

## The complaint

G has complained that Society of Lloyd's unfairly turned down a claim on its contingency non-appearance insurance policy after the performance of an event it was involved in was cancelled due to the impact of the Covid-19 pandemic.

Mr C has brought the complaint on G's behalf.

G has also been helped in bringing this complaint by a representative. For ease of reading, I'll refer to the representative's actions and comments as being those of G.

## What happened

G held a contingency non-appearance insurance policy with Society of Lloyd's. It claimed on its policy after one of its events was impacted by Covid-19 and the Government's response to the pandemic.

Society of Lloyd's turned down G's claim as it said G didn't have cover for the losses it was claiming for.

Unhappy with Society of Lloyds' response, G brought its complaint to us. It thought its claim should be covered under the Communicable Disease extension of the policy. Broadly, and in summary, it said:

- The extension covers Severe Acute Respiratory Syndrome (SARS) or atypical pneumonia.
- A reasonable reader of a policy (including the extension) would consider Covid-19 to fall within the umbrella of either SARS or atypical pneumonia.
- Other insurers have paid out claims on identical terms.

Our Investigator looked into G's complaint but didn't recommend it be upheld as he didn't think the policy provided cover. G disagreed and asked for an Ombudsman's decision.

In September 2022, I issued a provisional decision to both parties in which I said:

*"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 intend to depart from the investigator's findings and uphold G's complaint. I'll explain why.*

## Policy Terms

*The starting point is the policy terms. They cover G's net losses, as defined by the policy, should any insured performance or events be necessarily cancelled as the sole and direct result of a cause not otherwise excluded, which occurs during the period of insurance and*

*is beyond the control of G and the participant defined within the policy. The insurance also covers proven additional costs or charges reasonably and necessarily paid by G to avoid or diminish a loss payable under the policy, provided those charges don't exceed the value of the loss avoided or diminished.*

*Extension 7.15 of the policy covers Communicable Diseases, as defined. It says:*

*"Notwithstanding anything stated to the contrary, this insurance is extended to indemnify the Insured in the event that the Event is cancelled in its entirety as a sole and direct result of an Outbreak of the following diseases only*

*(1.1.1) Severe Acute Respiratory Syndrome (SARS); or*

*(1.1.2) atypical pneumonia; or*

*(1.1.3) bird flu (Avian Flu); or*

*(1.1.4) swine flu; and/or*

*(1.1.5) any other influenza variant deemed either an epidemic or pandemic by the World Health Organisation.*

*Which results in:*

- a. The imposition of quarantine or restriction in movement of people or animals by any national or international body or agency; and or,*
- b. Any travel advisory or warning being issued by a national or international body or agency,*

*Subject otherwise to the terms Condition and Exclusions of the policy."*

*The policy excludes:*

*"...any loss directly or indirectly arising out of, contributed to by, or resulting from:*

*...*

*7.15. any Communicable Disease or fear or threat thereof, unless:*

*7.15.1 such Communicable Disease infects an Insured Person and such infection of an Insured Person is the sole and direct cause of the necessary Cancellation, Abandonment, Postponement, Interruption, Curtailment or Relocation of any Insured Event; or*

*7.5.2 the Venue is closed by or under the order of any government or public or local authority as a sole and direct result of a Communicable Disease which originates and manifests itself within the confines of the Venue."*

*The policy states "Communicable Disease means any disease capable of being transmitted from an infected person or species to a susceptible host, either directly or indirectly."*

*The issue for me to decide is whether the facts of this complaint trigger the application of the Communicable Disease on its true construction.*

### **Interpretation of Insurance**

*The approach to contractual interpretation is set out in the Supreme Court's judgment in response to the FCA Business Interruption Test Case. Paragraph 47 of that judgement says "an insurance policy, like any other contract, must be interpreted objectively by asking what 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 the language of the contract to mean. Evidence about what the parties subjectively intended or understood the contract to mean is not relevant to the court's task."*

*At paragraph 77 The Supreme Court also commented that "...the overriding question is how the words of the contract would be understood by a reasonable person. In the case of an insurance policy of the present kind, sold principally to SMEs, the person to whom the document should be taken to be addressed is not a pedantic lawyer who will subject the entire policy wording to a minute textual analysis (cf Jumbo King Ltd v Faithful Properties Ltd (1999) 2 HKCFAR 279, para 59). It is an ordinary policyholder who, on entering into the contract, is taken to have read through the policy conscientiously in order to understand what cover they were getting."*

