DRN-3678316

The complaint

A limited company, which I'll call T, has complained about the settlement offered in response to a claim made under its business insurance policy with AXA Insurance UK Plc.

Mr H, as a director of T, has brought the complaint on its behalf. Mr H is also represented in the complaint but I will refer to Mr H or T throughout this decision for ease.

What happened

T held business insurance with AXA. T has said that, on 14 March 2020, a member of staff became unwell with Covid-19 symptoms; other members of staff became unwell with similar symptoms shortly afterwards. T therefore closed on 16 March 2020. T was also one of the businesses that were required to close as a result of the Government's response to the pandemic in March 2020 and could not reopen until July 2020.

T made claims under its policy with AXA for three different periods of closure: 1. for the period 16 March to 4 July 2020; 2. for the period 1 September to 14 September 2020; and 3. for the period 4 November 2020 to 16 May 2021. As they are separate claims, I am only going to address the first claim for the period from March 2020 in this decision. The handling of the other two claims will need to be considered separately.

AXA initially rejected the claim. In early 2022, AXA agreed to reconsider the claim after T complained to us. AXA subsequently agreed to meet the claim but has said it will only cover the losses T incurred over the two weeks from 16 March 2020, as that was the advised isolation period at the time. AXA says the fact that T could not reopen at the end of that two week period, was as a result of the Government response to the general pandemic and was not a result of the case at T's premises. In May 2022, AXA offered £11,103 for that two week period (having worked out T's expected revenue, minus costs savings as a result of being closed).

T is very unhappy with this, as it says the claim should be paid for the period it was closed. T is also unhappy with the time taken to settle the claim.

One of our Investigators looked into the matter and recommended it be upheld.

The Investigator considered that the judgments in *The Financial Conduct Authority & Ors v Arch Insurance (UK) Ltd & Ors* [2021] UKSC 1 ("the FCA test case") were relevant. While the Courts were not asked to consider the exact terms that are in T's policy, which require the relevant event of disease to have happened at the premises ("at the premises clauses"), the Investigator thought the findings of the Supreme Court in relation to policies requiring that the event happen with a particular radius of the premises ("radius clauses") were useful in considering at the premises clause related complaints.

The Investigator said that the Supreme Court had essentially found that each case of Covid-19 was a separate but broadly equal cause of the Government's response to the pandemic (*i.e.* the imposition of The Health Protection (Coronavirus, Restrictions) Regulations 2020,

which I'll call the March Regulations) and the business interruption that resulted from this; that they were each concurrent proximate causes of the Government's decisions. And that these decisions had taken into account reported and unreported cases. As such, the Investigator considered that the case of Covid-19 that AXA had accepted had been suffered by an employee on T's premises was a concurrent cause of the March Regulations.

The Investigator therefore considered the impact of the restrictions on T was something that was covered by the policy. She thought T's claim should be met, subject to any remaining terms of the policy, on the basis that the closure of its premises from 16 March to 4 July 2020 was caused by an insured event. She also thought interest should be added to the settlement of the claim.

AXA does not accept the Investigator's assessment. However, AXA says there are court cases in progress that would determine the correct application of the exact terms of T's policy and that I should not issue my decision until those cases are determined. AXA says I am required to take account of relevant law and there will be a judgment on this specific clause.

As far as I am aware there has been no judgment made on the cases referred to yet. I do not think it would be fair to wait until those are finalised. It is my responsibility to determine what I think is the fair and reasonable outcome as soon as reasonably possible, having regard to industry guidance, good practice and the law. I think I am able to carry out a fair consideration of the complaint having regard to all the circumstances of the matter, including current case law.

AXA also says the Financial Conduct Authority ("FCA") did not seek to persuade the Supreme Court there was cover for disease at the premises. It only asked the Courts to consider "*radius clauses*", where cover was provided in the event of disease within a certain specified radius of the insured premises. The Supreme Court did not consider "*at the premise*s" clauses like T's at all. This is because "*at the premises*" clauses were intended to provide "*narrow, localised cover*" for specific circumstances at the premises, with specific consequences. This is different from the commercial purpose of the radius clauses considered in the FCA test case and the findings on radius clauses were based on the contemplated risk being that a notifiable disease could affect a wide area.

In addition, even on the Supreme Court analysis the Government would have needed knowledge of cases of Covid-19 for them to be causative. No relevant competent authority would have had knowledge of any specific case at T's premises and was instead acting on the basis of information as to cases at a national, regional or local authority level.

As the Investigator has not been able to resolve the complaint, it has been passed to me.

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.

