DRN-3972690

The complaint

A company that I'll refer to as T has complained that QBE UK Limited unfairly declined to pay for more than one business interruption insurance claim after it was impacted by Covid-19.

Mr N, a director of T, has brought the complaint on T's behalf through a representative. For ease of reading, I will refer to T throughout.

What happened

T held business interruption insurance with QBE. "Policy one" ran from 21 April 2019 until 20 April 2020. "Policy two" ran from 21 April 2020 until 20 April 2021. T said it had been required to close due to Government restrictions as a result of Covid-19 and the Government's response to the pandemic. T made claims for losses it experienced as a result of that closure for the periods 23 March 2020 to 23 June 2020 under policy one, 5 November 2020 to 3 January 2021 under policy two and 4 January 2021 to 4 April 2021 under policy two.

QBE paid T's claim for the claim period from 23 March 2020 to 23 June 2020 under the extension for disease in policy one. It refused the claims under policy two.

T complained to QBE as it thought its first claim should have been paid under the extension for denial of access instead of the extension for disease. It also thought QBE should pay its two further claims as it had experienced further losses due to being required to close by the Government due to restrictions imposed as a result of Covid-19.

QBE said that Covid-19 had caused one indivisible loss and as it had paid T's claim for the period 23 March to 22 June 2020, no further indemnity was available for losses caused by Covid-19. QBE said that T's claim would not be covered under the extension for denial of access because the clause required damage to property and Covid-19 had not damaged property.

Unhappy with QBE's response, T brought its complaint to our service. It said that as the extension for disease describes an infectious disease as "damage", this should also apply to the extension for denial of access. It said that the principle of contra proferentem should apply.

QBE said that the Supreme Court in *FCA v Arch Insurance (UK) Ltd and others [2021] UKSC 1* (the FCA test case) found that whilst the peril is divisible, its effects and the loss that results from the peril are indivisible. It said it is therefore not possible to point to any individual case of Covid-19 and link this to a particular loss or element of loss. QBE said that the disease extension is not triggered by the closure of the premises or any particular Government action but covers all business interruption loss caused by cases of disease within the radius. It said that, for the purpose of this extension, there is no relevant distinction to be drawn between the different phases of the pandemic and UK Government's response. QBE said that, as it couldn't separate out the loss between individual cases of Covid-19, there is one indivisible loss which started with the first case within radius and is still running,

subject to the maximum indemnity period.

Our investigator looked into T's complaint and recommended it be upheld. While she thought QBE had acted reasonably in refusing to pay T's claim under the extension for denial of access, she thought the policy could respond to multiple claims for different manifestations of Covid-19. Therefore, she recommended QBE consider T's second and third claims on this basis.

T accepted our investigator's recommendation, but QBE didn't agree and provided a detailed response. I have summarised the points it made points below:

- It agreed that Covid-19 did not cause damage and therefore there is no cover for T's claim under the extension for denial of access in these circumstances. Therefore, the comments below are in relation to the extension for disease.
- The second and third claims would fall under policy two which commenced on 21 April 2020.
- The disease extension provides cover for business interruption or interference as a result of Covid-19 manifesting itself within a 25 mile radius of the premises. The extension is not contingent on any restrictions by the Government or other agency so while the restrictions are the means by which the insured peril has caused the loss they are not part of the insured peril.
- The question of whether T is able to make multiple claims is not answered by how many times they were restricted. Separate claims can only be made where there are separate insured losses caused by separate incidents of the insured peril.
- T has said that it continued to be impacted by Covid-19 so while the level of impact may have fluctuated, the business did not cease to be affected by Covid-19 in between lockdowns.
- While each case of Covid-19 is itself a cause of the loss and a separate occurrence of the insured peril the loss can't be allocated to specific cases of the disease within or outside the radius. This is supported by the Supreme Court who said: "*Although we do not think that it was strictly accurate for the court below to describe all the cases of COVID19 in the country as indivisible, what plainly is indivisible is the effect of such cases, via the measures taken by the UK Government, on any insured business. As the loss is indivisible, the question whether it was caused by an insured peril is an all or nothing one.*"
- Our investigator's approach would mean that each separate case of Covid-19 would trigger a new indemnity period. This is absurd and unworkable. The other outcome might be that there is a new claim each time the Government reviewed and renewed the lockdown, but our service has dismissed this approach in a decision on another complaint. This approach would also be directly contrary to the approach to causation taken by the Supreme Court. As T has had the benefit under the policy on the basis that the causative effects of Covid-19 cannot be separated, it would be irrational to introduce separability when applying the maximum indemnity period.
- The investigator's decision might have been influenced by the short indemnity period of three months. However, the length of the indemnity period should have no bearing on whether multiple claims can be made. A short indemnity period is designed to limit an insurer's exposure to insured perils that can have long term effects on a business, as might be the case with a disease.
- Its position is supported by legal advice which it has received.
- Where policyholders had a longer maximum indemnity period and their policy lapsed during the first lockdown QBE has allowed the full indemnity period. To uphold T's case would detriment those policyholders as it would need to curtail cover for those policyholders at the point of the Government's review. QBE took the approach that such an approach was not in line with the Supreme Court judgment.