*It was noted in Corbin & King Ltd v AXA Insurance UK PLC [2022] EWHC 409 (Comm) (quoting from an arbitration award issued by Lord Mance in The Policyholders Specified in Schedule 1 to the Arbitration Agreement v China Taiping Insurance (UK) Co Ltd) that this does not mention the insurer or any broker. Cockerill J therefore said that "... on this basis, we approach the Policy on its words, as if we are a small businessman, albeit with a broker to assist us." (paragraph 180).*

*There has been considerable discussion around the interpretation of the contract between the parties on whether the Communicable Disease extension can be interpreted to cover Covid-19. The key point however is that the contract must not be interpreted with hindsight. Rather the question is how the words would have been understood by the reasonable small business owner, assisted by a broker, with all the background knowledge which would have been reasonably available at the time the parties entered into the contract.*

*The insurance was entered into in November 2019, so the question for me is what, in November 2019, a reasonable person would have understood SARS and atypical pneumonia to mean. At that point, Covid-19 had not been identified. As a result, my view is that the two expert reports the parties have provided are of limited value because information such as the World Health Organisation's naming conventions is not knowledge which would have been reasonably available to the parties. This is in line with the Rockliffe Hall Ltd v Travelers Insurance Company Limited [2021] EWHC 412 (Comm) decision, where Cockerill J decided that the legislative history of the life of notifiable diseases was not information which would have been reasonably available to the parties.*

*I've considered what this approach, in my view, means for both SARS and atypical pneumonia below.*

### **SARS**

*SARS is a viral respiratory illness caused by the SARS-associated coronavirus, SARS-CoV. Both SARS and Covid-19 are caused by coronaviruses. I think the reference to SARS in the policy is likely to be interpreted as referring to the SARS disease which broke out in China and Hong Kong (and other locations) in 2002-2003. This is consistent with general knowledge of SARS and the UK's notifiable diseases list, which lists SARS separately.*

*And I think that the interpretation is unlikely to cover SARS variants for three reasons: first, the SARS outbreak was major news at the time so I think this is what a reasonable small business owner would take it to mean. Secondly, it's named in capital letters, unlike atypical pneumonia, bird flu, swine flu and "any other influenza variant...", which implies it is a specific disease. Finally, paragraph 1.1.5 specifically refers to "any other influenza variant". This implies that if variants are not mentioned, they are not covered.*

*Variants of bird flu and swine flu are however likely to be covered, but that is because, given the periodic outbreaks, I think it's likely the reasonable person would regard it as a type of flu which originates in birds and pigs and jumps to humans, rather than regarding it as a specific type (unlike SARS).*

### ***Atypical pneumonia***

*The reference to "atypical pneumonia" is not defined. In line with paragraph 56 of Rockliffe Hall, my view is that what is meant here is that the cause of the cancellation needs to be the disease or condition of "atypical pneumonia" as a thing with which an individual might be diagnosed.*

*As at November 2019, I think the natural meaning of "atypical pneumonia" is likely to be an unusual form of pneumonia. Based on the NHS website, pneumonia is inflammation of the lungs and can be caused by either a virus or bacteria. The Oxford English Dictionary describes it as "a lung infection in which the air spaces fill with pus".*

*The coverage here is for something which is sufficiently serious and communicable (because if it wasn't infectious it would fall outside the scope of the exclusion in 7.15 and so be covered as a Peril) that it could result in a quarantine, restrictions on movement or a travel advisory. It also has to be 'atypical', which isn't defined but appears to refer to it being uncommon in ordinary terms.*

*Society of Lloyds' position is that atypical pneumonia is primarily the result of bacterial infection. I haven't found any reasonably available information to support this. The British Medical Journal describes atypical bacterial pneumonia as caused by atypical organisms not detectable on Gram stain and which cannot be cultured using standard methods, such as Chlamydia species.<sup>1</sup> But I don't think this would qualify as information reasonably available to the policyholder or broker for the purposes of contractual interpretation.*

*I appreciate that Society of Lloyds may feel that Covid-19 is a disease in its own right and therefore cannot be interpreted as atypical pneumonia. However, I think the key here is whether a reasonable person in November 2019 would have thought that "atypical pneumonia" covered a new infectious disease which caused pneumonia, I think the answer would, on balance, be yes. This is consistent with Rockliffe Hall because it is still treating pneumonia as a condition, rather than a general description.*

*Overall, I consider that G's claim does fall within cover a reasonable interpretation of "atypical pneumonia" in November 2019 because it is a general condition, rather than a disease in its own right.*

