DRN-4368530

The complaint

A company I will refer to as L, complains about the decision of QBE UK Limited in relation to business interruption insurance claims L made as a result of the COVID-19 pandemic.

What happened

The following is intended merely as a brief summary of events and this decision focusses on what I consider to be the key issues in this dispute.

I will also add that L has previously raised other issues with this claim, but these are not subject to this complaint which is effectively limited to considering whether multiple claim periods should be included in the relevant claim settlement.

L operates as an agent for serviced apartments. L does not own or manage any of these apartments, and bookings are a variety of short and long term stays. I have referred to this as a holiday accommodation business for simplicity, whilst I acknowledge this may be an oversimplification. L held a commercial insurance policy underwritten by QBE. The policy period was 29 July 2019 to 28 July 2020, inclusive. The policy provided cover for a number of areas of risk including business interruption.

Whilst I have considered the whole policy, it is seemingly accepted that the most relevant cover in the circumstances says:

> "We shall indemnify you in respect of interruption of or interference with the business as insured by this section caused by::
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> > a) any human infectious or human contagious disease (excluding Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition) an outbreak of which the local authority has stipulated shall be notified to them manifested by any person whilst in the premises or within a twenty five (25) mile radius of it;
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> …
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> The insurance by this clause shall only apply for the period beginning with the occurrence of the loss and ending not later than three (3) months thereafter during which the results of the business shall be affected in consequence of the damage."

As a result of the COVID-19 pandemic, L claimed for its losses and QBE agreed that the above clause applied, offering a settlement in relation to the period from the start of the first national lockdown. It limited this to three months in line with the final paragraph above.

L was unhappy with this and thought that, effectively, the entire period when there were manifestations of COVID-19 within the relevant radius should be covered up to the end of the period of insurance. And that the three-month limit should apply from that point on. Its argument, put simply, is that each manifestation of COVID-19 was a new claim event.

QBE did not agree with this and said that whilst each manifestation was a potential new cause for a claim, this will only be relevant if the manifestations caused a separate and

distinct loss. And that L was subject to the same indivisible effects of the manifestations throughout the relevant period. So, there is only one valid claim, and this is limited to three months' losses.

L brought its complaint to the Ombudsman Service, but our Investigator was unable to resolve it. So, it was passed to me for a decision.

I issued a provisional decision on 4 August 2023. The following is an extract from that decision:

> "Having considered the arguments of both L and QBE, I currently consider they are both correct to an extent. But I also disagree with some of their reasoning and conclusions.
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> In order to make a successful claim there must be an insured event and an identifiable consequence of that. The insured event relevant to L's claim, as set out above, is effectively that a relevant disease has manifested within 25 miles of the relevant premises and this has caused an interruption or interference with L's business. (For the sake of simplicity, I will refer just to "interruption" from this point on.) And this must have led to an identifiable loss.
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> COVID-19 is a relevant disease in terms of this policy and, whilst I have seen no evidence, given L's location it seems highly likely there were many manifestations of this disease within 25 miles throughout the period up to 28 July 2020. The question is whether these caused an interruption that led to an identifiable loss. And, if so, how many separate occasions of loss.
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> It is true that the Supreme Court, in its judgment in the FCA test case[1], said that the effect of each manifestation (or occurrence) of COVID-19 was indivisible. However, it should be noted that the Court was at this time considering the impact of the first national lockdown. It was not considering whether there was any separate impact – or potential separate claim – after the conclusion of this lockdown.
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> And I don't think it could be reasonably argued that the manifestations of COVID-19 in, for example, March 2020 were the proximate cause of the decision to introduce the second national lockdown in November 2020. Those early manifestations would not be of equal causal effect in the November decision-making process as more recent manifestations in, for example, October 2020. So, had L's policy still been in force in November, it is likely this second lockdown period would form a separate claim period.
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> That separate claims can be made is also supported by other court judgments. These include S*tonegate 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").
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> It is not necessary for cover to apply in L's case that the cause of loss is, for example, a government restriction – such as a national lockdown. L's policy doesn't specifically require there to have been restrictions imposed, and certainly not on L itself. But the relevant manifestation(s) must have had some identifiable impact on L's business activities.
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> I don't consider it could be said that each manifestation of COVID-19 had a separate impact or caused a separate loss. Whilst each manifestation of COVID-19, within a relevant period, was an equal and proximate cause of the Government's response, as the judge in Stonegate said at paragraph 140 of the judgment:
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> > "It was only by reason of there being very many that they had the relevant