QBE asked for an Ombudsman's decision.

Before I reached a decision our investigator asked QBE if the outcome of *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)* changed its position on T's case. QBE said that its position had not changed.

I issued a provisional decision on this complaint on 31 January 2023. In that decision I said:

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

Denial of access

I have started by considering whether T's claim should have been met under the extension for denial of access. Having done so, I don't think it should. I'll explain why.

The wording of this clause in both the 2019 policy and 2020 policy appears to be the same. It says:

> *"**We** shall indemnify **you** in respect of interruption of or interference with the **business** caused by **damage**, to property in the vicinity of the **premises** which shall prevent or hinder the use of the **premises** or access thereto whether the **premises** or your property therein shall be **damaged** or not…"*

In respect of business interruption the policy defines damage as:

> *"a) loss of destruction of or damage caused by an insured peril as set in the Coverage- insured perils clauses of **Section** A Contents and **Section** C - Buildings*
> *b) glass breakage;"*

Therefore, for this to provide cover, the interruption to T's business would need to be as a result of loss of, destruction of or damage to property in the vicinity of its premises. I think that, for damage to have occurred, there would need to be a physical change or altered state to property in the vicinity of T's premises, which made it less valuable. Alternatively, it's possible damage could be said to have occurred if specialist cleaning was required to remove the cause of potential damage. However, I haven't seen anything to indicate that the interruption to T's business was as a result of damage to property in its vicinity.

I recognise that the word 'damage' is also used when setting out the indemnity period for the disease clause but in that context it wouldn't make sense if damage didn't refer to the insured peril. However, in this clause I think the policy definition makes linguistic sense as the clause requires damage to property in order to provide cover.

Therefore, I think QBE acted reasonably in saying there was no cover under this section of the policy.

I have therefore, gone on to consider whether QBE has acted fairly in deciding that T can only make one claim for losses caused by Covid-19.

Can the policy respond to the second and third claims made by T?

As QBE has pointed out, T's policy lapsed on 20 April 2020. Therefore, I think that the second and third claims would need to be considered under the policy which incepted on 21 April 2020.

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

The automatic reinstatement of sum insured clause in T's policy says that:

> *"In the event of a loss the **sum insured** hereby shall not be reduced by the amount of such loss provided that **you** shall:*
>
> *a) pay the appropriate extra premium on the amount of loss from the date thereof to the date of expiry of the **period of insurance**;*
> *b) if the loss results from theft give effect to any additional protective devices which **we** may require for the further security of the property insured."*

The Sum Insured for loss of gross revenue is £250,000, with an indemnity period of 12 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 QBE has already settled T's claim for its period of loss from March 2020, I have gone on to consider whether T's subsequent claims should be considered by QBE.

The extension for disease says:

> *"**We** shall indemnify **you** in respect of interruption of or interference with the **business** as insured by this section caused by:*
>
> *a) 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 manifested by any person whilst in the **premises** or within a twenty five (25) mile radius of it;*
> *b) actual or alleged murder, suicide or sexual assault in the **premises**;*
> *c) bodily injury or illness sustained by any person arising from or traceable to foreign or injurious matter in food or drink provided in the **premises**;*
> *d) vermin or pests in the **premises**;*
> *e) the closing of the whole or part of the premises by order of a competent public authority consequent upon defect in the drains or other sanitary arrangements at the **premises**.*
>
> *The insurance by this clause shall only apply for the period beginning with the occurrence of the loss and ending not later than three (3) months thereafter during which the results of the **business** shall be affected in consequence of the **damage**."*

QBE hasn't pointed to any new terms within the policy which incepted in April 2020 which would exclude T's claim for business interruption due to Covid-19. Therefore, as set out above, for the policy to provide cover, the interruption or interference to T's business needs to result from any human infectious or contagious disease manifested by any person at T's premises or within a 25 mile radius of them. It's not in dispute that Covid-19 is a human infectious or contagious disease.

