DRN-3846122

The complaint

A company that I will call T, complains about the settlement of its business interruption insurance claim, made as a result of the COVID-19 pandemic, by QBE UK Limited.

What happened

T operates as a hotel and held an industry specific commercial insurance policy underwritten by QBE. In March 2020 T contacted QBE to claim for loss of income as a result of the COVID-19 pandemic. QBE initially declined the claim, and it was not until January 2021 that it reversed this decision and accepted the claim in principle.

Settlement of the claim was offered a month after this, but T was unhappy that QBE had deducted the amount T had received under the Coronavirus Job Retention Scheme – commonly referred to as "furlough payments". QBE said that furlough payments were a saving T had made against cost that would normally have been payable.

T brought its complaint about the settlement of the claim to the Ombudsman Service. In addition to being unhappy with the deduction of furlough payments, T thought compensation should be paid for the length of time it had been made to wait for the claim to be accepted and settled.

Our Investigator recommended the complaint be partly upheld. He thought QBE had acted fairly and reasonably by deducting the furlough payments. But that interest should be added to the settlement for the amount of time T had waited after it made the claim. Both QBE and T disagreed with the elements of this recommendation that did not go in their favour. So this complaint has been passed to me for a decision.

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 decision as recommended by the Investigator, largely for the same reasons.

Furlough payments

The relevant part of T's policy contains a calculation for working out the size of the settlement of a claim. After describing how the reduction in revenue is initially calculated, it says the final settlement is this amount:

> "*minus… any sum saved during the indemnity period in respect of such of the charges and expenses of the business payable out of gross revenue as may cease or be reduced in consequence of the damage*"

I do note that "damage" within the policy carries a particular meaning relating to physical damage, and T's claim is not one based on such damage. However, I consider a court would interpret this policy in such a way that reference to damage in the above wording be a

reference to the ‘event’ that has caused the claim. In this case that event would be the occurrence of COVID-19.

QBE has said that furlough payments are a saving. So, effectively, I need to determine whether they are a sum saved in respect of the expenses T would have had to pay, that were not payable because of COVID-19.

Furlough payments were paid to businesses by the Government to cover part the cost of paying employees. They could not be used for any other purpose (albeit the timing of the relevant payments may have meant businesses had already paid staff, and the furlough payments acted as a ‘refund’ of these amounts). Paying employees their wages is an expense T would normally have. As a result of the furlough payments, T saved on having to pay these wages. So, I consider this can only reasonably be described as a saving on the business’ expenses.

The reason for T’s claim was – in simple terms – the COVID-19 pandemic. The Government introduced the furlough payments scheme as a result of this pandemic. So, it follows that the saving on T’s normal expenses was a consequence of the cause of its claim.

Based on this, it seems clear that QBE was entitled to calculate T’s settlement taking into account the furlough payments being a saving – i.e. to deduct these from the settlement.

I also note the judgment of the court in *Stonegate Pub Company v MS Amlin and others* [2022] EWHC 2549 (Comm), as well as other related judgments. In Stonegate, the court considered whether the relevant policyholder in the case should have the furlough payments they received deducted from their insurance settlement. So, whilst the court made its judgment based on the particular terms of the policy etc. I do consider the judgment to be a relevant consideration in T’s case.

The judge in Stonegate determined that furlough payments were deductible from the relevant claim settlement, saying at para 270:

> "...*I hold that the CJRS [furlough] payments did reduce costs payable out of Turnover and are to be taken into account under the savings clause*."

The clause in question is similar to that in T’s policy, so I think this judgment supports my own conclusion in this complaint.

I do note T’s comments that it would have made its employees redundant had it not been for the furlough payments, indicating that the wages would not then have been an expense they would have had to make so were not a saving.

However, it has not been suggested that T would have made its employees redundant had the pandemic not happened. So, T would have had to pay its employees their wages and would not have received any pay-out from the Government to cover these costs. And if they had made them redundant – either as a result of the pandemic or otherwise – T would not have received the furlough payments it did, so QBE would not be deducting them from the settlement.

Insurance is designed to put customers back in the position they would have been in had the insured event not happened. By reducing the settlement by the amount of the furlough payment, QBE is putting T back in this position. It has had to pay its employees wages, but has also received the (insured) income it might otherwise have.