[1] *The Financial Conduct Authority & Ors v Arch Insurance (UK) Ltd & Ors* [2021] UKSC 1

> causative effect, and because there were many and they together had that causative effect, it was appropriate to regard each as an equally efficient cause."

The government-imposed restrictions are merely a useful indicator of when loss may have arisen. And it is likely the different restrictions introduced were the result of – in part – different manifestations of COVID-19. But other events or changes as a result of different manifestations may also be relevant – such as changes in customer behaviour for a particular reason, whether this be new guidance or some other reason. Regardless of the change though, it is likely this was only as a result of the multiple manifestations having occurred – at least one of which would need to be within the 25 mile radius.

This also does not mean that every change of restriction or guidance would lead to a new claim though. As the judge in Greggs said, at paragraph 86 of the judgment:

> "…I do not consider that an informed observer would have regarded announcements or measures which simply continued existing restrictions or made trivial changes as being separate 'single occurrences' for the purposes of the SBIL definition. I do not believe that it conforms to the parties' intentions to have aggregation by reference to such matters, which effectively continued a status quo rather than marking any significant change to it. Nor would I consider that an informed observer would have regarded changes which simply reduced restrictions as being separate 'single occurrences' for the purposes of the definition. They were such as would of their nature be expected to reduce losses not to lead to them and thus would not constitute the type of matter which would sensibly be regarded as a factor unifying different losses."

Put simply, I consider this means a manifestation would need to have had to increase the impact on a claimant for a new claim event to have occurred. The renewal of the first lockdown every few weeks would not satisfy this. Nor would a reduction in the severity of a restriction – for example the change of social distance guidance from "2 metres" to "1 metre plus", on 4 July 2020. This was a relaxation of an existing potential cause of interruption.

It should be noted that the policies being considered in Stonegate effectively required the insured premises to have been closed by a public authority as a result of a relevant disease.

L's policy does not require this, but I still consider the reasoning in these judgments useful when thinking about L's complaint. As I've mentioned above, there needs to have been an identifiable loss that arises from the manifestation of the disease required by L's policy.

Exploring this briefly, this means for example that a manifestation of COVID-19 in April 2020 would not have an identifiable impact on L's business. By this point, L was unable to operate its business as a result of the government-imposed restrictions, which had been introduced as a result of manifestations in March 2020. Manifestations that happened whilst the business was entirely interrupted due to a particular set of restrictions did not create a new or different interruption unless they caused a different or more onerous restriction (or some other identifiable interruption).

So, it follows that the first interruption to L's business seemingly started in March 2020 and continued until July 2020. And that only one claim is possible in relation to this period. The maximum indemnity period for a claim under this clause of L's policy would only last for three months. So, there will be a period here in June to July 2020 where L likely continued to be impacted as a result of the manifestation(s)

of COVID-19 in March 2020 (and the restrictions introduced in consequence of this), but where its losses fall outside of the maximum indemnity period and so would not be covered as part of this claim.

Given the likely impact of the first national lockdown on its business, it does not seem that L would be able to make a new claim at least until the lockdown had ended on 4 July 2020.

It may be that an event occurred prior to this that, if there had been no national lockdown, might have caused loss. But the proximate cause of loss during this period will have most likely been the national lockdown.

In terms of whether a new claim is then possible, QBE has said that L was subject to restrictions from March 2020 throughout the rest of the period of insurance. QBE has said that L's business continued to be impacted by restrictions, of varying degree, from March 2020 until after the policy period had ended. So, there is just one continuous loss and hence one possible claim.

It is notable though that the judge in Stonegate considered that, whilst renewals of the lockdown period were not separate events that were capable of leading to a claim, the introduction of a localised lockdown for the Leicester area was such a separate event. For those businesses impacted by this localised lockdown, there was a continuation of interruption. But there could nonetheless be more than one claim event.

