DRN-4796262

The complaint

A limited company, which I will refer to as S, has complained that James Hallam Limited mis-sold it a business insurance ("Combined Liability & Office Insurance") policy.

Mr S, as a director of S, has brought the complaint on its behalf. Mr S is also represented in this complaint but I'll refer to Mr S or S throughout.

What happened

S is a travel agent and made a claim under the policy in 2020, after it was impacted by the Covid-19 pandemic.

The underwriters agreed to cover three periods of lockdown and travel restrictions (24 March to 4 July 2020, 5 November to 2 December 2020 and 20 December 2020 to 23 March 2021) which it calculated was a total of 223 days.

However, the underwriters said that S was underinsured, as the revenue sum insured under the policy was significantly less than the true amount. The underwriters say the policy was provided on a gross revenue basis and the premium was calculated on the basis of S's revenue (not retained income/profit) being £500,000 per annum, whereas the underwriters calculated that S should have been insured for approximately £3.6 million. The underwriters therefore said S was insured for only a percentage of the appropriate figure.

Because of this, the underwriters applied the average clause in the policy, which says that where the value of the insured business is found to be more than the sum insured, a policyholder is only entitled to claim a proportion of the sum insured. Having made a proportionate deduction to reflect that underinsurance, the underwriters paid approximately £55,000 in settlement of the claim.

S brought two complaints about the settlement made by the underwriters to this Service. I issued a decision that it was fair for the underwriters to apply the average clause based on S's revenue rather than profit in January 2023.

In that decision I set out that the policy defined income as money received by S for services provided, which would be the same as revenue received. And I determined that the schedule was clear that the sum insured was revenue up to £500,000. My final decision on that complaint was therefore that it was fair for the underwriters to apply the average clause based on revenue in the way it did.

S then raised a complaint that the average clause should not have been applied at all. S said that the underwriters would have been aware that the sum insured was less than its revenue and turnover, as its turnover was increasing and was disclosed at the start of the policy. So S says the underwriters should not have provided this policy with this level of cover.

The underwriters said James Hallam asked for standard business interruption cover and the £500,000 sum insured is the standard cover offered but on occasion they might be able to increase the sum insured to a maximum of £1million cover, if they are made aware the standard cover is not sufficient to meet the applicant's needs. However, this would not be for them to assess, even if they'd known that S's turnover was increasing.

The underwriters also said that if it had applied the Insurance Act 2015, they would have been entitled to void the policy, as it would not have provided a policy for the level of cover S says it should have had. However, instead they decided to apply the average clause set out in the business interruption section of cover. I determined that it was fair for the underwriters to apply the average clause based on revenue in the way it had and that it had settled the claim fairly.

S remained unhappy with the settlement amount and raised a complaint about the sale of the policy, as it says it was always advised by James Hallam to insure on a gross profit basis and the sum insured was set accordingly. S says James Hallam failed to advise properly and obtain appropriate cover. S wants James Hallam to compensate it for the value of the claim it was unable to make. S has made a number of points in support of its complaint against James Hallam. I have considered everything it has said but have summarised its main points below:

- In documents and in various meetings and conversations James Hallam advised to insure on gross profits basis.
- James Hallam fundamentally misunderstands the way business interruption claims would be assessed under this policy, as it told S a number of times that cover was on a gross profit basis (rather than income/revenue basis).
- James Hallam failed to properly advise on an adequate sum insured.
- And even if the cover was on a gross profit basis (as it understood it to be) the sum insured would still have been inadequate.
- It failed to consider the declarations S made about turnover when advising on the appropriate sum insured.
- James Hallam had all the financial information about S necessary to advise properly. S provided income figures for S every year which showed significant growth and increases in turnover each year.
- With the right advice cover could have been provided for £1.3 million over a 12-month indemnity period. In which case its claim would have been worth almost £700,000, instead of the £55,000 it received.
- James Hallam must have believed cover was on a gross profit basis, otherwise it could not contemplate setting up a policy with such a low sum insured, given the turnover figures it was aware of.
- And this was S's understanding as well, as a full revenue claim could never be paid.

James Hallam responded to S's complaint by way of a final response letter to S in August 2021. I have summarised the main parts of that letter below:

- It first arranged the insurance for S in 2015. S asked it to provide a quote based on the policy schedule it had with previous underwriters. James Hallam says the schedule showed business interruption cover *"loss of revenue £500,000 and maximum indemnity of 12 months."*
- It asked S to complete a proposal form for its recommended underwriters which asked whether the standard £500,000 sum insured was adequate and S confirmed it was.
- There was an option to ask for a higher amount and a longer indemnity period but S said it was adequate. At the time S's annual turnover was £2.325 million.
- The policy schedule provided to S once the policy was set up, set out clearly the sum insured of £500,000 for 12 months. And at each renewal the turnover was set out and asked S to confirm if the £500,000 was adequate.
- In 2017 the same level of cover was renewed and turnover then was £3.3 million.
- In 2018 the same level of cover was renewed and turnover then was £6.625 million.
- In 2019 the policy was renewed but in accordance with its recommendation was with a different underwriter but again with the same level of business interruption cover.

