DRN-4057418

Financial Ombudsman Service

The complaint

W, a limited company, has complained about the way that Society of Lloyd's calculated the settlement of its business interruption insurance claim. Reference to Lloyd's in this decision includes the underwriting syndicate which issued the policy.

Mr M, a director of W, has brought the complaint on W's behalf.

What happened

W runs a pub with a bed and breakfast business, tearoom and holiday let. It started trading in June 2019 and held a commercial insurance policy issued by Lloyd's. The policy ran from 12 June 2019 to 11 June 2020. The policy was renewed in June 2020 but with an exclusion for losses caused by Covid-19.

W made a claim to Lloyd's in April 2020 after it was required to close the business under the Covid-19 lockdown restrictions. Initially Lloyd's declined the claim.

In the same month the Financial Conduct Authority announced its intention to obtain a court declaration aimed at resolving the uncertainty around the validity of many business interruption insurance claims ("*the test case*").

In January 2021 the Supreme Court issued its judgment in the test case. As a result of that judgment Lloyd's accepted the claim and asked W for information regarding its losses.

Lloyd's said it would assess W's losses over an indemnity period running for 24 months from March 2020. That meant it took into account increased trading after the lockdowns ended. It calculated that W hadn't in fact made a loss at all.

W complained to Lloyd's about its interpretation of the indemnity period. It argued Lloyd's should just consider its accounts just for the lockdown periods which began in March 2020, November 2020 and January 2021.

As Lloyd's didn't change its decision about the indemnity period, W 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 decision is set out below:

"*Lloyd's accepted W's claim under the following clause in the policy which covered business interruption losses caused by:*

*"any occurrence of a **Notifiable Disease** within a radius of 1 mile of the **Premises**".*

It doesn't appear to be in dispute that the policy definition of "Notifiable Disease" includes Covid-19.

W's policy was in force between 12 June 2019 and 11 June 2020. The loss or damage claimed for must have happened during this period of insurance.

The indemnity period is the period of time during which the insurer will support the business following an insured event such as Covid-19. In this policy it is defined as:

"*the period beginning with the occurrence of the **damage** and ending not later than the **maximum indemnity period** thereafter during which the results of the **business** are affected in consequence of such **damage**."*

In this case the maximum indemnity period was 24 months.

Lloyd's decided that the indemnity period started on 5 March 2020 being the date on which there was a Notifiable Disease within one mile of the premises. The date of 5 March 2020 is the date upon which Covid-19 became a notifiable disease in England. Provided W can show it was impacted on this date and there was a case of Covid-19 within a one-mile radius of the premises, I think it would be reasonable to take 5 March 2020 as the date when the damage (as defined by the policy) started.

After the end of the first lockdown when pubs in England reopened on 4 July 2020 there was an increase in W's trade. W says this was due to investment in the business. Lloyd's asserts that pent-up demand and the Government's "Eat Out to Help Out" scheme very largely contributed to the increase. So it thinks W's business was still affected by the case(s) of Covid-19 that had led to the claim.

I need to consider when the indemnity period should end. Under the policy wording the indemnity period ends when the results of the business cease to be affected by the occurrence of a notifiable disease (as defined in the policy) which has occurred within a one-mile radius of the property up to a maximum period of 24 months.

Lloyd's calculated W's losses over a 24-month indemnity period. However, the Government restrictions were reviewed and changed over time. Before the hospitality sector in England was allowed to reopen on 4 July 2020, the Government issued guidance setting out a range of measures for pubs and restaurants to make their premises safer from a Covid-19 perspective such as requiring the use of table service where possible, providing clear signage on social distancing and hygiene etc. I think this shows that things had moved on from the original event causing the loss under the policy (the occurrence of Covid-19 within one mile of the premises) and by 4 July 2020 that same event could no longer be said to be affecting W's trade either positively or negatively.

In reaching a decision, amongst other things I have to consider relevant law and I think the judgments in the cases 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) are helpful when considering this complaint. That's because, one of the issues considered by the court was whether losses sustained beyond the expiry date of the policies were caused by occurrences of Covid-19 when the policy was in force.

In Stonegate the relevant period of insurance came to an end on 30 April 2020. The court said (at paragraph 209):

"At least after 4 July 2020 (or 6 July 2020 for Scotland and 13 July for Wales), when hospitality venues reopened, the government response, as I find from its nature and from what was said, was principally in response to the subsequent developments of the disease and the threat it posed from time to time. 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 the period of insurance came to an end on 28 September 2020. At paragraph 48 the court summarised the findings from Stonegate to reject VE's argument that losses throughout the maximum indemnity period had been caused concurrently and equally by all 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…"

Therefore, while an occurrence of Covid-19 within a one-mile radius of W's premises caused it to suffer a loss in March 2020, this same occurrence did not affect W's trade from 4 July 2020. I think it's fair to say that the indemnity period should end on the day before the first lockdown restrictions for pubs and restaurants were lifted in England, that is 3 July 2020. That means W isn't covered under the policy being considered here for later occurrences which led to the lockdown periods in November 2020 and January 2021 because the policy had ended by that time.