So, taking this into account, it does not appear that a court would require there to have been a period where a business stopped being interrupted, in order for a new claim to be possible.

In terms of whether there were then any new claim events caused by further manifestations within L's 25 mile radius, L will need to provide QBE of evidence of these manifestations and interruptions, and QBE will need to assess these potential claims. Full consideration of these is not a part of this complaint and is the responsibility of QBE as the insurer. My role is limited to directing QBE to take into account certain points when doing so.

That said, I will briefly comment on several of the potential claim events L has referred to, as well as the following change to guidance on holiday accommodation. Not all of these may amount to a valid claim in L's circumstances, and there may be others that do.

On 4 July, the restrictions causing the first lockdown were completely removed as far as they related to holiday accommodation businesses. Restrictions were continued in relation to other types of business, such as indoor gyms, nightclubs, and beauty salons. But, by law, the only restriction impacting holiday accommodation was that groups of more than 30 people could not gather. I am not sure on the size of the accommodation L arranges, but it does not seem likely this restriction would hugely impact its business.

However, the Government did provide advice for accommodation providers[2]. Seemingly, this advice was introduced as a result of manifestations that took place in June 2020, one of which may have been within L's 25 mile radius. This guidance said that people should not stay overnight with members of more than one other household; effectively limiting the numbers of households staying in holiday accommodation to two households at a time. This advice may have had an impact on L's ability to arrange bookings for larger premises. And if L can demonstrate that it

[2] https://webarchive.nationalarchives.gov.uk/ukgwa/20200901154230/https://www.gov.uk/guidance/covid-19-advice-for-accommodation-providers

suffered a loss as result of this advice, it may have a separate claim that QBE needs to consider.

L has referred to requirements around wearing facemasks as having had an impact on its business. The requirements on facemasks did change over the relevant period, but L will need to be able to demonstrate these changes caused an interruption to its business. It is possible that such changes reduced the level of tourism. The first changes would have been within the period of the national lockdown and, as above, this is unlikely to be the proximate cause of loss at this time. It may also be difficult to quantify the loss from any later changes or to separate this from existing causes of interruption. But this is something QBE will need to consider based on the claim evidence.

L has also referred to restrictions on pubs, restaurants, theatres, etc. But it does not appear any new restrictions were introduced during the period of insurance that increased the impact on these types of business or that would have led to an interruption of L's business.

I have not been provided with details of any changes in the ability of maid servicing of holiday accommodation throughout this period. But it would be open to L to provide QBE with evidence of such a change, and that this caused an interruption to its business.

Presumably, it would need to be demonstrated that it was a change in this ability that directly caused a decrease in bookings. This may depend in part on whether potential customers were even aware of any change though, and that this led to a decrease in bookings.

Lastly, L has referred to vaccination requirements for visitors to the UK. There are a couple of issues with this potential claim event. As well as demonstrating this caused an interruption of L's business, it will need to be shown that it was a manifestation within L's radius that, in part, led to these requirements, rather than manifestations in other countries. If the requirements were introduced to limit further cases of COVID-19 being brought into the UK, it does not seem likely to me that manifestations that were already happening here were the cause of that.

I make no definitive finding, provisional or otherwise, on each of these potential claim events in relation to L's circumstances. As I say, this is something QBE will need to do in the first instance.

It is recognised that quantifying losses in circumstances such as this will likely be difficult. However, I do currently consider that L's policy does not restrict it to making only one claim and that losses from separate manifestations may be divisible.

Claims are potentially possible in relation each manifestation of COVID-19, as long as its impact can be identified and separated from the impact of other manifestations that have already caused an insured loss. It is unlikely that this separation is possible for every manifestation – as the Supreme Court indicated, government and public actions will have been based on there having been a large number of cases of COVID-19 at any one time, and so the loss from many of these individual cases is indivisible.

But I do currently consider that some of the losses experienced across the period of insurance are divisible. For example, any loss attributable to a manifestation in July 2020 could likely be divisible from a manifestation in March 2020. L will though need to particularise and demonstrate its case for each claim event it considers to have occurred. Where claim periods overlap, it will not be possible to claim for any loss more than once."