James Hallam also said that "*during this period we have not at any time indicated to you that your business interruption cover will operate on a Gross Profit basis*" and that it had sold it appropriate cover which S had accepted as adequate for its needs.

After the complaint came to us, James Hallam said that the decisions I had made against the underwriters were incorrect and that the policy was in fact intended to provide cover for loss of gross profit, rather than loss of income/revenue. James Hallam made a number of submissions in support of its position. Again I have considered everything it has said but have summarised the main points below:

- The underwriters based the business interruption cover on gross revenue rather than net revenue which is inappropriate for travel businesses such as S, where turnover will usually be much higher than profit. And it is therefore standard in the industry to provide cover on net retained income not revenue.
- This was a delegated authority scheme managed/owned by another entity. It has been in contact with the entity that owns the scheme and they have confirmed that the intention was the *"policy is to provide cover for Loss of Income being the actual income of the business and not gross turnover".*
- It has forwarded this to the underwriters but they won't discuss it without S's permission.
- The policy wording is unclear on the subject, hence the underwriters' error.
- It also has evidence relating to three other claims covered by the same scheme where the underwriters have settled them on the basis of the *"Loss of Income being the actual income of the business and not the gross turnover."*
- The underwriters clearly have an obligation to treat their customers fairly and applying the average clause in S's case, when it has not done so for other customers, is clearly at odds with its obligations.
- The underwriters misrepresented the position to this Service during consideration of the complaints against them.

- Insurance is a policy of indemnity; allowing a travel agent to place its business interruption cover on a 'gross revenue' basis would result in their profiting from any claim, as their true loss would only be their own margin on the transaction, not the full turnover figure. It would also result in their having to purchase higher levels of cover than would be required.
- It has evidence of many policies being issued under the scheme with disclosed turnover considerably in excess of £1m, and the same "standard" business interruption cover of £500,000.
- The underwriters were clearly aware when issuing the policy that S's turnover was more than £5m. As the underwriters is a specialist in the travel insurance sector it was always its intention that the sum insured would be based on net retained income, rather than revenue.
- In any case, it states that S's loss in this case would have fallen within the existing sum insured. As such, if the ombudsman is minded to dismiss its concerns, the award must be a directional one (*i.e*. that James Hallam should bear any shortfall in cover after the loss has been professionally assessed) and not an immediate financial one.
- It acknowledges that S may have not been indemnified properly but it is not at fault for this and it is this Service's duty to ensure this is put right by the correct party, which is the underwriters and not James Hallam.
- Even if it made the recommendation to increase the sum insured, there is no evidence S would have taken this advice. S did not take its advice to extend the period of indemnity. It may not therefore have taken any advice about the sum insured and agreed to pay the additional premium that would have been required. This needs to be considered and it is not enough to just say it should have made the recommendation and didn't.
- And we also need to consider whether cover of the amount needed by S would have been available. And if so, would it have been with a policy that covered this claim. As it has said most of the policies it provided did not cover Covid-19 claims at all.
- It thinks it is likely there would not have been cover for Covid-19, so S would be in a worse position than it is now.
- There are many uncertainties and it cannot be said that the loss to S is the difference between the value of the claim and the amount the underwriters paid. If any award is made against it, it should include a deduction to account for the possibility that no other underwriters would have provided cover at the level needed; that any alternative policy didn't cover the claim at all and that underwriters may have found any other reason to refuse the claim amount.
- It is also extremely important to bear in mind that few tour operators' policies responded to Covid BI claims.

One of our Investigators looked into the matter. He recommended the complaint be upheld and that James Hallam should pay the shortfall of the claim that was reduced because of the underinsurance, together with interest from the date the underwriters paid the claim to the date of reimbursement. The Investigator also recommended that James Hallam pay S £1,000 compensation for the trouble caused by the mis-sale of the policy.

James Hallam did not accept the Investigator's assessment, so the matter was passed to me.

In the meantime, both parties provided further information and evidence about the alternative policies they say would have been available to S at the relevant time.

James Hallam also asked that the matter be put on hold and the complaints against the underwriters be re-opened and reviewed, because it says the underwriters have not interpreted the policy correctly, have misrepresented the cover and my decisions were incorrect. James Hallam said it was in discussion with the scheme owners and wanted the chance to negotiate on behalf of S with the underwriters, for them to reconsider the claim settlement.

I explained that the complaint against the underwriters cannot be reopened and reviewed by me or anyone else at this Service.

I also considered James Hallam's request to put the matter on hold. In doing so, I took into account that my role is to reach an outcome based on what I think is fair and reasonable in all of the circumstances, quickly and with minimum formality.

I noted that this matter has been ongoing for a long time for S, relating to events in 2020. There have been two final decisions already issued in relation to the underwriters and I have determined that it has settled the claim fairly and reasonably in line with the policy terms in those decisions. I also noted that James Hallam is free to make any representations it wishes to the underwriters. But overall, I did not consider that I could fairly delay this complaint any further.

