DRN-3468273

The complaint

Mr R, trading as C, complains that QIC Europe Ltd declined a business interruption claim.

What happened

In March 2020, the Government announced restrictions to combat the spread of Covid-19. These restrictions had a significant impact on C because they were required to close for commercial use and could remain open only for limited prescribed purposes.

C held a business insurance policy with QIC. This included business interruption cover, so they made a claim. They understood they would be covered under part e) of the following 'Disease' extension:

> 'B Disease
>
> The occurrence of:
>
> a) Acute Encephalitis Acute Poliomyelitis Anthrax Chickenpox Cholera Diphtheria Dysentery Legionellosis Legionnaires Disease Leprosy Leptospirosis Malaria Measles Meningococcal infection Mumps Opthalmia Neonatorum Paratyphoid Fever Plague Rabies Rubella Scarlet Fever Smallpox Tetanus Tuberculosis Typhoid Fever Viral Hepatitis Whooping Cough or Yellow Fever sustained by an person at the Premises;
>
> b) Injury or illness sustained by any person arising from or traceable to foreign or injurious matter in food or drink supplied from the Premises;
>
> c) vermin or pests in the Premises;
>
> d) an accident which causes defects in the drains or other sanitary arrangements at the Premises.
>
> e) where use of the Premises is restricted on the order or advice of the competent authority.
>
> f) medical emergency murder or suicide occurring on the Premises.'

QIC declined the claim, stating that part e) isn't a discrete insured event and this is an obvious formatting mistake. It's meant to act as a further condition of parts a) to d).

C complained to us, arguing that QIC had selectively misquoted and reformatted the extension. They said parts a) to f) can reasonably be interpreted as six discrete insured events. They felt the claim was also covered under the 'Public Emergency' extension, (Extension G), which covers them for losses caused by:

> ‘The actions or advice of a competent public authority due to an emergency likely to endanger life or Property in the Vicinity of the Premises which prevents or hinders the use or access to the Premises…’

Our investigator thought the complaint should be upheld. They felt the formatting of the policy made it look as though each event set out alphabetically under parts a) to f) of the ‘Disease’ extension separately triggered cover. And this interpretation made commercial and grammatical sense. They thought cover should therefore apply under part e).

They didn’t think cover would apply under the ‘Public Emergency’ extension. They noted that, in its judgment on the Financial Conduct Authority’s (‘FCA’) test case, the High Court said *“…the government action and advice in response to the national pandemic cannot be said to be due to an emergency in the vicinity, in the sense of the neighbourhood, of the insured premises…”* and this wasn’t appealed.

QIC didn’t agree. In summary, it says:

- Reading the extension as C suggests, it would say ‘The occurrence of… e) where use of the Premises is restricted on the order or advice of the competent authority’ which doesn’t make linguistic or grammatical sense;

- Other parts of the extension relate to things that happen at the premises, whereas part e) doesn’t, so it was an obvious outlier;

- The arbitration award in Policyholders v China Taiping Insurance (UK) Co. Ltd supports its position. Lord Mance made comments on a similar clause, which said:

  > ‘Insured Section 2 is extended to include [business interruption losses] in consequence of the occurrence at the Premises:
  >
  > a) of murder, suicide or food or drink poisoning;
  >
  > b) of a notifiable, human, infectious or contagious disease excluding Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition;
  >
  > c) of vermin, pests or defective sanitation;
  >
  > d) which causes restrictions on the use of the Premises on the order or advice of the competent local authority; or
  >
  > e) Damage covered and not excluded under Insured Section 2 to the drains or sanitary apparatus at the Premises which results in closure of the Premises for the Business…’

  Lord Mance said, *“In this regard, for example, sub-paragraph d) is not a further head of cover, but a qualification on the cover afforded by the first three sub-paragraphs”*;

- It’s illogical for part a) to provide cover for the occurrence of a closed list of diseases, only for part e) to provide cover for any disease which causes the use of the insured premises to be restricted;

- If the extension operated as C thinks it should, the separate extension for 'Public Emergency' would be rendered redundant;

- It doesn't accept that a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood that cover is available for an unlimited and undefined number of insured perils which might lead to the use of the premises being restricted on the order or advice of the competent authority, particularly given the premium charged.

