Before the Arbiter for Financial Services

Case ASF 068/2021

TU

(the Complainant/the Insured)

vs

ArgoGlobal SE (SE 2)

(the Service Provider/the Insurer)

Sitting of 22 February 2022

The Arbiter,

Having seen the complaint whereby the Complainant submits that:

It took a business insurance policy on the 17 January 2020 with Morgan Richardson Ltd being the insurance brokers, who were acting on behalf of ArgoGlobal. The policy covered business interruption. Due to Covid-19 affecting the finances of the Complainant, its representatives enquired with the insurance broker whether it could claim on the policy for business interruption.

In May 2020 the Complainant made an official claim with the insurance broker as it believed it could make a claim under *Section A2-Business Interruption.*

Section 4.0 'Notifiable Disease' read as follows:

'An outbreak of any Notifiable Disease occurring at the Premises, or occurring 25 miles of the Premises'.

The Complainant further states that this was acknowledged by the insurance broker via email.

The Complainant received a final response on the 8 June 2020 from the insurance brokers on behalf of the insurer where they stated that they were unable to accept the claim due to the following reason:

'*The Policy Changes Endorsement (in place for all policies incepting or renewing after May 2015) issued with your Policy Wording at inception, details Insurers definition of any notifiable diseases that are covered by the policy, and unfortunately COVID-19 is not noted on this list; we have referred to your insurers recently to further clarify that cover is not available and they have confirmed that Covid-19 is not a notifiable disease that the Policy covers'.*

The Complainant believes that it was covered for business interruption as shown under the *FCA Court Case* wording which includes

'*any notifiable disease/occurrence of a notifiable diseases/arising from any human infectious or human contagious disease manifested by any person'* and '*within 25 miles/1mile/ the "vicinity" of the premises/insured location'.*

The Complainant further stated that examples within the policy include:

- The In-Gauge Policy Changes 2020 Endorsement – pages 2 and 3 refer to Notifiable Disease occurring within 25-mile radius
- In-Gauge Insurance Policy – page 5 refers to 'Notifiable Disease – Human Infectious or contagious disease only' and page 10 refers to 'An outbreak of any Notifiable Disease.'
- MR Insurance Prospectus'- pages 2,5 and 14 refer to 'Notifiable Human Disease'

Further to this, on the 5 March 2020, the UK Government listed Coronavirus as a '*notifiable disease'*.

COVID-19 affected the finances of the Complainant greatly (£296,001 difference in sales between 2019 and 2020) and it has not recovered since the date of this complaint.

The Complainant bought the business policy with Business Interruption believing that if its finances became affected in any way, it would be protected and able to claim upon the policy.

In 2019 the Complainant's sales were £576,330 and in 2020 sales were £280,329. The difference in sales is £296,001, showing that the company has been greatly affected by COVID-19.[1]

After the Arbiter asked the Complainant to quantify its losses, the Complainant indicated that its loss ranged between £73,408 and £90,794.[2]

Having seen the reply whereby the Service Provider stated:

The In-Gauge policy at issue contains an additional cover for 'Notifiable Disease' under the Business Interruption section. This additional cover is part of the commercial package policy and was not purchased for an additional premium. The Notifiable Diseases section provides cover for loss of income resulting from an outbreak of any Notifiable Disease occurring at the premises or within a 25-mile radius.

The Policy Changes Endorsement, issued to the policyholder with the policy wording at inception, details insurers' definition of Notifiable Diseases. Rather than the policy referring to a general class of notifiable disease, Notifiable Diseases is defined by reference to a specific list of named diseases. COVID-19 is not listed within the policy definition. The intention of the policy is to cover only those limited number of specified diseases, the risk of which can be assessed. COVID-19 does not extend to the range of diseases insurers have already determined will be covered under the policy.

At the time the policy was purchased, it was not the underwriting intention to cover business interruption losses caused by an unknown pandemic.

In June 2020, the FCA brought a test case to resolve the contractual uncertainty over whether certain business interruption policies cover interruption as a result of the Covid-19 pandemic.

[1] *Pages (PP) 3-4*
[2] *Page (P) 151*

The test case did not cover all policy disputes and policy wordings. It did not consider policies that include a specified list of diseases which does not include Covid-19, as in the policy at issue. As such, the policyholder's claim and complaint are not affected by the outcome of the test case.

Having heard the parties

Having seen all the documents of the case.

