DRN-4941455

The complaint

A limited company, which I will refer to as R, complains about Aviva Insurance Limited's handling and settlement of its business interruption insurance claim, made in relation to the COVID-19 pandemic.

What happened

R is currently in administration, and the administrator has authorised this complaint being brought. Additionally, the claim and complaint process involved a number of other parties. However, as Aviva is responsible for the actions of its agents, and any comments made by R's representatives were made to support its position, for the sake of simplicity I will largely just refer to R and Aviva in this decision.

Further, whilst the circumstances and events leading to this point are detailed, these are known by the parties. So, what follows is intended only as a brief summary.

R operated as a manufacturer of envelopes, cards, and other related products. It held a commercial insurance policy underwritten by Aviva. The policy offered a number of areas of cover, including for business interruption. In 2020, R's business was impacted by the COVD-19 pandemic, and it claimed under the policy. This claim was initially declined, but later accepted following wider legal developments.

Aviva investigated the claim, asking R to provide various information and evidence over the course of some time. Interim payments were also made. The clause under which the policy was accepted has a maximum indemnity period of 24 months. And R has said that Aviva indicated it would cover R's losses for this period.

R considers that it had provided Aviva with all the information it needed by March 2022. Then, following more legal developments – including the judgment in *Stonegate Pub Company Ltd v MS Amlin Corporate Member Ltd and others* [2022] EWHC 2548 (Comm) ("Stonegate") – Aviva said that it would not cover any losses beyond the end of the second national lockdown on 2 December 2020.

Aviva ultimately paid £329,000 in settlement of the claim. R considers this settlement should be around £944,000. So, R complained about this decision, as well as how the claim progressed. And brought its complaint to the Financial Ombudsman Service.

As well as raising concerns with how the claim was handled, R's main position on the claim settlement was effectively that the occurrences of COVID-19 in the first half of 2020 caused its business plan to be materially impacted. And that its planned growth was essentially set back by 12 months. R considered Aviva should cover the difference between where R predicted it would be, and where it actually was, for the full Maximum Indemnity Period. R also did not consider it was appropriate to apply the Stonegate judgment to its circumstances.

It should be noted that this is a simplification of R's argument, rather than an attempt to set it out in full.

Our Investigator upheld R's complaint in part. He thought that the claim ought to have been progressed better, and said that Aviva should pay R £500 for the inconvenience caused. He also thought that Aviva had not calculated the claim correctly by limiting the periods of loss to those where national lockdowns were in effect. The Investigator said that losses outside of these periods would also be covered. However, he did not agree with R's position that it was the initial occurrences of COVID-19 and/or the first national lockdown that had caused all of its losses over the Maximum Indemnity Period. He thought that R's business was most likely no longer being interrupted or interfered with by the earlier occurrences of COVID-19 throughout this indemnity period.

Aviva made a number of comments, but largely accepted the recommendation our Investigator had made. R did not however and maintained its position. As our Investigator was unable to resolve this complaint, it has been passed to me for a decision.

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 have come to largely the same conclusion as our Investigator. I'll explain why.

As I have already said, the circumstances and arguments set out above are a simplification of those involved in this complaint. Both R and Aviva have made detailed submissions covering a number of aspects. However, as befits the informal nature of the Financial Ombudsman Service, I am not going to comment on each of these. Instead, I will be focussing on what I consider to be the key issues.

Claim settlement

The first issue I will address is the basis on which the claim has been settled.

Both parties are aware of the full content of R's policy. But it is worthwhile referring to a few of the more relevant parts here.

As is relevant to this claim, the policy provides cover the following:

> "In the event of interruption or interference to the Insured's Business as a result of:…
>
> viii. Notifiable Diseases..
>
> d. occurring within the Vicinity of an Insured Location,
>
> during the Period of Insurance…
>
> within the Territorial Limits, the Insurer agrees to pay the Insured the resulting Business Interruption Loss."

A number of these terms are defined within the policy. For the sake of brevity, I will just confirm that COVID-19 would be considered a Notifiable Disease. Vicinity carries a fairly broad definition, and this could refer to anywhere within the UK (or potentially beyond) depending on the circumstances.

Business Interruption Loss means, "the Reduction in Turnover". Reduction in Turnover in turn means "the amount by which the Turnover during the Indemnity Period falls short of the Standard Turnover…" The policy includes a trends clause, which would act to take into account what the Standard Turnover would likely have been had the insured event not happened – including any growth the business would otherwise have experienced.

Indemnity Period means, “the period of time during which the interruption or interference to the Insured’s Business occurs as a consequence of the Covered Event beginning with the occurrence of the Covered Event and ending not later than the end of the Maximum Indemnity Period thereafter.” And the policy schedule confirms the relevant Maximum Indemnity Period to be 24 months.

Lastly, the policy schedule refers to there being a maximum sum being payable for any Single Business Interruption Loss. And this is defined as, “all Business Interruption Loss… that arise from, are attributable to or are in connection with a single occurrence…”

The Stonegate judgment considered a policy with the same wording. R has said that this judgment should not be applied to its claim. However, I disagree – albeit the conclusions this application leads to are another matter.

