

The complaint

A company, which I refer to as S, complains that Arch Insurance (UK) Limited (Arch) unfairly declined a business interruption (BI) claim made under its Commercial Combined policy.

Mr S, who is a director of S, brings the complaint on S's behalf. For ease of reading, I'll refer to all comments and actions of Mr S as being those of S.

What happened

The background to this complaint is known to both parties and so I won't repeat it at length here.

Briefly, following an escape of water claim at S's premises, S made a BI claim for the losses it incurred while its business remained closed.

Following a review of S's claim, Arch said that there was no cover for BI because S failed to mitigate their losses. Arch said that records showed the average occupancy at S's hotel was 60% and therefore if S had taken reasonable steps to mitigate its losses, it could have used the upper floors of the hotel and avoided interruption to the business.

Arch also said that immediate steps should have been taken to dry and sanitise the affected areas. Arch noted that the escape of water incident happened during lockdown and so it said that the affected areas could have been isolated and any contamination within the communal areas such as the fire escape routes, could have been cleaned in order to allow for use of the upper floors of the hotel once restrictions were lifted. Arch concluded that S failed to take reasonable actions to mitigate their losses and therefore declined its claim.

S didn't accept that it delayed taking any action. It explained that the leak was discovered in April 2021, by this time there was already significant mould growth. Liability for the damage had been confirmed in May 2021, at which point S appointed experts such as a restoration contractor and a damage management specialist, to review the damage and advise on the next steps. The expert's report and subsequent estimates were received by mid-June 2021. S said it forwarded the report and estimates to Arch immediately, but it wasn't until mid-July 2021 that a surveyor was appointed to validate the costs. S said it sent multiple chasers during this time, but nothing happened until 18 August 2021 when a new surveyor was instructed by Arch, who then appointed a forensic expert on 24 September 2021. S complains that a loss adjuster and surveyor should have been appointed sooner and steps taken to approve the remedial work which its experts had already reported on and provided estimates for. S didn't feel that it was appropriate for it to take any further action at this point as liability for the claim had been accepted by Arch and therefore it was awaiting its approval for remedial action.

S argued that even though there was a delay from Arch, it appointed various experts, to advise on the correct way to deal with the contamination. The expert said in his report that it was evident from the fungal swab results that primary contamination and cross contamination conditions were present. Estimates for the costs involved in dealing with this was sent to Arch and their advice on how to proceed was followed. S is adamant that it did

take all reasonable steps to mitigate its losses. S maintained that it was Arch's actions in dealing with the claim which caused it inconvenience and delay in dealing with the claim.

Unhappy with Arch's response, S brought its complaint to our service. Our investigator looked into S's complaint, and he recommended that it be upheld. He felt that Arch hadn't treated S fairly. He thought that S took reasonable steps in the circumstances to mitigate its losses and it wasn't a reasonable expectation for S to continue with its business while it there was cross contamination reported. He also found that there were delays in responses being provided by the loss adjuster and surveyor which caused S inconvenience and delayed the claim.

He suggested that to put things right, Arch should reconsider S's BI claim in line with remaining policy terms and pay S £150 compensation for the inconvenience caused by its delay. Arch said that while it could see that S had acted in accordance with the advice provided by experts, they didn't agree that this would mean the whole hotel had to close. They said the areas affected by mould could have been isolated in order to allow S's business to continue operating. As an agreement couldn't be reached, the complaint has been passed to me to decide.

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.

I've read and carefully considered everything S and Arch have said. However, my findings focus on what I consider to be the central issues, and not all the points raised. The purpose of my decision isn't to address every single point that the parties have raised. My role is to consider the evidence presented by S, and Arch, to reach what I think is a fair and reasonable decision based on the facts of the case.

The crux of this complaint centres on Arch's decision to decline S's BI claim. The relevant rules and industry guidance say that Arch have a responsibility to handle the claims promptly and fairly and they shouldn't reject a claim unreasonably. I have to decide if I think Arch have applied the terms of the policy in a fair and reasonable manner when declining S's BI claim. Having reviewed everything available to me, I don't think they did, I'll explain why

When considering whether or not it was reasonable for Arch to decline S's claim, I have looked closely at the relevant policy terms and conditions.

