DRN-3828679

The complaint

A company that I'll refer to as P has complained that China Taiping Insurance (UK) Co Ltd ("China Taiping") unfairly reduced the amount paid on its business interruption insurance claim from March 2020 as China Taiping say P's income would have been impacted in any event by Covid-19 and the legislative response of the UK Government in response to the Covid-19 pandemic.

Ms F, a director of P, has brought the complaint on P's behalf.

What happened

P held a restaurant, shops and takeaways insurance policy with China Taiping, providing for (amongst other things) contents and business interruption insurance. The period of insurance was from 1 October 2018 to 30 September 2019. The policy schedule set out that for the loss of income cover, the indemnity period was 24 months and the sum insured was £400,000.

In early 2019, P's premises were damaged by a third party carrying out work in the local area. P closed its premises in April 2019 for repairs to be carried out. P claimed on its policy with China Taiping for the losses it incurred due to its closure. China Taiping accepted the claim and made a number of monthly payments to P.

The repairs to P's premises took some time and in April 2020 it was estimated that the repairs wouldn't be concluded until July 2020. However, China Taiping said that they wouldn't continue to make payments from 27 March 2020 as, if it wasn't for the damage caused by the third party, P would have been closed in any event due to the legislation introduced by the UK Government as a result of Covid-19.

P complained to China Taiping in May 2020. It said it had a licence to sell alcohol to be consumed away from the premises so could have continued to trade during lockdown. P also said that its policy had an indemnity period of 24 months and didn't contain a trends clause. Therefore, it said China Taiping wasn't entitled to reduce its settlement as a result of any trends in business.

China Taiping said the policy set out the circumstances that trigger cover and the method to quantify the amount payable. This included a 'but for' approach to causation. China Taiping said the purpose of the policy is to provide cover only where the loss results from an insured event. They said the regulations requiring P to close in March 2020 meant there was a separate intervening cause of P's loss which wasn't insured. China Taiping said that to indemnify P without using a 'but for' approach would, in effect, mean the policy guaranteed indemnity based on the pre-damage forecast, which wasn't the intention of the policy.

China Taiping said that ordinarily, if a loss of income is attributable to a cause which isn't wholly or partly connected to the insured damage, and that loss would have impacted the income if the insured damage hadn't occurred, then an adjustment would be made to reflect as accurately as possible the loss resulting solely from the damage. China Taiping didn't think it was necessary for the policy to have a trends or 'other circumstances' clause as they

said that would only provide additional clarification on wording that the parties had already agreed, i.e. that cover was for the shortfall between the income received and that which would have been received in the circumstances but for the damage. China Taiping added that this was a fair and reasonable way to settle P's claim.

Unhappy with China Taiping's response, P brought its complaint to our service in June 2020. P told us that China Taiping had later accepted that P could have traded as an off licence during the first lockdown if it had been open. It had therefore agreed to pay P 20% of its loss of its income for that period as this was the amount China Taiping thought P had lost as a result of being closed during this time. P said that from July 2020 until the end of the indemnity period China Taiping often paid a reduced settlement as they thought P would have remained impacted by Covid-19 during this time. P didn't think this was enough. It said repairs weren't completed until August 2021 and there wasn't anything in the policy which allowed China Taiping to reduce the settlement due to Covid-19 or the legislation introduced by the UK Government.

Our investigator looked into P's complaint and recommended it be upheld. He said as P's losses had been the result of an insured event and closure by Covid-19 and the UK Government regulations weren't excluded by the policy, China Taiping should pay P's loss of income without taking account of any trends in the business due to Covid-19 or the legislation introduced by the UK Government. He recommended that China Taiping add interest to the additional settlement amount at a rate of 8% simple from one month after each payment would have been due to the date China Taiping make payment.

P accepted our investigator's recommendation, but China Taiping did not. They provided a detailed response setting out why they didn't think they should pay for P's full loss of income during the period it would have been impacted by Covid-19 and the UK Government regulations.

