DRN-3953208

The complaint

A club that I'll refer to as F has complained that Aviva Insurance Limited only paid for one period of loss following its business interruption insurance claim for multiple periods of closure.

Mr J has brought the complaint on F's behalf.

What happened

F held business interruption insurance with Aviva. F said it tried to claim on its policy in April 2020 after its business was impacted in March 2020 by Covid-19 and the Government's response to the pandemic. F said that a claim was recorded in August 2020.

Aviva said it received F's claim on 4 September 2020. Aviva initially declined F's claim as it didn't think the policy provided cover. Aviva said F's claim was referred to it again in February 2021 and it reviewed the claim following the Supreme Court judgment in the Financial Conduct Authority's Business Interruption Insurance 'test case'. Aviva accepted F's claim and in April 2021 paid F £10,000, which was the policy limit for the extension for prevention of access and loss of attraction.

F said it had been impacted by a second period of closure from November 2020 and thought it should receive a further £10,000 as the second lockdown was a separate period of loss from that which occurred in March 2020.

Aviva said that the second period of lockdown was as a result of the same originating cause as the first lockdown and therefore it had paid the maximum under the clause. It said there wasn't any cover under other parts of the policy as the disease clause covered a specified list of diseases which didn't include Covid-19.

Unhappy with Aviva's response, F brought its complaint to us.

F said that the losses were four months apart and so should be considered separate claims. F said that there were examples in the policy of linked occurrences, all of which refer to a 72 hour period. F also said that the policy provided cover for notifiable human diseases and that is why Aviva reviewed the claim following the Supreme Court judgment. F was also unhappy with the time it had taken Aviva to pay its claim.

Our investigator looked into F's complaint and recommended it be upheld. He thought the occurrence of Covid-19 which led to F's losses in March 2020 was different to the occurrence which led to the losses in November 2020. He recommended Aviva reconsider F's claim for losses from November 2020 and add interest to any settlement.

In response F reiterated its complaint points and let us know about the impact of Aviva's delay in settling the claim. F said that due to the claim not being paid it took out a Bounce Back Loan (BBL) for £25,000 in May 2020 which it is still repaying. F said it had tried to discuss its claim with Aviva on numerous occasions, but Aviva had refused to engage.

Aviva disagreed with our investigator's recommendation and asked for an ombudsman's decision. It provided a detailed explanation of why it doesn't think the policy covers a separate period of loss. In summary, Aviva said that the aggregation clause and definition of 'occurrence' means that it has paid the amount required by the policy. Aviva said that F's losses had all been caused by Covid-19, which was the same originating cause and that there hadn't been a break in the chain of causation. Aviva said that the 'examples' of occurrences that F said all had a 72 hour time period weren't examples but were specific limitations deliberately imposed on those circumstances.

Before I considered this complaint, our investigator got in touch with Aviva to ask if it had reconsidered F's complaint in light of some recent court judgments - *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). Amongst other issues, the courts had considered aggregation clauses and whether losses caused following the lapse of a policy were caused by the same occurrences of Covid-19 as those which had caused the initial loss in March 2020.

Aviva said it had reviewed F's claim following the judgments, but its position remained the same. In summary, it said that the wording of the clause in its policy was materially different from those considered by the court. Aviva said that the aggregation clause considered in the Stonegate judgment refers to loss which arises from, is attributable to, or is in connection with, a single occurrence. Whereas the relevant wording in F's policy refers to one loss or series of losses arising out of and directly resulting from one source or original cause, which is a much wider formulation.

Aviva also said that it thought the Stonegate judgment supported its position because at paragraph 78 of the judgment the court said there is "a considerable amount of authority relating to aggregating provisions, and to how they should in general be approached". Aviva said it had made this point in its response, in particular a passage from Lord Mustill's judgment in *Axa Reinsurance (UK) plc v Field* which makes it clear that there is a contrast between "originating cause" type wordings and "occurrence" or "event" type wordings. Aviva said that the choice of "one source or original cause" wording in the F's policy is aggregation language of the broadest kind, which can therefore be distinguished from the wording at issue in the Stonegate and other related judgments.