On 30 November 2021, I issued a provisional decision. I said:

"I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I must have regard for the law, but will ultimately make my decision based on what I think is fair and reasonable in all of the circumstances of the complaint.

The starting point is to ask what a reasonable person, having all the background knowledge which would have been available to the parties when they entered into the contract, would have understood it to mean. In interpreting a contract, a court will give the words used their natural and ordinary meaning, and set them in the landscape of the contract as a whole.

The overall purpose of both the clause in question and the contract as a whole must be kept in mind. And where different constructions are possible, it's important to consider which one better reflects commercial common sense (without doing violence to the language used or applying hindsight). The parties' subjective expectations or intentions are irrelevant.

In addition to the clause considered by Lord Mance, I note that, as part of the FCA's business interruption insurance test case, on insurer argued there was an *"obvious formatting error*" in its policy wording. The clause read as follows:

> 'Any loss:
> a) During the first four hours;
> b) During any period other than the actual period when access to the Premises was prevented;
> c) As a result of labour disputes;
> d) Occurring in Northern Ireland;
> e) As a result of infectious or contagious diseases any amount in excess of £10,000.'

The insurer said there was an obvious formatting error in part e) because it did not read grammatically. It said that the policy contained other extensions with grammatically coherent, free-standing sub-limits, and there was no obvious reason for a lower sub-limit for claims related to disease. It therefore said that part e) should be read as if 'any amount in excess of £10,000' was on a new line and so there was a complete exclusion for all claims relating to infectious or contagious diseases. The insurer relied on the case of Chartbrook v Persimmon Homes [2009] UKHL 38. As set out in the judgment (which referred to previous House of Lords judgments):

- A court will not easily accept that the parties have made linguistic mistakes, particularly in formal documents, but in some cases, the context and background might lead to the conclusion that *"something must have gone wrong with the language".* In such a case, the court was not required to attribute to the parties an intention which a reasonable person would not have understood them to have;

- It requires a strong case to persuade a court that something must have gone wrong with the language. For example, if the wording, read according to ordinary grammatical rules, makes no commercial sense. A contract can be surprisingly favourable to one side but is unlikely to have been intended to produce an arbitrary or irrational result;

- A court can correct mistakes in a contract through the process of interpretation, but:

    - *"Two conditions must be satisfied: first, there must be a clear mistake on the face of the instrument; secondly, it must be clear what correction ought to be made in order to cure the mistake. If those conditions are satisfied, then the correction is made as a matter of construction."*

    - The background and context must be taken into account.

The High Court rejected the insurer's argument on the basis that there was no obvious error and there might have been a good commercial reason for imposing a sub-limit on disease cover. The wording could have been improved, but it made grammatical sense.

How do these principles apply to the arguments raised here?

I've considered whether a reasonable person would have understood that something must have gone wrong with the language in QIC's disease extension. As above it would require a strong case to persuade a court of this.

I accept that 'The occurrence of: e) where use of the Premises is restricted on the order or advice of the competent authority' wouldn't be a very well drafted term. But having said that, it isn't nonsensical either

The punctuation is of limited assistance. There's no 'and' or 'or' to make proper sense of the semi-colons for example. Parts a) to c) have semi-colons, but parts d) to f) have full stops. If part e) was a qualification to parts a) to d), I think a reasonable person would expect it either to start with a capital letter, or for there not to be a full stop after part d).

There are also other terms in the policy that are 'correct' that similarly contain grammatical issues. For example, part f) reads 'The occurrence of medical emergency, murder or suicide occurring on the premises' where it would be more natural to remove the word 'occurring'.

In extension A (Alternative Accommodation), under 'What is not covered', the policy reads 'Any costs incurred: occurring more than 24 months after the date the Damage occurred…' where it would be more natural to remove the word 'occurring'. So, the grammatical issue in the disease extension isn't obviously out of kilter with how the policy as a whole is written.

And reflecting on the clause considered in the FCA's test case (from another insurer's policy wording), a term which read 'Any loss: As a result of infectious or contagious diseases any amount in excess of £10,000…' was found to contain no obvious error. I don't consider the wording at issue here to be any more unusual.