In summary, China Taiping have said that:

- The loss of income clause in the policy sets out the quantification machinery for measuring the loss of income resulting from insured damage. It provides for a 'but for' approach to put the policyholder in the same position it would have been in if the damage hadn't occurred.
- The UK Government regulations were neither concurrent with nor arose out of the same underlying cause as the insured damage.
- The UK Government regulations were an intervening event which must be taken into account when quantifying P's loss of income. Otherwise, China Taiping would be guaranteeing the policyholder's income for the duration of the closure in the 24-month indemnity period and that is not what the policy intended.
- The policy was no longer in force in March 2020 as it had lapsed in October 2019.
- The policy is written in plain English and it is clear that the policy intended to pay for any shortfall between the actual post-incident figures and those that P would otherwise have achieved had the insured damage not occurred.
- No reasonable person would expect the policy to operate in the way P suggested.
- A 'trends clause' isn't necessary for the proper operation of the loss of income clause as the existing clause sets out that the commercial purpose of the policy is to indemnify the policyholder for the income they would have earned had the damage not occurred.
- The position is analogous to the "star chef" example given in para 231 of the Supreme Court judgment in the *FCA v Arch Insurance (UK) Ltd and others* [2021] UKSC 1 (the "FCA Test Case"). The Court gave the example of a restaurant which had a star chef who was due to leave the restaurant on 1 April 2020 for reasons

unrelated to the pandemic. The Court said in that case it would be unreasonable to require the insurer to indemnify the policyholder for loss of turnover resulting from the inability to use the premises due to the Covid-19 restrictions insofar as such turnover would have been reduced in any event by reason of the chef's departure.

- At para. 236 of the judgment in the FCA Test Case the Supreme Court observed that claims for loss of income by their nature give rise to difficult questions of quantification, often concerning what would have happened in hypothetical circumstances. So, for example, in the case of the restaurant with the star chef, it might be very difficult and uncertain to estimate what the effect on turnover of the chef leaving would have been if the restaurant had not been required to close on 21 March 2020 (due to the Covid-19 restrictions). But the Supreme Court said that such difficulty of proof is not a sufficient reason to ignore the effects of the chef's departure.
- At para. 268 of the judgment in the FCA Test Case the Supreme Court held that a trends clause incorporating the "but for" test should be construed by recognising that the aim of such a clause is to arrive at the results that would have been achieved but for the insured peril and circumstances arising out of the same underlying or originating cause.
- The pandemic was entirely fortuitous, such as in the case of an outbreak of a separate fire after the policy had lapsed. It was not the intention of the policy to cover all such later events.

I issued a provisional decision on this complaint on 22 June 2022 explaining why I intended to uphold this complaint. In that 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 uphold P's complaint.

P has made a number of detailed points in support of why China Taiping shouldn't reduce its payments. I'm not going to address them all in this decision and will instead focus on what I consider to be the key reasons for upholding this complaint. The question I've needed to consider is whether the wording of P's policy allows China Taiping to reduce P's settlement to take account of losses it might have incurred due to Covid-19 and the Government's response to the pandemic, as well as what is fair and reasonable in all the circumstances.

I understand that China Taiping have already paid P's business interruption insurance claim until March 2020 and only the period from March 2020 remains in dispute. My decision is therefore in relation to the period in dispute and not any losses prior to March 2020.

The terms and conditions of P's policy say:

> *"the amount payable as indemnity shall be*
> *(a) the shortfall between the Income received during the Indemnity Period and the Income which would have been received but for the Damage*
> *(b) the additional expenditure necessarily and reasonably incurred to avoid such a shortfall but only to the extent of the shortfall thereby avoided*
> *less any sum saved during the Indemnity Period on business expenses or charges which cease or reduce as a result of the Damage"*

The policy has an indemnity period of 24 months.

The clause set out above doesn't refer to 'trends' or 'other circumstances' and therefore I think it is quantification wording rather than a trends clause.

It's generally accepted in insurance that if there are two equally effective causes of a policyholder's loss and one is covered by the policy and the other is not, the policy will cover the loss unless one of the causes is expressly excluded under the policy. In this case, P's claim for accidental damage (the insured cause) is covered under the policy. Closure due to Covid-19 or the Government Regulations (the uninsured cause) isn't something that's covered by the policy. However, it's also not expressly excluded either.