It's also not in dispute that Covid-19 manifested within a 25 mile radius of T's premises in March 2020 which caused T a loss. For this reason, QBE paid for the losses T incurred for three months from the date it closed.

The relevant question in this complaint is whether the interruption or interference to T's business in November 2020 to January 2021 and from January 2021 to April 2021 was as a result of a case of Covid-19 which manifested in March 2020, which continued to affect the results of T's business, or a result of a separate a case of Covid-19 which manifested in any person within a 25 mile radius of T's premises. Having considered this, I think the interruption or interference with T's business in the second and third claims were caused by different cases of Covid-19 to those which caused the first period of claim.

I say that because the claims T made were for losses which arose principally as a result of the UK Government restrictions in response to Covid-19 in March 2020, November 2020 and January 2021. As QBE has said, the restrictions imposed by the UK Government weren't part of the insured peril. However, the cases of Covid-19 led to restrictions which caused T's loss.

QBE has submitted that T's business suffered loss throughout the pandemic, including between the periods of heightened Government restrictions. It has said that separate claims can only be made where there are separate insured losses caused by separate incidents of the insured peril. However, while T's loss might not have ceased throughout this prolonged period, I think the impact on its business, both from the various Government restrictions and from other effects, was due to different cases of the disease over time. Separate manifestations of Covid-19 within a 25-mile radius of T's premises (the insured peril) caused the various Government restrictions and other effects, which together interrupted T's business. For example, once the restrictions which had been introduced in March 2020 were eased, I don't think that the Government would have introduced new restrictions if it wasn't for a new threat caused by new cases of Covid-19.

In reaching a decision, amongst other things I have to consider relevant law. I have taken account of the Supreme Court judgment in the FCA test case, but I don't think the findings of the Supreme Court in the test case mean that T can't claim for more than one case of Covid-19 if that is a separate insured peril which results in a separate period of loss. While it might be impossible to separate the cases of Covid-19 which led to the restrictions in March 2020, I believe that those cases can be separated from the cases which contributed to the UK Government's decision to introduce further restrictions in November 2020 and January 2021.

I don't believe that this approach is contrary to the position taken by another ombudsman in the complaint QBE has referred to because in that case the ombudsman was considering the review of restrictions within the first lockdown and not the decisions which led to later lockdowns.

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):

> *"Those responses 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 T's losses arising from the Government's actions in November 2020 and January 2021 weren't caused by the manifestations 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 and January 2021 were made in response to a new threat, i.e. on the basis of new cases of Covid-19.

For the same reasons as I don't think the cases of Covid-19 which manifested within a 25 mile radius of T's premises in March 2020 were the same cause of the restrictions in November 2020. When the UK Government announced restrictions on 4 January 2021 they said, "…in fighting the old variant of the virus, our collective efforts were working and would have continued to work. But we now have a new variant of the virus…in England, we must therefore go into a national lockdown which is tough enough to contain this variant.". I believe that this demonstrates that the cases of Covid-19 which manifested in a person and contributed to the interruption or interference to T's business in January 2021 can be separated from those cases which contributed to the restrictions in November 2020 and therefore the policy can respond to these as separate claims.

I also don't think those cases which led to the November 2020 restrictions were the same cases which led to the restrictions which were imposed in January 2021.

QBE has referred to having received legal advice on this point, however, I've not had sight of the advice so I can't comment on that further. As I've set out above, I believe the current legal position supports my view that T's policy can respond to claims for the interruption to its business in November 2020 and January 2021.

QBE has also referred to the length of the indemnity period as being a potential factor in our investigator reaching the outcome she did. I recognise QBE's point that an insurer chooses an indemnity period to reflect the level of exposure it wants to take on but that doesn't change my view that this policy can respond to more than one claim for an insured peril if those claims are due to separate instances of that insured peril.

