DRN-4936546

The complaint

A limited company, which I will refer to as G, complains about the decision of China Taiping Insurance (UK) Co Ltd in relation to its business interruption insurance claims, arising out of the COVID-19 pandemic.

What happened

The following is intended only as a brief summary of the events leading to this complaint. Additionally, whilst other parties have been involved in the correspondence, for the sake of simplicity, I have just referred to G and China Taiping.

G operates as a restaurant and held a commercial insurance policy underwritten by China Taiping. In March 2020, G was forced to temporarily close its premises due to the government-imposed restrictions relating to the COVID-19 pandemic. G claimed on its policy under a clause providing cover for losses caused by:

> "The actions or advice of a competent Public Authority due to an emergency likely to endanger life or property in the vicinity of the Premises which prevents or hinders the use or access to the Premises"

The policy did not cover:

> "Any loss
>
> (a) during the first four hours
>
> (b) during any period other than the actual period when access to the Premises was prevented
>
> …
>
> Any amount in excess of £10,000"

China Taiping ultimately met the claim, up to the relevant policy limit of £10,000.

G was further impacted by restrictions introduced in October 2020 and then from November 2020. G was effectively closed from November 2020 to April 2021. It claimed again for these losses. Ultimately, after a period of some time, China Taiping settled the claim on the basis that there was one period of loss covering the November 2020 to April 2021 period. So, it considered there was a single claim relating to these losses, and limited the settlement to a further £10,000.

G was unhappy with this. It said that during the period between November 2020 and April 2021, different restrictions applied. There were two distinct and separate national lockdowns, separated by a period of local "tier" restrictions. G considered this meant there were three claims relevant to this period. As well as the period in October 2020.

China Taiping did not change its position though, and referred to a number of court judgments. These included *Stonegate Pub Company Limited v MS Amlin Corporate Member Limited & Others* [2022] EWHC 2548 (Comm) ("Stonegate"), *Various Eateries Trading*

Limited v Allianz Insurance Plc [2022] EWHC 2549 (Comm) ("Various Eateries") and *Greggs Plc v Zurich Insurance Plc* [2022] EWHC 2545 (Comm) ("Greggs").

China Taiping said that these judgments had established that there would not be a separate occurrence unless the claimant business had reopened and were subsequently closed again. This meant that, whilst G had been able to reopen between the first national lockdown that started in March 2020 and the second lockdown starting in November 2020 – so was able to make two claims – it had not reopened between November 2020 and April 2021, so was only able to make a single claim relating to this period.

G brought its complaint to the Ombudsman Service. Our Investigator recommended that it be upheld. He referred to references in the Greggs judgment to the imposition of restrictions on the locality of Leicester in July 2020 as being a separate occurrence even though there was a continuum of closure. So, the Investigator felt that the introduction of localised restrictions in December 2020, and then the subsequent introduction of the third national lockdown in January 2021, were separate claim events allowing for new claims to be made relating to each of these. The Investigator also added that the restrictions imposed on G in October 2020 were a separate claim event.

G accepted the Investigator's opinion, but China Taiping did not. It referred to paragraph 69 of the Stonegate judgment, which says:

> "…I do not accept Stonegate's case that there would have been multiple 'triggers' in the case of an Insured Location which once closed stayed closed but where the closure was enforced by the reiteration, continuation or renewal of regulations which were, materially, to the same effect. The 'trigger' is the enforced closure, and in my view there will be one such 'trigger' unless and until the Location opens and is then closed again."

As our Investigator was unable to resolve the complaint, it was passed to me for a decision. I issued my provisional decision on 12 July 2024. The following is an extract from that decision:

> "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, essentially, I am minded to conclude that China Taiping has come to a fair and reasonable conclusion when limiting G's losses between November 2020 and April 2021 to a single claim event. But I do think G's losses in October 2020 ought to be considered as a separate claim. I'll explain my reasoning.
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> In coming to my decision, part of what I am required to take into account is the relevant law. This includes case law.
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> In addition to the court judgments China Taiping referred to, of particular note to this decision are the judgments in the Various Eateries appeal ([2024] EWCA Civ 10, "VE Appeal"), *Gatwick Investment Limited & Others v Liberty Mutual Insurance Europe SE & Others* [2024] EWHC 124 (Comm) ("Gatwick"), *Corbin & King Ltd and others v Axa Insurance UK Plc* [2022] EWHC 409 (Comm) ("Corbin & King") and *London International Exhibition Centre PLC v Royal & Sun Alliance Insurance PLC and others* [2023] EWHC 1481 ("Excel"). As well as the *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1, on appeal from the decision of the Divisional Court [2020] EWHC 2448 (Comm) ("the FCA test case").
>
> I'll not refer to each of these judgments individually. A number of them have, as far as is relevant, merely established that the clause above is capable of responding to the type of claim in question. This is not something that is disputed in this case. But the number of judgments listed above – which is not an exhaustive list of relevant case

law – demonstrates that this is a heavily litigated area. And the issues relevant to this complaint have been considered by the courts. I need to take the findings in these judgments into account when thinking about G's complaint.

G's complaint is, essentially, about how many separate claims arise in G's circumstances.

In order for G to be able to claim, there needs to have been an interruption to G's business caused by the actions or advice of a relevant authority which have been made/given due to an emergency in the vicinity of the premises, and which has caused a prevention or hindrance of use or access to those premises. In essence, this will be met where the Government has said that G was unable to use its premises as it normally would, due to occurrences of COVID-19, and this has caused an interruption to G's business.

As a result of occurrences of COVID-19, the Government (a term I use loosely to refer also to other relevant authorities) introduced a number of restrictions that impacted the use of G's premises during 2020 and beyond. The question is, how many of these restrictions caused a separate claim event?