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<sup>1</sup> <https://bestpractice.bmj.com/topics/en-gb/18#:~:text=Atypical%20bacterial%20pneumonia%20is%20caused,Chlamydia%20pneumoniae%2C%20and%20Legionella%20pneumophila.>

### **Good industry practice and other issues**

*As I understand it, other insurers have paid out claims on identical policy terms. This would, in itself, indicate good industry practice which I'd urge Society of Lloyds to consider in this case and before I issue my final decision."*

Both parties responded to my provisional findings. G has accepted what I've said. Society of Lloyd's have also responded. They disagree with the outcome I've reached. I've summarised their points they've made below:

- Covid-19 is a separate virus in accordance with guidance from the World Health Organisation.
- 'Typical' and 'atypical' pneumonia differ; With atypical pneumonia unlikely to hospitalise, and a person is unlikely to be significantly ill – this not necessarily the case with Covid-19. They've provided links to various online resources about these illnesses.
- While it is accepted that pneumonia can be a complication of Covid-19, the catalyst of insurance losses were the governmental closures brought about by the Covid-19 outbreak, and the preventative measures to prevent its spread, not latter complications.
- Covid-19 is a Coronavirus, with pneumonia being the result of a bacterial infection.
- Having considered everything available online, they accept that whilst Covid-19 can lead to pneumonia, it is not the same as pneumonia. They are separate diseases. Not all those who get Covid-19 will get pneumonia.
- The policy wording explains that “... *the Event is cancelled in its entirety as a sole and direct result of an Outbreak of the following diseases*”. As such, they don't believe it responds as the catalyst of this insurance loss was the governmental closures brought about by the Covid-19 outbreak, and the preventative measures to prevent its spread, not latter complications.

### **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 remain of the view that this complaint should be upheld for the same reasons set out within my provisional decision and with the same remedy. This is because Lloyd's haven't provided me with anything that persuades me that a reasonable person - in November 2019 - wouldn't have thought that “atypical pneumonia” covered a new infection disease which caused pneumonia.

So, whilst I agree that Covid-19 is a disease in its own right, I also think that a reasonable person in November 2019 would've taken the view that it fell within the general condition of “atypical pneumonia”.

When reaching this conclusion, I've taken into account the references that Lloyd's have made to several online resources, but having reviewed them, I'm not persuaded they change the position. In my view, a reading of those resources don't make clear that “atypical” i.e. unusual pneumonia (defined on the NHS website as inflammation of the lungs, which can be caused by either a virus or bacteria - not solely bacteria as Lloyd's say) isn't something that would have been caused by Covid-19.

And whilst I appreciate that cover extends to the cancellation being the direct result of an outbreak of listed diseases, I don't think this excludes G's claim. I've already explained why I think cover extends in this case to 'atypical pneumonia'. And that cover applies where there's an imposition of quarantine or restriction in movement of people or animals by any national or international body or agency resulting from the disease. The insurance

loss was caused by governmental closures and the preventative measures to stop the spread of Covid-19, but for the reasons I've already set out, I think this would extend to a reasonable person in November 2019 thinking that cover was in place for the condition based on all the background knowledge which would have been reasonably available at the time.

### **Putting things right**

In light of my findings above, Lloyds should reconsider G's claim under the remaining policy terms.

If Society of Lloyd's makes a payment to G in respect of that claim, they should add interest of 8% per year simple to run two months from the date of the claim, until it is paid.

### **Our Award Limits**

G should note that for complaints referred after 1 April 2020 for acts or omissions by a business on or after 1 April 2019, our maximum financial award limit is £355,000. Where I uphold a complaint, I can award fair compensation to be paid by a financial business up to this amount plus interest. If I think that fair compensation is more than £355,000, I may recommend that Society of Lloyd's pays the balance.

I note G's policy limit is up to £400,000. I don't know whether its claim, once assessed, is likely to amount to more than £355,000. If so, I can only direct that Society of Lloyd's pays up to this limit with a recommendation that they pay any balance. The recommendation is not part of my determination or award. Society of Lloyd's doesn't have to do what I recommend. It's unlikely that G can accept my decision and go to court to ask for the balance. G may want to get independent legal advice before deciding to accept my findings or indeed any final decisions I might make in respect of them.

### **My final decision**

For the reasons set out above, I uphold G's complaint against Society of Lloyd's and direct them to put things right in accordance with what I've said above.

Under the rules of the Financial Ombudsman Service, I'm required to ask G to accept or reject my decision before 1 December 2022.

Lale Hussein-Venn  
**Ombudsman**