

DETERMINATION

Case number: 207307

Small Business – water damage – extent of cover – settlement method

SUMMARY OF FACTS

1. The applicant held a retail insurance policy with the Financial Services Provider (FSP) which provided cover for building and contents including stock at two locations.
2. The applicant lodged a claim for water damage to stock on 17 March 2009 which occurred on 2-3 March 2009.
3. Upon lodgement of the claim the FSP engaged an external assessor to assess the nature and extent of the damage.
4. Following advice from the assessor the FSP accepted that the stock required professional assessment and engaged a qualified water damage restoration company to assess the stock.
5. Upon receipt of the reports the FSP accepted the conclusions of the restoration company and offered the applicant a cash settlement based on the amount of water damage the restoration company identified.
6. The applicant was dissatisfied with the decision of the FSP and following a request for a review, the FSP requested its assessor attend the site and confirm the restoration company's conclusions.
7. Following confirmation from the assessor that he agreed with the restoration company's conclusion the FSP, in an attempt to settle the matter, offered the applicant a further \$10,000 which was refused.
8. The applicant has refused to re-take possession of the stock following its assessment by the restoration company.
9. The applicant seeks a review of the FSP's cash settlement offer as she submits that all damage now claimed by her has occurred as a result of the insured event.

ISSUES IN DISPUTE

10. Whether the FSP is required to provide an additional cash settlement under the terms and conditions of the policy for damage to the insured stock.
11. Whether the applicant is required to take possession of the stock held by the restoration company.

RELEVANT POLICY PROVISIONS

“Understanding Your Policy and its important terms and conditions

To properly understand this Policy's significant features, benefits and risk You need to carefully read:

- about each of the available types of cover and benefits in the relevant Sections One-Twelve (the cover provided under each Section can be affected by the following);

...

- the “Claims procedure and conditions” and “General conditions applicable to all Sections of this Policy” sections – these set out certain general rights and obligations that You and We have. If You do not meet them We may be able to refuse to pay or reduce what We pay for a claim to the extent permitted by law;

...

Claims procedure and conditions

1. Claims procedure

- a. As soon as You become aware of anything happening which may result in a claim under this Policy You must, at Your own expense (unless the expense is covered under Claims preparation expenses below):

...

- (v) give Us all the information, proof and assistance We may require to prosecute, defend or settle Your claim including detailed of any other insurance effected by You or on Your behalf.

- (vi) as soon as it is reasonably practicable after the loss, Damage, Injury or Sickness (as defined in Section Eight – Personal Accident and Sickness) (or any further time which We may allow in writing) deliver to Us a written claim containing as detailed an account as is reasonably practicable of the circumstances surrounding the loss, Damage, Injury or Sickness and the amount claimed. If We ask You to provide Us with a Statutory Declaration You must provide it,

...

- (viii) at all times give Us all the information and assistance We may reasonably require.

...

- c. After you have advised Us of any loss, Damage, Injury or Sickness (as defined in Section Eight – Personal Accident and Sickness) as set out in this condition

...

- e. If You advise Us of loss or Damage to Property Insured, as set out in this condition:

- (i) We may, or anybody We appoint may:

- (a) enter, take or keep possession of the Buildings where destruction or Damage has happened
- (b) take or keep possession of the Property Insured for the purposes of Our investigations; and
- (c) if We accept liability for the loss, sell such Property Insured or dispose of it in a reasonable manner;

but, You are not entitled to abandon such Buildings or Property Insured to Us. If We enter, take or keep possession of the Buildings or the Property Insured it will not be an admission of liability nor will it affect any of Your obligations under this Policy.

...

Section One – Material Damage

The cover

Where this Section is shown as insured on the Schedule, We will settle Your claim in accordance with the Basis of Settlement if any of the Property Insured:

1. is Damaged at the Situation;
2. by any sudden or unexpected or unforeseen occurrence which is not otherwise excluded; and
3. which occurs during the Period of Insurance.”

