appropriate, subject to average. Therefore, in attempting to make a pro-rata settlement for the non-restorable machinery (making it subject to average), based on the mis-guided values of the loss adjuster, SOL was acting outside of the policy terms. Therefore, for non-restorable goods, I think SOL should have paid £49,705. This figure was derived, in the main from amounts C gave and that the loss adjuster agreed with. There was only one figure which the loss adjuster reduced from £7,383 to £3,600. I haven't seen anything on this particular item to make me think the loss adjuster's value in this respect was unfair.

The estimate SOL received to repair restorable machinery was £105,000. Its specialist was confident it could repair. I'm satisfied by what it said about the possibility of restoration and C

never gave it a chance to try. So I'm satisfied that this is a reasonable figure in settlement for the machinery SOL said was restorable and I'm not going to make any allowance for the fact that C has replaced some of these machines.

SOL settled at £110,000 (net of the £5,000 excess). As set out above I think it should have paid £49,705 and £105,000 which give a total of £154,705. The excess would always have needed deducting, leaving a fair and reasonable settlement figure of £149,705. That means that SOL owes C £39,705. I think interest fairly needs to be added to this from the date the lower settlement was paid, which I believe was around 12 February 2016.

responses to my provisional decision

C said it accepted my findings. SOL said it didn't think the complaint should be upheld.

SOL said it had agreed a cash settlement for the claim which took into account the fact C was under insured. It didn't think I had taken into account the under-insurance it had found. It said there was wording within the policy that allowed deductions to be made. SOL said the settlement it had made had taken that under-insurance into account. SOL queried how I could say its loss adjuster's calculations were wrong and then use them for the basis of my award. It also said a lot of time had been put into researching the correct like-for-like replacements. SOL pointed out that C had been advised by a representative who had accepted the settlement on its behalf.

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I've read the policy wording and I don't think it is that clear. There is a clear explanation in point 5 of the general conditions about what will happen when a sum insured "*is stated to be subject to average*" – essentially that the policyholder will cover the cost of the underinsured part. But the policy doesn't then say that the buildings sum insured is subject to average, whereas other sections of the policy do. There is other wording within the buildings section but I don't find that term to be particularly clear. There is no reference to average or under-insurance within the term – and while I had considered this term before reaching my provisional decision, it didn't seem to me to be one that likely reserved SOL's right to settle the claim on an average basis where there was under-insurance.

This service has long held that where under-insurance is argued at claim stage it will only be fair for an insurer to settle the claim based on average where this right has been clearly reserved in the policy wording. I'm not persuaded that SOL has done that here.

I commented provisionally that, in respect of machines that needed replacing, most of the figures used by the loss adjuster correlated with those provided by C. So I think it is fair to rely on those figures as part of my award. The machines for which I think the loss adjuster didn't provide replacement prices on a like-for-like basis were actually machines that SOL felt could be restored. And I'm satisfied that, as another part of my award, the restoration price should be paid. So the incorrect valuations, for the replacement cost of machines that could be restored, fall away.

I'm not disputing that the loss adjuster put a lot of work into trying to establish the replacement costs of machinery. But I do think that, in respect of a number of machines, he

got this wrong. The file evidence shows that the final prices for a number of machines are based on the cost of what the manufacturer says is the model now available. That does not necessarily equate to a like-for-like product. And C's comparison of what its machines did against the loss adjuster's suggested replacements and the ones C found itself are compelling evidence as to 'like'.

C, throughout this claim, has been concerned about mitigating its loss of business. In the circumstances it wouldn't be fair, in my view, to say the acceptance – which was the only sure way for C to be put in funds in order to carry on trading – should prevent it from being able to challenge the fairness of that settlement.

my final decision

I uphold this complaint. I require Society of Lloyd's to pay C £39,705 in settlement of its claim for damaged machinery, plus interest*. This to be paid within 28 days of the date on which we tell it C accepts my final decision (if it does).

* Interest is at a rate of 8% simple per year from the date the original claim settlement was made in February 2016 until settlement is made. If Society of Lloyd's considers that it's required by HM Revenue & Customs to take off income tax from any interest due to C, it should tell it how much it's taken off. It should also give C a certificate showing this if it asks for one, so it can reclaim the tax from HM Revenue & Customs if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask C to accept or reject my decision before 4 September 2017.

Fiona Robinson
ombudsman