

The complaint

A company that I'll refer to as F has complained that The New India Assurance Company Limited (New India) unfairly turned down its business interruption insurance claim.

Mr R, a director of F, has complained on F's behalf.

What happened

F held business interruption insurance with New India. F made a successful claim on its policy after its business was forced to close in March 2020 as a result of Covid-19 and the Government's response to the pandemic. The claim was paid under the following clause:

*"The Insurer will indemnify the Insured for
1 (a) loss of Income and
(b) additional expenditure
resulting from...
any occurrence of a Notifiable Disease within a radius of 25 miles of the
Premises"*

New India said that the indemnity period for this clause was limited to three months and therefore they would only pay for losses incurred between 21 March 2020 and 20 June 2020. However, F said it had been required to close again on 5 November 2020 and thought it should be able to make a further claim for its losses incurred from that date.

Unhappy with New India's position, F brought its complaint to our service.

Our investigator looked into F's complaint and recommended it be upheld. He thought that the occurrence of Covid-19 which had led to F's loss in March 2020 was different to the occurrence which had led to later losses. So he thought New India should consider F's claim for the period of loss which began in November 2020. He thought a reasonable indemnity start date for the later loss would be the earliest date that there was an occurrence of Covid-19 in the 14 days before the announcement of the November lockdown.

New India provided a detailed response. In summary they said:

- If the issue which forms the basis of F's complaint is to be considered then it should be considered by a Court.
- The Government response to Covid-19 is a single, continuous incident or set of instructions which are subject to an indemnity period of three months.
- The restrictions put in place by the Government in response to Covid-19 have been amended a number of times, but the modifications don't amount to new restrictions. If they did, this would trigger new cover every time the restrictions changed. New India compared this scenario with a fire which had died down, but the smouldering effect continues.
- The Supreme Court judgment in *FCA v Arch Insurance (UK) Ltd and others* [2021] UKSC 1 (the FCA test case) didn't consider whether there would be multiple indemnity periods, but this is likely because it was focused on the first lockdown

period.

- The Supreme Court said (para 201) that the effect of each case of Covid-19 was indivisible, via the measures taken by the UK Government.
- The Supreme Court also said (para 68-71) that an occurrence was something that happened at a particular date and was not capable of extending over more than one date. It went on to say that a disease that spreads does not happen at a particular time and place and it occurs in a multiplicity of times and place and may occur in different ways.
- In the case of this policy, the cover is triggered by the occurrence of the disease and not by the individual lockdowns.
- The maximum amount payable in respect of a business interruption loss in any one policy period is the sum insured for section 3. Where a claim is made, unless it is for £2,000 or less, the total amount will reduce with each claim until it reaches nil.
- It is incorrect for F to assert that there has been more than one occurrence of Covid-19 in order to benefit from multiple indemnity periods as the wording of the policy clearly only provides cover for a single occurrence up to a three month indemnity period limit.
- A notifiable disease is defined as an illness sustained by any one person rather than an outbreak of a disease in multiple persons.
- The cover is for loss of income resulting from any occurrence of a notifiable disease within a radius of 25 miles. This indicates that the indemnity period is calculated at *“the period beginning with the occurrence or discovery of the incident or the date from which the restrictions on the premises are applied and lasting no more than 3 months thereafter during which the results of the business shall be affected as a result of the incident or restriction”*.
- The Supreme Court found that only cases of the disease within the specified radius were sufficient to trigger cover.
- The Supreme Court’s decision focused on Government action. F’s policy only requires a loss and isn’t dependent on Government action.
- F identified 23 March 2020 as the date of the occurrence for the purpose of starting the indemnity period and hasn’t provided evidence of any other occurrence.
- Reference to ‘restrictions’ in the definition of the indemnity period is intended to refer to (iii) and (iv) which also include the word restrictions. The reference to ‘discovery’ is intended to refer to (iii) (b). Therefore, the wording discovery/restrictions should have no bearing on the relevant clauses.
- It doesn’t make commercial sense to treat each separate occurrence of Covid-19 as a trigger for a new indemnity period and there is no reasonable rationale to treat it as an open-ended entitlement to indemnity.

New India asked for an Ombudsman’s decision.

I issued a provisional decision on this complaint on 21 November 2022 explaining why I thought this complaint should be upheld. I said:

I’ve considered all the available evidence and arguments to decide what’s fair and reasonable in the circumstances of this complaint.

New India have made a number of detailed points. Given the informal nature of our service I’m not going to address each point in this decision and will instead focus on what I consider to be the central issues to this complaint.