China Taiping accepts that the first national lockdown, starting in March 2020, is a separate claim event from later restrictions. So, it is accepted that there can be more than one claim event.

The Investigator's conclusions are essentially based on the comments in the Greggs judgment about the Leicester restrictions (and other local restrictions). However, it is notable that in making the relevant points, the judge in Greggs was discussing the application of the aggregation clause in the policy relevant to that judgment. He was not discussing causation as such, which is a separate issue that he had previously dealt with in the judgment.

The issue relating to aggregation is whether a business interruption loss can be said to arise from, be attributable to, or to be in connection with a 'single occurrence' so as to be aggregated as a single loss. The policy in the Greggs case contained definitions and terms that meant that aggregation was applicable. Therefore, it was necessary for the judge to consider what a 'single occurrence' would be in respect of this.

G's policy does not contain such aggregation wording. So, the application of aggregation principles does not directly apply to G's case.

The issue of aggregation can be contrasted with the discussion in the Greggs judgment over how the insuring clauses initially operated in terms of claim, which referred to "covered events" and the "triggers" of these. In the judgment, a covered event and/or a trigger are not the same concepts as a single occurrence. As far as is relevant, a covered event was essentially described as taking place each time actions or advice of the Government prevented or hindered use of or access to the premises.

In paragraph 24 of the Greggs judgment, the judge, who was the same judge as in Stonegate and Various Eateries, said:

> "…the number of Covered Events will be the number of occasions on which there were materially different restrictions imposed or advised by government or a relevant agency which prevented or hindered the use or access to [the premises] and that steps taken or advice given which merely repeated or renewed an existing prevention or hindrance of access would form part of one set of 'actions or advice'."

This is effectively a summary of what the judge said in paragraph 73 of the Stonegate judgment.

It should be noted that paragraph 69 of the Stonegate judgment, to which China Taiping has referred, deals with a slightly different type of policy clause. This was an "Enforced closure" clause, which required the relevant authority to have forced the closure of the insured premises. This is different to the requirements in G's policy. The judge in this case did not make an explicit comment that the type of clause in G's policy operated in similar manner. But the reference in the paragraph 24 quote above to the repetition or renewal of an existing prevention or hindrance does align with this.

More explicit comments to this effect can be found in the Gatwick judgment. The judge in that case was, in part, considering a claim made by "Hollywood Bowl" in relation to a clause similar to that in G's policy. This case was considering whether new restrictions introduced in July 2020, when the first national lockdown came to an end, meant there was a new claim event for Hollywood Bowl – which had to remain closed. The judge explained that the insurer had set out its defence by saying:

> ""a closure is a closure is a closure". Nothing changed in July. There was no significance to the change in regulations: the status quo remained the same. Other businesses may have been permitted to reopen, but that was not the case with Hollywood Bowl."

He went on to conclude:

> "There was indeed a continuum of closure as far as Hollywood Bowl is concerned. It was an agreed fact that their premises in England were not permitted to open until 15 August 2020, and accordingly the limited exceptions in the July Regulations (blood donation etc) were of no relevance to Hollywood Bowl. There was, as [the insurer] submitted, nothing at all which changed in July, except for the identity of the regulations pursuant to which Hollywood Bowl's premises remained shut. Against the factual background described above, I do not consider that it can sensibly be said that there were new restrictions."

These comments are definitive and deal with the application of a clause materially similar to that in G's policy, to circumstances which are also materially similar. Once G's premises were closed in early November 2020, and so access and use were prevented, the fact that the regulations requiring this closure changed in December 2020 and then January 2021 does not mean there was a new claim event. There was a single closure, and so a single claim.

I consider this to be the position set out in current case law, and I see no reason to fairly and reasonably depart from this in G's case. It follows that I consider it was appropriate for China Taiping to conclude that there was only one claim between November 2020 and April 2021, and so to restrict the settlement of this claim to a single maximum figure of £10,000. It follows that I cannot fairly and reasonably ask

China Taiping to do anything more in relation to G's losses between November 2020 and April 2021.

However, the November 2020 restrictions required a full closure of the premises. Prior to these being introduced, other restrictions had been introduced in October 2020 which did not require G to close. And I consider this would lead to a potential separate claim.

The tier restrictions introduced in October 2020 impacted businesses differently depending on the area they were in. I understand that G's premises are in an area that would have fallen into Tier 2. This meant that they would not have had to close their premises, but would have potentially been impacted by opening hour restrictions and in terms of limitations on the numbers it was possible to serve. So, this apparent hindrance of use would be a separate claim event and if G suffered losses as a result, it would be appropriate for China Taiping to consider and settle those in line with the policy terms.

This October claim is a separate claim from the one that started in November 2020. The restrictions introduced in November were materially different and placed a more severe restriction on G's use of its premises. This created a new claim event in November. This can be contrasted with the later restrictions, that continued a requirement for the premises to be closed.

So, I provisionally conclude that it is fair and reasonable that China Taiping should reconsider G's claim on the basis that whilst there is no further claim event in December or January, there were separate claim events in October and November 2020."

I asked both parties to provide any additional comments or evidence they had. G responded, rejecting the outcome. But did not add anything further. China Taiping also said that it 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.

Having done so, in light of the fact that neither party had any additional comments to make following my provisional decision, I have reached the same outcome as set out in my provisional decision for the reasons set out above.

I appreciate this outcome may not be welcomed by G. But I consider it to be fair and reasonable in the all the circumstances of this complaint.

Putting things right

China Taiping Insurance (UK) Co Ltd should reassess G's claim(s) on the basis that there were separate claim events in March, October and November 2020.

My final decision

My final decision is that I uphold this complaint in part. China Taiping Insurance (UK) Co Ltd should put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask G to accept or reject my decision before 30 August 2024.

Sam Thomas
Ombudsman