REASONS FOR DECISION

12. The Panel is satisfied that a full exchange of information has taken place between each party and that each party has had the opportunity to address any issues raised.

The Applicant's Submission

13. The applicant states that all stock assessed by the FSP's external experts was damaged by water.
14. The applicant submits that the photographs provided by the FSP clearly show that the stock was damaged as a result of water.
15. The applicant refutes reports by the FSP that only a small portion of the stock was damaged as a result of water.
16. The applicant submits that the initial assessor confirmed that all the stock was water damaged and as a result of this, she agreed to pack up all affected stock to form the basis of the settlement amount.
17. The applicant submits that the settlement amount provided by the FSP and its subsequent offer of an additional \$10,000 is inadequate, and she is entitled to be indemnified under the policy for the total amount of stock which she submits was water damaged.

The FSP's Submission

18. The FSP states that it has relied on its expert reports in determining the cash settlement offered to the applicant.
19. The FSP submits that the reports clearly conclude that there has only been water damage to a minority of the stock presented by the applicant for inspection.
20. The FSP submits that in the absence of any alternate evidence it is entitled to rely on those reports in offering a cash settlement.
21. The FSP submits that it has been fair and reasonable in attempting to settle the claim by offering the applicant an additional amount of money to take the final settlement figure to \$60,000.
22. Finally the FSP submits despite the applicant's refusal to do so, she is required to take possession of the stock as per the policy terms and conditions, and it is not responsible for ongoing storage costs as a result of her refusal to do so.

Consideration of each party's submission

23. The Panel has reviewed each party's submission together with the terms and conditions of the policy.
24. The Panel accepts that there is no dispute whether the applicant has a valid claim under the policy. Rather what is in dispute is the FSP's decision to provide a cash settlement based on what it determined to be the proportion of stock damaged by water.
25. The applicant has submitted that the total stock assessed by the FSP's experts has been damaged by water.

26. Further the applicant concedes she has refused to take possession of the stock until such time as the dispute was reviewed and settled and that given the time taken to progress the claim, she denies any liability for storage costs being incurred.
27. In making the submission that all stock has been damaged by water, the applicant submits that she relies on the evidence she has stated in her correspondence to the FSP and FOS in addition to photographs supplied by the FSP.
28. Further the applicant relies on her submission that the original assessor informed her that all stock was covered by the policy and she had a genuine belief that all of the stock which was transferred to the restoration company's premises for inspection had been accepted as water damaged.
29. The FSP has provided an email from the initial assessor dated 15 June 2009 to the applicant which contradicts this submission of the applicant.
30. The FSP has provided reports from its assessor and restoration specialist which it submits confirms that only a small portion of the stock was damaged.
31. The restoration specialist noted in relation to the damaged stock in a report dated 7 August 2009:

"Upon inspection of pallets at our Warehouse during Monday 30th June, it became apparent that several displayed obvious signs of having been affected by water, several pallets requiring re-boxing and replacing due to the collapse of original shipping boxes.

Boxed on several pallets were displaying mould, and these were quickly isolated in order to prevent cross-contamination to adjacent pallets."

...

Our inventory records that we have identified only several pallets of candle stock which may be considered to have been affected by water.

Such stock has been condensed to 2.5 pallets, which have been isolated from the remaining 51.5 pallets of stock upon which we can find no evidence of water damage.

OUTCOME – GENERAL STOCK

Inspection of stock contained on pallets 55 to 64 has identified that some stock displays evidence of mould, whilst several boxes of iron homewares show clear evidence of rust upon that stock.

The majority of general stock displays damage of breakage, age, deterioration and other damage not related to water (i.e. lamps with either cut power cords, or no cords, general soiling and similar damage to suggest that there have items have been in long-term storage, or may be return stock or displace stock.

..."