I therefore issued a provisional decision on this matter in March 2024. I have set out my provisional findings below:

> "**What I've provisionally 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 do appreciate the significant implications of this matter for both parties. Having considered everything carefully, I do not intend to require James Hallam to pay the shortfall of S's claim. I will set out my reasoning below.
>
> The Insurance Conduct of Business Sourcebook says that those selling insurance have a responsibility to provide clear, fair and not misleading information about the cover being provided, in order to put the customer in a position where they can make an informed choice about the insurance they are buying. This includes providing clear information about the main cover and any significant terms. If the seller is also making a recommendation or advising a customer to take a particular policy, then they should specify the customer's demands and needs and propose a policy that's consistent with them as far as is reasonably possible and take reasonable care to ensure the suitability of its advice.
>
> James Hallam first sold the insurance to S in 2015 but I am only considering the sale of the policy that started in 2019 in this decision. However, I have considered the information from before that date.
>
> James Hallam has not disputed that these were advised sales, so it had an obligation to ensure the suitability of its advice.
>
> James Hallam discussed S's insurance needs in 2015. James Hallam says that S asked for cover on the same basis as its existing policy, which provided cover for

various events that might befall a business such as S's, including property damage and business interruption, with loss of revenue cover of £500,000 and a maximum period of indemnity of 12 months.

James Hallam says it therefore recommended a policy with the same level of cover for loss of revenue. It says the proposal form asked:

> *"Is the standard £500,000 sum insured adequate?"*

And S confirmed that it was and also confirmed the 12 month indemnity was also accepted.

James Hallam says the policy documents were issued on this basis and it invited renewal each year thereafter. Its documents made clear that S should let it know of any important changes and S's duty to disclose all material information.

The policy was renewed each year with the same sum insured for business interruption cover. James Hallam says it recommended that S consider a longer indemnity period and the renewal report it issued at each renewal stated, *"Loss of income £500,000 12 months"* and that the statements of facts issued at each renewal stated as follows:

In 2017 – "*Our total gross turnover of the company is £3,300,000. I/We have selected a business interruption figure of £500,000 with an indemnity period of (12 Months)"*

In 2018 – "*Our total gross turnover of the company is £6,250,000. I/We have selected a business interruption figure of £500,000 with an indemnity period of (12 Months)".* James Hallam says that at renewal in 2019, it recommended a different underwriters. It again recommended that S opt for a longer business interruption indemnity period and set out the sum insured of £500,000.

James Hallam says S accepted its recommendation without asking for any amendments. And so, the policy was issued with cover for "*Loss of revenue £500,000".*

James Hallam's final response letter states that "*during this period we have not at any time indicated to you that your business interruption cover will operate on a Gross Profit basis".*

So James Hallam's position at that stage was that it had made sufficiently clear to S that the cover provided was for loss of gross income/gross revenue and not loss of gross profit, and it had never advised that the cover was on a gross profit basis and that the sum insured was the sum that S requested.

If James Hallam understood the policy provided in 2019 to be on a gross revenue basis, then it was still not suitable for S and would mean it had failed to provide suitable advice, as it recommended a sum insured of £500,000 when it was aware that S's revenue was far higher than this.

However, after the complaint was referred to this Service, James Hallam changed its response and said that it thinks the underwriters have misrepresented the cover provided when we dealt with the complaints against the underwriters. And that in fact the policy was based on loss of gross profit, otherwise the cover would never have been adequate for a travel agent, where turnover and gross revenue would always be much higher than its gross profit. I think this is significant change of position.

James Hallam has not provided any explanation as far as I am aware why its stance changed so significantly later and in fact has said more recently that it has been consistent throughout.

S says it was always advised to insure on a gross profits basis by James Hallam and thinks James Hallam always thought it was in fact on a gross profit basis, otherwise it would have queried the sum insured.

I think this is persuasive. I say this also in part because the previous policies provided by James Hallam had been on a gross profits basis, and the 2018 policy defined revenue and income differently.

I considered the interpretation of the policy wording in my decisions against the underwriters. I was satisfied that the policy was sufficiently clear that it was offering business interruption cover on the basis of loss of gross revenue and not loss of gross profit.

James Hallam has asked that my decisions against the underwriters be reviewed. As explained above, this is not possible within our rules. But in any event, I remain of the opinion that the policy terms were sufficiently clear and the underwriters' interpretation of the policy was reasonable, and that James Hallam ought to have interpreted the wording in the same way at the time it was advising S.

Ultimately, the amount that would be paid in respect of a claim would be much the same, as the policy allows the underwriters to make deductions for cost savings. So there is no suggestion, from the underwriters or S, that S would be covered for loss of revenue that would never have been its to keep, which is what James Hallam has suggested would be the case for a policy provided on a gross revenue basis. However, the difference in the basis on which cover is provided is significant in terms of the appropriate sum insured.

Having considered everything, it is my opinion that James Hallam failed to understand at the time the basis of the policy it was recommending to S and therefore failed to provide suitable advice to it. I will explain why.