The business interruption section of T's policy provides cover for a number of events. Many of these relate to damage and it isn't argued that damage as required by the policy is what led to T's business being interrupted. But the business interruption section also provides cover for insured loss in consequence of:

> "*closure of the Premises by a competent authority due to an human notifiable infectious disease or food poisoning suffered by any visitor or employee or by*

defective sanitation vermin or pests at the Premises as specified in the schedule or by murder or suicide occurring at the Premises."

AXA accepted that at least one of T's employees had suffered Covid-19, which is a human notifiable infectious disease, and that T was required to close as a result on 16 March 2020.

The issue in dispute is whether AXA is only responsible for the losses that occurred during the 14 days from 16 March 2020 which was the advised isolation period at that time, or the entire period from 16 March until 4 July 2020.

The relevant policy term above has a number of elements, and for there to be cover each element has to be met in the correct causal sequence. This means that for there to be cover the following has to be established:

1. an employee or visitor has to suffer a human notifiable infectious disease at T's premises, which causes
2. closure of the premises by a competent authority, which causes
3. an interruption or interference with T's business that is the cause of financial loss.

I agree with the Investigator that The Supreme Court judgment on the FCA test case is relevant. Some of the terms considered by the Supreme Court referred to the occurrence of a disease, whereas others required there to have been a manifestation. T's policy requires a person to have "*suffered*" from the disease. I don't consider there to be any significant difference here in terms of the application of the reasoning around causation. The only difference is in relation to the circumstances covered and the proof required to evidence that. Once this evidential burden is overcome (and AXA has already accepted that Covid-19 was "*suffered"* at T's premises) the application of the court's reasoning on causation is, in my view, unlikely to be different.

The question of whether the placing of restrictions on T's premises by the Government's announcement in March 2020 and the March Regulations was as a result of the suffering of Covid-19 at T's premises, is one of causation. The appropriate test of causation here is to consider, objectively and in the context of the policy as a whole, what the intended effect of the policy term was as it applies to the circumstances of the claim.

So, the first question to determine is whether the reasoning of the Supreme Court, in the FCA test case, on radius clauses applies to "*at the premises*" clauses. This is an issue that has already been considered by this service and a copy of a relevant final decision has been shared with AXA. However, it disagrees with the approach of this service.

But whilst different policies have different wordings, there is no significant difference between the contractual construction of the radius clauses to the "*at the premises"* clauses. The only difference between these clauses is the geographical area that they cover.

AXA says that it is this difference in geographical area that is relevant to the current case. It says the "*at the premises*" clauses such as in T's policy were intended to restrict cover to specific events at the premises only.

The Supreme Court had not been asked to determine the correct interpretation of "*at the premises*" clauses. But its comments, at paragraph 71 of its judgment, were made in relation to a specific policy. The policy being considered by the court included both "*in the radius"* and "*at the premises"* subclauses, and this was likely to be context the court bore in mind when considering the potential meaning of the term. This is not the case with T's policy.

The Supreme Court said that the scope of the insured peril for an "*at the premises*" clause was not the entire outbreak even if there was an occurrence on the premises, this was also the conclusion it reached in relation to the radius clauses. The Supreme Court found that the insured peril for radius clauses was also not the entire outbreak provided it came within the radius. There was no distinction between radius and premises clauses drawn by the Supreme Court here. And I consider both types of clause provide cover for cases within their geographical limits and not cover for cases elsewhere.

It is to this point that the geographical limit is relevant. But the Supreme Court's reasoning – that the insured peril is each case of Covid-19 that falls within the geographical limit of the clause – applies equally to at the premises clauses as it does to radius clauses.

Additionally, the Supreme Court did not make any distinction between radius clauses and premises clauses when these were combined in the same policy. A single case – even at the premises – was considered sufficient for the cover to respond and to cover the losses sustained by the insured party as a result of that occurrence. The Supreme Court confirmed that a single case can be enough for causation to be established under a radius clause, and there would be cover under a clause containing both a premises and radius subclauses if the only case of Covid-19, within the geographical limits of the clause, was at the premises.

As has been said, the only significant difference in the construction of the "*at the premises"* clauses with the "*radius clauses"* is the geographical area they specify. This can be undefined, the whole country, a 25-mile radius, a 250-metre radius, or the policyholder's premises. A clause that sets out a smaller area only acts to limit the possibility of a case occurring, and so limit the chances of a claim being made. This is a reasonable and understandable commercial intent by an underwriter.