I've thought about whether the wording, read according to ordinary grammatical rules, makes no commercial sense, bearing in mind the overall purpose of the clause in question and the policy as a whole.

If part e) is read as an insured event, the policyholder is then entitled to cover if any parts a) to d) occur, even if no restriction on the use of the premises is imposed.

Parts a) to d) could all cause interruption to a business without such a restriction. That's consistent with the position for part f), which even under QIC's reading is not qualified by part e). Equally, there could be situations where a restriction was imposed on a business even if parts a) to d) hadn't occurred. So, part e) can be read as a catch-all for business interruption caused by restrictions on the premises, even if not caused by parts a) to d).

On the face of it, this is very broad cover, but I don't think that it makes no commercial common sense. Even without a 'competent authority' qualification, there would still need to be a sufficiently serious occurrence of parts a) to d) to have impacted the business. QIC says this wouldn't be consistent with the modest premium charged, but although the insured events are broadly defined by C's reading, the increased risk of a claim is counter-balanced by the relatively low indemnity limit (£25,000).

I acknowledge QIC's argument that this reading undermines the limitation of part a) to a particular list of diseases, which must occur at the premises. But QIC could have added an exclusion if it had wanted to do so, for example, to make it clear that no other diseases were covered under the policy, or that there was no cover for a pandemic or epidemic. And e) only applies if restrictions are imposed, which limits the situations in which the cover might apply.

So, by C's reading, part a) covers certain diseases if they're sustained by someone on the premises (provided they cause business interruption). Part e) covers a wider range of diseases, plus other situations, but only if they cause business interruption and are also sufficiently serious to require a public authority to restrict use of the premises. And both have the same policy limit.

This reading does also create a considerable overlap between e) and the 'Public Emergency' clause. Both have the same limit on cover, so they aren't inconsistent. And there is often overlap within insurance policies.

If there is a clear conflict between a specific provision and a general one, the specific one will prevail. In the arbitration award delivered in Policyholders v China Taiping Insurance (UK) Co. Ltd, for example, Lord Mance noted a considerable overlap between an extension for 'Denial of Access' and an extension for 'Disease, Infestation and Defective Sanitation' and between their sub-clauses. He held that it was difficult to regard one as specific cover and the other as general. So, I don't think the overlap created by C's reading of the disease extension at issue here automatically means that reading makes no commercial sense.

Overall, while I appreciate the wording could be improved, and that the arguments here are very finely balanced, I'm not satisfied that a reasonable person would have understood that something must have gone wrong with the language.

Is this finding at odds with Lord Mance's comments?

The arbitration award does not determine what is relevant law for the purposes of what I will take into account in considering what is fair and reasonable in all the circumstances of the case. However, where the arbitrator is an eminent lawyer, and clearly impartial, as in this case, the award is likely to be influential to a judge reviewing the same issue.

I'm not persuaded there's a direct parallel between the two clauses because the language is different. Part d) of the China Taiping begins with 'which', and part a) of the QIC extension begins with 'where'. 'Which' is generally used to distinguish something that comes before it. Despite the formatting, it's clear that 'something' would need to be an occurrence of one of the events set out in parts a) to c).

The use of the word 'where' in part e) of QIC's clause means it can be understood much more easily without there having to be a 'something' that comes before it. Whilst it may have been QIC's subjective intention to have this wording act as a qualification of cover, this isn't something that's required under C's reading of the term.

My provisional decision

I intend to uphold this complaint and to direct QIC Europe Ltd to:

- Reconsider C's claim on the basis that use of their premises was restricted on the order or advice of the competent authority from 24 March 2020*;

- If, taking into account the remaining terms of the policy, any settlement is due to C, QIC should pay this. Any excess that is payable should be deducted from the total claim amount, before any policy limit is applied;

- QIC should pay C interest on this settlement.

The interest payable on any settlement should be based on C having been deprived of monthly interim payments that would have been made during the course of the claim.

The first of these payments would have been paid on 24 May 2020 and would have covered C's indemnified losses for the period from 24 March 2020 to 23 April 2020. The next would have been paid on 24 June 2020 and would have covered C's indemnified losses for the period from 24 April 2020 to 23 May 2020. Payments would have continued in this pattern until restrictions were lifted or the indemnity limit was reached. This interest should be paid at a rate of 8% annual simple per annum.

