

The complaint

A limited company, that I will refer to as L, complains about the claim decision made by Covea Insurance plc in relation to a business interruption insurance claim made in relation to the COVID-19 pandemic.

What happened

The following is intended only as a brief summary of events. Additionally, whilst other parties have been involved on both sides, I have just referred to L and Covea for the sake of simplicity.

L operates, as far as is relevant, as a clothing manufacturer and supplier. L held a commercial insurance policy, underwritten in part by Covea. The events subject to the complaint span two policy periods; from 17 March 2019 to 16 March 2020, and 17 March 2020 to 16 March 2021. Whilst there are two potentially relevant policies, the terms are materially the same and, in light of the circumstances, I consider it appropriate to consider the complaint(s) as one.

L has said that in March 2020 it began to be impacted by the COVID-19 pandemic. And a claim for its losses was made. The claim was considered under the following clause:

“The cover under this section is extended to include (following loss, damage, or destruction to items specified in the schedule):

...

4. Infectious Disease, Murder or Suicide, Food or Drink or Poisoning

...

(c) any occurrence of a Notifiable Disease within a radius of one mile of the Premises...”

It is not disputed that COVID-19 is a Notifiable Disease for the purposes of the policy. Nor is it disputed that there were occurrences of this disease within the relevant radius.

The policy defined the indemnity period for a claim as:

“the period beginning with the occurrence of the damage and ending not later than the maximum indemnity period thereafter during which the results of the business shall be affected in consequence of such damage”

The maximum indemnity period as set out in the policy schedule(s) was 12 months.

Ultimately, Covea accepted the claim, but calculated the settlement based on a period of interruption from 23 March 2020 to March 2021. The exact end date for Covea’s calculation is not clear from the information provided. It isn’t clear whether Covea’s settlement was for an entire 12-month period from this date or until 16 March 2021, the end of the policy term.

Regardless, L complained about this. It said that the claim should have commenced on 9 March 2020, which is when it says it first suffered a loss as a result of an occurrence of

COVID-19 within the radius of its premises. And that the indemnity period for this claim should run until 8 March 2021. At which point a new 12-month claim period should start.

When Covea did not change its stance, L referred its complaint to the Financial Ombudsman Service. However, our Investigator did not recommend it be upheld. He didn't fully agree with either parties' argument. He said that L had not demonstrated that its losses had started on 9 March 2020. He also said that even if this is when L's losses had started, this did not mean it should be entitled to two claims each with a 12-month indemnity period.

The Investigator set out some of the legal background to his reasoning, including references to *Stonegate Pub Company Ltd v MS Amlin Corporate Member Ltd and others* [2022] EWHC 2548 (Comm) ("Stonegate"), and *Greggs PLC v Zurich Insurance PLC* [2022] EWHC 2545 (Comm) ("Greggs"). And explained that he considered there were actually a number of potential claim events throughout the period of insurance, but that these would not necessarily each lead to a claim for 12 months of loss.

The Investigator said that the claim(s) ought to have been assessed on the basis that any losses from, for example, July 2020 were not attributable to an occurrence of COVID-19 in March 2020, as this was the period of national lockdown caused by the March occurrence. And so, when these restrictions were removed in July 2020, this March occurrence was no longer the cause of any continued loss. And that this was the case regardless of the fact the policy did not require any restrictions or closure of the premises.

So, the Investigator concluded that although Covea may have assessed the claim in a different manner, he did not think this had caused any detriment to L. And he did not recommend the complaint be upheld.

L disagreed with this outcome. It said that each occurrence of COVID-19 was capable of leading to a new claim. So, whilst it accepted that each of these claims may not last for a full 12-month period, L considered that Covea should cover L's losses up until at least the middle of 2021. L also said that its losses did commence on 9 March 2020.

As our Investigator was unable to resolve the complaint, it has been passed to me for a decision. I issued my provisional decision on 8 December 2023. The following is an extract from that decision:

"In an attempt to simplify matters, I have set out some of the basic considerations I have applied to this complaint. These are based in part on the legal background – including *Greggs*, *Stonegate*, and the FCA test case¹ – and the facts of this case.

- The policy requires there to have been an occurrence of COVID-19 with 1 mile of the insured premises that has led to an interruption (or interference) resulting in loss.
- Each and every occurrence of COVID-19 within the UK up until the decision was a potentially equal, proximate cause of the decision to introduce the lockdown one restrictions. But it was only by reason of there being very many occurrences, that they had the relevant causative effect.
- The policy does not indicate a policyholder is unable to make more than one claim under any area of cover within the period of insurance.

¹ *The Financial Conduct Authority & Ors v Arch Insurance (UK) Ltd & Ors* [2021] UKSC 1 and the related judgment in the court at first instance

- The policy does not require there to have been any government (or public authority, etc.) action, such as requiring the premises to close. As such, an interruption could be the result of changes in public behaviour or some other impact of an occurrence of COVID-19.
- The judgments in Stonegate and Greggs considered policies that did require government action/closure. However, I consider the reasoning in these judgments is still useful in considering the current situation.
- These essentially said that, in respect of the cases being considered, it was possible for more than one claim to be made in relation to the circumstances surrounding the pandemic.
- But that this was only possible where 'new' occurrences had led to a new impact. The judge did not consider the renewal or lessening of existing restrictions would be a new claim event. I consider this applies to public behaviour (or any other factor that caused an interruption) as much as it does to government action.
- Claims are only valid where the proximate cause of loss is the insured event.
- An occurrence of COVID-19 many months ago is unlikely to be the proximate cause of new government action/public behaviour. As the Investigator has said, the proximate cause of the decision to introduce the second national lockdown was occurrences in and around October 2020, rather than those in March 2020. Public behaviour would be impacted in a similar way.