Ultimately, taking all of the circumstances into account, I am unable to fairly and reasonably say that QBE acted inappropriately in deducting the amount of the furlough payments T

received, relevant to the indemnity period, from the settlement of its claim.

Interest

When deciding whether it's fair and reasonable to award interest, I've thought about what QBE should have done in relation to T's claim. Whilst I appreciate the difficulties insurers faced with claims of this nature, the clarity provided by the courts in the test case does not alter the fact that T had a valid claim and that QBE's decision to decline this in 2020 was ultimately incorrect.

I've noted QBE's point that it needed to wait until the outcome of the test case and ultimately it was the Supreme Court that found that clauses such as that in T's policy provided cover. However, I think it was always open for QBE to make that decision and ultimately the Supreme Court found that QBE's decision not to provide cover was incorrect.

QBE has referred to Section 13A of the Insurance Act 2015 which provides a remedy when an insurer doesn't pay any sums due within a reasonable time. I understand that, under this provision, QBE doesn't think it should pay any damages to T. However, while I consider the law, I'm also required to make a decision based on what I think is fair and reasonable in all of the circumstances. My role is to consider what a business might or might not have done wrong and to decide on fair compensation if things didn't happen as they should have. I acknowledge that this might mean I make a decision which is different to one the courts reach but in this case I think it's fair and reasonable to do so.

So, while I've considered what QBE has said about Section 13A of the Insurance Act 2015, the rules in the FCA Handbook allow me to make, amongst other things, a money and interest award for what I consider to be fair compensation if a complaint is determined in the favour of the complainant. In reaching a decision on what is fair and reasonable I've taken account of the fact that QBE has had the benefit of money it should have paid to T and that T has been without that money.

So, I think is fair compensation to put T back in the position it would have been in if QBE had not initially turned down T's claim. As an incorrect decision was made on the claim, I think it is reasonable to say that this should not have happened, and that T's claim should instead have been met in 2020. Because this did not happen, T has been left without funds that it otherwise would have had, and as it has been without this money, I believe that it is fair and reasonable to add interest to the settlement to compensate them for this loss.

I've noted QBE's point regarding the FCA guidance, but I am unaware of any guidance from the FCA that indicates that interest should not be added to the settlement of a valid claim in circumstances such as this.

As I consider QBE could have come to the decision to uphold T's claim in 2020, I consider that interest should be payable from when the claim would have been settled as a result of this. In relation to an ongoing claim of this nature, it is reasonable that an insurer waits for losses to accrue before making settlement. However, it is not necessarily reasonable that an insurer wait for the end of an indemnity period before making settlement. Generally speaking, I would expect regular monthly payments to be made.

An insurer would need to wait for a period for the claimant's loss to crystalise to an extent – and I consider a period of a month would be reasonable in this case. And then the insurer would need some time to assess the claim and losses, before making payment. I consider a reasonable time to do this on a claim of this nature would be around a month. I don't consider the existence of the FCA test case alters this in the circumstances of this complaint.

So, in T's case, I consider that QBE should have made monthly payments from a point two months after T's insured losses started, until the insured losses were fully paid – taking into account the indemnity period and other relevant circumstances. And that interest, at a rate of 8% simple, should be added to settlement from the date each of these payments would have been made, until QBE made its offer of settlement on 23 February 2021.

Whilst the settlement was not paid immediately after this offer, this was largely due to T disputing the deduction of furlough. And as I consider QBE acted appropriately in making this deduction, I cannot fairly require it to pay interest on the settlement it had offered for the period after the offer was made.

Putting things right

In order to put things right, QBE should pay T interest on the claims settlement. The interest payable should be based on T having been deprived of monthly interim payments that should have been made during the course of the claim.

The first of these payments should have been paid two months after the date T's insured losses first started to accrue and should have covered T's indemnified losses for first month of these losses. Subsequent monthly payments should have been based on losses for the subsequent months.

QBE 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 up to 23 February 2021. This interest should be paid at a rate of 8% simple per annum.

My final decision

My final decision is that I partly uphold this complaint. QBE UK Limited should put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask T to accept or reject my decision before 18 January 2023.

Sam Thomas
Ombudsman