The quotation provided to James Hallam by the underwriters in September 2019 says:

> *"Business interruption*
>
> *Loss of revenue £500,000*
> *Loss of gross profit NOT INSURED*
>
> *12 months Indemnity Period".*

I do not think there can be any grounds to say this is unclear or creates any ambiguity. James Hallam said in its submissions that the proposal form allowed for gross profit or increased cost of working and it selected gross profit but that is not reflected in the quotation provided by the underwriters and set out above (although it was in the proposal form for the previous underwriters).

The policy wording provided said:

> "*BASIS OF SETTLEMENT*
> *(1) LOSS OF INCOME Loss of Income to the business."*

And it defines "*Income*" as "*Money paid or payable to the Insured for services provided in the course of the Business at the Premises".*

James Hallam recommended the policy with this level of cover to S, stating that it satisfied its insurance needs. S accepted the recommendation and after the quotation was accepted, the underwriters produced the policy schedule for year September 2019 - September 2020, which said there is cover for business interruption as follows:

> *"Loss of revenue £500,000*
> *Additional Increased cost of working £ not insured*
> *Indemnity period 12 months."*

Part of James Hallam's defence to the complaint is that the policy "*schedule and policy use varying terms and are unclear in their intentions*". I think it means the fact that the documents refer to revenue and also income, and it reads income as meaning the retained income – *i.e.* actual profit that S makes. I don't agree but, in any event, even if there was any lack of clarity of the basis of the cover being offered, then as a broker, James Hallam had a duty to clarify anything that was unclear in order to ensure S understood the cover being recommended to it.

It seems to me that the underwriters made sufficiently clear to James Hallam that the cover offered was not on a gross profit basis but a loss of gross revenue basis. And I think all of the above should have been clear to an insurance broker that this was a gross revenue policy and the sum insured should have been set accordingly.

Policy intention

James Hallam also says the underwriters' interpretation of the policy is at odds with usual insurance practice in this market and so it cannot be right that it considers it is on a gross revenue basis. I do not agree with this but it also seems to me that it misses the point that if this policy was unusual or had different terms from the market norm then James Hallam had a responsibility to clarify the terms of the policy it was recommending to S.

As mentioned above, James Hallam also says this can't be the basis of cover, as it would mean S would get cover for loss of revenue that it has no insurable interest in, as it says that the intention of the policy was to cover an insured's financial loss in the event of claim and was not to "*compensate it for the loss of revenue into the business, which would give it full credit for cost of sales, thereby amounting to a windfall."*

James Hallam has sent a copy of an email from the scheme owners, which it says supports its view that the policy was intended to be provided on a gross profit basis. The email says "*it is our view that the intention of the Policy is to provide cover for Loss of Income being the actual income of the business and not gross turnover*".

I think this just confirms that the actual claim would be the same – the actual loss to S. But it doesn't change the fact that this will be calculated starting with the loss of gross revenue and that the sum insured should therefore have been set based on the gross revenue of the business.

James Hallam has also referred to other claims it says were settled by the same

underwriters but on a gross profit, rather than gross revenue basis. I can only consider the circumstances of S's complaint against James Hallam in this decision. I cannot therefore consider the actions of an underwriter, that is not a party to this complaint in relation to policyholders that are not S.

Duty of S to check the cover recommended by James Hallam was suitable

James Hallam also says that it considers Mr S, and S, to be "*sufficiently well informed with adequate experience ability and knowledge to make an informed choice as to whether the proposed cover is sufficient for your needs and requirements."*

Of course there is some responsibility on customers to understand what they are buying. However, those selling insurance have a greater responsibility to give a customer appropriate information about a policy, such that the customer can make an informed decision about the arrangements recommended to them and which might affect their decision to buy the policy. Whether the customer is a commercial business or not, they are entitled to rely on the advice given to them by their broker, as the expert in insurance matters. James Hallam had an obligation to ensure the suitability of its advice and to provide clear, fair and not misleading information. Overall, having considered everything, I think that James Hallam should have identified that the sum insured was not adequate for S.

Alternative policies available

Having concluded that James Hallam failed to recommend a policy with appropriate cover for S, I have to consider what impact, if any this has had on S. Overall, I think James Hallam would have been able to provide a policy with the correct sum insured but I do not think it is likely, on the evidence currently available to me, that it would have offered a policy that would have provided a claim payment to S at all. I will explain why.

James Hallam says that even if it had recommended a higher sum insured, S might not have accepted its advice. It points to the fact that it included a recommendation in the renewal packs that it extend the period of indemnity from 12 months to 36 months and S did not ask it to do that.

S says that if it had been given strong, clear advice that it needed a higher sum insured, and a longer indemnity period, it would have done so.

James Hallam presented the policy with the sum insured of £500,000 and 12 month indemnity period, and within that a written recommendation to consider a longer indemnity period. But if it had advised properly, it seems to me that it would not have offered this policy with a sum insured of £500,000 at all. It would have recommended a policy with an appropriate sum insured. S had disclosed its turnover reasonably accurately at each renewal, so it had all the necessary information. So if James Hallam had recommended a policy with the appropriate level of cover, as I consider it should have done, there is no reason to think that S would not have accepted its recommendation. (In saying this, I have also borne in mind evidence provided by S that shows that the difference in premium for a higher business interruption sum insured was likely to be modest compared to the total premium.) And I do not consider it can be said that S would likely still have gone ahead with the policy that was recommended because it should not have been offered at all in my opinion.