I should also point out here that the premises of some policyholder's will be greater than a 250-metre radius. And it would be illogical to consider that a policy requiring a case of Covid-19 within a radius smaller than a policyholder's premises would provide cover for the consequences of the March Regulations, but that this would not be the case if the policy specified a larger area – that of the entire premises.

I am not persuaded that, had the policy being considered by the court at that time referred only to a radius of 5-miles, 1-mile, 250 metres, or been limited to the extent of the premises, a different conclusion would have been reached. The key issue the court was referring to here in terms of causation was, to my mind, the point that it is not just the impact of cases of disease within the relevant radius, whatever that may be, that are relevant to causation. The size of that radius was not, in my view, a key consideration here.

More significant to my mind is the type of diseases being covered and the fact that these will often have an impact both within and without the radius relevant to any policy whether that be 25-miles, 250-metres or the limits of the insured's premises. I will return to this point below.

Ultimately, the court found that the approach that applied to the interpretation of the insured peril was the same for both radius clauses and at the premises clauses. And that this was that clause only covers the cases of Covid-19 which happen within that radius. The cover is for the cases of disease within the radius (or at the premises, depending on the wording of the policy), not for the disease itself nor for the consequences of diseases outside the radius/premises.

The impact on the cover of requiring the disease to have been suffered on the premises is the same as is provided by a policy limiting the relevant radius to one mile, rather than 25 miles. It does not change the form of cover provided, it merely lowers the chance of the

policy term being activated. There is less chance of a disease event (manifestation, occurrence or suffering) at the premises than within one mile of the premises, and there is less chance of a disease event within one mile of the premises than within 25 miles. Each individual event, regardless of where it happened, was an equal cause of the restrictions being imposed. But for the impact of that disease event to be covered, it must have happened within the geographical limit set by the policy.

Taken at face value, radius clauses offer the same type of cover as at the premises clauses – the only difference being a smaller geographical area where the manifestation needs to take place before resulting business interruption is covered.

As mentioned above, I consider the type of disease covered by the policy is also a relevant consideration. T's policy, as with many similar policies – both those with radius clauses and at the premises clauses - provides cover for notifiable infectious human diseases. Effectively, this is any of the diseases on the list of notifiable disease in Schedule 1 of The Health Protection (Notification) Regulations 2010, including any new disease added to this list.

Covid-19 was added to the list in early March 2020, which is why T's policy provides any cover at all in the circumstances.

Many of the diseases are unlikely to have originated at the premises, so any occurrence there is likely to be part of a larger outbreak. If AXA had wanted to restrict cover in T's policy to disease originating at the premises, it could have done so. But it did not.

The same risk of a widespread and unpredictable outbreak of disease applies to both radius clauses and at the premises clauses. If these wide-spreading diseases are on the policyholder's premises, they are also likely to be found outside of these premises. So, whether or not the disease is on the premises, it seems that the actions of the relevant authority will in fact largely be the same.

It is likely restrictions would be introduced covering a broad geographical area in relation to many of the diseases covered by T's policy. And this would have been something that both AXA and T might reasonably have been aware of at the time the insurance contract was entered.

I note the Supreme Court's comments at paragraph 194 of its judgment in respect of this point:

> *"…we consider that the matters of background knowledge to which the court below attached weight in interpreting the policy wordings are important. The parties to the insurance contracts may be presumed to have known that some infectious diseases - including, potentially, a new disease (like SARS) - can spread rapidly, widely and unpredictably. It is obvious that an outbreak of an infectious disease may not be confined to a specific locality or to a circular area delineated by a radius of 25 miles around a policyholder's premises. Hence no reasonable person would suppose that, if an outbreak of an infectious disease occurred which included cases within such a radius and was sufficiently serious to interrupt the policyholder's business, all the cases of disease would necessarily occur within the radius. It is highly likely that such an outbreak would comprise cases both inside and outside the radius and that measures taken by a public authority which affected the business would be taken in response to the outbreak as a whole and not just to those cases of disease which happened to fall within the circumference of the circle described by the radius provision".*

I consider this reasoning also applies in relation to a policy which provides cover only where there is a suffering of the disease by an employee or visitor at the premises of the insured. Whilst some of the notifiable diseases covered by the policy would in some cases be limited to a very localised outbreak – potentially contained to the premises – many of the diseases covered by the policy would inherently be those that would be found beyond the premises if they were ever at the premises. As with radius clauses, it would be contrary to the commercial purpose of the policies for cases of disease suffered outside the premises to deprive the policyholder of cover for cases at the premises.

I consider it likely that if there were employees and/or visitors suffering from many of the diseases covered by T's policy, the actions taken would likely have been similar.