I have considered the points China Taiping have raised, but in my view, the 'but for test' set out in the relevant clause doesn't mean that the uninsured cause necessarily prevents cover for the insured cause given the uninsured cause is not excluded.

China Taiping considers the position here to be analogous to the "star chef" example at para 231 of the Supreme Court judgment. However, at para 232, the judgment goes on to say:

> *"The distinction between the departure of the chef and the consequences of COVID-19 which would have reduced the turnover of the restaurant in any event is in our view to be found in other parts of the judgment under appeal."*

I think it's likely that, what the Court meant by "other parts of the judgment", are those parts of the judgment where trends clauses are considered – as this is the type of situation that would usually be considered in relation to trends clauses.

Trends clauses are considered at paras 251-288 of the judgment. Paras 260-264 state the following:

> *"260. First, the trends clauses are part of the machinery contained in the policies for quantifying loss. They do not address or seek to delineate the scope of the indemnity. That is the function of the insuring clauses in the policy.*
> *261. Second, in accordance with the general principle referred to earlier (see para 77 above), the trends clauses should, if possible, be construed consistently with the insuring clauses in the policy.*
> *262. Third, to construe the trends clauses consistently with the insuring clauses means that, if possible, they should be construed so as not to take away the cover provided by the insuring clauses. To do so would effectively transform quantification machinery into a form of exclusion.*
> *263. A similar point was made by the court below (at para 121 of the judgment) when discussing the trends clause in RSA 3, where the court stated that the clause is: "… part of the machinery for calculating the business interruption loss on the basis that there is a qualifying insured peril. Where the policyholder has therefore prima facie established a loss caused by an insured peril, it would seem contrary to principle, unless the policy wording so requires, for that loss to be limited by the inclusion of any part of the insured peril in the assessment of what the position would have been if the insured peril had not occurred."*
> *264. In the present case that means that, unless the policy wording otherwise requires, the trends clauses should not be construed so as to take away cover for losses prima facie covered by the insuring clauses on the basis of concurrent causes of those losses which do not prevent them from being covered by the insuring clauses."*

I think that the above paragraphs support that the "quantification machinery" should not be construed so as to take away cover for losses covered by an insuring clause on the basis of concurrent causes of those losses, where the uninsured cause is not excluded. To do so would effectively transform that "quantification machinery" into an exclusion. I appreciate that

China Taiping don't think that the wording is intended to act as an exclusion, but I think, in effect, this is what it would be.

I recognise that the Supreme Court wasn't asked to consider this type of quantification wording and the Court's comments were in relation to losses caused by the same underlying cause. It's therefore possible that my decision would be a departure from the law. However, I'm required to reach a decision based on what I think is fair and reasonable in all the circumstances. So, even if I'm wrong about the legal position, given that P's policy did not explicitly exclude cover in the circumstances of Covid-19 and the Government's related actions, I think it would be unfair for China Taiping to remove cover on the basis of this as an intervening cause. Therefore, I still believe the fair and reasonable outcome is for China Taiping to indemnify P for its losses from March 2020 without making any adjustment for the impact of Covid-19 and the Government Regulations.

P had been closed for around a year before the lockdown occurred and irrespective of Covid-19, it would have been closed during the period in dispute as the necessary repairs had not been completed. Therefore, if China Taiping didn't indemnify P for its losses during this period they would be saving money that they would otherwise have needed to pay. I've noted China Taiping's point that P's policy had lapsed but I don't think this is relevant to my decision. That's because P's policy has an indemnity period of 24 months and my decision is based on it being fair and reasonable for China Taiping to indemnify P for its closure due to the original damage rather than as a result of Covid-19 and the Government Regulations.

I've also noted P's point that it wasn't able to apply for Government support during this time as it wasn't closed due to Covid-19 or the Government Regulations. I don't think it's fair and reasonable for China Taiping to reduce P's claim settlement on the basis that it would have been closed if P wasn't able to apply for support as it wasn't closed due to Covid-19.

To put things right I think the fair and reasonable outcome is for China Taiping to pay P's claim from March 2020 without making any adjustments for the impact of Covid-19 or the Government Regulations. China Taiping can deduct any payment they have already made to P for it being able to trade as an off-licence during this time.

