DRN-4176186

The complaint

A company that I will refer to as H, complains about the settlement, by Royal & Sun Alliance Insurance Limited ("RSA"), of its business interruption insurance claim made as a result of the COVID-19 pandemic.

What happened

The following is intended merely as a brief summary of the key events. Additionally, whilst various other parties have been involved in correspondence, etc. for the sake of simplicity I have just referred to H and RSA.

H operates as a restaurant business and held a commercial insurance policy underwritten by RSA. As a result of the government-imposed restrictions introduced as a result of the COVID-19 pandemic, H had to temporarily close. H claimed for its losses under the policy. This complaint relates to a claim for losses relating to a period from 20 December 2020.

Ultimately, RSA agreed to meet H's claim. However, H is unhappy with the settlement offered. Primarily, this is because RSA deducted the money H had received from the Government via the Coronavirus Job Retention Scheme ("furlough"). RSA said this was either a saving on a cost to H's business or the principal of indemnity meant this deduction was appropriate.

H's complaint was referred to the Ombudsman Service. Our Investigator didn't think RSA had acted unfairly in deducting the furlough payments from the settlement. He felt the payments were made because businesses had been forced to close as a result of the pandemic and measures taken to limit the spread of COVID-19. That these payments acted to cover H's employment costs, reducing the H's overall financial losses. And that if RSA did not deduct this sum, H would receive a settlement greater than the actual loss suffered.

H remained unsatisfied, reiterating its argument that any saving of employment costs was not caused by the same "damage" being covered by the policy. As our Investigator has not been able to resolve the complaint, it 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.

As part of my considerations, I have taken note of various case law. Included in this is the judgment in *Stonegate Pub Company v MS Amlin and Others* [2022] EWHC 2548 (Comm) ("Stonegate"), which both parties have already referred to.

A number of issues were initially raised by H during the events leading to this complaint. However, at this point the key issue is whether or not it is fair and reasonable for RSA to deduct money H received as furlough payments relating to the relevant period of indemnity from the settlement of the claim relating to this period. H has effectively said that the policy was drafted by RSA, and clearly sets out how savings should be dealt with. And the claim

should be interpreted in line with this.

The period in question is that from 20 December 2020. H says that its business was interrupted at this point by an insured event. The insured event is, in simple terms, the closure of its premises on the advice of the Government as a result of COVID-19 manifesting at its premises. It appears to be an accepted fact that COVID-19 did manifest on H's premises a few days prior to 20 December. However, the relevant clause is a composite one, requiring all of the relevant elements to be present – i.e. that, as a result of this manifestation, the Government advised H to close or placed restrictions on its premises.

My understanding is that H was already closed by this point in time, due to existing restrictions the Government had imposed in relation to previous cases of COVID-19. RSA has accepted that H has a valid claim, but this point is relevant as H could already have been receiving furlough payments prior to the insured event.

The furlough scheme was first introduced during the March 2020 lockdown. The decision to extend the scheme for the period relevant to this complaint was made at the end of October/start of November 2020. So, at the time of the insured event, H may well have already been receiving furlough payments.

H's main argument is that the "damage" it is claiming for only existed after the decision had been made to pay businesses furlough, so these payments were not caused by the damage.

Firstly, it is necessary to consider what the policy says about the settlement of claims. The policy provides cover for:

> "the amount by which the Gross Revenue ... during the Indemnity Period shall fall short of the Standard Gross Revenue … in consequence of the Damage."

Gross Revenue is defined as:

> "The money paid or payable to the Policyholder for work done and services rendered, in course of the Business, at the Premises."

And Standard Gross Revenue is:

> "The … Gross Revenue … which would have been obtained during the Indemnity Period, if the Damage had not occurred and allowing for trends of the Business or circumstances which would have affected the Business irrespective of the Damage occurring"

Damage has a specific definition in the policy. But I agree with H that, in relation to the clause under which the claim has been considered, it means the circumstances of that clause.

The policy also contains the following provision:

> "Savings
>
> If any of the charges or expenses of the Business payable out of … Gross Revenue … cease or reduce in consequence of the Damage the amount of such savings during the Indemnity Period shall be deducted from the amount payable"

The judge in Stonegate found that, in relation to the circumstances of that case, furlough payments could be deducted from the claim settlement. H's policy and circumstances are different in some ways to that considered in this case, but I do think there are some parts of the judge's reasoning that can be drawn upon.

The wording of the policy was different to that in H's case, but essentially said similar things. That loss of income due to an insured event was covered, but that any saving of cost that the claimant had made as a result of the insured event could be deducted from this. The judge did not have to consider, in the judgment, whether the introduction of the furlough scheme was as a result of the insured event, as the parties to the case had accepted that it was. But the judge did think that furlough payments were a saving that could be deducted from the claim. He made this finding initially based on the policy wording, but also in relation to the general legal position.

It should also be noted that the Stonegate judgment related to the closure of premises, in part, prior to the introduction of the furlough scheme. So, the decision to introduce the furlough scheme that benefitted the parties in that case was made after the insured event. Yet this was not seen as an issue preventing this being considered, effectively, as a saving under the resulting from the insured event. This point was ultimately not disputed, so we do not have the benefit of any legal reasoning from the judgment. But the fact it was not disputed and that the judge did not consider any discussion of the point to be necessary is to my mind indicative of how it should be viewed.