Should our service consider this complaint

New India have said that if the issues within this case are to be considered then they should

be considered by a court “following proper disclosure by the insured (hitherto not provided), proper examination of appropriate expert evidence and appropriate submissions on the substantive issues.”

I accept that this complaint might concern a developing area of law, but New India haven't explained what disclosure or expert evidence they think should be produced. They have also not explained what additional submissions would be made in a court process. The Financial Ombudsman Service routinely deals with complaints about how insurers have dealt with claims and I see no reason why I should not consider this complaint. Therefore, I have gone on to do so below.

Having considered carefully the information provided by both parties, I intend to uphold this complaint. I'll explain why below.

The policy

F's policy was in force between 9 December 2019 and 8 December 2020. As set out above, F's claim was paid under the following clause:

“The Insurer will indemnify the Insured for
1 (a) loss of Income and
 (b) additional expenditure
resulting from...
...ii...
c) any occurrence of a Notifiable Disease within a radius of 25 miles of the
Premises...”

Notifiable disease is defined as:

“Illness sustained by any person resulting from
(i) poisoning by food or drink
or
(ii) any human infectious or human contagious disease (excluding Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition) an outbreak of which the local authority has stipulated shall be notified to them”

Under the heading 'Indemnity Period', the relevant section says:

“in respect of 1(ii), (iii), (iv) and (v) of Cover

The period beginning with the occurrence or discovery of the incident or the date from which the restrictions on the Premises are applied and lasting no longer than three months thereafter during which the results of the Business shall be affected as a result of the incident or restrictions.”

I have noted New India's point that they intended the words 'discovery' and 'restrictions' within this section to relate to other part of the clause and I accept that a reasonable person would interpret these terms in that way.

Can F recover for two separate periods of loss from two separate occurrences of disease within the same policy period?

I have started by considering whether the policy allows F to recover two separate periods of loss from two separate occurrences of the notifiable disease, both occurring in the policy period.

The reinstatement clause in F's policy says that:

"In the event of a claim for an amount not exceeding £2,000 the Sum Insured shall not be reduced by the amount of the loss destruction or damage. In the event of all other claims the Sum Insured shall be reduced by the amount of the loss destruction or damage until the next renewal of the Policy unless the Insurer agrees on payment of an additional premium to reinstatement of the Sum Insured".

The Sum Insured for loss of income is £600,000, with an indemnity period of 24 months. I do not think the reinstatement clause can be read as saying that, if there is an indemnity period of less than a year, the indemnity period can only be triggered once. This is because there is no reference to the indemnity period in the clause and the clause appears to explain how the sum insured works if there is more than one claim. Also, I don't think it's likely that if a policyholder suffered an interruption to its business for a short time due to one disease, it would then not be able to make a separate claim for another period of loss due to an unrelated disease at a different time within the policy period.

So I think the policy would allow for two (or more) claims to be made under the same clause if there were two (or more) separate causes for two (or more) separate periods of loss. Therefore, given New India has already settled F's claim for its period of loss from March 2020, I have gone on to consider whether the losses F claimed for from November 2020 were as a result of the same occurrence of Covid-19 as in March.

Was there a separate occurrence of Covid-19 which caused F to suffer a separate period of loss from November 2020?

As set out above, for the policy to provide cover, F's loss of income needs to result from the occurrence of a notifiable disease within a 25 mile radius of F's premises. It's not in dispute that a person sustaining Covid-19 meets the definition of a notifiable disease under the policy.

It's also not in dispute that there was an occurrence of Covid-19 in March 2020 which caused F a loss. For this reason, New India paid for F's losses incurred over three months from the date of that occurrence.

The relevant question in this complaint is whether the losses sustained by F in November 2020 were as a result of that occurrence in March, which continued to affect the results of F's business, or a result of a separate occurrence. Having considered this, I don't think they were.

I say that because the claims F made were for losses which arose as a result of the Government restrictions in response to Covid-19 in March and November 2020, And while the occurrence of Covid-19 in March was a proximate cause of the Government's restrictions at that time, it was not a proximate cause of the Government's restrictions in November 2020. As the Government restrictions were reviewed and changed over time and, given that the March restrictions had been eased, I don't think that the Government would have introduced new restrictions if it wasn't for a new threat caused by new occurrences of Covid-19.

In reaching a decision, amongst other things I have to consider relevant law. I have considered the points New India have made about the Supreme Court judgment in the Financial Conduct Authority's Business Interruption Insurance 'test case'. As New India have said, the court did not consider the issue of successive lockdowns as its focus was on the

March 2020 restrictions. But I don't think the findings of the Supreme Court in the FCA test case mean that F can't claim for more than one occurrence if that results in a separate period of loss.