I have noted QBE's point about how it has treated its policies which have a 12 month indemnity period. However, I'm required to reach a decision on this complaint based on what I consider to be fair and reasonable in all of the circumstances. And I don't think it would produce a fair and reasonable outcome for me to not uphold this complaint based on how QBE has treated other policyholders when I believe that this policy can respond to T's claims from November 2020 and January 2021.

Therefore, I've then gone on to consider whether there were cases of Covid-19 which manifested within a 25 mile radius of T's premises which resulted in the interruption or interference with its business.

The UK Government announced the November lockdown on 31 October 2020. The Financial Conduct Authority Covid-19 calculator indicates that on 31 October 2020 there were more than 1,000 cases of Covid-19 within a 25 mile radius of T's premises. Even with this figure being adjusted to represent the number of cases which would be considered to have manifested I consider that this sufficiently demonstrates that there were cases of Covid-19 which had manifested within a 25 mile radius of T's premises which led to the interruption or interference with T's business.

On 4 January 2021 the UK Government announced a further lockdown to start on 5 January 2021. On 4 January 2021 the FCA covid-19 calculator indicated that there were over 20,000 reported cases within a 25 mile radius. For the reasons set out above, I consider that this sufficiently demonstrates that there were cases of Covid-19 which had manifested within a 25 mile radius of T's premises which led to the interruption or interference with T's business.

I think it would be fair and reasonable for QBE to have the opportunity to assess the claim to determine if T has shown that it has experienced a loss which is covered by the policy. When assessing the claim QBE should do so on the basis that the policy can respond to a second claim from 5 November 2020 and a third claim from 4 January 2021 as there were new cases of Covid-19 which manifested in any person within a 25 mile radius.

For clarity, I would like to point out that there was a formatting error in my provisional decision where a line from within the paragraph was moved to a separate line below the first paragraph. The paragraphs which read as:

"For the same reasons as I don't think the cases of Covid-19 which manifested within a 25 mile radius of T's premises in March 2020 were the same cause of the restrictions in November 2020. When the UK Government announced restrictions on 4 January 2021 they said, "…in fighting the old variant of the virus, our collective efforts were working and would have continued to work. But we now have a new variant of the virus…in England, we must therefore go into a national lockdown which is tough enough to contain this variant.". I

believe that this demonstrates that the cases of Covid-19 which manifested in a person and contributed to the interruption or interference to T's business in January 2021 can be separated from those cases which contributed to the restrictions in November 2020 and therefore the policy can respond to these as separate claims.

I also don't think those cases which led to the November 2020 restrictions were the same cases which led to the restrictions which were imposed in January 2021."

Should have read as:

"*For the same reasons as I don't think the cases of Covid-19 which manifested within a 25 mile radius of T's premises in March 2020 were the same cause of the restrictions in November 2020 I also don't think those cases which led to the November 2020 restrictions were the same cases which led to the restrictions which were imposed in January 2021. When the UK Government announced restrictions on 4 January 2021 they said, "…in fighting the old variant of the virus, our collective efforts were working and would have continued to work. But we now have a new variant of the virus…in England, we must therefore go into a national lockdown which is tough enough to contain this variant.". I believe that this demonstrates that the cases of Covid-19 which manifested in a person and contributed to the interruption or interference to T's business in January 2021 can be separated from those cases which contributed to the restrictions in November 2020 and therefore the policy can respond to these as separate claims.*"

T accepted my provisional decision. QBE said it didn't have any further comments.

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.

As I've received no further comments from T or QBE to change my mind on this outcome of this complaint, I see no reason to depart from my provisional decision. It remains that I think the fair and reasonable outcome to this complaint is for QBE to reassess T's claims as set out below.

Putting things right

To put things right, QBE should reassess T's claims for losses from 5 November 2020 and 4 January 2021 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 and a third claim from 4 January 2021 as there were new cases of Covid-19 which manifested within a 25 mile radius of its premises.

My final decision

I uphold this complaint require QBE UK Limited to reassess T's claims for losses from 5 November 2020 and 4 January 2021 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 and a third claim from 4 January 2021 as there were new cases of Covid-19 which manifested within a 25 mile radius of its premises.

Under the rules of the Financial Ombudsman Service, I'm required to ask T to accept or reject my decision before 21 March 2023.

Sarann Taylor
Ombudsman