*if C have a restaurant / bar, the first date of loss is likely to be 20 March 2020, with interim payments therefore being made on the 20th of the relevant month, and the interest payable on any settlement should be adjusted accordingly."

Responses to my provisional decision

C asked for clarification on whether or not the disease extension's indemnity limit of £25,000 applies to each policy year, or whether it applies to each claim made. They said they had made further claims for the second and third periods of lockdown and been told by our service that these would all be considered under this complaint reference.

QIC responded. I have considered all of its points and summarised them below:

- It agreed with the guiding principles I'd referred to in my provisional decision;

- It remained of the view that the error in the clause considered by Lord Mance in Policyholders v China Taiping Insurance (UK) Co. Ltd was indistinguishable from the error in QIC's 'Disease' extension. It highlighted that the Policyholders themselves highlighted that sub-paragraph d) of the China Taiping clause wasn't a further head of cover. 'Which' and 'where' can both qualify the words which precede them;

- The clause (from another insurer's policy wording) considered as part of the FCA's test case isn't relevant because the court held that it was grammatically correct. QIC's 'Disease' extension doesn't make linguistic sense and isn't grammatically correct. My findings that the wording of QIC's 'Disease' extension isn't nonsensical, or any more unusual than the wording of the clause considered as part of the FCA's test case, are incorrect;

- It enclosed a version of the extension without the drafting mistake, which was incepted before the policy in question here. Except for the drafting mistake it's identically worded. This points to there having been a *"regrettable but entirely obvious"* mistake;

- Noting my reference to Chartbrook v Persimmon [2009] UKHL 39, it accepted that the court will not readily accept that the parties have made linguistic mistakes in a formal document, but highlighted the judge's comments that *"the law [does] not require a court to attribute to the parties an intention which a reasonable person would not have understood them to have…"* It said no reasonable person would read part e) of QIC's 'Disease' extension as set out in the provisional decision. When read according to ordinary grammatical rules, it makes no commercial sense, and produces an arbitrary or irrational result;

- The formatting error is obvious, and it's clear what correction ought to be made to correct it (one of simple formatting);

- Highlighting that there's a full stop after part d) doesn't carry out the requisite process of analysis and construction. Contrary to my provisional decision, the punctuation is of considerable assistance. The full stop after part d) encloses parts a) to d), which are qualified by part e);

- The uses of the word 'occurring' in part f) of the 'Disease' extension and extension A (Alternative Accommodation) are irrelevant as they don't make any difference to the grammatical sense of the paragraphs in which they appear;

- All of the other parts of the 'Disease' extension are capable of being an 'occurrence', whereas part e) is not;

- It repeated its comments about C's interpretation of the 'Disease' extension being inconsistent with the modest premium charged. Such a construction would be an affront to business common sense, which Lord Neuberger said was a very important factor to take into account when interpreting a contract in Arnold v Britton [2015] AC 1618. It also undermines the inclusion of a specific list of diseases in part a) of the extension, removes all certainty from the operation of the extension and renders the 'Public Emergency' extension redundant;

- There's no need for the addition of an exclusion of the types suggested in the provisional decision if part e) is read as QIC contends it must be;

- My provisional decision fails to set the words used in the landscape of the contract as a whole, and doesn't give consideration to the purposes of the 'Disease' extension. It seeks to re-write the scope of cover in a way which is impermissible (taking into account Lord Mustill's speech in Charter Reinsurance v Fagan [1997] AC 313, 338);

- It disagreed with the award of interest, noting the express guidance provided by the FCA in June 2020 that insurers await the final resolution of the test case before determining their position on coverage and advising policyholders of their decisions.

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.

QIC has repeated a number of points it has made in previous submissions. Many of those are addressed in my provisional decision, to which I add the following findings.

QIC says the error in the clause considered by Lord Mance is indistinguishable from the error in its 'Disease' extension. In addition to the reasoning given in my provisional decision, I'd highlight that the China Taiping clause has punctuation which helps to indicate that there was an error. Parts a) to d) are separated by semi-colons, not full stops, and part e) is split out by the use of a capital letter, use of the word 'or' and the nature of the risk in question.

