DRN-3610782

The complaint

Mr D, trading as L, complains about the decision of The National Farmers' Union Mutual Insurance Society Limited in relation to his claim for business interruption losses resulting from the COVID-19 pandemic.

What happened

The following is intended only as a summary of the key events. Additionally, whilst other parties have been involved in the correspondence around this claim and complaint, I have just referred to Mr D and "NFUM" for the sake of simplicity.

Mr D operates a self-catering holiday home business, consisting of two properties, and held a commercial insurance policy underwritten by NFUM. In March 2020, as a result of the government-imposed restrictions introduced in relation to the COVID-19 pandemic, Mr D had to close his business. He claimed under the business interruption section of his policy.

Ultimately, NFUM accepted that cover was provided for the claim. The cover was limited to £10,000 per event, per property. NFUM said there were two claimable events, starting in March 2020 ("lockdown one") and then in September 2020 (rule of six), and paid Mr D a total of £40,000 – two properties and two events.

Mr D was not satisfied with this, and considered there to have been a third event – starting on 4 July 2020 – that impacted one of his properties. Mr D explained that this property is larger than his other one, and income from this larger property was limited due to restrictions that were introduced in July 2020 on more than two households staying together overnight. This restriction led to cancellations, and losses which were only partly recovered by booking some smaller numbers of guests.

NFUM did not consider that any further settlement was due under the policy though. Its position is that the restrictions that ran from 4 July were not a separate event to lockdown one. It has said that whilst Mr D was able to reopen his properties, this was on a restricted basis, so this first event continued beyond the end of the actual lockdown.

Mr D brought his complaint to the Ombudsman Service. Our Investigator noted that the policy did not define what "any one event" should mean, but felt that a fair and reasonable outcome was not to uphold Mr D's complaint. She felt that there needed to have been a "restriction imposed" on Mr D's business. But that the restrictions introduced in July 2020 were placed on the general public rather than Mr D's business.

Mr D remained unsatisfied and so his complaint has been passed to me for a decision.

Having considered the circumstances, including the policy, I did not entirely agree with our Investigator's conclusions or reasoning. I agreed with our Investigator that there needed to have been some sort of quantifiable impact on the relevant business, but was not persuaded that there needed to have been a restriction imposed on the business itself.

So, I contacted NFUM and set out my provisional reasoning on the complaint. I said that

lockdown one had come to an end at the start of July, when the regulations that had imposed the lockdown measures were revoked. However, as a result of cases of COVID-19 - presumably during June 2020 - the Government introduced new guidance. This included a recommended limitation on the numbers and makeup of those who could stay together overnight at holiday accommodation. I said that, if this new guidance caused a loss of profit, then this would seem to be a new event for the purposes of the policy. And that I thought NFUM should reassess Mr D's claim on this basis.

I also pointed NFUM towards a number of court cases and the judgments from these that had been handed down after the Investigator's opinion. These included *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"). These judgments had made some findings on whether policyholders could bring more than one claim in relation to business interruption caused by the pandemic.

NFUM responded, disagreeing with my provisional reasoning. It said that the judgments in Stonegate and Greggs, along with that in *Corbin & King v Axa* [2022] EWHC 409 (Comm) ("Corbin & King") actually supported its position. And that it remained satisfied that it had limited the settlement of Mr D's claims fairly.

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, I have come to the same conclusion as I have outlined above.

Mr D's policy wording provides cover for loss of profit caused by an interruption to Mr D's holiday accommodation business as a result of, in part:

> "*food or drink poisoning, or any HUMAN DISEASE if it must be reported to the local authority. The illness or disease may be:*
>
> *- at YOUR HOLIDAY HOME;*
>
> *- within 25 miles of YOUR HOLIDAY HOME;*
>
> *- traced back to food or drink supplied from YOUR HOLIDAY HOME*"

The policy contains a definition of HUMAN DISEASE that is limited to certain, specified diseases. However, NFUM has taken the proactive stance that, due to wording contained in other policy documents, this definition should be read broadly and should include COVID-19. So, effectively, if COVID-19 has occurred at Mr D's holiday accommodation or within 25 miles of it, and this has caused an interruption to his business, cover is provided.

NFUM should be commended for its decision here. But this does not mean that its decision with regard to the issue at hand is correct.

The policy provides cover under this section for up to 12 months' loss of profit, but the cover is capped at £10,000 per claim and £50,000 for the whole year. NFUM has already accepted that Mr D has valid claims under the policy, and has paid out £40,000 relating to four separate claims, as set out above. So, all that remains in dispute is whether or not a separate claim should apply to the period from 4 July 2020, or whether losses in this period were a continuation of the claim starting in March 2020 – and so already subject to the £10,000 cap.