I appreciate that, had the claim been settled prior to this judgment being handed down, it would not have been applied by Aviva to the claim. And that R considers Aviva delayed the claim – potentially deliberately to ensure this judgment could be applied. But ultimately this case law did exist at the time Aviva reached its conclusion on the claim settlement. It also exists at the time I am coming to my decision. So, even if Aviva had not relied on it, it is something I would need to take into account. This also applies to judgments that have been handed down since Aviva’s settlement of the claim, but prior to this decision.

Given the Stonegate judgment, and the two other judgments handed down by the same judge at the time, considered the same policy wording that R has, I do consider these to be relevant to the claim.

That said, I do take R’s point that the circumstances relating to the insured parties in those cases were somewhat different to R’s. R was not a business whereby customers visited the premises on a daily basis. It was also not a business that was forced to close or stop operating as a result of the government-imposed restrictions introduced at the time. In both of these aspects, R is different to those businesses involved in the Stonegate, and related, judgments. This doesn’t mean that the principles set out in the judgments can’t be applied, but it does mean that the context of R’s circumstances also needs to be taken into account.

R’s ability to carry out its business of manufacturing was likely directly impacted to an extent by occurrences of COVID-19. There is limited evidence to support these comments on file, but it is seemingly likely that some staff may have even contracted COVID-19 and would have had to take time off. Or that social distancing guidelines and the necessity to consider staff health and safety meant that production at maximum capacity was not achievable.

However, it is significant that R was not actually required to close by the government-imposed restrictions. R itself has said that later national lockdowns did not directly impact its ability to carry out its work. But I am also not aware of any requirement in the first national lockdown that would have had a significant direct impact on R’s ability to function.

The impact on R appears to be more to do with its customer base, rather than its own ability to operate. The impact on its customer base, and hence demand, did mean that R reduced its operations, but this was the indirect impact of the pandemic.

The Stonegate judgment considers consumer behaviour in terms of causation. The judgment clearly considers that consumer behaviour resulting from cases of COVID-19 could be a reason why there might be a valid claim under the terms of the policy, in particular the “disease” clause referred to above. So, I consider the actions of R’s customers, and the impact this had on R, to be relevant.

R has argued that it was the situation in the first half of 2020 that had an impact which then lasted at least 24 months.

At that time, it seems R's main customer was apparently, what I'll refer to as, a high street retailer. This customer, and others like it, would have been required to close as a result of the national lockdown. And the impact of this would be that these customers were not making new orders with R. I can appreciate that this would have had a marked impact on R. I also recognise the argument that this led to a shortfall in working capital, which in turn reduced the level of investment R was able to make in its business – and hence potentially slowed growth.

The question is, was this the only – or more precisely, the proximate – cause of R's losses in the period after 31 October 2020; the end of the period insurance? In order to claim for its losses after 31 October 2020, the proximate cause of any loss needs to be the occurrence(s) of COVID-19 prior to this date.

There are a couple of questions that emerge from this. Was the impact on R's customers so significant in the first half of 2020 that it meant R was set back in its trajectory by 12 months – as has been argued by R? If so, would this have been the same had there been no further cases of COVID-19 after the end of the period insurance on 31 October 2020?

Given there were further occurrences of COVID-19 after this date, this is difficult to answer. R has said that later restrictions did not impact it. However, clearly these restrictions would have impacted its customers. I do note that R built a stronger customer base with supermarkets, etc. which were able to remain open. But even their customers would also have been impacted by restrictions and other impacts of the ongoing pandemic.

It is also notable that other circumstances would likely have had an impact on the situation. Some of these relate directly to the pandemic, whereas others less so. But it is clear that there would likely have been an increase in certain costs and potentially a change in market behaviour – perhaps with customers focussing more on online sales. I note that several of the high street card companies have faced challenges over the last few years, and I don't think it would be reasonable to say that these are linked solely to the impact of the pandemic in the first half of 2020.

Some of the challenges faced by these businesses may also have meant R would never have achieved the level of growth it anticipated prior to the pandemic, even had the pandemic not occurred. The counterfactual in a situation involving such complexities is difficult to determine and I don't think anyone could say with certainty what would otherwise have happened.

Ultimately though, I think that had there been no further cases of COVID-19 after the end of R's period of insurance, on 31 October 2020, R's business would most likely have recovered from the setback it experienced in the first half of 2020 much more quickly than it did.

Exactly when the proximate cause of R's losses stopped being the cases of COVID-19 that occurred prior to 1 November 2020, is again difficult to be certain of.

Aviva has covered R's losses up until 2 December 2020, which is when the second national lockdown came to an end. The lockdown started a few days after R's period of insurance had finished, but was in part caused by cases of COVID-19 that would have occurred in these final few days of cover. So, any impact from this lockdown would be something R could claim for.

R has said that, after the first lockdown, its business was not impacted by further lockdowns.

Based on its argument, this second lockdown would not lead to any insured loss. However, I more persuaded that this second lockdown – and later restrictions and changes in customer behaviour – would have had an impact on R's business. It may not have caused a downturn in R's business for this period, but it would have slowed R's ability to recover from the setback already experienced. So, I think this would be an insured loss.