As P has been without money it should have had China Taiping should also pay interest on the outstanding amount at a rate of 8% simple per year from the date they should have paid the claim to the date China Taiping make payment. China Taiping were paying P's claim on a monthly basis and I think this is what it should have continued to do. China Taiping should therefore have paid P's claim for the period 27 March to 27 April on 27 May, the claim for 27 April to 27 May on 27 June and so on.

P accepted my provisional decision and said it had nothing substantially to add to my findings, although it provided comments in response to China Taiping's. I will not set out its full reply but have summarised its comments below.

- In regard to China Taiping not guaranteeing a 24 month indemnity period, P said this is exactly what a small business expects when it takes out insurance – i.e. that if something catastrophic happens it will be covered for the full 24 month indemnity period if needed.
- If China Taiping had intended the policy to respond as though it had a trends clause they could have added one to the policy.
- The policy only lapsed because China Taiping refused to offer a renewal.
- It would not be fair for an insurer to rely on the policy having lapsed in order to end the cover, otherwise any indemnity period which lasted longer than the duration of the policy would not provide the cover suggested.

- In response to China Taiping's point that no reasonable person would interpret the policy to respond in such a way, P said it has interpreted the policy as it is set out in the policy and how it would be understood in plain English.
- It agrees with my comments that in order for the 'Star Chef' analogy (as set out in para. 231 of the FCA Test case) to apply the policy would require a trends clause, which it does not.
- China Taiping might say that the intention of the policy was to not cover later events but what is relevant is their intent as set out in the policy wording.
- P believes that my decision is the correct legal position and is consistent with basic contract law.
- P let us know that China Taiping made two offers to settle their complaint which were less than I had recommended in my provisional decision. P refused these offers.

China Taiping didn't agree with my provisional decision and provided a response. Again, I'm not going to repeat the entire response, but will summarise it below.

- My provisional decision correctly identified that the correct question to be answered is whether the wording of P's policy allows China Taiping to reduce P's settlement to take account of losses it might have incurred due to Covid-19 and the UK Government's response to the pandemic.

Error of law

- I had made an error of law which means I'd failed to assess the information and evidence on a correctly informed basis.
- The closure of P's business due to Covid-19 and the UK Government's response to the pandemic was not an originating or concurrent cause of the loss as it happened consecutively or subsequently.
- Where I have referred to the Supreme Court judgment in the FCA Test Case (paras. 260 – 264) I have done so in relation to concurrent causes. This is an error as Covid-19 and the UK Government restrictions weren't a concurrent cause of the loss.

Correct test for causation is 'but for'

- China Taiping agrees that the clause is quantification wording rather than a trends or circumstances clause.
- The Supreme Court (para. 266) said that the interpretation of a trends clause expressly calls for the application of the 'but for' test (as per the 'but for' wording in its Loss of Income clause).
- The Supreme Court concluded that "*287. For the reasons given, we consider that the trends clauses in issue on these appeals should be construed so that the standard turnover or gross profit derived from previous trading is adjusted only to reflect circumstances which are unconnected with the insured peril and not circumstances which are inextricably linked with the insured peril in the sense that they have the same underlying or originating cause. Such an approach ensures that the trends clause is construed consistently with the insuring clause, and not so as to take away cover prima facie provided by that clause."*
- Therefore, the trading position should be reflected to account for the losses unconnected with the insured peril. China Taiping's Loss of Income clause expressly calls for the 'but for' test and requires the same approach.
- Covid-19 and the UK Government regulations are unconnected to the insured peril so this should be reflected in the settlement.

Decision neither fair nor reasonable

- If my decision doesn't apply the rationale set out above it would be neither fair nor reasonable and no reasonable person could reach the same outcome if they had been properly informed and directed as to the relevant law.
- China Taiping have treated P fairly and reasonably throughout the claim and made payments over their contractual liability in order to assist P wherever possible.
- As part of the claim settlement China Taiping paid P an amount for takeaways with no deductions for 26 weeks and also paid the wages of two staff members for the full 24-month indemnity period.
- China Taiping allowed P's turnover in full for August 2020 to take into account the 'eat out to help out' scheme and paid in excess of 70% for losses between July and November 2020.
- China Taiping paid P's fees to enable it to apply for a reduction in business rates. This saved P £30,000.
- A final decision along the lines of my provisional decision would have major implications for China Taiping's business as it would mean they would have to guarantee cover for the full indemnity period where there is a later event which is unconnected with the original insured peril.