I think the following judgments are helpful when considering this complaint: Stonegate Pub Company Ltd v MS Amlin Corporate Member Ltd and others [2022] EWHC 2548 (Comm) (Stonegate), Greggs PLC v Zurich Insurance PLC [2022] EWHC 2545 (Comm) (Greggs) and Various Eateries Trading Ltd v Allianz Insurance PLC [2002] EWHC 2549 (Comm) (VE). That's because one of the issues considered by the court was whether losses sustained beyond the expiry date of the policy were caused by occurrences of Covid-19 when the policy was in force. In reaching its conclusions, the court also took the outcome of the FCA test case into account.

In Stonegate, the court said (at paragraph 209):

"[The Government] responses [to the lockdowns in November 2020 and January 2021] were not equally caused by the cases before the end of the Period of Insurance, but rather were predominantly caused by more recent cases, and the threat of future cases, at the time of the adoption of the measure in question."

In VE, at paragraph 48, the court summarised its findings from Stonegate to reject VE's argument that losses throughout the maximum indemnity period had been caused concurrently and equally by all of the cases of Covid-19 which had occurred within the relevant radius. The court said:

"(1) the decisions in the FCA Test Case do not establish that all cases of Covid-19, whenever occurring, were equal concurrent causes of the governmental actions and public response at any given time; (2) the fact that the cases of the disease occurred in Period of Insurance may have caused the later cases of the disease (because 'cases make cases') is not sufficient to say that the cases of the disease in the Period of Insurance were the proximate cause of governmental measures and public response after the Period of Insurance; and (3) the 'death blow' or 'grip of the peril' principle is inapplicable."

In Greggs, the Court said at paragraph 39:

"...it appears highly doubtful that, on any view, there can be said to have been only one period of interruption or interference. It seems certain that the degree of interruption or interference with Greggs' business changed over time between the first cases of Covid-19 and the end of the Indemnity Period..."

I believe that the judgments referred to above support my view that F's losses arising from the Government's actions in November 2020 weren't caused by the occurrence of Covid-19 in March 2020 which caused its earlier losses.

However, for completeness, even if I'm wrong and they don't support my decision, I still think my decision provides a fair and reasonable outcome in all of the circumstances. This is because I think it's fair and reasonable to conclude that the Government's restrictions from November 2020 were made in response to a new threat, i.e. on the basis of new occurrences of Covid-19.

I've then gone on to consider whether there were occurrences of Covid-19 within a 25 mile radius of F's premises which resulted in a loss of income.

The Government announced the November lockdown on 31 October 2020. This required F

to close from 5 November 2020. The Financial Conduct Authority Covid-19 calculator indicates that on that date there were more than 1,000 cases of Covid-19 within a 25 mile radius of F's premises. Therefore, I believe there was an occurrence of Covid-19 within a 25 mile radius of F's premises which contributed to the Government's decision to impose restrictions and so caused F's loss.

As I think the occurrence of Covid-19 which caused F's loss from November was a separate occurrence to that which caused its loss in March, I believe separate cover is triggered and therefore New India should pay F's claim in line with the remaining terms and limits within the policy.

I note that New India started the three month indemnity period in March 2020 on the date F was required to close. I think this was a fair and reasonable approach and therefore New India should start the indemnity period for this second claim from 5 November 2020. As New India didn't pay F's claim for its losses from November when this claim was made, F has been without money it should have had. Therefore, I think it's fair and reasonable that New India pay F interest on the settlement.

F made its second claim on 27 April 2021. As this was after the loss had crystallised I think it would be fair and reasonable for New India to pay interest on the settlement amount calculated from this date until the date they make payment. As F was without the opportunity to use the money I think it would be fair and reasonable for New India to apply our usual rate of 8% simple per annum.

F accepted my provisional decision, but New India did not agree to pay F's claim at this time.

New India said that they recognised that the court's judgments in Stonegate, VE and Greggs provided significant guidance in the context of the interpretation of some of the multiple claims in the market and the potential for policies to respond to multiple claims. They said that an appeal had been granted on the above cases and confirmed their intention to apply the appeal court's judgment to this complaint. As such, New India asked me to defer my decision until the outcome of the appeal was known.