I issued a provisional decision on this complaint on 6 January 2023. I said:

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

Business interruption insurance offers protection from risks common to a business, but different policies can provide different types of cover. What is and isn't covered is set out in the policy terms and conditions. I've therefore looked carefully at this particular policy to see if Aviva has acted fairly, reasonably and in line with the terms and conditions of the policy when declining 's claim.

Prevention of access and loss of attraction

F's claim was paid under the clause for prevention of access and loss of attraction. The relevant part of the clause covers:

> *"v) closure or sealing off of the **Premises** or any right of way by the police or other statutory authority which*
> *a) prevents or hinders the use of the **Premises** or access thereto or, where the*

> ***Premises*** *forms part of a larger complex development or shopping centre, prevents or hinders the use of the entire complex development or shopping centre or access thereto or;*
> *b) causes a reduction in the number of people using the* ***Premises*** *or, where the* ***Premises*** *forms part of a larger complex development or shopping centre, causes a reduction in the number of people using the same"*

The clause for prevention of access and loss of attraction is listed as an extension to the policy. Under the heading 'Extensions' the policy says:

> *"Unless otherwise stated in the Schedule the following Extensions apply. Extensions may be subject to Sub-limits, which, if applicable, are stated in the Schedule."*

F's policy schedule has a section regarding sub-limits which says:

> *"Sub-limits form part of the Limit of Liability and, unless otherwise stated do not apply in addition to it.*
> *All Limits of Liability apply any one* ***Occurrence****.*
> *Limits are inclusive of the Excess unless otherwise stated.*
> *If more than one Sub-limit applies to the same loss, the* ***Insurer's*** *liability will be limited to the lesser Sub-limit"*

The property damage and business interruption section of the policy says that where a word is set out in bold it has a specific definition. The policy defines occurrence as:

> *"Occurrence means any one loss or a series of losses arising out of and directly resulting from one source or original cause.*
>
> ***Note****: The duration and extent of any one source or original cause shall be limited to*
> *i)72 consecutive hours as regards earthquake, storm and/or flood.*
> *ii) 72 consecutive hours and within the limits of one city, town or village as regards riot, civil commotion and malicious damage…"*

It doesn't appear to be in dispute that there is a £10,000 limit per claim. It also doesn't appear to be in dispute that the second lockdown amounted to a closure or sealing off of F's premises by a statutory authority which prevented or hindered the use of the premises or caused a reduction in people using the premises. What is in dispute is whether Aviva has acted fairly and reasonably in deciding that each period of lockdown resulted from the same underlying cause and therefore it won't pay anything further for the second period of lockdown.

As set out in the policy, I think the sub-limit set out in the schedule applies to the clause for prevention of access and loss of attraction. And the sub-limit says that the limits apply to only one occurrence. The word occurrence is set out in bold in the schedule and so I think the policy definition applies. I've therefore considered whether the second period of lockdown was as a result of a new occurrence as defined by the policy. Having done so, I think Aviva has acted fairly and reasonably in declining to pay for a second claim period. I'll explain why.

I believe that the occurrences of Covid-19 which led to the first lockdown were different to the occurrences of Covid-19 which led to the second lockdown. However, the definition of occurrence in F's policy also includes any losses or a series of losses arising out of and directly resulting from one original cause. And even though different instances of the disease

led to different periods of lockdown, in the context of this policy wording, I consider that the losses arose from and resulted directly from one original source or cause – i.e. the losses all arose from Covid-19.

I have considered F's point about the references to 72 hours within the definition of occurrence. However, I think these points provide limits for the risks mentioned in the definition rather than being examples. So I don't think the reference to 72 hours makes a difference to F's claim.

Therefore, I intend to find that it was fair and reasonable for Aviva to refuse to pay for a second claim under this part of the policy.

Other parts of the policy

F has noted that there are other parts of the policy which it thinks might provide cover, in particular the clause for disease. F said that the reason Aviva waited until after the test case to settle its claim was because of the disease clause, but I don't think that's correct. Aviva wrote to F prior to the test case to let it know that the part of the policy impacted by the test case was the extension for prevention of access and loss of attraction. I've seen the letter which also says that the disease clause wouldn't be impacted by the test case.

The disease clause provides cover where there are restrictions on the premises on the order or advice of a competent authority as a result of, amongst other things, a notifiable disease at its premises. I haven't seen anything to indicate that there was a notifiable disease at F's premises prior to the second lockdown which resulted in the restrictions on its premises. So, I don't think Aviva needs to pay anything under this clause. However, if F believes there was an occurrence of Covid-19 at its premises which resulted in the restrictions, F would need to raise this with Aviva to consider first.

