DRN-5102541

The complaint

Mr and Mrs L, trading as a partnership which I will refer to as B, complain about the decision by China Taiping Insurance (UK) Co Ltd to decline their business interruption insurance claim, made as a result of the COVID-19 pandemic.

What happened

The following is intended only as a brief summary of events. Additionally, although other parties have been involved in the process, for the sake of simplicity I have largely just referred to Mr and Mrs L, B and China Taiping.

B operates as a public house with accommodation, and held a commercial insurance policy underwritten by China Taiping. In March 2020, B's business was interrupted by the government-imposed restrictions introduced as a result of the COVID-19 pandemic.

B contacted China Taiping to claim for its losses, but the claim was declined. I have explained the reasons for this below when setting out my reasoning for my decision.

Sometime later, B complained about this decision and brought its complaint to the Financial Ombudsman Service. However, our Investigator thought that China Taiping had acted appropriately when coming to its decision on the claim. So, he did not recommend the complaint be upheld.

B remained unsatisfied with this, and their complaint 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 am not upholding this complaint largely for the same reasons as our Investigator.

I would like to reassure B that I have considered all of the evidence and arguments they have provided. However, I will not comment on each point within this decision. Instead, I will focus on what I consider to be the key issues. This is not meant as a discourtesy, but rather is a reflection of the informal nature of the Ombudsman Service.

B's business was interrupted in March 2020 due to the government-imposed restrictions. So, the type of cover they're looking to claim under is business interruption insurance. There are a range of business interruption insurance policies on the market covering different risks. For example, some only provide cover for basic things such as fire or flood, whilst others provide cover in more circumstances either as part of the policy or as optional add-ons. The starting point is to consider the specific policy B took out.

The policy B held provides cover for a number of causes of business interruption. Largely these require there to have been physical damage to property, which is not what led to B being interrupted. The two terms within the policy that are closest to providing cover are the

Denial of Access subclause b and c, the Disease, Infestation and Defective Sanitation subclause b. I'll deal with these in turn.

Before I do so, I will note that a number of legal judgments and an arbitration award are relevant considerations in relation to this complaint. As well as the "FCA Test Case" (*The Financial Conduct Authority (FCA) v Arch Insurance (UK) Ltd & Ors* [2020] EWHC 2448 (Comm)) and other judgments, an arbitration process relating to a China Taiping Insurance (UK) Co Ltd is significant.

Mr and Mrs L are aware of this arbitration, having been initially involved in its process. Ultimately, they were not included in the arbitration and the Award the arbitrator reached is not binding on this Service (or on B). And as Mr and Mrs L have said, the arbitration is different to a court judgment. However, it did involve consideration of the same policy wording. And the arbitrator, Lord Mance, had a duty to act fairly and impartially, giving each party a reasonable opportunity of putting its case and dealing with that of its opponent. So, I have considered the outcome and reasoning in the arbitration when reaching my own decision.

Denial of Access

The relevant part of this clause provides cover where there is an interruption to the insured business resulting from:

> "b the closing down or sealing off of the Premises or property in the vicinity of the Premises in accordance with instructions issued by the Police or other competent local authority for reasons other than the conduct of the Insured or any director or partner of the Insured or the condition of the Premises or the carrying out of repair or maintenance work at the Premises or the Insured's non-compliance with a prior order of the Police or other competent local authority;
>
> c the actions or advice of the Police or other competent local authority due to an emergency threatening life or property in the vicinity of the Premises…"

However, both subclauses "b" and "c" above only provide cover where something has happened leading to either the Police or other competent local authority to issue instructions or advice, or take action. So, before it is necessary for me to consider whether there has been an emergency in the vicinity of B's premises, I need to consider whether the interruption to B's business was as a result of something the Police or other competent local authority did.

Neither of the terms "the Police" nor "other competent local authority" have been defined within the policy. As such, it is necessary for me to consider what these terms are most likely to mean in the context of this policy.

I think "the Police" can be interpreted in line with the normal everyday usage of this term and I think this would be commonly understood. However, the closure of B's premises was a requirement of following the instructions of the government-imposed restrictions, rather than any action of the police.

I appreciate that, had B remained open, or reopened, during the lockdown period it might have been closed by the police. However, this is not what did happen. I am only able to reach my decision based on the circumstances of this complaint, rather than what might have happened in different circumstances. Mr and Mrs L obeyed these instructions of the government-imposed restrictions and closed B's premises. So, it cannot be said B's business was interrupted by instructions issued or action taken by the police.

It is though necessary for me to consider in more depth what the term “competent local authority” means.

Taking everything into account, including the decision in the China Taiping arbitration, I consider that the term “competent local authority” as it is used in B’s policy means a localised authority. As the arbitrator concluded, there is seemingly no reason for the inclusion of the word “local” in this term other than to limit the relevant authorities to a narrow geographic area. And I consider the natural way of reading this term would be to conclude that it referred to local bodies only.

When reaching this conclusion, I am again mindful of the fact B’s insurance contract should be interpreted objectively, based on the understanding a reasonable person would have had at the time the contract was entered. I don’t think the reasonable person would have read this policy and considered that this term referred to a national authority/the Government. That would not be the natural understanding of the words used in the term.

And nothing else in the policy indicates a different meaning should be applied.

I do note that a slightly different interpretation of the term “competent local authority” was reached in the FCA Test Case when the court considered the Ecclesiastical policies. However, such terms need to be interpreted based on the context of the contract they appear in. And there are significant differences between the Ecclesiastical policies and B’s policy. To my mind, the key difference was that the Ecclesiastical policy used this term in a clause that also contained the term “Government Police or Local Authority”. And it would not have made commercial sense for the two terms to have a different meaning in that context.