It has not been disputed that there were likely further occurrences of COVID-19 within the radius of Mr D's accommodation after March 2020. I make no finding on this point, as it is not one that has been argued and potentially it remains for Mr D to evidence this to NFUM. But, given the size of the geographical area and the location of the premises in question, I believe it is reasonable for the moment to proceed on the basis that it is quite likely that there were occurrences of COVID-19 within the 25-mile radius of the accommodation throughout most of the rest of 2020. This allows me to consider whether, assuming there was such an occurrence, NFUM came to a fair and reasonable outcome on Mr D's claim.

Our Investigator has said that there would only be a valid claim where there was a restriction imposed on an insured business following a relevant occurrence of COVID-19. I do not entirely agree with this, as I have set out above. However, I do think there needs to have been some quantifiable impact from the relevant occurrence. I consider this is most easily identified where there has been the introduction of new rules or guidance that has detrimentally impacted the relevant business – either because the measures were imposed on that business or because they materially interfered with the ability of the business to operate as it normally would. As far as this relates to this particular case, I consider this would be an event that had caused an interruption to a relevant business.

Given the findings of the Supreme Court in the FCA test case[1], each individual occurrence of COVID-19 was capable of being a proximate cause of government-imposed restrictions. However, I consider it is only restrictions that were introduced soon after the relevant occurrence that would have been caused, in part, by that occurrence. For example, the occurrences in March 2020 were not the proximate cause of the restrictions introduced in September 2020. This again is not in dispute, as is demonstrated by NFUM's agreement to settle the claims for the period starting in September 2020.

Also, as set out in the judgments of certain court cases I will refer to in more depth below, merely renewing or slightly amended existing guidance would not be considered an event that had caused an interruption.

It is evident that, by July 2020, the number of new COVID-19 occurrences was lower than it was in March 2020. This meant the Government felt able to remove the majority of restrictions. However, the number of COVID-19 cases occurring around this time also meant that the Government introduced other restrictions.

Up until 4 July 2020, holiday accommodation businesses had been forced to cease operations during the "emergency period". At the date in question, this was a result of regulation 5 of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020. This regulation had been renewed and slightly amended over the preceding months, for example to allow accommodation to be offered to certain limited groups; elite athletes, etc. Breaching these regulations was against the law. I consider these amendments to the regulations would be considered as trivial changes or those that reduced the impact of the existing restrictions.

On 4 July, these restrictions were completely removed as far as they related to holiday accommodation businesses. The Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020 fully removed these restrictions and revoked the previous regulations. Similar restrictions were introduced/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.

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

However, the Government did provide advice for accommodation providers[2]. This said that people should not stay overnight with members of more than one household; effectively limiting the numbers of households staying in holiday accommodation to two households at a time. As Mr D has said, this advice then had an impact on his ability to rent out his larger premises at a full price. It should be noted that the measures outlined in the guidance were announced in mid-June[3], but only became applicable on 4 July 2020. I have referred to this later date as being when the guidance was 'introduced', as this describes the date the guidance came 'into force'.

The question is, was the introduction of this new guidance a new insured event.

At this point it is necessary to consider the relevant case law, including Stonegate, Greggs, and Corbin & King referred to above.

NFUM has referred to the judgments in Corbin & King and the judgments in Stonegate and Greggs, two cases heard alongside each other. Also heard alongside this was *Various Eateries Trading Ltd v Allianz Insurance PLC* [2022] EWHC 2549 (Comm) ("VE"). These cases considered a number of matters, but they included comments around whether it was possible for the policyholders involved to make multiple claims on their policies for the various, different restrictions. As such, they are of relevance to Mr D's complaint. I'll refer to these collectively as the "multiple-claim" cases and judgments.

However, before referring to the comments made in these multiple-claim judgments that were particularly relevant, I consider it is important to point out some of the features relevant to these cases and the differences with Mr D's complaint.

The judge in the three cases heard alongside each other specifically said that, whilst the policyholders had referred to a large number of changes to the restrictions impacting their businesses, he was not going through each of these to say whether each was a relevant event. So, whilst he did make comments about some of the occasions when the restrictions changed, the fact that he did not say whether the introduction of the guidance referred to above on 4 July 2020 would or would not have constituted a relevant event, is not in itself conclusive.

And, as NFUM has itself said, the claimant in Corbin & King did not bring a claim in relation to the period from 4 July 2020, so whether it would potentially have been possible to claim for this period was not something the judge in this case was required to consider. That Corbin & King had not brought this claim, does not automatically mean that another claimant – with a different policy and different circumstances – would not be successful with their claim.

Additionally, the multiple-claim cases related to policyholders who were restaurants/food providers and pubs. Mr D is a provider of self-catered holiday accommodation. As such, at certain times, different restrictions would have applied to Mr D as to the parties in the multiple-claim cases. This is particularly relevant, as the guidance brought in on 4 July 2020 applied to persons staying overnight. So, it would not have impacted a restaurant, etc. but would have impacted an accommodation provider (depending on their circumstances). As such, I would not have expected the judges in the multiple-claims cases to have referred to these restrictions.