Both L and QBE responded to my provisional decision with additional comments.

L largely agreed with the reasoning in the provisional decision and much of its response was in relation to how its business would have been impacted by various events. It queried whether or not the Supreme Court judgment in the FCA test case would have also taken into account the situation after the first national lockdown. And said that as customers often book accommodation ahead, the timing of loss could be different to the cause of that loss.

QBE disagreed with the reasoning in the decision and maintained its position that only one claim was possible under L's policy in relation to the COVID-19 pandemic. QBE explained that the differences between the policy in Stonegate and L's policy meant that it was not as straightforward as porting the commentary from that judgment into the circumstances of this complaint. QBE considered that, as the clause in L's policy provided potential cover for diseases that could 'hang around' within the reasonably large 25-mile radius of the premises, responses (including those of a public authority) were likely to vary. So, it was a commercial decision to limit the cover provided to a maximum of three months and allowing subsequent claims made this commercial decision redundant.

QBE also said that, if I were not minded to come to a different decision, it would be of assistance if I could set out some factors in relation to the claim calculation. These included that L would need to prove that any particular case of COVID-19 within the 25-mile radius had resulted in an impact that was distinguishable from the impact of previous cases and/or that it suffered from a new or exacerbated form of loss going beyond what it had suffered previously. QBE also considered that L would only be entitled to claim for the difference between the first and second loss; i.e. that the second claim would only be for any increase in loss, rather than be based on a comparison of a situation of there being no ongoing pandemic. Finally, QBE said that the causal potency of any relevant COVID-19 manifestation should be limited to 14 days.

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 thank both parties for their submissions. I have tried to summarise the key points that I consider most relevant above. But I have also considered all of the evidence provided – both recently and throughout the course of the complaint.

Having done so, I have come to the same conclusions as in my provisional decision, largely for the same reasons.

I note QBE's comments over the application of the Stonegate judgment to the current case. And I do recognise that there are differences in the policy wording and circumstances. However, I am not persuaded that these mean the underlying reasoning should not be taken into account when thinking about this complaint.

L's policy is different to that in the Stonegate case. But, whilst I have somewhat cherry-picked this quote from QBE's own submissions, I broadly agree with the following:

> "The only relevant question under the QBE Policy is whether a separate occurrence of the insured peril has caused a separate and distinct loss. The reality is that businesses will have continued to be impacted each and every day, to a greater or lesser extent, by the ongoing pandemic, with multiple new incidents of the insured peril on a daily basis."

I note that QBE's argument is based on there being a continuing and evolving response to

the pandemic/outbreak of disease. However, the insured peril is, effectively, an interruption or interference caused by a relevant manifestation of COVID-19. Many of the cases of COVID-19 will have led to the same interruption – for example all of those that contributed to the first national lockdown. But other cases will have led to different interruptions.

For example, as I have set out above, it is clear to me that it was different cases of COVID-19 that led to the second national lockdown, than that led to the first. The cases in March 2020 were not the proximate cause of the Government's decision in October 2020. It was the later cases, in an around October, that were the proximate cause of this decision. L's claim does not involve this second national lockdown, but it does provide a useful and clearly identifiable separate event of interruption due to different cases of COVID-19. And there is no reason why this reasoning should not apply to other events that interrupted L's business within the period of insurance and which were proximately caused by manifestations of COVID-19 within 25 miles of its premises.

That there will have been, undoubtably for many businesses, an ongoing impact of the pandemic in general does not mean that there is only one event. I have referred to the Leicester lockdown above as demonstrating this. The question is what the proximate cause of any given interruption was.

I note QBE's argument that limiting cover for a three-month maximum period was a commercial decision taken to minimise the potential liability. However, I am not persuaded that, at the time the policy was entered, it was anticipated that there would be any disease that "hung around" for a period longer than this which led to a varying approach from public authorities, etc. I don't think the parties entering the contract, or a reasonable person thinking about this at the time, would have anticipated a situation where customers would be claiming in relation to separate manifestations of a single disease in the manner which ultimately unfolded.