I responded to New India through our investigator to say that I didn't intend to await the outcome of an appeal before issuing a final decision. I said that the Financial Ombudsman Service was established by Parliament to resolve disputes between regulated financial companies and their customers. As set out in section 225(1) of the Financial Services and Markets Act 2000 (FSMA) our service is empowered to resolve disputes quickly and with minimum formality. At the point I responded there was no known timescale for an appeal, and I said that due to the time this process was likely to take I didn't think it was appropriate to defer my decision, given that our remit is to resolve complaints quickly and with minimum formality.

In response, New India said my intention to not defer my decision pending the outcome of an appeal was highly irregular. They said that the issue in dispute is highly technical and depends on the facts of each case. They said that their decision to decline F's claim does not qualify our service to make a decision as the appeal has not been heard in Stonegate, VE and Greggs. New India said that, in any event, they had not been provided with any further evidence from F to support a second claim and it would not be appropriate for them to be required to pay a claim on that basis. New India said it would be fair and reasonable for me to allow them to re-evaluate F's claim in light of the court's judgment and any appeal judgment which might follow.

In response, I let both parties know that while I did not intend to await the outcome of an appeal on Stonegate, VE and Greggs before issuing a decision I had given further

consideration to the points New India had made in relation to not being given an opportunity to review F's second claim. I said that I intended to amend the redress within my decision to:

“New India should assess F's claim for losses from 5 November 2020 on the basis that the policy provides cover in the way set out within my decision – i.e. that it can cover a second claim for losses caused by Covid-19.”

F did not respond by the required date. New India said that they agreed with the outcome as they understood it to mean that they could reassess F's claim and apply the findings of any appeal on Stonegate, Greggs and VE.

Our investigator clarified with New India that my decision does not mean that New India can wait for the outcome of the appeal before assessing (and, if F had suffered losses, paying) F's second claim. New India confirmed that they therefore did not agree to resolve F's complaint as I'd recommended.

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.

New India's request for the decision to be deferred

I have carefully considered New India's request to defer my decision until the appeal has been heard on Stonegate, VE and Greggs but I remain of the view that I am able to make a decision on this complaint. My role is to reach an outcome based on what I think is fair and reasonable in all of the circumstances. Under FSMA, I may do this quickly and with minimum formality.

I understand that Stonegate, VE and Greggs have been given permission to appeal but given that there is no timescale for any appeal it could take some months for an outcome to be reached. I believe that I have sufficient information to reach a fair and reasonable outcome without waiting for the outcome of any appeal. As explained in my provisional decision, I have based my decision on what I believe to be fair and reasonable in all of the circumstances and in my view that is supported by the current legal position. I think it's fair and reasonable to conclude that the Government's restrictions from November 2020 were made in response to different occurrences of Covid-19 than those which led to its decision to impose restrictions in March 2020. That's because I don't think the March 2020 restrictions would have been eased if the threat from the original occurrences of Covid-19 remained.

Can F recover for two separate periods of loss from two separate occurrences of disease within the same policy period?

Apart from New India's comments about why they shouldn't be required to pay a claim they haven't investigated New India didn't provide anything further in response to my provisional decision, or subsequent emails, to indicate why the outcome I reached was wrong. Instead New India have indicated that they would apply the findings of any appeal on Stonegate, Greggs and VE to F's claim.

As New India haven't provided further comments and I've set out my reasons for upholding this complaint in my provisional decision I don't think it is necessary for me to comment any further on why I believe this complaint should be upheld, other than to set out how I think New India should put things right.

Having considered New India's point that they haven't yet assessed F's claim for losses from

5 November 2020, I think it would be fair and reasonable for New India to have the opportunity to assess the claim to determine if F has shown that it has experienced a loss which is covered by the policy.

Putting things right

To put things right New India should assess F's claim for losses from 5 November 2020 on the basis that the policy provides cover in the way set out within my decision – i.e. that the policy responds to a second claim from 5 November 2020 as there were new occurrences of Covid-19 within a 25 mile radius. New India should do so promptly rather than awaiting the outcome of any appeal in Stonegate, Greggs and VE.

My final decision

My final decision is that I uphold this complaint and require The New India Assurance Company Limited to assess F's claim for losses from 5 November 2020 on the basis that the policy provides cover in the way set out within my decision – i.e. that the policy responds to a second claim from 5 November 2020 as there were new occurrences of Covid-19 within a 25 mile radius. The New India Assurance Company Limited should do so promptly rather than awaiting the outcome of any appeal in Stonegate, Greggs and VE.

Under the rules of the Financial Ombudsman Service, I'm required to ask F to accept or reject my decision before 21 February 2023.

Sarann Taylor
Ombudsman