Interest

- Given the length of time our service has taken to reach a decision China Taiping invites me to reconsider this part of the decision.

Before reaching a final decision I asked P to clarify the period in dispute as well as the amount it thinks is owed by China Taiping. I also asked both parties to confirm whether the money already paid by China Taiping was in dispute.

P confirmed that the period in dispute is March 2020 until February 2021. Although China Taiping sent P its final response to the complaint in July 2020, China Taiping have agreed to me reaching a decision on the entire period in dispute.

I also asked China Taiping whether they believed that Covid-19 had delayed repairs to P's premises. China Taiping said they could not say whether repairs had been delayed.

I also let parties know that in relation to China Taiping's comments on why Covid-19 wasn't a concurrent cause I intended to rely on an extract from "*Insurance Claims (5th edition), Alison Padfield QC"* which says at para 4.3. "*The two causes do not have to be exactly co-extensive in time: a later cause may join with a previous and continuing cause so as to become concurrent*".

China Taiping said that this extract had been taken by Alison Padfield QC from para. 47 of *Handelsbanken, Norwegian Branch of Svenska Handelsbanken Ab (Publ) v Dandridge & Others [2002] EWCA Civ 577* ("*Handelsbanken*"). China Taiping said P's case could be differentiated from this case because:

- The originating cause of P's loss and damage (i.e. the structural damage by the third party) was the previous cause of P's loss but was not a continuing cause.
- Unlike in *Handelsbanken*, the initial accidental damage by the third party to P's premises was a one-off cause, unlike the continued detention in the case of the vessel.
- The Covid-19 outbreak and the subsequent UK Government responses occurred well after expiry of the policy.
- On any reasonable (and correct) analysis the initial damage by the third party and the

Covid19 outbreak did not operate concurrently to cause P's loss, but consecutively (or subsequently).

China Taiping said that they believed that the outstanding amount of the claim they would be required to pay by my decision would be around £51,000.

To clarify the amounts already paid under the claim, the amount in dispute and the redress I intended to award I sent an email to both parties via our investigator on 25 January 2023. In that I said I understood from P that China Taiping had paid P £212,194 for the period up to March 2020. I said I didn't consider that the amount paid for the period up to March 2020 was in dispute. Therefore, I said that the amount paid for the period up to March 2020 is not subject to our award limit.

I said that the period in dispute is from March 2020 until February 2021. I understood from P that China Taiping had already paid £50,258 for this period. I said that this period would be subject to our award limit of £355,000.

China Taiping asked for an extension to review matters. An extension was given until 8 February 2023 but China Taiping did not provide any further comments by the required date.

P confirmed the figures were accurate. It said it believed that about £50,000 would be due from China Taiping in settlement of its claim. It added that the amount paid for the claim up to March 2020 included money paid directly by the third party, but as this was out of scope of the decision it didn't think this made a difference.

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'm not persuaded to depart from the outcome I reached in my provisional decision and subsequent emails. I will explain why below.

I understand that the period in dispute is from March 2020, when China Taiping reduced P's settlement to account for the UK Government restrictions as a result of Covid-19, until February 2021, the end of the 24-month indemnity period.

P said that China Taiping have already paid £212,194 towards P's claim for the period up to March 2020. Neither party have indicated that the amount paid in relation to the period up to March 2020 is in dispute, so I do not consider that it forms part of P's complaint.

I consider that the amounts paid by China Taiping to P relating to the period March 2020 until February 2021 *are* in dispute – as China Taiping considers that the payments were correctly reduced during that period, whereas P disagrees and says that China Taiping should have continued to pay the full amount of its claim.

