

The complaint

A company I shall refer to as T complains about the decision of HDI Global SE to decline its business interruption insurance claim, made as a result of the COVID-19 pandemic.

What happened

The following is intended only as a brief summary of the key events. Additionally, whilst other parties have been, and remain, involved in the correspondence and process, for the sake of simplicity I have just referred to T and HDI.

T operates as a restaurant and held a commercial insurance policy underwritten, as far as is relevant, by HDI. The policy provided cover for a number of areas of risk, including business interruption. In September 2020, T made a claim on the policy for losses caused by the pandemic. It said that it had experienced occurrences of COVID-19 on its premises prior to the introduction of the government-imposed restrictions in March 2020. T said that it had actually closed as a restaurant prior to the start of the lockdown period these restrictions led to, only offering a take-away service.

HDI declined the claim. It said that limited cover might be available if T could provide evidence to demonstrate that there had been an occurrence of COVID-19 at the premises, and that this specific occurrence had led to a public authority imposing restrictions on T. HDI did not consider that the nationwide restrictions were caused by any one occurrence. HDI did provide a final response letter to a complaint at this point.

More than a year later, T contacted HDI again to pursue matters. HDI agreed to consider the situation further and also provided its consent to the Ombudsman Service considering any complaint that was referred to us even though the timeframe for doing so may have expired. T provided some further evidence, in the form of two witness statements, to show that there had been at least one occurrence at the premises in March 2020. However, HDI was not persuaded by this evidence, nor did it alter its position on whether such an occurrence was the cause of the national lockdown.

T referred its complaint to the Ombudsman Service. However, our Investigator was not persuaded that the evidence available demonstrated it was more likely than not that there had been an occurrence of COVID-19 at the premises prior to the Government's decision to introduce the relevant restrictions.

As T remained unsatisfied, its complaint has been passed to me for a decision.

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.

Having done so, whilst I am sorry to hear about the considerable financial impact COVID-19 restrictions have had on T, I won't be upholding its complaint. I'll explain why.

Firstly, I will just confirm that whilst this complaint may have been referred to the Ombudsman Service more than six months after a final response was issued, HDI has consented to us considering the complaint. So I consider this complaint is in our jurisdiction and I am able to come a finding on its merits.

The type of cover it's looking to claim under is business interruption insurance. There are a range of business interruption insurance policies on the market covering different risks. For example, some only provide cover for basic things such as fire or flood, whilst others provide cover in more circumstances either as part of the policy or as optional add-ons. The starting point is to consider the specific policy T took out.

I have considered the whole policy, but have focussed this decision on what appears to be generally accepted as the clause most likely to provide cover in the circumstances. This says cover is provided for losses cause by:

“closure or restrictions placed on the Premises on the advice of or with the approval of the Medical Officer of Health for the Public Authority as a result of a Notifiable Human Disease occurring at the Premises”

Several of the capitalised terms in this clause have specific definitions within the policy. It is though enough for the purposes of this decision to confirm that COVID-19 is a Notifiable Human Disease. And that if this occurred at T's address prior to and causing the Government decision to introduce the national lockdown, the policy would cover T's losses.

I note HDI's comments about whether an occurrence at T's premises would be a cause of the government-imposed restrictions. The Ombudsman Service has previously issued decisions indicating that such a causation argument in T's case would likely be successful. HDI is correct in that each decision is separate and does not set legal precedent. However, I will take this opportunity to refer HDI to the rules and guidance in the FCA Handbook concerning complaint handling, including DISP 1.3.2A(2) G and 1.4.2(4) G. I would also point HDI in the direction of the High Court judgment in *London International Exhibition Centre PLC v Royal & Sun Alliance Insurance PLC and others* [2023] EWHC 1481 (Comm) which it may wish to consider in relation to its general approach.

Regardless, before it is necessary to consider issues of causation, it must first be demonstrated that there was most likely an occurrence of COVID-19 at the premises prior to the decision to introduce the restrictions.

The evidence provided by T is limited. It is common knowledge that testing for COVID-19 in March 2020 was scarce, so it is not unexpected that there will be a lack of a positive test result. A more pragmatic approach needs to be taken. However, the evidence provided essentially consists of two almost identical statements from employees of T, signed in March 2022. These are not supported by any contemporaneous evidence.

The statements say that in mid-March 2020 the individuals suffered a very high temperature and persistent cough. They say that T's director was also ill with the same symptoms. And that, as a result, these individuals stopped working and the premises closed other than for one day providing takeaway only.

T has also said that two other employees were also ill with the same symptoms. And that this and the fact they worked in close proximity to each other is significant because of the contagious nature of COVID-19. T has also said it can evidence that it closed prior to the national lockdown.

The statements were signed a long time after the events in question and, given the family nature of this business, by persons likely to have an interest in this claim. Additionally, they

are almost identical, which suggests they are not the individuals' own words. These points act to limit the amount of weight that can be placed on this evidence. That said, I note T's comments about HDI's initial decline meaning the statements were provided at a late date, and I have no specific reason to doubt the content of these statements.

However, even accepting that they are accurate representations of these individuals' understanding of the events at the time, they are not overly persuasive that these individuals had COVID-19. High temperatures, coughs, and also the spreading of an infection between people working closely together are not unique to COVID-19. Many other illnesses were also present in the population in March 2020, such as colds and flus, which may have caused similar symptoms. These may also spread rapidly through a group that have close interactions over a prolonged period. And published data suggests that many of those who thought that they had COVID-19 and self-isolated in fact did not have this illness.

Given it seems T closed the majority of its operations before it was legally required to, I am persuaded that these individuals most likely experienced an illness. But the government-imposed restrictions that led to T being closed were introduced as a result of COVID-19. So, it is the occurrence of this disease at T's premises that needs to be demonstrated. Based on the evidence provided, I am not persuaded that it was most likely COVID-19, rather than some other illness, that occurred at T's premises. It follows that I am satisfied HDI's decision to decline the claim was in line with the policy, and in all the circumstances of this case fair and reasonable.

Having considered the rest of the policy carefully, I do not consider there to be any area of cover that means HDI should have met T's claim. I know this decision will be disappointing for T, but I hope I've provided it with a thorough explanation of my decision.

My final decision

My final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask T to accept or reject my decision before 30 August 2023.

Sam Thomas
Ombudsman