As I highlighted previously, QIC's 'Disease' clause has a different wording, so I don't think it's irrational to take a different approach, just as a different approach was applied to the clause considered as part of the test case.

QIC says the parallels drawn between the clause considered as part of the test case and its 'Disease' clause are irrelevant because the former is grammatically correct. It says the latter isn't and doesn't make linguistic sense. But I think the judge's findings on the clause considered in the test case illustrate how strong a case is needed to persuade a court that something must have gone wrong with the language.

The clause says, 'Any loss… As a result of infectious or contagious diseases any amount in excess of £10,000.' QIC's 'Disease' clause says, 'The occurrence of: e) where use of the Premises is restricted on the order or advice of the competent authority.' I'm still of the view that, as with the clause considered in the test case, and other terms in QIC's policy wording, the wording of the 'Disease' clause could be improved, but makes linguistic sense.

Whilst QIC remarks that the uses of the word 'occurring' in part f) of the 'Disease' extension and extension A (Alternative Accommodation) don't make a difference to the grammatical sense of the paragraphs in which they appear, I think the quality of the drafting generally is relevant when interpreting a contract, and considering whether something must have gone wrong with the language.

I don't think it's relevant that QIC issued versions of the policy with different formatting unless it can show that C saw that version before entering into their policy, in which case it could have formed part of the background information available to the parties. QIC hasn't, to my knowledge, made any such argument. Furthermore, when addressing a comparison between the clause considered as part of the test case and a similarly worded policy, the High Court said, *"the fact that different wording is expressed in different terms is not a reason for construing this provision to mean something different from what it clearly means on its face..."*

QIC says that reading the 'Disease' extension produces an arbitrary and irrational result. My commentary on this is given in my provisional decision. As the judge noted in Chartbrook v Persimmon [2009] UKHL 39, a contract can be surprisingly favourable to one side. I accept that, by C's reading, the cover offered is broad, but for the reasons given in the provisional decision, I think it's explicable. And it's counter-balanced by the reasonably low indemnity limit, so I'm not persuaded by QIC's argument about the modest premium charged.

Commercial common sense also needs to be viewed from the perspective of the reasonable person, bearing in mind the facts and circumstances known or reasonably available to both parties. Whilst QIC, as an insurer, may consider that the cover offered by C's reading is broad relative to the comparatively modest premium, I'm not satisfied, given the nature of C's business, that this was reasonable background knowledge they would have had.

I don't agree that the only correction required in order for the extension to be read as QIC says it should be is one of formatting. The punctuation would also need changing. The full stop at the end of part d) would need to be removed. The conventional approach if part e) was intended to qualify parts a) to d) would be to put 'and' or 'or' at the end of part c) and then either no punctuation, a comma or (as QIC used elsewhere in the policy) a semi-colon, at the end of part d). As such, I don't think use of a full stop at the end of part d) shows that part e) wasn't intended to be a stand-alone insured event.

I note QIC says part e) is incapable of being an 'occurrence', because the introduction of the regulations which affected C's business wasn't something that happened at a particular time, at a particular place, in a particular way. In considering this point, I've kept in mind Midland Mainline v Eagle Star Insurance Co Ltd [2003] EWHC 1771 (Comm). The case concerned business interruption to train operating companies resulting from the imposition of emergency speed restrictions at sites across a particular network, on which a broken rail (caused by gauge corner cracking) had led to a crash. The judgment was overturned on appeal, but not on the point I'm about to describe.

The policy covered business interruption *"…in consequence of the following occurrences… The Insured being prevented from or hindered in the use of or access to any station depot or track… and caused by…"* The High Court held that *"prevention, appropriately caused, is to be the occurrence."* I consider that a restriction in the use of something is capable of being an 'occurrence' (if the relevant legal test is met), just as the Court found that a prevention or hindrance of use is.

The Court considered whether there was just one occurrence (the programme of restrictions as a whole) or whether each emergency speed restriction constituted a separate occurrence. In doing so, it said that, to justify labelling something as an event or occurrence there must be sufficient unity of time, locality, cause and motive.

I think that unity exists here. The restrictions were imposed on a particular date, applied consistently across a particular location (England), due to a particular cause (Covid-19) and with a particular motive (halting the spread of the disease). So, overall, I think the imposition of restrictions on C's premises is reasonably capable of being an occurrence.