For completeness, I have set out the relevant wording within the policy below. Section 3 of the policy is headed "**LOSS OF INCOME**" and provides:

"*COVER*

The Company will indemnify the Insured for

1.
(a) loss of Income and

(b) additional expenditure resulting from
(i) Damage
(a) insured by Sections 1 or 2
(b)…

occurring during the Period of Insurance and the amount payable as indemnity shall be

(a) the shortfall between the Income received during the Indemnity Period and the Income which would have been received but for the Damage
(b) the additional expenditure necessarily and reasonably incurred to avoid such a shortfall but only to the extent of the shortfall thereby avoided

less any sum saved during the Indemnity Period on business expenses or charges which cease or reduce as a result of the Damage

If during the Indemnity Period the Insured or others acting on the Insured's behalf sells goods or performs services away from the Premises for the benefit of the Business any money paid or payable for such sales or services shall be taken into account in arriving at the Income during the Indemnity Period."

"**Income**" is defined as, "*The money paid or payable to the Insured for goods sold and delivered (less the net purchase price of such goods) and for services rendered in the course of the Business at the Premises*".

"**Damage**" is defined as "Loss, destruction or damage".

"**Period of Insurance**" is the period of cover, 1 October 2018 to 30 September 2019.

"**Business**" means P's business, and "**Premises**" mean P's premises, both as set out in the policy schedule.

"*Indemnity Period*" is defined as, *in respect of 1* (i) of Cover,

"The period beginning with the occurrence of the loss destruction damage or event and lasting no longer than 12 months thereafter during which the results of the Business shall be affected by the loss or damage"

It is not in dispute between the parties that the indemnity period is 24 months, as set out in the policy schedule.

The legal position

As I have set out in my provisional findings, the starting position in insurance law is that where there are two effective causes, one insured and one uninsured (but not excluded) the insurers are liable because the uninsured cause does not prevent cover for the insured cause. This can be contrasted with the situation where there are two proximate causes of loss, where one is insured and one is expressly excluded from cover under the policy. In this situation, although it will depend on how the provisions are drafted, the exclusion will generally prevail and the loss will not be covered.

In this case, the originating cause of loss to P was the property damage caused by the third party works in early 2019. Later, in March 2020, the impact of Covid-19 and the subsequent restrictions was a concurrent cause of loss. However, neither Covid-19 nor the UK Government restrictions are explicitly excluded under the policy. Therefore, I believe that the

starting position here is that the uninsured cause (Covid 19 and the UK Government restrictions) does not prevent cover for the insured cause (accidental damage).

The Supreme Court set out some general principles of construction in the FCA Test Case:

> "*The core principle is that 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*" (para. 47).
>
> "*…the overriding question is how the words of the contract would be understood by a reasonable person. In 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 Lts 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*" (para. 77).

The loss of income clause in the policy doesn't refer to 'trends' or 'other circumstances' and therefore I think it is quantification wording rather than a trends clause.

China Taiping agrees that the policy does not include a trends clause. I've seen other China Taiping policies on the market around the same time which did include a trends clause. This indicates to me that the policy was deliberately drafted in this way and intended to not operate with a trends clause. Also, even if China Taiping hadn't drafted other policies with a trends clause, I think that a reasonable policyholder entering into the contract would have understood that any loss would not be adjusted by reference to trends or circumstances that may have existed during the indemnity period. As such, I don't think the reasonable person entering into the contract in October 2018, would understand the policy to operate in the way China Taiping say it was intended to operate.

Concurrent cause

China Taiping think I have made an error of law by finding that the UK Government restrictions in response to Covid-19 is a concurrent cause of P's loss because it happened consequently or subsequently to the structural damage by the third party. While I accept that the UK Government restrictions occurred later than the property damage, I don't think that stops them being a concurrent cause of the loss.

I believe reference to a concurrent cause refers to a situation where during the period of the loss there are two (or more) causes of loss. These may be in existence at the start of the period of loss (i.e. originating concurrent causes) or may occur at different times during the period of loss (sequential concurrency). Concurrency can also operate in parallel. Therefore, the fact that the UK Government restrictions as a result of Covid-19 did not occur until a year after the initial damage to the property does not mean they cannot be a concurrent cause. It occurred during the period of loss of income and was a causative factor in P's income being reduced. This is supported by "*Insurance Claims (5th edition), Alison Padfield QC"* which says at para. 4.3. "*The two causes do not have to be exactly co-extensive in time: a later cause may join with a previous and continuing cause so as to become concurrent*".