And I consider that this loss would continue for as long as the impact of cases of COVID-19 prior to 1 November 2020, including the impact from the first and second national lockdown, were the proximate cause of loss. I consider that this is essentially until there was a new event that became the proximate cause of loss.

The latest I think this would happen is the start of the third national lockdown in January 2021, but it is possible R's business was impacted by the Tier restrictions in December 2020 to the extent that these became the proximate cause. This would depend on the location of R's customer base, given it is the impact on the customer base that – in my view – is the significant driving factor in R's losses. If the majority of R's customer base is in a region where the end of the second lockdown meant there was greater freedom, but then later Tier 4 restrictions removed this, the end date will likely be the date these restrictions were introduced.

Aviva somewhat disagrees with this position that losses can continue beyond the end of the second national lockdown. But as with the losses sustained during the period between the first and second lockdowns, the issue is in part the period of recovery from the impact of the lockdowns, rather than the direct imposition of restrictions on R's business outside of these lockdowns. The impact on R's business outside of these lockdown periods was the customer behaviour that existed at these times, and the cause of this customer behaviour would have been the occurrences of COVID-19 during the period of insurance. It would not be until new occurrences of COVID-19 altered this behaviour – most likely at the point when new restrictions were introduced.

As our Investigator has set out, the policy does not just cover R's losses for the period of national lockdown. And I consider it is fair and reasonable that Aviva reassess the claim on the basis that R's business was impacted by occurrences of COVID-19 from March 2020 until the impact of the second national lockdown stopped being the proximate cause of loss. This end date will need to be determined based on the evidence of R's customer base, but my informal indication is that this is likely to be either 20 December 2020 or 6 January 2021.

To be clear though, I do not consider that the proximate cause of losses R sustained as a result of cases of COVID-19 that occurred within the period of insurance would extent beyond these dates. I consider that the imposition of Tier 4 restrictions, either locally or as part of the third national lockdown, would have been the proximate cause of loss at that point.

Claim handling

R has complained about the handling of the claim and the impact this had on its business. R has since gone into administration and places the blame for this in part on Aviva's handling of the claim.

Aviva initially declined the claim, and later reversed this decision in October 2020 following wider legal developments. Following this, Aviva requested financial information from R to consider its losses. It does not seem that this began to be provided by R in any detail until May 2021. Over the following month, further information was requested and received. And then Aviva provided R with the first interim settlement payment it made.

From this period on, I do note that R was asked for further detailed information. A further payment was made in August 2022, with a final payment in May 2023 following R's complaint. R considers Aviva's needs amounted to endless requests for unreasonable amounts of information. However, given the circumstances of its claim, and the fact that its losses do not relate directly to the imposition of restrictions on its own business, I do not find Aviva's requests to be overly surprising or unreasonable. And I do not consider Aviva could have finalised the claim without this information.

I can appreciate that R was focussed on its business during this time. But it is difficult to say that Aviva should be held responsible for the delay in progression of the claim when it was waiting for R to provide it with information.

There were however times when Aviva ought to have been more pro-active. And its communication over the claim could have been clearer. So, I think compensation for the inconvenience caused here is fair and reasonable in the circumstances.

I have also thought about the periods of delay in making the settlement payments. Firstly, I don't agree that it was fair and reasonable to have initially declined the claim. And it took Aviva five months to alter this position. Had it not initially declined the claim, it is reasonable to consider that the interim payments would then have been made five months sooner.

I note that it is possible that the claims might have been progressed more quickly had Aviva made its requests for information at an earlier time – R may have had more capacity to deal with these at that time. But equally, it may have taken longer. So, I consider it reasonable to apply this five-month period directly.

There was then a further eight and half month delay in between the second and third payments. It seems that Aviva had all of the evidence it needed to have made this payment. And the delay was purely down to it considering whether such a payment was required.

So, I consider Aviva ought to pay R five months' interest on the first and second interim payments. And thirteen and half month's interest on the third payment. This interest should be calculated at 8% simple per annum. And I calculate this to amount to £13,460.

Our Investigator recommended £500 compensation. I consider part of this related to the delays experienced though. So, I consider, taking into account the interest for the delay and the other compensation, an overall payment of £13,750 is appropriate here.

I do not consider that the evidence provided persuades me that any delays or issues that Aviva is responsible for were the cause of R entering administration though. There were seemingly multiple factors that led to this. And even if these did not exist, I would need to consider whether R mitigated its loss or potential impact – and this would include thinking about how promptly it responded to information requests to progress the claim.

Putting things right

Aviva Insurance Limited should put things right by reassessing R's claim on the basis that losses resulting from occurrences of COVID-19 in the Vicinity of R's premises prior to 1 November 2020 caused an insured loss from March 2020 throughout the period until the impact of the second national lockdown was no longer the proximate cause of R's losses. This should take into account the points made above.

Aviva Insurance Limited should also pay R £13,750 interest and compensation, as set out above, for its claim handling and associated delays.

My final decision

My final decision is that I uphold this complaint. Aviva Insurance Limited should put this right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask R to accept or reject my decision before 21 January 2024.

Sam Thomas
Ombudsman