Considers

The Arbiter decides the case by reference to what, in his opinion, is fair, equitable and reasonable in the particular circumstances and substantive merits of the case.[3]

The Arbiter is presented with two interpretations. The Complainant states that under the policy it is covered under Business Interruption due to a Notifiable Disease and COVID-19 was a notifiable disease.

On the other hand, the insurer insists that the term *notifiable disease* as originally mentioned in the policy was changed and the list of diseases, as mentioned in the Endorsement, has to be considered as a closed list. COVID-19 is not mentioned in the list and, therefore, any business interruption due to COVID-19 is not covered by the policy.

Further Considers

The Complainant mentioned the *Financial Conduct Authority v Arch Insurance (UK) Limited & ors [2021]*(*FCA Test Case)*[4] to back its argument that business interruption due to COVID-19 is covered.

The Arbiter saw this judgement of the Supreme Court. Although this judgement interprets a number of policies referred to the Court by the parties which covered thousands of policies, the Court itself made it amply clear that it was not interpreting all the policies in the country that may cover business interruption due to an outbreak of a contagious disease. The Court itself

[3] *Chapter 555 of the Laws of Malta, Article 19(3)(b)*
[4] *https://www.supremecourt.uk/cases/docs/uksc-2020-0177-judgment.pdf*

explained that weight has to be given to the specific wording of particular policies. In fact, the Court itself discussed at length and gave interpretation to the wording of the specific policies presented to it by the parties.

Therefore, in this case, the Arbiter has to consider the specific policy merits of this case, with particular reference to what constitutes a *notifiable disease.*

The Complainant took out the business insurance policy on the 17 January 2020 with Morgan Richardson Ltd (Insurance Brokers) who were acting on behalf of ArgoGlobal SE, the Service Provider.[5] The policy entered into effect on the 24 January 2020.[6] In a letter dated the 17 January 2020, the Complainant was informed that several documents were being enclosed: Summary of Cover/Debit Note; the new Policy Schedule & Document Booklet.

The Complainant was also advised to '*read your Policy carefully to ensure that it meets your requirements and if, after reading all the documents, you have any queries please telephone us'.*[7]

The intermediary, on behalf of the Service Provider, also advised that:

'Your insurance is, as advised previously, also subject to some ***Special or Additional Terms*** *and these are shown under Endorsements on the enclosed Policy documentation … A Prospectus encompassing a Policy Summary is also enclosed for your reference.'*

The Complainant did in fact receive the documents mentioned in the 17 January letter and has presented them in this case. The Arbiter will consider these documents with particular reference to the notion of *Notifiable Disease* as included in the policy terms.

In the Policy document, under the heading *Definitions, 'Notifiable Disease'* is defined as:

'Human infectious or contagious disease only'.[8]

[5] *P. 3*
[6] *P. 22*
[7] *Ibid*
[8] *P. 34*

Then, under section *A2- Business Interruption*, Description of Additional Cover,[9] *Notifiable Disease* is denoted as:

'An outbreak of any Notifiable Disease

- *occurring at the Premises, or*
- *which is attributable to food or drink supplied from the Premises, or*
- *occurring within 25 miles of the Premises.'*

Under '*Exclusions and Limitations'* the policy states:

'*not operative in respect of acquired immune deficiency syndrome (AIDS)'.*

However, an '*In-Gauge Policy Changes 2020 Endorsement'*[10] was also sent to the Complainant as being part and parcel of the policy document. In fact, it is stated in bold letters: '**Attaching to and forming part of the Policy'**.[11]

Under the section of Definitions,[12] the Endorsement document states:

'*The definition for Notifiable Disease is deleted and replaced by:*

Notifiable Disease

Illness sustained by any person resulting from any of the following: Acute Encephalitis, Anthrax, … or Yellow Fever.'

The list includes 34 diseases but does not include COVID-19.

The Endorsements also changed the meaning of Notifiable Disease under section 4.0 of the original policy document regarding the geographical aspect of notifiable diseases, if occurring '*within twenty five mile radius*'. In the original document, the notifiable disease had to occur *'within 25 miles of the Premises'.*[13]

The Arbiter also notes that these changes were sent to the Complainant, together with the letter of the 17 January 2020, where he was advised to read

[9] *P. 39*
[10] *P.96 et seq*
[11] *Ibid*
[12] *P. 97*
[13] *PP. 39 ,98*

carefully the documents and raise any query if the cover did not meet his requirements.