Contact with Aviva and delays in settling the claim

F is unhappy about the time it took for Aviva to settle its claim and that it still doesn't think the claim is properly settled. I don't think Aviva needs to pay anything further on F's claim, so I do think the claim has been properly settled. However, I do think Aviva took longer than it should have done to pay F'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 F had a valid claim and that Aviva's decision to decline this in 2020 was incorrect.

Our rules allow me to make, amongst other things, a money award for what I consider to be fair compensation if a complaint is determined in the favour of the complainant. So I've considered whether Aviva's delay caused F a financial loss. Having done so, I don't think it did, I'll explain why.

F has told us that it took out a BBL in May 2020 to cover the amount it would have received from Aviva in settlement of its claim. I understand that there is 0% interest on the BBL for 12 months which means that F would not have incurred interest on the amount it was without due to Aviva's error until May 2021. However, Aviva paid F's claim in April 2021 and F could have paid this amount off its BBL at that point if it wanted to. I also haven't seen enough to persuade me that Aviva turning down F's claim incorrectly caused such a level of inconvenience as to award compensation. As such, I don't intend to require Aviva to compensate F for any delays in settling the claim.

I appreciate this isn't the outcome F was hoping for but, having considered things very

carefully, I don't intend to uphold this complaint.

Aviva didn't provide any additional comments in response to my provisional decision but F didn't agree. In summary, F said:

- When the pandemic arose the UK Government said that insurers would do the right thing by businesses. F suggested it should be asked what was meant by this because F closed in order to do the right thing for the country.
- There had been a number of instances where Aviva had not answered the phone. F had been inconvenienced by the delays in the payment of its claim. F provided details of when it had made calls to Aviva.
- My provisional decision said that F could have paid money off its BBL when Aviva made the settlement. However, its business suffered losses in excess of £100,000 so needed these funds.
- F asked whether any future claims would also be considered to be as a result of the same underlying cause.

On 24 January 2023 I let both parties know that the further information from F had persuaded me that it had been inconvenienced by Aviva's delay in paying its claim. This is because I can see it needed to get in touch with Aviva a number of times to resolve its claim which should have been paid sooner. I said that I intended to require Aviva to pay F £200 to compensate for its inconvenience.

F did not respond with any further comments. Aviva did not think it was fair to award compensation for it not settling the claim before the outcome of the Supreme Court judgment. However, it accepted that its communication after agreeing to settle the claim could have been more effective and agreed to pay £200 compensation in recognition of that point only.

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 Aviva should pay F £200 compensation for inconvenience. I'll explain why F's other comments haven't persuaded me to depart from the other findings in my provisional decision.

I understand that F closed as it was required to by the Government. However, I don't believe that the comments made by the Government mean that insurers needed to pay claims which aren't covered by a policy. I have explained in my provisional decision why I believe that Aviva has paid what it needs to under F's policy and for those reasons I am not going to require Aviva to pay F's claim for losses it incurred from November 2020. I'm unable to comment on any future claims as the circumstances of those claims would need to be considered separately at that time.

I recognise that F's losses were greater than the amount owed by Aviva. However, F told us that it had taken a loan to cover the amount owed by Aviva. Therefore, F had the money during this time and wasn't required to pay interest on it. While it is for F to decide what to do with the settlement it received from Aviva, I don't think it would be fair and reasonable for me to require Aviva to pay interest on the settlement amount as F could have used it to pay off the money Aviva should have paid it sooner.

Aviva has agreed to pay F £200 compensation as it accepted its communication could have been better after its decision to settle F's claim. I remain of the view that this is a fair and

reasonable amount of compensation for Aviva to pay F for the unnecessary inconvenience it caused.

Putting things right

To put things right, Aviva should pay F £200 compensation for its inconvenience.

My final decision

My final decision is that I uphold this complaint in part and require Aviva Insurance Limited to pay F £200 compensation for inconvenience.

Under the rules of the Financial Ombudsman Service, I'm required to ask F to accept or reject my decision before 17 March 2023.

Sarann Taylor
Ombudsman