DRN-3975523

The complaint

C, a mutual society, has complained that Aviva Insurance limited didn't settle its business interruption insurance claim in full.

Mr W, an officer of C, has brought the case on its behalf.

What happened

C runs a club. It held business interruption insurance with Aviva. It made a claim in April 2020 after the business was affected by Covid-19 lockdown restrictions.

Aviva initially declined the claim as it didn't think the policy provided cover.

In January 2021 following the Supreme Court judgment in a test case brought by the Financial Conduct Authority (the FCA test case) Aviva reviewed the claim. It accepted the claim and in March 2021 made a settlement of £10,000 which was the sub-limit for loss under the policy extension for prevention of access and loss of attraction.

C thought based on the wording of the policy it was entitled to a further £10,000 being the policy sub-limit under the section of the policy providing cover for business interruption losses caused by a notifiable human disease.

Aviva disagreed. It said C's losses under both the prevention of access and notifiable human disease sections of the policy had the same originating cause and it wasn't entitled to claim twice. It also said even if C had been able to make a separate claim under the notifiable human disease extension, it would only have been successful if it could have shown that there'd been an occurrence of Covid-19 at the premises that had caused restrictions on the use of those premises on the order or advice of a competent authority.

C brought its complaint to this service. I issued a provisional decision explaining why I was minded to uphold the complaint in part. An extract from my provisional findings is set out below:

"*Business interruption insurance offers protection from risks common to a business but different policies 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 whether Aviva has acted fairly, reasonably and in line with the terms and conditions of the policy when refusing to consider C's claim under the disease section of the policy.*

Notifiable Human Disease and Other Health Risks

There are various extensions to the core business interruption cover. One of these covers:

" i) any occurrence of a Notifiable Human Disease or a Notifiable Human Disease attributable to food or drink supplied from the ***Premises*** *….*

*That causes restrictions on the use of the **Premises** on the order or advice of a competent authority."*

It seems to be accepted that Covid-19 falls within the policy definition of a Notifiable Human Disease.

Prevention of access and loss of attraction

C's claim was paid under this extension. The relevant part of the clause covers losses caused by:

*"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 policy schedule set out the limits of liability for different parts of the policy. It stated that the sub-limit of liability for Notifiable Human Disease and Other Health Risks was £10,000 and it was also £10,000 for Prevention of Access and Loss of Attraction.

C's policy 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 to 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 lower 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 says "Occurrence" means:

"any one loss or series of losses arising out of and directly resulting from one source or original cause."

It doesn't appear to be in dispute that there is a sub-limit of £10,000 for claims made under the notifiable human disease and the prevention of access extensions to the policy. What is in dispute is whether Aviva has acted fairly and reasonably in deciding that C's claims under these two extensions resulted from the same underlying cause.

How we should interpret insurance policies is set out in the Supreme Court's judgment in response to the FCA test case. Paragraph 47 of that judgment says "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."

At paragraph 77 the Supreme Court also commented that "…the overriding question is how the words of the contract would be understood by a reasonable person. In the 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 Ltd 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."

As set out in the policy I think the limits apply to any 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 loss caused by an occurrence of a notifiable human disease resulted from the same source or original cause as the one which caused the closure of the premises by a statutory authority. I think it did and I'll explain why.

Mr W says that there were cases of Covid-19 at the club. If I understand him correctly, he believes that these cases were separate from the cases of Covid-19 that led to the first lockdown. However, the definition of "Occurrence" in C's policy includes losses arising out of and directly resulting from one source or original cause. This is very broad wording. Even though there might have been different instances of the disease, I consider that the losses arose out of and directly resulted from one source or original cause – i.e. all the losses arose from Covid-19.

Mr W has referred me to the judgment in the test case where the Supreme Court found at paragraph 104:

"As, discussed, each individual case of disease is in our view properly regarded as an occurrence. Accordingly, where there are multiple cases of disease, each is an "occurrence"…"

However, this was in the context of deciding what the term "occurrence" meant in policies where such a term wasn't defined and also with regard to the issue of whether a particular occurrence of Covid-19 was within or outside a specified geographical area e.g. within 25 miles of the insured premises. C's policy has a definition of "Occurrence" and so I need to take into account that definition. Having done so I don't think it entitles C to bring a separate claim under the notifiable human disease extension in addition to the prevention of access claim as in each case the loss resulted from the same cause so there was only one "Occurrence" as defined in the policy for which the policy sub-limit was £10,000.

C is also unhappy about the time it took for Aviva to settle its claim and the way it handled it. I do think Aviva took longer than it should have done to pay C's claim. Whilst I've noted Aviva's point that it felt it needed to wait until the outcome of the test case, I'm not persuaded by it. This delay in dealing with business interruption insurance claims was permitted under the guidance issued by the Financial Conduct Authority to insurers at the time but not required by law. Additionally, the guidance

did not suggest that, for customers whose claims were found to have been incorrectly declined, interest should not be awarded. I recognise that there was uncertainty about the interpretation of the wording in certain policies. However, I think it was always open for Aviva to have accepted the claim sooner and ultimately the Supreme Court found that Aviva's initial decision not to provide cover was incorrect.