Both parties to the complaint (or at least their representatives) are well versed in the relevant legal background, so I would hope that none of these points are seen as overly controversial. And I would stress that, with this in mind, I have summarised them rather than expanded on them in detail.

When applying these points to L's complaint, I consider that there is the potential that there are actually multiple claim periods that relate to the timeframe. Each of these has the potential of lasting for 12 months. But they would in actuality only last for as long as the relevant occurrence of COVID-19 that led to the claim is the proximate cause of loss.

Where there is a shorter indemnity period, this is more of an issue. For example, in July 2020 when the first national lockdown ended, a policy with only a three-month indemnity period would then need a new claim event – i.e. a new impact from a new occurrence of COVID-19. In the absence of government action, this can be quite difficult to demonstrate. It would need to be shown that public behaviour had been altered by occurrences of COVID-19 after the end of the lockdown.

Where, as is the case with L's policy, there is a 12-month indemnity period, the situation is simplified. And this is even more so given the location of L's premises. Ultimately, it is likely L's business was being impacted by an occurrence of COVID-19 throughout the period from March 2020 until beyond 16 March 2021. And, from a practical sense it does not matter whether this is a new occurrence or the continuing impact of a previous one.

So, assuming there were occurrences within the 1-mile radius of L's premises, as soon as these caused an interruption or interference with L's business there is a valid claim. And this claim/these claims would continue for at least the duration of the policy.

The remaining questions are whether the first claim should start prior to 23 March 2020. And how long after the end of the second policy should the indemnity period continue.

In terms of the first of these, it is for L as the claimant to evidence its claim and losses. L has referred to figures that show that it had losses in March 2020 compared with March 2019. But these do not show when in March these losses occurred – nor for what reason. It is fairly evident that, even for a business that was not itself required to close, there would be a downturn in business caused by the national lockdown. So, I can understand why, in the absence of anything more persuasive, Covea has based the claim as starting from 23 March 2020. And I have not seen anything that persuades me this was unfair or unreasonable.

Calculating the end date of the ‘final claim’ is not entirely straightforward. L’s losses at this time would, in my opinion, most likely have been the result of the third national lockdown which started in early January 2021. The indemnity period would then continue for as long as this was the proximate cause of L’s losses. This is based on an occurrence of COVID-19 in late-December 2020/early-January 2021 having (in part) led to the decision to introduce this lockdown, and so this occurrence being the proximate cause of the loss for as long as this lockdown was in effect.

But the third lockdown did not come to an abrupt end. There was a “roadmap” which set out how this process would take place. The reduction of restrictions would not be a new claim event. So, the relevant indemnity period for this particular claim would run from 6 January 2021 until the relevant occurrence that had led to this decision was no longer the proximate cause of L’s losses.

Any other occurrence either before or after this date, but prior to the end of the policy term, that had led to a different interruption may be a separate claim event. And this has the potential for a claim lasting longer than the third lockdown. But such an occurrence would need to be the proximate cause of loss.

I do not think it likely that L’s claim should last until as late as 19 July 2021, but it is clear that after this point the majority of legal limits on people and businesses had been removed. And so, whilst there may be issues with public behaviour caused by the continued prevalence of occurrences of COVID-19, any loss connected to this behaviour is more likely to have been proximately caused by occurrences around that time – i.e. after the end of the policy term.

Exactly when this final indemnity period should end is a question of fact that needs to be demonstrated based on the circumstances of L’s claim. It will need to take into account the reduction of the restrictions relating to the third lockdown, and the impact these reductions had on L’s business. When the remaining restrictions were no longer the proximate cause of any ongoing loss, is when the indemnity period ends. Ultimately, Covea will need to make this assessment, taking into account the points above.”

I invited both parties to respond with any additional comments or evidence. L, in part, request that the final decision established an end date for the final permissible claim, and said that the most obvious one would be the end date of the ‘roadmap’ in July 2021. Covea confirmed receipt of the provisional decision, but has not provided anything further.

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.

Given neither party has provided anything further to either disagree with or change my provisional findings in relation to the majority of this complaint, I have come to the same decision as I have previously, for the reasons set out above.

L did request that I confirm what the end date of the final claim should be. I agree that it would be helpful if this whole matter could be resolved with finality as part of this complaint. However, I consider that Covea will need to be given the appropriate opportunity to consider the claim in the first instance, taking into account the points above. Necessary evidence and information is not available to me to make a finding on when this claim should end. And it is not the role of the Ombudsman Service to act as claims handlers.

L has said that, although they had been lessened over time, restrictions introduced as part of the third lockdown still impacted its business until July 2021. This is likely true. However, the question is whether these restrictions were the proximate cause of loss up until this point. This may be the case, or it may be that other factors – which were the result of occurrences of COVID-19 after the end of the policy term – became the proximate cause of these losses prior to this. Because of the nature of L's business, it is not clear to me based on the available evidence when this would be.

That said, I would hope that both parties are able to approach the resolution of this in a pragmatic manner. Any disagreement might necessitate a further complaint, which would be best avoided.

Putting things right

Covea Insurance plc should reassess L's claim(s) taking into account the points above.

My final decision

My final decision is that I uphold this complaint. Covea Insurance plc should put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask L to accept or reject my decision before 5 February 2024.

Sam Thomas
Ombudsman