The actions taken by other governments in relation to outbreaks of SARS and Ebola which led to broad geographical areas or multiple types of business having restrictions imposed on them would provide examples of this. It seems that the more likely the disease is to be wide-spreading, the more wide-spread the restrictions will be that are imposed to control that disease.

By including cover for a number of diseases where the likely actions to be taken would be those that would impact more than a single premises, I considered AXA has seemingly agreed to provide cover where actions are taken (in relevant situations) that impact more than just the insured's premises.

Additionally, T's policy provided cover for up to £500,000 over a 12-month indemnity period for its at the premises cover. I consider this undermines the suggestion that the clause is only intended to provide short-term cover for an incident which is only on the premises and not elsewhere. It is highly unlikely, in my opinion, that such a limited event would lead to such a lengthy and expensive claim.

The Supreme Court found that each and every occurrence of Covid-19 was an approximately equal and proximate cause of the Government's decision-making process. The Supreme Court set out some general principles or standards to be applied when considering the proximate cause of loss. These included determining whether a peril that is covered by the policy had any causal involvement and, if so, whether a peril that was excluded from the cover provided by the policy had any such involvement. And then determining whether the occurrence of one of these made the loss inevitable in the ordinary course of events.

The court went onto say that whilst the Government's decisions to introduce the restrictions in March 2020 could not reasonably be attributed to any individual occurrence of Covid-19, this decision was taken in response to all the cases in the country as a whole. And the Supreme Court agreed with the High Court here that, "*all the cases were equal causes of the imposition of national measures".*

The Supreme Court found that here was no reason why one insured event, acting in combination within a number of uninsured events, should not be regarded as a proximate cause of loss even if that insured event was not necessary or sufficient to bring about the loss on its own. And that; "*Whether that causal connection is sufficient to trigger the insurer's obligation to indemnify the policyholder depends on what has been agreed between them*."

As such, a key issue was what risks AXA agreed to cover. This is a question of contractual interpretation of T's policy, answered by applying the intended effect of the policy to the circumstances of T's claim.

In making its findings in the test case, the Supreme Court relied on the presumption that an

infectious and contagious disease – like many of those AXA chose to cover in T's policy – can spread rapidly, widely and unpredictably, so that an outbreak which is sufficiently serious to lead to a policyholder suffering an interruption to their business was highly likely to include cases inside and outside the radius relevant to the policy. The court found it would not be feasible, and would be contrary to the commercial intent of the policy, for cases outside of the radius to deprive the policyholder of cover in relation to cases within the radius. I note the comments of paragraph 206 of the Supreme Court judgment which support this.

Radius clauses did not limit cover to situations where the interruption of the business was caused only by cases of disease manifesting within the area, as distinct from other cases outside the area. And, in such circumstances, other concurrent effects on an insured business of the underlying cause of the business interruption, *i.e.* the pandemic generally, do not reduce the indemnity under the relevant clause.

I see no persuasive reason why the considerations that the Supreme Court applied generally to radius clauses do not equally apply to at the premises clauses. And consider the same applies here to T's complaint. As the Supreme Court said, all that is necessary for a radius clause which also requires the closure to be as a result of, for example, government action, is for the closure or restrictions to be in response to cases of Covid-19 which included at least one case existing within the geographical area set out in the relevant clause.

In T's case, this geographical area is its premises and AXA agreed there was at least one employee suffering from Covid-19 within this area. And I consider the Government's actions and advice were in response to cases of Covid-19, which included the case(s) that at T's premises.

It might be that the case(s) of Covid-19 at T's premises would not have been reported to the Government at the time it made its decision. But I do not consider this point to be crucial in terms of the discussion of causation. It is clear that as well as the reported cases that the Government was specifically aware of, the decision it took was also made due to the estimated number of unreported cases.

It was the number of these unreported cases, as well as the reported ones, that led to the Government making its decision. Each one of these reported and unreported cases will have arguably been a proximate cause of the Government's decision-making process. But it would not be possible for estimated cases to lead to an insurance claim where an actual suffering of the disease was required by the policy.

By the time the decision to introduce the March Regulations was taken, a number of individuals included in the figures of who had sustained Covid-19 may already have recovered. But I consider these cases would still be those that, together with the other cases around that time, were the concurrent causes of the Government's decision. The Government and its advisors were not looking at individual cases in isolation, they were considering the accumulation of these which would have formed the framework of the rate of infection and allowed for a prediction as to the future R-number and resultant hospitalisations.