However, I have to consider what would have happened, if James Hallam had offered a suitable alternative policy at the relevant time and this includes the cover provided by the policy not just the sum insured.

It seems the underwriters would only have offered cover up to £1m sum insured. If James Hallam had recommended that level of cover, S would have still been underinsured but would have received more than it did from the underwriters. However, as this would still not have been suitable for S, I do not think this policy should have been recommended to S at the time either.

S has also provided evidence of other policies with similar wording that it says would have provided cover for Covid-19 related claims for the full amount of its claim. S says its current policy has a sum insured of £2m and is with an underwriters that provided policies in 2019 with disease cover that would have covered its Covid-19 related claim.

James Hallam does not accept that these are proof that S could have got that level of cover in 2019, or that would have paid any amount in the event of its claims. James Hallam stresses how few policies did pay out for Covid-19 related claims and so S is lucky to have received any settlement of its losses of that period. And it says S's claim was met as the underwriters provided cover for disease within 25 mile radius of the business premises, whereas the underwriters S refers to had more limited wording, which covered disease at the premises only. Given this, James Hallam says it is likely that policy would not have responded to the claim at all. I will address this further below.

Another example policy S provided, is a policy placed by James Hallam in February 2020 and contains travel revenue cover of £5,000,000 over a period of 24 months. However, James Hallam says that this policyholder had £35m turnover, and had a £5m sum insured over 24 months, so £2.5m per year. It says this shows that this policy was clearly arranged on the basis of the policyholder's net income, which supports its argument that this was always the intention of the policy. And it says that this is not evidence that a policy offering cover on turnover of £6m (as S had) would have been available to it in 2019.

I agree with James Hallam that this policy appears to have been set up as a gross profits policy. S says this is the same policy wording that James Hallam arranged for it up until 2019 and on that wording the sum insured of £500,000 would have been adequate. But James Hallam recommended that S change underwriters in 2019 and recommended a policy that was instead a gross revenue policy and did not change the sum insured accordingly. I agree with this.

I have considered everything provided by both parties. Having done so, I think there is sufficient evidence that appropriate level of cover would have been available for S, either on a gross profits or a gross revenue basis. I also think it is most likely that James Hallam would have recommended that S renew the policy with the same underwriter as it had in 2018.

There is no evidence as far as I am aware that the policy was not suitable for S for any other reason and it seems the recommendation to change provider was due to cost.

I have to now consider it this whether that policy would have met S's claim(s) as a result of Covid-19. While this cannot be determined with absolute certainty now, I

have to consider what is most likely to have happened if this policy had been in place at the relevant time.

The previous policy did provide an extension to the core business interruption cover, which included the following cover for business interruption losses as a consequence of:

> "*closure or restrictions placed on the Premises on the advice or with the approval of the Medical Officer of Health of the Public Authority as a result of a notifiable human disease manifesting itself at the Premises".*

S says it did have a staff member with Covid-19 in 2020. However, in order to satisfy this policy term, S would have to establish that:

1.There was a manifestation of the disease, which we consider means a diagnosis of or display of symptoms of the notifiable disease, at the business premises; and
2. that this manifestation was the cause (or part of the cause) of the closure of the business premises or restrictions placed on the business premises.

In addition, this would need to be established for each of the three indemnity periods S claimed for.

While S's business was undoubtedly impacted by Covid-19, travel agents were not required to close their premises in the March 2020 restrictions imposed by the Government. As far as I am aware, they were only included in the list of businesses required to close as part of the restrictions imposed on 6 January 2021. And while there were restrictions on people travelling, there were no other restrictions, as far as I am aware, imposed on S's premises.

Obviously, S's business was impacted by the pandemic but the policy required the restrictions to be placed on the premises themselves.

S can provide further evidence on this point in response to my provisional decision but currently, I am not persuaded that it is more likely than not that James Hallam's mis-sale in 2019 has resulted in a financial loss to S. Instead, it seems to me that by selling a policy that it should not have done, S has benefited by having a claim met under a wider disease cover terms that would likely not have been met under the policy that was more suitable for it at the time it was sold.

Compensation

I can only make an award that recognises the impact on the eligible complainant. In this instance, the eligible complainant is a limited company, rather than any individual. A limited company cannot suffer distress or frustration and so I can't make an award in this category. I can make an award for inconvenience.

Although I do not think there is enough evidence to conclude that S has suffered a financial loss as a result of the mis-sale of the policy, it has lost the opportunity to present a claim for the full amount of its business interruptions losses and have that tested. And I am satisfied that the mis-sale has caused S significant inconvenience.

Having considered all the circumstances, I think the compensation recommended by the Investigator is reasonable and that James Hallam should pay S the sum of £1,000 compensation for the trouble caused by the mis-sale of the policy."