In summary, I think Lloyd's should recalculate the settlement based on an indemnity period running from 5 March 2020 up to and including 3 July 2020.

If as a result of such re-calculation a settlement amount is due to W, I currently think it is fair and reasonable that Lloyd's 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 date of settlement. Interest is simple interest at the rate of 8% a year."

In summary Lloyd's made the following points in response:

- It reminded me that the indemnity period is defined as the period "*during which the results of the business are affected in consequence of such damage*".
- It thought the indemnity period should cease only when the business was no longer adversely or positively affected by the insured peril.
- It said "*Of necessity, make-up trading will be experienced after a business reopens following a period of closure*."
- It sent information on the success of the Eat Out to Help Out (EOHO) scheme.
- It thought the scheme was an attempt to reverse the damage caused to hospitality businesses by the first lockdown.

Mr M said that W wouldn't have been able to reopen in July 2020 if it hadn't been for a bounce back loan of £50,000 which it had taken out in May 2020. The loan was interest-free for the first 12 months. As at 28 February 2023 the loan had not been repaid.

Our investigator explained to W that we often don't require a business to pay any interest on delayed settlement for the period when a consumer didn't have to pay interest on a bounce back loan.

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.

Lloyd's says that W experienced bumper trading when it reopened in July 2020 due to the incentives provided by the EOHO scheme and pent-up demand. Lloyd's goes on to allege that these were direct results of the insured peril, namely cases of Covid-19 within a one-mile radius of the premises. I disagree and I'll explain why.

A briefing paper prepared by the House of Commons Library [CBP8978, 22 December 2020] described the EOHO scheme as "*one of the government's policy measures aimed to support businesses reopening after the first Covid-19 lockdown period. It formed part of the Chancellor's summer economic update on 8 July 2020*." There were various other support measures around this time targeted at the hospitality industry.

In the Stonegate case referred to above the claimant was claiming for all its business losses suffered as a result of the occurrence of Covid-19 within the vicinity of its premises up to the end of the 36-month indemnity period provided by the policy on the basis that all such losses were proximately caused by losses occurring within the policy period. One of the arguments put forward on behalf of the claimant was essentially that "cases make cases". The court didn't agree. The judge in that case said at para 216:

"*It would mean that cases within the Period of Insurance were regarded as proximately causative of loss which occurred as a result of the occurrence of different cases, many generations of infection later, simply because these other cases would not have existed without the earlier cases. That would mean that a very indirect and distant cause (the earlier cases) was regarded as a proximate cause of the loss*."

By analogy I think the Government's EOHO scheme was primarily a response to damage to part of the UK economy as opposed to being directly caused by the original cases of Covid-19 which led to W's premises having to close.

Similarly, I think any pent-up consumer demand after 4 July 2020 would have been driven by a number of different factors, such as public perception that the risk of infection had decreased and measures taken in the hospitality sector to make their premises safer from a Covid-19 perspective. Again, I don't think that the original peril can be said to have affected the results of W's business after this point.

I remain of the view that Lloyd's should recalculate the settlement based on an indemnity period running from 5 March 2020 up to and including 3 July 2020.

Putting things right

For the reasons set out above, I think Lloyd's should reconsider W's claim on the basis of an indemnity period running from 5 March 2020 up to and including 3 July 2020.

I provisionally thought that if as a result of such re-calculation a settlement amount was due to W, it would be fair and reasonable for Lloyd's to 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 date of settlement.

I need to take account of the fact that in May 2020 W took out a bounce back loan of £50,000. No interest is charged on the loan for the first year and thereafter it is charged at 2.5%. As I don't think this loan wouldn't have been necessary if W's claim had been settled promptly and correctly, I don't think W was without the settlement funds from the date of the loan until the amount of the settlement based on monthly interim payments as set out above exceeded the £50,000 received via the bounce back loan or until the date when interest was payable on the loan whichever is the sooner. So, no interest is payable for this period. For the period when interest is payable it is simple interest at the rate of 8% a year.

However, Lloyd's is entitled to deduct from this interest calculation any interest which would be payable on the sum of W's bounce back loan for the period W has had the benefit of this loan. Lloyd's should instead pay W the cost of its borrowing.

My final decision

For the reasons set out above, I uphold this complaint in part and require Society of Lloyd's to put things right as set out above.:

Under the rules of the Financial Ombudsman Service, I'm required to ask W to accept or reject my decision before 28 April 2023.

Elizabeth Grant
Ombudsman