Although each case of disease was individual, the effects of the disease – the Government's measures – were indivisible. And as the Supreme Court said at paragraph 212 of its judgment:

> *"…each of the individual cases of illness resulting from COVID-19 which had occurred by the date of any Government action was a separate and equally effective cause of that action…"*

I appreciate that part of the cause of T's continued closure in the present case is the same as its initial closure (*i.e*. the suffering of Covid-19 at the premises). But, the term in the policy is a composite one. The term requires both the suffering of disease and the action of the competent authority. It is the action of this authority that is also an integral element of the continued closure and this action had not taken place at the time of the initial closure. Prior to the Prime Minister's announcement in March 2020, there were no specific restrictions that had been placed on the premises that caused any interruption to its business.

T's policy does require that the action is taken by the competent authority and I don't think there is any dispute that this was the case.

As such, taking all the circumstances of the complaint into account, I consider that T's policy should cover it for the losses it sustained when it was interrupted by the Prime Minister's announcement and the subsequent regulations made on 21 March and 26 March 2020, in addition to the period from 16 March 2020 already agreed. This means I consider AXA is liable for the full extent of the period T was closed from 16 March to 4 July 2020, which is when I understand T would have been able to reopen.

Conclusion

Having considered how the terms of T's policy would likely have been interpreted by a reasonable person at the point the contract was entered into, bearing in mind that it is a policy sold to SMEs. I don't think a reasonable person would interpret a clause that provides £500,000 and 12 months of cover in relation to various diseases, including those most likely to be wide-spread and hence requiring far-reaching measures to tackle them, to be limited to consequences directed solely at the insured's premises.

I think it is reasonable to read T's "*at the premises*" clause, in the context of the rest of the policy and the circumstances of the claim, as providing cover for losses resulting from a person having suffered Covid-19 at its premises. Although I can't be sure, I also this this was more likely than not that this is how a court would interpret this term.

Given the findings of the Supreme Court, I also think the suffering at T's premises was an equally effective concurrent cause of the decision to introduce the March Regulations, as the suffering of the disease beyond the limits of T's premises. And the cases off the premises are not an excluded cause.

Referring back to the elements of the insured peril I set out earlier in my decision, in their correct causal sequence, and taking the points above into account, I am satisfied that:

- An illness caused by Covid-19 was suffered by a person at T's premises.
- This was a proximate and concurrent cause of the Government's decision to introduce the March Regulations.
- These March Regulations were introduced by a competent authority.
- These Regulations required the closure of T's premises; and
- this closure caused an interruption or interference with T's business that likely caused a loss.

As the elements of T's disease clause have been met in the circumstances, I consider AXA's decision to limit T's claim to the period up to 28 March 2020 and not cover the losses sustained as a result of the Government's restrictions was not made correctly. And so I don't consider AXA dealt with T's complaint fairly or reasonably. AXA should reconsider the claim from 16 March to 4 July 2020.

Putting things right

For the reasons given above, I consider T's complaint should be upheld. In order to put things right AXA should:

- Reconsider T's claim on the basis that there was an occurrence on its premises that caused an interruption to its business from 16 March 2020 to 4 July 2020.
- If, taking into account the remaining terms of the policy and any payment already made in respect of this claim for the period 16 to 28 March 2020, any settlement is due to T, AXA should pay this. Any excess that is payable should deducted from the total claim amount, before any policy limit is applied.
- AXA should pay T interest on this settlement.
- AXA should also pay T interest on any amount already paid in settlement of the claim for the period it already agreed from 16 March 2020.

T first made the claim on 23 March 2020. So the interest payable on the settlement should be based on T having been deprived of four monthly interim payments that should have been made during the course of the claim.

The first of these payments should have been paid on 16 May 2020 and should have covered T's indemnified losses for the period 16 March 2020 to 15 April 2020 inclusive. Subsequent monthly payments should have been based on losses for the periods; 16 April 2020 to 15 May 2020, 16 May 2020 to 15 June 2020, and 16 June 2020 to 4 July 2020. These payments should have been made on 16 June 2020, 16 July 2020, and 16 August 2020 respectively.

AXA should pay T interest on the amount of each of these interim payments, for the period from the date of each of these interim payments should have been made to the date of settlement. This interest should be paid at a rate of 8% simple per annum. If AXA has already paid part of the sum due for the period 16 March to 15 April 2020, then interest only needs to be paid on that part of this payment from 16 May 2020 (which is when I think the payment for this period of loss should have been paid) to the date of actual payment to T.

My final decision

Under the rules of the Financial Ombudsman Service, I'm required to ask T to accept or reject my decision before 1 June 2023.

Harriet McCarthy
Ombudsman