Interpreting the policy

The parties are giving a different interpretation to the policy and the Arbiter has to decide which is the correct version.

The Complainant rests his case on the original definition of Notifiable Disease and refers to Section A2 – Business Interruption which reads*:*

'An outbreak of any Notifiable Disease occurring at the Premises, or occurring within 25 miles of the Premises'.[14]

However, he omits to mention that the Endorsement changed the meaning of Notifiable Disease making it limited to the 34 diseases that it specifically mentions. Unfortunately, COVID-19 is not mentioned.

Exhaustive or Demonstrative List?

In this regard, the Arbiter makes reference to what has been decided in the judgement mentioned by the Service Provider in *Rockliffe Hall vs Travelers Insurance Co.,*[15] where the Court held that when there is a closed list of diseases, the list is exhaustive.

In this regard, the Court made reference to another Court judgement[16] which explained that:

'*Definitions in statutes and deeds can be exhaustive or non-exhaustive. Non exhaustive definitions are usually prefaced by the word "include". More often however, a definition is intended to be exhaustive, and it will then generally begin with the word "mean" or "means". It is difficult to read a definition which begins with the word "means" as other than exhaustive*.'

In the present case, the definition starts with:

[14] *P. 147*

[15] *https://www.judiciary.uk/wp-content/uploads/2021/04/CC-2020-NCL-000011-Rockliffe-Hall-Limited-v.-Travelers-Insurance-Company-Limited-170221.pdf*

[16] *Singapore Airlines Ltd v Buck Consultants Ltd [2011] EWCA Civ 1542; [2012] 2 Costs L.O. 132 at [19]:*

'*illness sustained by any person resulting from <u>any of the following</u>'.*[17]

The list of diseases that follow does not include COVID-19. The words ***<u>any of the following</u>*** close the list. The Arbiter therefore concludes that the list is exhaustive and does not include COVID-19.

The geographical aspect raised by the Complainant would have applied if the Notifiable Disease definition had included COVID-19. On the other hand, if any of the mentioned diseases would have occurred within the 25-mile radius of the Premises, then the policy would have offered cover.

In interpreting the policy, the Arbiter has kept in mind that a policy document should not be interpreted through a lawyer's lens but rather in line with what the judges in the *FCA Test Case* and the *Rockliffe Hall* have stated, namely, that the document should be seen through the eyes of the reasonable man who would have been in the same position of the parties.

The Arbiter is of the opinion that the reasonable man who would have read the policy endorsement, would have realised that there is a closed list of diseases that are covered by the policy and COVID-19 is not listed among them.

The Time Factor

Another indication that COVID-19 could not have been included in the policy list of notifiable diseases, is the time factor. The Complainant and the Service Provider had concluded their negotiations in December 2019[18] when COVID-19 had not been diagnosed in the UK.

In fact, it was on the 12 January 2020 that the WHO announced that:

'*a novel coronavirus had been identified in samples obtained from cases in China. This announcement was subsequently recorded by Public Health England ("PHE"). The virus was named severe acute respiratory syndrome coronavirus 2, or "SARS-CoV-2", and the associated disease was named "COVID-19"*'[19].

The Complainant effectively bought the policy on the 17 January 2020, that is 5 days after the pandemic was announced by the WHO. In those 5 days, it would

[17] *Arbiter's emphasis*
[18] *P. 154*
[19] *Quoted from the Judgement: FCA Test Case, pp.3-4*

have been impossible for the insurer to change its policy and include COVID-19; and as has been stated above, the negotiations regarding the policy had been concluded in December 2019, before the outbreak of the pandemic was announced in the UK and in Europe. This clearly shows that it was not the intention of the parties to include COVID-19 in the policy. Moreover, the changes made to the original policy had been made in 2015 and were communicated to the Complainant at the inception stage and not after the Complainant had bought the policy.

The Arbiter has a legal and moral obligation to read the policy as a reasonable man would have done, but cannot re-write the policy.

The Complainant also makes reference to the *FCA Test Case*. The Arbiter saw that judgement by the Supreme Court and came to the conclusion that the Complainant's policy has a definitive list of specified diseases, and this kind of policy was not the subject of the FCA Test Case.

Decision

For the above-stated reasons, the Arbiter cannot uphold the complaint.

Due to the peculiarities of this case, each party is to bear its own costs of these proceedings.

Dr Reno Borg
Arbiter for Financial Services