I have considered China Taiping's points about why they think P's case can be differentiated from *Handelsbanken,* but I don't agree. While the accidental damage to P's premises might

have been a one-off event, the impact of it (i.e. that the premises hadn't been repaired) continued throughout the impact of Covid-19 and beyond the period of the policy and the indemnity period.

I think that a key question is whether or not the losses from the two causes can be separated. "*Riley on Business Interruption Insurance (11th edition)*" says at 13.6 "*The Supreme Court findings on concurrent causation suggest that if they cannot, then in the absence of any other argument, there is cover in full for all periods where both are proximate causes*". I think it would be extremely difficult to separate the loss of income from the property damage, which left P unable to trade in its usual way, with the loss of income from the impact of the UK Government restrictions, which also left P unable to trade (save for takeaway business). Therefore, I believe that Covid-19 and the UK Government restrictions were a concurrent cause of P's loss.

The 'but for' test

China Taiping have agreed that the loss of income clause in the policy is not a trends clause. However, they seek to rely on the Supreme Court reasoning on trends clauses in the FCA Test Case to justify their argument that P's loss of income should be adjusted to reflect the circumstances of the Government restrictions. In my view, as the loss of income clause isn't a trends clause, the court's reasoning in relation to trends clauses doesn't apply.

China Taiping also believe that there should be a strict application of the "but for" test. However, it is acknowledged that the "but for" test is inadequate. As the Supreme Court held in the FCA Test Case at para. 182:

> *"It has, however, long been recognised that in law as indeed in other areas of life the "but for" test is inadequate, not only because it is over-inclusive, but also because it excludes some cases where one event could or would be regarded as a cause of another event*".

The Supreme Court then set out a number of examples where a strict application of the "but for" test would be deficient. One example is a case of two fires, started independently of each other, which combine to burn down a property. As the Supreme Court held, at para.182 "*It is natural to regard each fire as a cause of the loss even if either fire would by itself have destroyed the property so that it cannot be said of either fire that, but for that peril, the loss would not have occurred."* Another is a case where two hunters simultaneously shoot a hiker who is behind some bushes and medical evidence shows that either bullet would have killed the hiker instantly even if the other bullet had not been fired. Applying the "but for" test in these cases would produce the result that neither fire caused the property damage and neither hunter's shot caused the hiker's death – results which the Supreme Court concluded *"is manifestly not consistent with common-sense principles*".

I recognise that if P had not been closed due to the accidental damage, it would have been impacted by Covid-19 and the UK Government restrictions. However, the loss of income clause in the policy isn't a trends clause. And for the reasons set out above and in my provisional decision, I don't think this circumvents the position that the uninsured cause doesn't prevent cover for the insured cause where the uninsured cause is not excluded. Whether Covid-19 and the UK Government restrictions had occurred or not, P's income would have been impacted by the damage to its premises until the end of the indemnity period in February 2021. My understanding is that the repairs to the property damage were not completed until August 2021.

China Taiping consider their situation to be analogous to the star chef example set out in para. 231 of the FCA Test Case, where "*counsel for the FCA postulated a case where the*

restaurant had a star chef who was due to leave on 1 April 2020 for reasons unrelated to the pandemic. In this case it would be unreasonable to require the insurer to indemnify the policyholder for loss of turnover resulting from inability to use the premises in so far as such turnover would have been reduced in any event by reason of the chef's departure". However, I disagree. As I set out in my provisional decision quoted above, I think that paragraphs 232 and 260 to 264 of the FCA Test Case support that the "quantification machinery" in a policy (here set out in Section 3: LOSS OF INCOME) should not be construed so as to take away cover for losses covered by an insuring clause on the basis of concurrent causes of those losses, where the uninsured cause is not excluded. To do so would effectively transform that "quantification machinery" into an exclusion. I appreciate that China Taiping don't think that the wording in Section 3 of the policy is intended to act as an exclusion, but I think, in effect, this is what it would be.