In my provisional decision, I addressed QIC's arguments regarding the overlap C's reading creates between the 'Disease' and 'Public Emergency' clauses, and that it undermines the limitation of part a) to a particular list of diseases, which must occur at the premises. Whilst I appreciate QIC has said that my reference to the possibility of incorporating an exclusion doesn't sufficiently address these issues, ultimately, I just need to decide whether they provided clear evidence of a mistake.

As I set out previously, there is often overlap in insurance policies, so the overlap between the 'Disease' and 'Public Emergency' clauses doesn't in itself indicate there's been an error. In terms of the operation of the 'Disease' extension, part a) covers certain diseases if they're sustained by someone on the premises (provided they cause business interruption). Part e) covers a wider range of situations, which could include diseases not listed in part a), but only if they're sufficiently serious to require a public authority to restrict use of the premises. This isn't, in my view, implausible, and I don't think it indicates a clear mistake has been made.

I acknowledged in my provisional decision that in interpreting a contract, the words must be set in the landscape of the contract as a whole. And that the overall purpose of both the clause in question and the contract as a whole must be kept in mind. I paid regard to those principles when reaching my decision on what would be fair and reasonable in all the circumstances of the complaint.

Regarding interest, this complaint concerns the outcome of a claim. Based on what I've seen, I think QIC came to the wrong decision when considering the 'Disease' clause in C's policy. So, if when it reconsiders the claim, in line with the remaining terms and conditions, it turns out that QIC should have met the claim, that's the outcome it should have come to when the claim was originally made.

The decision QIC reached in 2020 wasn't something the FCA issued guidance on and was a decision it made itself. C were denied money they might otherwise have had from that point onward, and it's this loss QIC needs to account for.

I can see C were told by our service that we'd consider their complaints about all three periods of lockdown under this reference. QIC's stance on any subsequent periods of lockdown was the same – that part e) isn't a discrete insured event. Whilst it has been careful to say that no admissions are made in this regard, QIC seems to acknowledge that there are circumstances where it might be argued that the £25,000 indemnity limit applies on an occurrence basis.

I think, in reconsidering C's claim, QIC will also need to decide whether use of C's premises was again restricted on the order or advice of the competent authority during subsequent periods of lockdown, and, if so, whether each period of lockdown should be treated as a separate occurrence of part e) of the 'Disease' clause, or whether they form one occurrence, bearing in mind the legal principles I've already referred to above. Procedurally, I don't think it would be fair for me to give my opinion on those issues here.

It would create a situation where, to make the below directions binding on QIC, C would also have to accept my findings on whether cover exists for subsequent periods of lockdown, and the operation of the indemnity limit, which they might not want to do depending on what my findings were. Therefore, I think it's better for all parties that, if necessary, these points are considered separately at a later date. If they can't be resolved between the parties, C should let our investigator know, who will set up a new complaint reference and ensure that they're considered promptly to minimise any delay that handling the complaint in this way will cause.

My final decision

I uphold this complaint and direct QIC Europe Ltd to:

- Reconsider C's claim on the basis that use of their premises was restricted on the order or advice of the competent authority from 24 March 2020*;
- If, taking into account the remaining terms of the policy, any settlement is due to C, QIC should pay this. Any excess that is payable should be deducted from the total claim amount, before any policy limit is applied;
- QIC should pay C interest on this settlement.

The interest payable on any settlement should be based on C having been deprived of monthly interim payments that would have been made during the course of the claim.

The first of these payments would have been paid on 24 May 2020 and would have covered C's indemnified losses for the period from 24 March 2020 to 23 April 2020. The next would have been paid on 24 June 2020 and would have covered C's indemnified losses for the period from 24 April 2020 to 23 May 2020. Payments would have continued in this pattern until restrictions were lifted or the indemnity limit was reached. This interest should be paid at a rate of 8% annual simple per annum.

*if C have a restaurant / bar, the first date of loss is likely to be 20 March 2020, with interim payments therefore being made on the 20th of the relevant month, and the interest payable on any settlement should be adjusted accordingly.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 6 June 2022.

Mike Walker
Ombudsman