I do think that restrictions that might be imposed on B, which might fall generally into the areas of cover provided by sub-clauses “b” and “c” in the Denial of Access extension, could be the result of instructions of either local or national bodies. But that there is reasonable commercial sense in China Taiping having limited cover to where those instructions are given by a local body. This would have given B cover for the events which were most likely to affect it, but would also have limited China Taiping’s exposure to extreme events, which are more likely to result in a national response, such extreme events likely to result in high value claims. So, whilst I appreciate B’s comments that the omission of the word “Government” should be considered a mistake and coverage relating to Government action should be considered implicit in the wording, I do not agree with this interpretation. And, significantly, I don’t think a reasonable person would have understood the policy as providing such cover when it was entered.

Ultimately, I consider that in the context of B’s policy the term “competent local authority” refers to a localised body. The instructions that led to the closure of B’s premises were issued by the Prime Minister and the UK Government. And I don’t consider these to be a localised body. As such, I do not consider B was instructed to close its premises by a “competent local authority”. And I consider China Taiping acted fairly and reasonably when declining B’s claim under the Denial of Access extension

<u>Disease, Infestation and Defective Sanitation</u>

This extension in B’s policy provides cover losses caused by, in part:

> “…the occurrence at the Premises:
>
> …
>
> of a notifiable, human, infectious or contagious disease excluding Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition

…

Clarification of Notifiable Human Infectious or Contagious Disease Endorsement

It is hereby understood and agreed that for the purposes of the cover afforded by this Extension, the reference to a notifiable, human, infectious or contagious disease contained in paragraph b shall be deemed to mean solely the following diseases:

Diseases notifiable under the Public Health (Control of Disease) Act, 1984 or the Public Health (Infectious Diseases) Regulations, 1988, namely:

Acute encephalitis, Acute poliomyelitis, Anthrax, Cholera, Diphtheria, Dysentery, Food poisoning, Leptospirosis, Malaria, Measles, Meningitis, Meningococcal, Pneumococcal, Haemophilus influenzae, Viral, Other specified, Unspecified, Meningococcal septicaemia (without meningitis), Mumps, Opthalmia neonatorum, Paratyphoid fever, Plague, Rabies, Relapsing fever, Rubella, Scarlet fever, Smallpox, Tetanus, Tuberculosis, Typhoid fever, Typhus fever, Viral haemorrhagic fever, Viral hepatitis, Hepatitis A, Hepatitis B, Hepatitis C, Whooping cough and Yellow fever.

No other disease shall be added to the above list without the prior written consent of the Insurers."

Having considered this term, I'm not persuaded this section of the policy would have provided B with cover for the circumstances of their claim. This is because COVID-19 isn't one of the diseases listed in the definition.

As I've said above, a range of policies are available. And some provide cover for all "notifiable diseases" – a list of diseases updated by the Government. These policies might, depending on the circumstances, provide cover. But this is not the type of policy B had.

I think the purpose and effect of the policy they have is to provide cover in the event of the diseases listed above. Mr and Mrs L have questioned which other notifiable diseases, which existed at the time the policy was entered, that are not included on this list. There are many potential illnesses and diseases that the policy does not cover though including, for example, SARS (another type of Coronavirus). I don't think the policy can or should fairly be read as covering any and all diseases that fall outside of the defined list set out above.

When coming to this conclusion, I am mindful of Mr and Mrs L's comments about the inclusion of the word "Unspecified" in the list. They've said that this word should be considered to mean that all (notifiable) diseases that had not been specified in this list should be covered.

In considering the appropriate interpretation of a policy, I need to take into account what I consider a court would determine to be the understanding that a reasonable person, with all the relevant background knowledge, would have at the time the contract was entered. It is necessary not only to consider the words in question, but also the rest of the contract – as this forms part of the background knowledge of the reasonable person.

Other than the words "Viral, Other specified, Unspecified", the extension itself sets out a list of specific diseases. The list itself is prefaced by the words "shall be deemed to mean solely the following diseases". And is then followed by "No other disease shall be added to the above list without the prior written consent of the Insurers." This indicates to me that a reasonable person would understand this as being an exhaustive, closed list.

Interpreting the inclusion of "Unspecified" to mean all (notifiable) diseases not specified in this list – potentially because they have not yet been discovered – would make having a list at all redundant. Taking into account that I consider this to be an exhaustive, closed list, I am unable to agree that this makes reasonable commercial sense. Nor that a court would likely

find that the parties entering the contract could reasonably believe this.

I do agree that the policy could have been drafted in a way that made it clearer. However, I do not think the policy is misleading or that a court would consider it ambiguous.

This is supported by the comments of the policyholders own legal representatives during the arbitration process, who said the words “Viral, Other specified, Unspecified” seemed meaningless. The QC in this arbitration did not include any argument in the submissions that this wording might indicate cover for a claim relating to COVID-19. And Lord Mance did not “find much of any assistance in this” wording. Whilst this is not conclusive in relation to the current issue, it is supportive of what I consider a court would decide were the issue presented to them.

Ultimately, I consider the policy clearly only intended to cover certain diseases. And I don’t think it can fairly and reasonably be read in a different way. I don’t think it is a correct interpretation of the policy wording to say that cover is provided in relation to all unspecified (notifiable) diseases. And as COVID-19 was neither included nor added to the list of diseases, I am satisfied China Taiping’s decision to decline the claim was in line with the policy, and in all the circumstances of this case fair and reasonable.

I am sorry to hear about the considerable financial impact COVID-19 restrictions have had on B and Mr and Mrs L. And I appreciate this is not the outcome they were hoping for. But I cannot fairly and reasonably require China Taiping to do more in the circumstances of this complaint.

My final decision

My final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr and Mrs L to accept or reject my decision before 30 December 2024.

Sam Thomas
Ombudsman