I've also taken account of the fact that Aviva has had the benefit of the money it should have paid C. The rules governing this service 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 favour of the complainant. In this case, my decision is based on what I think is fair compensation to put C back in the position it would have been in if Aviva had accepted the claim originally. I acknowledge that my decision might be different from one which a court might make. But in this case I think it is fair and reasonable to do so.

In relation to an ongoing claim of this nature, it is reasonable that an insurer should wait for losses to accrue before making settlement. However, it is not necessarily reasonable for an insurer to wait for the end of an indemnity period before making any settlement. Generally speaking, I would expect regular monthly payments to be made.

It is also reasonable that an insurer will need some time to assess a claim and make a settlement. I consider a reasonable time to do this for a claim of this nature would be around two months from when C first made its claim in April 2020 in order to wait for losses to accrue and to give Aviva a reasonable amount of time to assess the claim. I don't consider the bringing of the test case alters this in the circumstances of this complaint.

I currently think it is fair and reasonable that Aviva should add interest to the first month's loss from two months after the claim was made, the second month's loss from three months after the claim was made and so on until the policy sub-limit of £10,000 is reached in each case until the date of settlement. Interest is simple interest at the rate of 8% a year.

Aviva incorrect rejection of C's claim initially caused it some inconvenience to C. Mr W had to constantly chase Aviva on C's behalf over a period of several months. I am minded to award £250 for the inconvenience Aviva caused C in this respect."

In summary in reply Aviva made the following points:

- It would like me to note that I agreed with it on the main issue complained about by C.
- Aviva didn't think the award of interest was fair or justified for three reasons:

  (a) It said insurance claims do not attract interest as a matter of law as a claim for payment under a policy is a claim for damages rather than a debt claim.
  (b) Aviva acted at all times in accordance with the FCA's guidance on the test case. After the judgment of the Supreme Court had been handed down in the test case, it had taken steps to settle the claim as efficiently and expeditiously as possible.
  (c) It didn't think C was unhappy with the time period for settlement of the initial claim as opposed to delays from March 2021.
- Even if an award of interest were justified, it thought the rate of 8% was punitive.
- It accepted that it had caused some inconvenience to C by declining the claim for a further payment under the notifiable disease extension on incorrect grounds and thought compensation of £250 was fair in the circumstances. It didn't think it should be required to compensate C for its initial handling of the claim.

Mr W said he was disappointed with my decision but had no 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.

For the reasons set out in my provisional findings I agree that Aviva treated C fairly in saying that C wasn't entitled under its policy to bring a separate claim under the notifiable human disease extension in addition to the prevention of access claim.

The rules governing this service allow me to make, amongst other things, a money award for what I consider to be fair compensation if a complaint is determined in favour of the complainant. In this case, my decision is based on what I think is fair compensation to put C back in the position it would have been in if Aviva hadn't turned down its claim at first. As mentioned above, my decision might be different from one which a court might make. But in this case I think it is fair and reasonable to account of the fact that Aviva has had the benefit of the money it should have paid C and to compensate C for the financial loss of being without that money.

I've noted Aviva's point that it acted in accordance with the guidance issued by the Financial Conduct Authority to insurers at the time. But, as explained in my provisional findings, the guidance did not suggest that, for customers whose claims were found to have been incorrectly declined, interest should not be awarded.

With regard to Aviva's comment that C hasn't complained about the time period for settlement of the initial claim, I should explain that this service has an inquisitorial remit, which allows me to consider the subject matter of a complaint as a whole. I am not restricted to just the specific points raised by a complainant, or those addressed by a business in reply to a complaint. So I have looked at how Aviva handled C's claim from when it was first made.

It's not the role of this service to penalise financial businesses. Our usual approach is to apply an interest rate of 8% simple per annum broadly to reflect the opportunity cost of being without the funds. I've considered Aviva's arguments, but I think the relevant issue here is the opportunity cost of the lost funds to C. In this case I don't consider that awarding interest at 8% would result in C being overcompensated. Without any compelling reason to depart from our usual approach, I consider it fair and reasonable that Aviva should pay C interest at the rate of 8% simple a year from and to the dates specified in my provisional findings.

As I understand it, Aviva doesn't object to paying compensation of £250 but it does object to this being categorised as compensation in part for its initial handling of C's claim. Our service doesn't award compensation for each individual failing. Instead, we take a holistic view of everything that's happened and make an award based on the overall impact. In this case, having reviewed the circumstances of the claim, I think that overall the sum of £250 is fair and reasonable to compensate C for the inconvenience it was caused.

Putting things right

To put things right I think Aviva should:

- add interest to C's first month's loss from two months after the claim was made, the second month's loss from three months after the claim was made and so on until the policy sub-limit of £10,000 is reached in each case until the date of settlement.

Interest is simple interest at the rate of 8% a year.
- pay compensation of £250 to C for the inconvenience caused to it.

My final decision

For the reasons set out above, I uphold this complaint and require Aviva Insurance Limited to put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask C to accept or reject my decision before 20 March 2023.

Elizabeth Grant
Ombudsman