

The complaint

The trustees of a trust, who I will refer to as T, have complained that Folgate Insurance Company Ltd unfairly added an exclusion to T's Commercial Property Investors' policy and declined its claim. The trustees have also complained that Folgate Insurance Company Ltd delayed in providing an outcome on the claim which caused T a financial loss it would not have otherwise incurred.

The trustees have complained through a representative. But, for ease of reading, I will refer to T throughout.

What happened

T held commercial property insurance for a number of years with an insurer who merged with Folgate. The policy renewed annually and in 2018 T's agent confirmed that the building and outbuildings were built of brick, metal, stone or concrete and were roofed with slate, timber beams, tiles, concrete or felt on timber.

In February 2021, there was a fire at the pump station at the property, which was housed in a timber structure. T claimed on its policy.

Folgate instructed a loss adjuster to investigate the cause of the fire. The loss adjuster thought that the pump would need to be replaced. While it was waiting for an outcome of the claim, T paid for contractors to pump out the tank.

On 29 November 2021, Folgate told T that it had not made a fair presentation of the risk when buying the policy as the outbuilding containing the pump was made of timber. Folgate said it would have added an exclusion to T's policy which excluded all losses arising from the timber outbuilding and, therefore, declined T's claim.

T brought its complaint to our service. T said the cause of the fire was not due to it being within a timber building and the level of damage had not been increased by the timber either. T also said that given Folgate knew about the timber building in July 2021 it should have confirmed its position sooner. It said that, had Folgate provided an outcome on the claim sooner, it would have avoided the costs incurred in paying contractors to pump out the tank as it would have replaced the pump instead.

Folgate said it had various matters to look into when investigating the claim and did not think it had unnecessarily delayed things.

Our Investigator looked into T's complaint and initially didn't think it should be upheld. She didn't think that T had made a fair presentation of the risk when renewing the policy and she also didn't think that Folgate had caused any unreasonable delays. She also said that she hadn't seen any evidence that T had incurred a financial loss due to any delays as the claim had been fairly declined.

In response, T pointed to the costs that it had incurred in pumping out the tank rather than replacing it. It referred to the case of 'Quadra Commodities S.A v XL Insurance Company SE

(& ors)' ("Quadra") and Section 13 of the Insurance Act 2015 (the Act) to explain why it thought it should be awarded damages in respect of the time taken for Folgate to decline the claim.

Our Investigator reviewed the information and thought that Folgate had caused some unreasonable delays. She recommended that Folgate pay T £500 compensation for the inconvenience it caused in not sufficiently chasing information between July and November 2021. However, she remained of the view that there could not be any consequential losses because the claim was declined.

Folgate said it would consider paying a small monetary award but did not agree that £500 was reasonable. It said our Investigator had originally found that Folgate had not caused any unreasonable delays.

T also didn't agree with the proposed outcome. It said that it had no knowledge of the information that had been requested of it in March 2021. It also said that our Investigator had acknowledged a delay between July and November 2021 and its loss due to this delay was in excess of £15,000.

Both T and Folgate asked for an Ombudsman's decision.

I issued a provisional decision on T's complaint on 5 May 2023 where I explained why I was upholding its complaint in part. In that I said:

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

The claim

The relevant legislation to be considered here is the Insurance Act 2015. Under the Act, T (or an agent acting on its behalf) had a duty to make a fair presentation of the risk when buying its policy. And for Folgate to take any action, it needs to show that T didn't do that and that it made what's known as a qualifying breach. To demonstrate a qualifying breach, Folgate would need to show that if T had made a fair presentation of the risk, it would either have not offered T the policy or would have done so on different terms. In order to make a fair presentation of the risk, T needed to disclose every material circumstance which it knew, or ought to know, about or to give enough information to enable Folgate to know it needed to undertake further enquiries.

The fire occurred in February 2021, so the relevant renewal is the one that took place in January 2021. The relevant part of the Statement of Fact for this renewal says:

"c) Can you confirm the buildings, garages and outbuildings are entirely:

i) built of brick, metal, stone or concrete?

ii) roofed with slates, timber beams, tiles, concrete or felt on timber?"

Next to the question is the answer "Yes".

As this question was included in the Statement of Fact, it indicates to me that the answer was something that Folgate wanted to know about when deciding whether to offer cover, so I think it is a material circumstance. I don't believe it is in dispute that the question was not answered correctly because there was a timber outbuilding and I think T knew, or ought to have known, that. So, I don't think T made a fair presentation of the risk when renewing its

policy.

In order for Folgate to take any action it needs to show that it would either have not offered T the policy or would have done so on different terms. In this case, Folgate has provided me with information which satisfies me that if T had disclosed that there was a timber outbuilding, then Folgate would have added an exclusion for any losses arising from the timber outbuilding.

This means that T made a qualifying breach and, under the Act, Folgate was entitled to apply the exclusion it would have applied if T had made a fair presentation of the risk when renewing the policy.