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

S's response to my provisional decision

S does not accept my provisional decision and has also asked that I hold making a final determination of the complaint. S has made a number of comments. I have considered everything it has said but have summarised the main points below:

- It is disappointed that while I have acknowledged James Hallam's negligence in setting up the policy, I have not held it responsible for the huge shortfall in the claim settlement it has received.
- It is now clear that James Hallam also believed the cover was on the basis of gross profit, or retained income. The underwriters did not agree and I supported the underwriters on this point in my previous decision. However, my decision against the underwriters is incorrect and while it cannot be reopened, James Hallam has evidence that the underwriters has settled other claims under the exact same policy wording on a gross profit basis and that the scheme owners support this interpretation of the policy provisions. The decision must therefore be paused, so that this can be explored.
- James Hallam admits that it believed cover was arranged on a gross profit basis. Given this, it was appropriate for James Hallam to have recommended this policy, which was "*a specially designed niche scheme for the Travel sector that offered excellent cover and significant cost savings*". However, if it had advised correctly, then the sum insured would have been £1 million, resulting in it receiving a claim payment of around double what it did.
- However, the adequacy of the sum insured can only be resolved properly once it knows if the underwriters are prepared to look at the claim again regarding basis of cover. Once this is explored, the complaint against James Hallam would also become much clearer.
- S's accounts for the period ending 31 March 2019 show why it thought £500,000 sum insured was adequate on a gross profit or net retained income basis in September 2019. With appropriate advice from James Hallam, taking into account growth trends (which James Hallam was aware of), it would have selected sum insured of between £900,000 and £1,000,000, which would have been available on the new scheme.
- Given that the same policy would have been available with up to £1 million worth of cover, the policy would still have been appropriate, and it is not necessary or relevant to look at how the previous policy might have responded.
- Having said that, while claims under the previous policy wording may have been difficult to establish, with suitable evidence of an occurrence of Covid-19 happening before lockdown, it might have been able to get a claim paid for perhaps six months.
- It was therefore appropriate that James Hallam should have recommended, and S accept, the new policy in view of the cost savings available but with the higher sum insured.
- The issue of the longer indemnity period is a red herring. S chose to insure 12 months' gross profit and that cover should have been arranged properly. 12 months was adequate for S.

S has also referred to a recent court case: *Infinity Alliance Ltd v Heath Crawford Ltd* [2023] in which a broker was found to have failed to provide appropriate advice about how to set an adequate sum insured to a commercial customer and was ordered to pay it the amount by which its claim was reduced for underinsurance.

I agreed to an extension of time for S to have discussions with the underwriters. In summary it has told us:

- The underwriters treated S as a tour operator (which would buy accommodation and flights and then sell them on) rather than a travel agent (which commits to pay only when the holiday is sold). It was unaware of this and James Hallam never discussed the type of business when recommending the policy.
- In 2019, S was part tour operator and part travel agent. The underwriters have now agreed to consider the whole revenue from the tour operator sales (*i.e*. gross revenue) but only the retained portion of the revenue after paying the tour operator for travel agent sales (*i.e*. net revenue). James Hallam should have been aware of the split and advised accordingly.
- Based on this new understanding, the underwriters have increased their offer of settlement from £55,149 to £69,666. This is entirely the result of recalculating the average for the underinsurance.
- It says the increase should be higher than this and it is still negotiating the actual split of the business.
- The sum insured under this policy could have been £1 million and there is no reason to believe this cover would not have been provided if it had been requested on S's behalf by James Hallam.
- This level of cover was only not requested due to James Hallam's negligence.
- The underwriters have confirmed that the sum S would have received in settlement of the claim would have been £139.332 if the sum insured had been £1 million.
- So it is now beyond doubt that James Hallam should, as a minimum, be instructed to pay the difference between £139,332 and the £69,666 it has agreed to pay in settlement of the claim.
- This would put S back in the position it would have been in if James Hallam had correctly provided the same policy but with a sum insured as £1million. Interest should be added to this payment.
- However, James Hallam should pay the difference between the full value of the loss claim (£340,418) and the claim settlement received (£69,666), as it has shown on the balance of probabilities that there were other policies available that would have provided an adequate sum insured and met this claim.
- This is supported by the underwriters in an email dated 27 September 2024, which states: "*the shortfall due to the average is GBP 270,752. This is the figure I believe the FOS should consider as an award/compensation as part of the complaint against the client's broker (not just doubling the award we have already paid.)."*
- James Hallam should also pay interest on the additional £14,517 the underwriters have recently paid as the reason for the delay in payment of this amount was that James Hallam failed to understand and failed to tell the underwriters the split in the business.
- I should increase the compensation award to an amount more in keeping with the havoc that its actions have inflicted on S.
- S also wants the opportunity to submit representations that there were other policies available that would also have covered the Covid-19 claim and that would have given enough coverage should it be shown that £1 million was insufficient.