While it is accepted that damage was caused to the ground floor corridors at the hotel as a result of an insured event while the premises was closed during the coronavirus lockdown, Arch declined S's BI claim on the basis that S didn't mitigate its losses. The most relevant part of S's policy states:

"Claims Procedure

If in relation to any claim You have failed to fulfil any of the following conditions You will lose Your right to indemnity or payment for that claim

You must ensure that...

8. You carry out or permit to be taken any action which may be reasonably practicable to prevent or minimise loss and/or interruption of the Business and to prevent further accident Damage or Injury"

Arch said that S didn't take reasonable steps to mitigate its losses because drying equipment wasn't installed as soon as reasonably practicable, and it allowed the situation to deteriorate. It also believes that S could have done more to isolate the affected areas of the hotel and sanitise communal areas to utilise the upper floors of the hotel which were not damaged.

As per the policy terms, I'm satisfied that S's policy contains a condition which states that S would have to show that it took reasonable steps to mitigate its losses in order for the BI claim to be considered.

I've carefully considered what actions S took and whether it was sufficient to minimise the loss and interruption to its business.

The escape of water occurred while S's business was closed due to the lockdown restrictions in place and therefore the exact date and time of the incident is not clear. However, I understand that it was discovered towards the end of May 2021, and it's believed to have occurred about a week or so before. S said that local management were visiting the property to check on it and when the leak was identified, S was informed. S's caretaker was able to stop the leak to prevent further damage. By this point there was already mould growth. Within a week of identifying the leak, S appointed various experts who specialise in the field to review the damage and provide advice on remedial action. This was done at S's own expense while it was waiting for Arch to review its claim. S also then met Arch's loss adjuster to in May 2021 to review the claim.

S said that it forwarded on the necessary reports and quotes for remedial action, from the experts it appointed, to Arch for authorisation in mid-June 2021 but there was a delay in this being approved and therefore it couldn't take any action while it awaited Arch's approval. From the timeline which has been provided by S, nothing significant happened with approving S's claim until at least September 2021. This doesn't appear to be in dispute. In this respect I'm satisfied that S took reasonable steps to investigate the damage and seek expert advice within a reasonable timeframe.

Arch said that S should have installed drying equipment sooner to prevent further damage from occurring. I note that the experts appointed to assess the damage confirmed that drying equipment shouldn't be installed because this may cause cross-contamination and spread the mould. They recommended restorative drying to be undertaken by an expert and I believe this formed part of the remedial action. I think it's therefore reasonable that S acted on this advice and as the investigator said in his view, if the drying equipment had been installed it may have caused more damage. As liability had been accepted by Arch for S's claim, I think it was reasonable for S to await approval from Arch.

Arch said that if sanitisation had been completed and the damage isolated, the upper floors of the hotel could have been used to minimise the BI. I can see why Arch has suggested this as a solution, however I also note S explained that the fire exit from the upper areas to the ground floor passed through contaminated areas which would have also been used as the contractor's access and so this area would likely be sectioned off to prevent further contamination which would have left S with limited fire exists. The experts appointed also said cross-contamination had occurred in the communal areas of the hotel. Based on this evidence, I agree with our investigator that reopening before it was safe to do so would have caused health and safety concerns, as well as reputational damage to S's business.

S also complained that there were delays in dealing with the claim and lack of responses from the loss adjuster and surveyor which resulted in having to chase them for answers. S says this caused it inconvenience and delayed the claim.

When dealing with an insurance claim, I think some time lag is always to be expected however in this case I agree with our investigator that the delays caused S inconvenience in having to chase the loss adjuster and surveyor on various occasions and it also delayed the claim.

In summary, I'm satisfied that S did take reasonable steps to mitigate its losses and I don't consider that Arch acted fairly or reasonably in declining S's BI claim for failing to mitigate its losses.

Putting things right

In order to put things right Arch should reconsider S's BI claim in line with the remaining policy terms.

I've also thought about the delays and I'm in agreement with our investigator that Arch should pay £150 compensation for the inconvenience caused.

My final decision

For the reasons explained above, my final decision is that I uphold S's complaint and I direct Arch Insurance (UK) Limited to:

- Reconsider S's BI claim in line with the remaining policy terms and conditions.
- Pay S £150 compensation for the inconvenience caused by its delays.

Under the rules of the Financial Ombudsman Service, I'm required to ask S to accept or reject my decision before 28 July 2023.

Ankita Patel
Ombudsman