The exclusion says:

“Excluding all losses arising from the timber outbuilding”

As the pump station was housed in the timber outbuilding I think it is fair for Folgate to say that the loss arose from the timber outbuilding. Therefore, I think it is reasonable for Folgate to decline T's claim even though the timber outbuilding does not appear to have contributed to the loss. This is because I think the intention of the exclusion was to decline all cover for any losses originating from the timber outbuilding.

Delays

When handling a claim, Folgate has an obligation to do so promptly. As T has pointed out, Section 13A of the Act sets out that insurers need to pay claims within a reasonable time. It has also referred to the outcome of 'Quadra'. It said that in 'Quadra', the judge said that, as the claim was substantial and complex a reasonable time for the insurer to have investigated was about a year. T said its claim was not complex or substantial and therefore 11 months was too long.

I do not intend to set out a complete timeline as the history to the claim is well known to both parties. However, I am going to set out what I consider to be key dates.

The loss adjuster's report in February 2021 notes that there was a timber outbuilding. I have looked at Folgate's claim notes and can see that on 12 March 2021 Folgate asked the loss adjuster if T could advise when the timber outbuilding was added. I think this is a reasonable question because the answer is relevant to the action that Folgate could take.

T has provided an email exchange which shows that its agent told the loss adjuster that it did not know when the timber building had been installed as it was in place when the current management took over.

On 29 March 2021, the loss adjuster let T's agent know that the claim wouldn't progress until it was able to give an approximate age of the pumping station. The loss adjuster chased T's agent for a response which it received in May 2021. Again, T said it could not give an exact date although it thought it had been there since 1987 but had been overhauled in 2018.

In May 2021, the loss adjuster asked T's agents when the timber outbuilding had been installed. T's agent responded around a month later to say that it could not provide any historical information. T confirmed that the timber building had been in place since it took over the management of the property in 2016.

In July 2021, the loss adjuster let T's agent know that Folgate was looking into whether the correct information had been given when the policy renewed. While this did raise the issue of

the correct information not being given, it did not set out the implication of this – i.e. that the claim might not be covered.

Between July and November 2021 Folgate undertook enquiries with the surveyor who surveyed the property in 2018 to determine whether they had been made aware of the timber outbuilding. But I don't think Folgate did enough to chase the surveyor for an answer, considering the costs T was incurring, as it did not send any reminders between the beginning of August and the beginning of November.

Overall, I don't think that Folgate dealt with T's claim promptly. I accept that it was necessary for Folgate to make further enquiries about the age of the timber building and about the knowledge of the surveyor who assessed the property in 2018 in order to make a fair decision on whether to accept T's claim. However, I think it was clear in March 2021 that T did not know the origins of the building. I also think that Folgate should have contacted its surveyor sooner, and also chased for a response. Also, the surveyor, as Folgate's agent, delayed matters by not responding until November 2021.

I am aware of Folgate's obligations under Section 13A of the Act but I am also able to make a decision based on what I consider to be fair and reasonable in all of the circumstances. This might mean I make a decision which is different to one a court might reach. In this case, I think it would be fair and reasonable for Folgate to compensate T for taking longer than I think it should have done. It's difficult to know exactly how long Folgate should have taken to deal with T's claim, and in reaching a decision I have taken into account that T did not always quickly respond to Folgate's queries as quickly as it could have done, as well as that it was only necessary for Folgate to make further enquiries because T had not made a fair presentation of the risk.

Overall, I believe that it would be fair and reasonable to conclude that Folgate should have received all the information it needed by the end of July 2021 at the latest. I say this because if Folgate had contacted the surveyor in March, it would likely have had a response by the end of July, based on the time the surveyor did take to respond. So, I think the fair and reasonable outcome is for Folgate to compensate T for any financial losses that it incurred from 1 August 2021 until Folgate gave an answer on its claim on 29 November 2021.

T said that once it knew the claim was not covered it paid to replace the pump. So I think this is most likely what it would have done sooner if Folgate had provided an answer on its claim. I have not seen anything to indicate that T did not mitigate its losses. It arranged for contractors to pay for temporary pumping out in order that it could continue to trade.

Therefore, I think that delays in Folgate's investigation caused T a loss it would not otherwise have had. As such, I think it is fair and reasonable for Folgate to pay for the pumping out costs between 1 August 2021 and 29 November 2021.

T's spreadsheet shows that the pumping costs between these dates amounts to £18,260.86. T should let me know if it is VAT registered as, if it is, Folgate does not need to pay the VAT element of the costs.

As T has been without money it should have had, I think it would be fair and reasonable for Folgate to pay T interest at our normal rate of 8% simple per annum from the date T paid the invoices until the date it makes payment."

T confirmed that it was able to reclaim VAT but did not provide any further comments.