What is fair and reasonable in all of the circumstances

While I disagree with China Taiping's interpretation of the law in relation to this, I accept that the legal position is unclear. The Supreme Court in the FCA Test Case was dealing with cases which had concurrent causes or losses from the *same* underlying cause. Whereas, in this case, the two causes are not from the same underlying cause.

However, even if my interpretation of the legal position is incorrect, I still think the outcome I have reached is fair and reasonable in all of the circumstances. Therefore, even if my findings above and in my provisional decision are a departure from the law, I think it is fair and reasonable to do so.

That's because, in addition to my reasons above, if China Taiping are able to adjust the amount of P's claim for loss of income they would be benefiting hugely from the impact of Covid-19 as this is the amount they would have had to pay for the damage. The impact of the property damage existed throughout the claim period and would have done so if Covid-19 hadn't occurred. P said that at the point of lockdown in March 2020 it wasn't due to open for at least nine months and China Taiping's report from April 2020 indicate that repairs weren't due to be completed before the first lockdown ended. P also said that it wasn't able to apply for Government support during the pandemic due to being closed, although I note that China Taiping doesn't think P would have been eligible for this in any event. Moreover, China Taiping haven't indicated that Covid-19 caused any delay in the repairs. So I don't think Covid-19 will have caused China Taiping any additional loss that they weren't already liable for in this case.

As I have also set out above, the policy doesn't include a trends clause and I don't think a reasonable policyholder would interpret it in the way that China Taiping say that it should work. Therefore, I don't think it would be fair and reasonable for me to allow China Taiping to adjust the settlement as though there were a trends clause.

I do recognise China Taiping's point that there have been occasions where they have supported P to achieve other savings or given an advance of what was due from the third party insurer. However, I don't think that's a reason for me to not require China Taiping to pay the settlement without making any deduction for Covid-19 and the UK Government restrictions, given that China Taiping have recovered costs from the third party insurer.

I have also considered China Taiping's point that this decision will have implications for their business. However, my role is to consider the fair and reasonable outcome to this particular complaint, and I have set out my reasons for why I think this is the fair and reasonable outcome. I don't believe that the impact of this decision on China Taiping's business should mean I reach a different outcome.

Interest

I have noted the point China Taiping have made about the length of time taken to reach a decision; however I'm not persuaded to change my mind. As China Taiping are aware, the issue at the heart of this complaint is not straightforward and there have been a number of arguments put forward by both parties which I've needed to consider. Moreover, it has always been open to China Taiping to settle this claim in the way I require.

I do recognise that China Taiping have, in some circumstances, helped P by paying money owed directly by the third party insurer. However, ultimately, I don't believe that China Taiping made the correct decision in how they settled this claim and that has led to P being without money it should have had, while China Taiping have had the benefit of that money instead. Therefore, I remain of the view that the fair and reasonable outcome is for China Taiping to add 8% interest to the settlement as set out in the 'Putting things right' section below.

Claim value

I have noted the amount China Taiping and P believe should be paid (around £50,000) in response to my decision. I will not be making a finding on the amount payable in this decision. If, following my decision, P is unhappy with the amount China Taiping pay, it would need to complain about that separately.

Putting things right

I uphold the complaint. I think that fair compensation should be calculated as follows:

China Taiping should pay P's claim, in line with any limits within the policy, from March 2020 until February 2021 without making any adjustments for the impact of Covid-19 or the UK Government regulations. China Taiping can deduct any payments they have already made to P under the policy for this period.

As P has been without money it should have had, China Taiping should also pay interest on the outstanding amount at a rate of 8% simple per year from the date they should have paid the claim to the date China Taiping make payment.

China Taiping were paying P's claim on a monthly basis and I think this is what they should have continued to do. China Taiping should therefore have paid P's claim for the period 27 March to 27 April 2020 on 27 May 2020, the claim for 27 April to 27 May 2020 on 27 June 2020 and so on.

My final decision

My final decision is that I uphold this complaint and require China Taiping Insurance (UK) Co Ltd to settle P's claim as set out in the 'Putting things right' section above.

Under the rules of the Financial Ombudsman Service, I'm required to ask P to accept or reject my decision before 23 March 2023.

Sarann Taylor
Ombudsman