32. The FSP's assessor in his report dated 31 March 2010 states:
"Further to the E-Mail update of the 10th February 2010 we confirm that we have reviewed the stock held by [restoration specialist] on the afternoon of Thursday 11th February 2010.
We initially requested the commercial assessment manager of [company] who had managed the review, [name] to who the writer stock that had been deemed damaged and undamaged. We then undertook a random audit of boxes of stock chosen by our office to review the findings of [company]. From the review undertaken we are fully supportive of [company] findings in this matter.

From the audit of what has been deemed unaffected candles, the candles show no indication of water damage. We have randomly removed a box of stock which is held out our office that is indicative of the state of candles that have been deemed to be undamaged.

We are satisfied and supportive of the findings of [company] report and suggest that the previous offer of settlement is appropriate.”

33. The applicant has submitted that the photographs provided by the FSP clearly show that the stock has suffered water damage.
34. Having thoroughly reviewed the photographs, the Panel does not concur with the applicant's statement.
35. The Panel does not accept that the photographs provided show candles or other items that have suffered water damage. Rather the photographs tend to indicate that the stock was unaffected by water damage.
36. It is noted by the Panel that the FSP has on numerous occasions attempted to amicably settle this dispute with the applicant. Further it is noted that a Case Manager from FOS attempted to renegotiate a settlement between the parties.
37. The onus is on the applicant to establish on the balance of probabilities that the stock has been damaged and is covered by the terms and conditions of the policy.
38. Whilst the Panel accepts that the applicant has a genuine belief, she is entitled to indemnity under the policy, the Panel notes that in order to establish her onus, she needs to provide substantive evidence to support her belief.
39. In this instance the applicant has not provided any further evidence, other than the material earlier noted, to support her assertions, nor has she provided any substantive evidence which contradicts the findings of the reports provided by the FSP.
40. In the absence of such evidence, the Panel has no basis upon which to determine that the FSP's reports should not be relied upon in this instance.
41. The Panel accepts that a portion of the stock has been damaged by water and the FSP has provided a cash settlement in the amount of \$50,589.27 to indemnify the applicant for the loss.
42. However based on evidence supplied, the Panel does not accept that there is evidence to conclude on the balance of probabilities that the remaining stock has suffered water damage and that the applicant is entitled to be indemnified for the remaining stock.
43. In relation to the dispute surrounding the applicant's refusal to take possession of her stock thus resulting in the FSP incurring storage fees, the Panel notes the following:
 - a. The FSP has requested the applicant take possession of the stock on numerous occasions;
 - b. The FSP has agreed to incur storage costs up to a certain date whilst this dispute continued;
 - c. The applicant concedes that she has refused to take possession of the stock;

- d. The policy clearly states that an insured cannot abandon property into the possession of the FSP.
- 44. The Panel accepts that it was reasonable whilst the dispute was continuing, for the FSP to incur storage costs for the stock in the event that a further inspection and/or assessment of the stock was required.
- 45. However, under the policy the applicant is not entitled to abandon the stock to the FSP.
- 46. Therefore at the conclusion of the dispute, it is fair and reasonable and a requirement of the applicant under the policy to take possession of the stock and if she still refuses to do so, it is reasonable for the FSP to request the restoration company to deal directly with her and any costs incurred would be the responsibility of the applicant.

CONCLUSION

- 47. Accordingly the Panel determines that the FSP is not required to provide an additional cash settlement to the applicant under the terms and conditions of the policy.
- 48. The Panel accepts that in paying the applicant \$50,589.27 it has discharged its obligation to the applicant under the terms and conditions of the policy.
- 49. The Panel notes that the FSP had offered an additional sum of money in an attempt to settle the matter however this has been refused by the applicant on a number of occasions, and therefore the FSP is not required to pay the applicant that additional sum as a result of this determination; however should it of its own volition so choose, that course is naturally still available to it
- 50. Finally, by way of ancillary comment, the Panel states that the applicant is required to take possession of the stock and should she continue to refuse to do so, the Panel states the FSP is entitled to request the restoration company to deal directly with the applicant and that the FSP will not be liable for any possible storage fees incurred as a result of the applicant's refusal from the date of this determination.