Folgate did not agree with my provisional decision: In summary, it said:

- Delays were largely unavoidable and the evidence provided demonstrates that it regularly chased for updates.
- The loss adjuster's report says, "we discussed (strictly without prejudice to policy liability) measures that could be taken to empty the system until the pumping system was replaced." Folgate would not recommend that substantial ongoing costs are incurred if a full reinstatement/repair can be arranged.
- T had a duty to mitigate its losses and Folgate managed T's expectations about whether the claim would be covered.
- T arranged repairs when the claim had been declined. This indicates that it could have done so sooner and by not doing so incurred unreasonable temporary pumping out costs.
- If it was required to pay for pumping out costs, it should be noted that T has also had the benefit of the money that it would need to have paid out for repairs sooner. This would balance out some of the costs and interest should not be payable for this period.
- It remains of the view that £250 is a fair and reasonable amount to compensate T.

I asked T to comment on Folgate's point that it incurred unreasonable costs by not replacing or repairing the pump sooner.

T said it agreed with Folgate's loss adjuster that regular pumping out should commence to prevent an overflow and be kept under review pending the outcome of the claim.

T said Folgate asked for quotes for a new pump station. T said it provided two quotes on 1 March 2021 and a third quote on 3 March 2021. Folgate asked T for a quote for a different type of pump and T said it provided this quote on 19 April 2021. T said that Folgate indicated in June 2021 that it was aware costs were continuing to rise but did not indicate to T that it should replace the pump itself. T said that its policy specifies that repairs/replacement should not be carried out without prior approval as it could prejudice the claim.

Before I reached a final decision I contacted both parties through our Investigator to let them know that, having considered the points raised, I intended to change the date interest is awarded from. I said I was minded to agree with Folgate that it would not be fair for Folgate to pay interest during the period that T had the benefit of the money it ultimately used to pay to replace the pump.

Folgate said that it agreed in principle with the suggested compensation but said it would cap the interest on 27 June 2023 as it did not think it was fair for it to be required to keep paying interest while the dispute was ongoing. T did not provide any further comments by the required date.

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.

Neither party have provided further comments in relation to my findings under the heading of 'The claim'. Therefore, I see no reason to comment on this further. While Folgate has now agreed to my award in principle, for completeness, I will address the additional points it made regarding the delays.

Folgate's comment that the delays were largely unavoidable has not persuaded me to depart from my findings set out in my provisional decision above. This is because I do not think it has provided any new evidence on why the delays were unavoidable and I have already explained why I think Folgate caused unreasonable delays when dealing with T's claim.

As Folgate said, T has a duty to mitigate any losses. However, while T did incur additional costs, I am not persuaded that it did not reasonably mitigate its losses. While I accept that Folgate's loss adjuster discussed measures on a without prejudice basis, I have not seen anything to persuade me that Folgate indicated to T that it should carry out repairs to ensure that costs were minimised. In an email of 28 June 2021, Folgate made reference to costs increasing. Folgate knew that it was looking into concerns about whether T had made a fair presentation of the risk but did not let T know that it might want to consider replacing the pump itself. And while Folgate did let T's broker know that it had concerns about the information provided at the sale, it did not provide any further indication about what this might mean for T's claim. Taking all of this into consideration, I remain of the view that Folgate delayed in making a decision on T's claim and this caused T a loss that it wouldn't otherwise have had. Therefore, I still think that part of the fair and reasonable outcome to this complaint is for Folgate to pay T £18,260.86 to compensate it for its financial loss as a result of the delays. As T has confirmed that it is able to recover VAT, Folgate will not need to pay any VAT element of this.

I have considered Folgate's point about the time that T was without money it should have had due to paying the additional pumping out costs.

If Folgate had not caused unreasonable delays T would need to have paid for the replacement pump sooner. Due to Folgate's delays, T had the benefit of this money for longer than it should have done. Therefore, I agree that it would not be fair and reasonable for me to require Folgate to pay interest on £18,260.86 for the period in which T had the benefit of the money it used to pay for the pump. Therefore, I think it is fair and reasonable that Folgate pays 8% simple interest per annum from the date T paid to replace the pump, as that is the date it was without money it should have had.

I do not agree that it would be fair and reasonable for Folgate to cap the interest on 27 June 2023. It has always been open to Folgate to pay T for delays caused by its errors and T will be without the benefit of money it should have had until Folgate makes payment. Therefore, interest should be paid until the date Folgate makes payment of the £18,260.86 (minus any VAT).

Putting things right

The fair and reasonable outcome to this complaint is for Folgate to pay T £18,260.86 (minus any VAT), plus interest at 8% simple per annum from the date T paid for the new pump until the date Folgate makes payment.

My final decision

My final decision is that I uphold this complaint and require Folgate Insurance Company Ltd to do as set out in the 'Putting things right' section above.

Under the rules of the Financial Ombudsman Service, I'm required to ask T to accept or reject my decision before 28 July 2023.

Sarann Taylor
Ombudsman