H has argued that the savings provision in its policy does not apply. It has said that any reduction in the expense of meeting employment costs was not in consequence of the insured event, as the insured event only occurred after the decision had been made to pay businesses furlough. I can appreciate the weight in this argument.

However, even if I accept H's argument here, and agree that the furlough payments do not fall within the scope of the savings provision, it is still necessary to consider RSA's other reason for deducting the payments from the settlement.

Essentially, RSA has referred to the general principle of indemnity on which the majority of insurance is based. This effectively says that the purpose of the insurance is to return the claimant to the position they would have been in had it not been for the circumstances that caused the insured loss. And that a policyholder should not benefit from the claim so that they are put in a better position than they otherwise would be.

H has said that the general principle of indemnity is overridden by the set methodology contained in the policy wording, namely the savings clause. And I have noted the judge's comments at paragraph 271 of the Stonegate judgment:

> "…I doubt that, if the relevant savings are not within the savings clause, they fall to be taken into account as a matter of the general law, because the parties have agreed that there should be recovery of BIL and have agreed how this should be calculated, and it would appear to me that the general law could not be relied on to produce a result different from that specifically provided for. But if I am wrong about that, and the general law is potentially applicable, my view is that it would produce the same result as I have found to be the case by application of the clause."

However, it is necessary for me to think about the situation in the round and consider all of the relevant circumstances. I also note that a court when considering this situation might stick more rigidly to the methodology set out in the policy. But, whilst I must take account of the law, I am not bound by it where I do not think it would lead to a fair and reasonable outcome in all the circumstances.

H has also referred to paragraph 289 of the Stonegate judgment, which refers to the findings of an Australian court in relation to a similar government-support payment scheme. The Australian court had found that payments from the support scheme were not deductible from insurance settlements, as the payments had not been caused by the insured event. The judge in Stonegate explained that the policy wordings were different and so he had come to

a different conclusion.

However, the Australian courts had also come to a different conclusion in terms of the causation of the restrictions that had been introduced. The spread of COVID-19 in Australia was different to that in the UK, and the Australian courts essentially did not consider that each and every occurrence/manifestation of COVID-19 in Australia was a proximate cause of the restrictions in Australia. So, the court also did not consider that the payments were caused by a particular case of COVID-19. Whereas the UK courts considered that each case of COVID-19 was a potential proximate cause of the restrictions.

So, whilst I can see H's argument here, I think that the different wider context means a direct comparison is not straightforward. It should also be noted that an Australian judgment has limited weight in the UK. Additionally, as mentioned, I am not necessarily bound by UK law in reaching a fair and reasonable decision.

Looking at the situation broadly, H suffered losses as a result of the COVID-19 pandemic. As a result of the COVID-19 pandemic, H received payments from the Government. It is notable, as pointed out by the judge in Stonegate, that the Government did not say that the payments being made were intended to benefit only the recipient and not their insurer. It is also the case that this situation is fairly novel.

In this case, the insured event is linked to a very specific manifestation of a disease, that was the partial cause of widescale restrictions. H was closed because of the multiple cases of COVID-19 that occurred. Each of these has been found to have been a proximate concurrent cause of the Government's decision to introduce the restrictions. That at least one of those cases manifested at H's premises means that it is able to claim on its policy. And it is the combination of this manifestation and the resulting restrictions that is the insured event set out in the policy. The restrictions themselves were aimed at limiting the spread of COVID-19 and so protecting lives.

The furlough scheme on the other hand was not introduced directly as a result of cases of COVID-19. Its purpose was not directly related to the disease, in that it was not designed to limit the spread of the disease or protect lives. The scheme was introduced because businesses were being impacted by the wider circumstances surrounding the pandemic. The level of impact businesses generally felt was itself an indirect consequence of numbers of cases, as these led to further restrictions on those businesses. But the purpose and direct cause of the various iterations of the furlough scheme were not necessarily the same as those for introducing the restrictions that caused H to close.

I acknowledge that, had there been no manifestation at H's premises the other cases of COVID-19 at that time would likely have meant that H would still have been required to close during the indemnity period. H's manifestation was one of a large number of concurrent causes of the restrictions. H would also have been able to claim under the furlough scheme in this situation, even though it would not have suffered an insured event.

However, I don't think that just because the cause of an additional payment received by a claimant, such as H, is slightly different to the cause of the claim means it should be discounted. The underlying cause of both was the pandemic – and I think it is fair and reasonable in the circumstances of this particular case that both should be seen as having the same cause, i.e. the insured event.

Ultimately, in this particular case, I think it is fair and reasonable to consider the 'insured event' to be more than just the specific manifestation at H's premises. I do appreciate a court might come to a different conclusion on this point, but I consider this to be the fair and reasonable approach in the circumstances of this case.

The purpose of insurance is to return the insured party to the position they would have been in had it not been for the insured event. So, whilst noting the comments in Stonegate above, I consider it is fair and reasonable for RSA to apply the indemnity principle to the claim in the manner outlined in that judgment.

As the Government made a payment to H that reduced the loss H suffered during the indemnity period, and the Government did not indicate that this payment was intended to benefit only the insured to the exclusion of the insurers, I consider it was fair and reasonable for RSA to deduct the relevant furlough sums from the claim settlement. I appreciate that this is not the outcome H was hoping for. But I do consider it fair and reasonable in all the circumstances of this particular case.

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 H to accept or reject my decision before 10 November 2023.

Sam Thomas
Ombudsman