James Hallam's response to my provisional decision

James Hallam says that S is seeking to redefine the scope of its complaint by asserting that it failed to recognise the business activity split. This is in any event, not the case. The split in activity was clearly noted on the "*Market Presentation*" submission to the underwriters in 2019, which said:

"Occupation: Tour Operator&/or Travel Agent …

Business Activity

Tour operating principal activity (gross turnover - this year)	*(GBP)*	*977,360*
Tour operating principal activity (gross turnover - next year)	*(GBP)*	*1,250,000*
Travel agency (gross turnover - this year)	*(GBP)*	*5,913,546*
Travel agency (gross turnover - next year)	*(GBP)*	*6,050,000"*

It says this final determination should be made on the basis of the scope of the original complaint and representations made by the parties in respect of the initial specific complaint.

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 have considered everything S and James Hallam have provided in response to my provisional decision including the case law referred to. S wanted me to wait until it had a final offer from the underwriters but I do not think any increased offer is likely to make a difference to the outcome of the complaint (I will explain why below) and so in fairness to both parties I think it is appropriate to proceed with my final determination of the complaint.

Despite my sympathy for the impact this matter has had on S, I am not persuaded to change my provisional findings. I will explain why below.

Scope of the complaint

James Hallam says the scope of the complaint is being changed. I disagree, rather S is seeking to provide new evidence that goes towards appropriate redress in support of its complaint that the policy was mis-sold. James Hallam is also concerned it has not been a party to the discussions between S and the underwriters. While I understand it wanted to be involved, there is no obligation on S to consent to this.

Was the policy mis-sold?

I provisionally concluded that I thought it likely that James Hallam believed the policy it recommended to S in September 2019 provided business interruption cover on a gross profit basis. I also set out that I was satisfied the underwriters had made it sufficiently clear to James Hallam that it was offering business interruption cover on the basis of loss of gross revenue and not loss of gross profit. This conclusion was based on the policy wording as well as the quotation provided by the underwriters to James Hallam which included the following wording:

"*Loss of revenue £500,000*
Loss of gross profit NOT INSURED"

James Hallam has not responded to this or the fact it changed its position on the basis of the cover provided. Given this, I see no reason to change my provisional findings in this regard and remain of the opinion that James Hallam failed to understand at the time the basis of the policy it was recommending to S and therefore failed to provide suitable advice to it.

Based on the revised settlement from the underwriter would the same policy with a higher sum insured have been suitable?

As set out in my provisional decision, having concluded that James Hallam failed to recommend a policy with appropriate cover for S, I have to consider what impact, if any this has had on S.

S has provided copies of some of the correspondence it has had with the underwriters.

In response to S's initial request that it reconsider the claim settlement the underwriters said:

> *"the claim submitted by* … [S] *was reviewed by experienced forensic accountants. They ascertained from* … [S's] *financial records that the business clearly operates as a tour operator/vendor selling holidays in its own right rather than simply as a travel agent. It was therefore right that the business should have insured its full gross revenue (ie the full amount expected to be received from customers) as income rather than only the difference between customer payments and the cost of purchasing the holidays."*

S then submitted evidence to the underwriters that part of the business was a travel agent and part a tour operator. Following that evidence, the underwriters agreed to reconsider the claim settlement. Having reconsidered the claim, the underwriters wrote to S in June 2024 to say:

> *"in 2019* … [S] *received sales as a principal of £2,715,522, and gross sales as an agent of £1,294,159 (equivalent to £129,416 net). The total sales in 2019 would therefore be £2,844,938. This is the amount that we would expect to see recorded as revenue in the 2019 annual financial statements. However, the annual financial statements show revenue of £4,145,443. Sales of £2,844,938 would equate to adequacy of sums insured of 17.6%.*
>
> *Our thoughts at this stage are that there is enough to show that some of the revenue was agency sales and that the "true" measure of annual revenue is likely a bit lower than that we had previously used. It is unfortunate that the annual financial statements are likely incorrectly prepared, that (almost) all of …* [S's] *agency sales are through a physical premises with the website selling (almost) only packages with …* [S] *as principal, and that* … [S's] *sales booking systems have no way of distinguishing between the two types of sales.*
>
> *We can also partially understand how* …[S] *has got themselves into their current position of being so underinsured, given the explanation below that they were an agency until around 2018 and have since slowly morphed into delivering more principal sales. Unfortunately, in doing so, the nature of the risk to them (and in turn, to an insurer) also changes.*
>
> *If we were to accept a reasonable figure of 10% for the level of commission received on agency sales, the loss payable after underinsurance would increase by £14,517 to £69,666*."

This letter confirms that the underwriters accepted that the underinsurance was not as much as originally determined. Instead of cover being for 13.91% of the correct sum insured (which is what the underwriters said initially), as of June 2024, it thinks it is 17.6% (based on

total revenue of £2,844.938, against the sum insured figure of £500,000). This means the underwriters still consider that S was underinsured by 82.4%.

S says this is still not correct and the underwriters have not calculated the split of the business correctly. S says there should still be a further additional settlement of around double what has been recently offered (which would be around £28,800 more).

However, this would still leave a significant underinsurance. In its earlier submissions S said the proper sum insured should have been £1.3million. Based on S's recent submissions (that the settlement should have been increased by around £28,800), I have worked out S would still have been underinsured by around 75%.