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

3 https://webarchive.nationalarchives.gov.uk/ukgwa/20200701162606/https://www.gov.uk/government/publications/staying-alert-and-safe-social-distancing/staying-alert-and-safe-social-distancing-after-4-july

However, the judge in the three cases heard together in particular, did make some comments that are useful when considering whether a policyholder can make more than one claim under a policy and what circumstances may allow, and prevent, this.

NFUM has referred to paragraph 192 of the Stonegate judgment, which said:

> "*I would not regard the review and renewal of the 26 March Regulations in England, Wales and Scotland which occurred in April, May and June 2020 as having been separate occurrences, for the reasons given in paragraph [86] of my Judgment in the Greggs Action*."

And paragraph 86 of the Greggs 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*."

NFUM has relied on this to argue that the changes on 4 July 2020 acted to reduce the restrictions that applied, and so should not be considered to be an 'event' leading to a separate claim.

NFUM say the 4 July 2020 regulations were expected to reduce losses not to lead to them. I do not dispute that this is the case in relation to the Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020 specifically. I agree that these regulations removed the majority of relevant restrictions. However, Mr D is not claiming because of the impact these regulations had on his business. Mr D's business was impacted by the guidance that was introduced separately from these regulations.

I note that there is a somewhat persuasive argument that the changes brought in on 4 July, both the regulations and other guidance, were a collective bundle of measures which were introduced in response to the same occurrences of COVID-19. The regulations were brought in because the rate of infection, and hence the number of occurrences, had decreased. But some occurrences were still taking place which meant that the Government felt the guidance was necessary.

However, I consider this is somewhat nuanced. Thinking about the reasoning in the FCA test case, whilst it can clearly be seen that a particular occurrence of COVID-19 was a proximate cause of the guidance, as well as certain aspects of the new regulations – for example the restriction on nightclubs – the revocation of the existing regulations was due to an absence of (as many) occurrences.

Additionally, whilst not overly persuasive to my mind, it is arguable that there was a break between the lockdown period and the application of the guidance to people staying at Mr D's accommodation. The restriction on Mr D opening his premises ended at 00.01 am on 4 July 2020, when regulation 5 was revoked. It isn't entirely clear when the advice for more than two households not to stay overnight became applicable. But certainly this would not apply to Mr D's until after he had opened his premises and presumably not until the night of that day, which would at the earliest have been some time later that day. As I say, I don't find this

overly persuasive from a holistic point of view, but it is supportive of there being a difference between the lockdown restrictions and the household-limit.

However, I do think further comments of the judge in Greggs are significant. He said, at paragraph 88:

> "…*in cases where restrictions were imposed on limited areas of the country, I would regard these as being separate occurrences. Thus I consider that an informed observer would regard the restrictions applied to some parts of Leicester on 4 July 2020 as being a 'single occurrence'*."

The judge in Greggs considered that the 'introduction' of restrictions in Leicester would constitute a new event, even though these were essentially a continuation of the restrictions imposed on Leicester, as well as the wider nation, that formed the lockdown one restrictions. It is hard to see that these were, on the face of it, anything other than continuing or making trivial changes to existing restrictions as they applied to Leicester, or part of a reduction of the restrictions as they applied to the whole country. But, whilst I cannot be sure of the judge's reasoning here, he presumably considered this could constitute a new event because this change was significant in the overall context of the restrictions applied to the country.

The guidance introduced on 4 July 2020 which impacted Mr D's business was not limited to a particular area of the country. But it was limited to impacting a particular type of business. The impact, from a commercial perspective, of the overnight stay measures in the guidance was specific to accommodation providers. This was a significant departure from restrictions requiring businesses across various industries, across the entire country to remain closed.

Whilst this change may have meant the overall impact on Mr D's business decreased, I don't consider that this is scenario the judge in Greggs, at paragraph 86 above, was likely envisaging. The type of restriction that applied to Mr D's business was significantly different as a result of the change.

It is possible that I am wrong in my assessment of the legal position here. However, as well as taking into account the law, I am required to consider all of the circumstances of a complaint in order to determine what I consider to be fair and reasonable. In this regard, I am not necessarily bound by the law. So, even if I am incorrect and a court would not conclude that the introduction of the relevant guidance to be a new event capable of leading to a claim, I consider that it is fair and reasonable, in the circumstances of this complaint, that this should be considered such an event in Mr D's claim.

I consider that these restrictions were significantly different to the restrictions that existed up to that point, to constitute this being a new event that was capable of leading to a claim. Previously, Mr D was unable to operate his business at all. Following the change, he was fully able to open his business, but was impacted by the guidance directed at guests that had not previously existed.

It follows that I consider Mr D's claim was unfairly and unreasonably limited, and that NFUM should reassess it on the basis that the introduction of the guidance on 4 July 2020 constituted a new event.

Putting things right

The National Farmers' Union Mutual Insurance Society Limited should reassess Mr D's claim on the basis that there was a separate claim period commencing on 4 July 2020.

My final decision

My final decision is that I uphold this complaint. The National Farmers' Union Mutual Insurance Society Limited should put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or reject my decision before 19 June 2023.

Sam Thomas
Ombudsman