Additionally, the three-month maximum period also related to the other parts of this clause, which deal with quite different situations. One of those is murder in the premises. To follow QBE's argument through, this means it envisaged a likely situation where multiple murders occurred at the premises over a period in excess of three months, and QBE felt it necessary to limit the cover provided to only the first of these murders. This seems quite unlikely to me.

The three-month maximum period, to my mind, is intended to minimise the length of time the impact from a single insured event is covered. This could be a single murder or a single manifestation of disease/COVID-19. In a situation where the premises were closed due to investigations into the murder for more than three months, liability would be limited to that period. However, were there to be a second murder at the premises, this would seemingly be a new claim event – even if the murder was somehow related to the first. Similarly, where there is a second manifestation of a relevant disease which causes an interruption, there is a new claim event which is subject to a new three-month maximum indemnity period. That this manifestation is part of the same pandemic as an earlier manifestation does not mean it is not a separate insured event.

In a situation where there is an ongoing impact from lots of separate cases of disease, identifying that a particular case – or one of a particular group of cases – has caused a separate interruption from earlier cases is understandably difficult. But I have set out in my provisional decision, as above, the factors an insurer would need to take into account when considering a claim in such circumstances. And that it is for L to initially demonstrate that there was a relevant manifestation and that this caused an interruption.

As set out in my provisional decision, I am not making any finding on which manifestations of COVID-19, nor which wider consequences, have led to a valid claim. So, whilst I thank L for

its submissions over how its business was impacted over different periods, these are largely issues QBE will need to consider when assessing the claims.

In terms of what the FCA test case considered, whilst I appreciate the judgments were handed down after the end of the first lockdown, this does not change was what being considered within those cases.

I do note that L has said that it did cater for groups in excess of 30 people, so my comments around this particular restriction not having a huge impact may not have been accurate. I apologise if any of my comments, both this particular one and the others I made in relation to the potential claim events, have been misleading or inaccurate. As I say though, I was not making any findings in relation to these events. I was merely using them to highlight some of the factors that will need to be taken into account when the claims are reassessed. This reassessment will also have to take into account what losses relate to the indemnity period(s).

Similarly, I note QBE's request that I include a number of statements about what will need to be demonstrated and what any claim would cover. I will say that I agree any new claim would need to be based on L evidencing both a relevant manifestation of COVID-19 and that this had a distinguishable impact. This is a point I have set out in my provisional decision where I have stated that there must be an insured event and an identifiable consequence of that.

In terms of the other two points QBE has requested I confirm, I will not go as far making any distinct finding on these. They are not points that L has had the opportunity to comment on and they do not specifically form part of this complaint. What I will though say is that the Supreme Court judgment in the FCA test case included commentary on how loss should be calculated once a claim has been generally accepted – particularly in relation to applying 'trend clauses'. Care will also need to be taken in considering what the proximate cause of any claimed loss is. In terms of the timing of any relevant case of COVID-19, the insured event is the interruption of business as a result of such a manifestation. As long as this occurs within the period of insurance, a claim for a maximum of 3 months' loss would appear possible even if this period extends beyond the term of the policy.

I acknowledge that there are likely to be some outstanding issues that have not been resolved as a part of this complaint. I encourage both parties to work together in the spirit of working through these. Without making any particular findings, I am doubtful that all of the potential claim events L has referred to will lead to losses QBE should cover as separate claims. And it is initially for L to demonstrate that is has suffered the separate claim events.

But my ultimate conclusion is that L's policy does allow for multiple claims to be made, where it can be shown by the claimant that separate manifestations of COVID-19 have led to an interruption which has had a distinct impact.

Putting things right

L will need to particularise and demonstrate to QBE that it suffered interruptions, from relevant manifestations of COVID-19, that had a distinct impact. And QBE should assess these claims on the basis that the policy is capable of responding to multiple claim events, taking into account the points above and the remaining terms of the policy.

My final decision

My final decision is that I uphold this complaint. QBE UK Limited should put things right in the manner set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask L to accept or reject my decision before 10 November 2023.

Sam Thomas
Ombudsman