I have not seen any persuasive evidence that the correct sum insured would have been £1 million (or close to it) which is the maximum the underwriters of this policy would have offered cover for.

It is for this reason I think it appropriate to go ahead with this final determination, as even if the underwriters increase the settlement to the amount requested by S, it would still mean it was underinsured.

S says it is beyond reasonable doubt that James Hallam is responsible for the shortfall in the claim settlement between what S has now received from the underwriters and the amount it would have received if cover had been provided for £1 million.

However, as set out in my provisional decision, as far as reasonably possible, I have to restore S to the position it should have been in had James Hallam provided correct advice in 2019. If it had recommended this policy, S would still have been underinsured even with £1 million sum insured. Therefore, while the policy cover itself may have been suitable, the level of cover would still not have been suitable for S in September 2019. I therefore remain of the opinion that, even with £1 million sum insured, this policy should *not* have been recommended to S at that time as it would still have been unsuitable for its insurance needs.

I am not persuaded by an argument that a policy ought to have been recommended when it was not suitable, even though – with the benefit of hindsight – it would have been more beneficial than the policy that was sold. S ought to have been sold a policy that met its needs and, ultimately, this policy would not have been suitable. So, I cannot fairly and reasonably conclude that it ought to have been sold to S.

It follows that I do not consider it correct that James Hallam should pay the shortfall as a result of underinsurance on the basis S could have had cover with the same underwriters up to £1 million.

Alternative policies available

In my provisional decision I considered what other alternative policies, with adequate sums insured were likely to be available to S in September 2019. Given that S had previously held cover with an underwriter that would have offered cover at the level S needed, I thought it most likely that James Hallam would have recommended S renew with the same underwriters it had in 2018. No other evidence has been provided about any other policies that James Hallam would likely have been able to offer at that time.

S has asked that it be allowed to submit representations that there were other policies available on similar wordings that would have given enough cover but it has not done so. S has had sufficient opportunity to provide any evidence it wishes.

In any event, even if it can show there were other policies that would have been suitable and would have had the same disease cover as the policy it was sold by James Hallam in 2019, I have to consider what is most likely. It seems to me most likely that James Hallam would have recommended S continue with the same policy it previously held. At the time of this sale, I do not think the disease cover would have been a particular concern, so do not think there would have been any reason to look for other cover. The reason for changing underwriters in 2019 was, I understand, due to cost.

The policy S had in 2018 provided cover for *"closure or restrictions placed on the premises as a result of a notifiable human disease manifesting itself at the premises".*

S says that "*with suitable evidence*" it might have been able to claim successfully under this policy for around six months of business interruption as a result of the Covid-19 pandemic.

However, the policy required any restrictions or closure as a result of Covid-19 to be placed on S's premises. As set out in my provisional decision, while S's business was undoubtedly impacted by Covid-19, and there were restrictions on people travelling, travel agents were not required to close their premises in the March 2020 restrictions imposed by the Government. As far as I am aware, they were only included in the list of businesses required to close as part of the restrictions imposed on 6 January 2021 and there were no restrictions, as far as I am aware, imposed on S's premises. So, it still seems to me unlikely any claim for business interruption as a result of Covid-19 would not have been under this policy.

I therefore remain of the opinion that James Hallam's mis-sale in 2019 has not resulted in a financial loss to S. Instead, it seems to me that by selling a policy that it should not have done, S has benefited by having a claim met under a wider disease cover terms that would likely not have been met under the policy that was more suitable for it at the time it was sold.

This is different from the case of *Infinity Alliance Ltd v Heath Crawford Ltd* [2023], as the court found in that case that the insured could have been fully insured but for the incorrect advice about the sum insured. So I do not think that case directly impacts the outcome of this complaint.

Compensation and interest

I have considered what S has said about the reason for the delay in the additional payment of £14,517 recently agreed by the underwriters.

S has provided the correspondence it has had with the underwriters about this additional payment. An email dated 28 August 2024 from the underwriters says they were refusing to add interest on the additional payment of £14,517 because the annual financial statements initially provided by S were "*incorrectly prepared with regard to agency sales*" and it has only recently received information that has led to the reassessment of the claim and the increase in settlement.

I also note the split of the business was provided by James Hallam to the underwriters in the market presentation submission in 2019.

I am not therefore persuaded that James Hallam is responsible for the delay in the payment of this part of the claim settlement and do not therefore agree that it should pay interest on it.

I have also considered what S has said about the proposed award of compensation. As explained in my provisional decision, I cannot award a limited company compensation for distress. The compensation is for the inconvenience to the business. I remain of the opinion

that the sum of £1,000 is appropriate compensation for the trouble caused by the mis-sale of the policy.

My final decision

I uphold this complaint against James Hallam Limited and require it to pay S compensation for the inconvenience this mis-sale has caused of £1,000.

Under the rules of the Financial Ombudsman Service, I'm required to ask S to accept or reject my decision before 4 November 2024.

Harriet McCarthy
Ombudsman