

Before the Arbiter for Financial Services

Case ASF 081/2022

RI

(the Complainant/the Insured)

vs

ArgoGlobal SE as substituted by

RiverStone Insurance (Malta) SE (S- E2)¹

(the Service Provider/the Insurer)

Sitting of the 10 January 2023

The Arbiter,

Having seen the complaint² whereby the Complainant submitted that his hospitality business was forced to close down in March 2019 by Government order due to the COVID-19 outbreak. The closure of business took place on several occasions.

Although he had business interruption insurance, the Service Provider refused to indemnify him for his sustained losses of 50K plus.

The business interruption happened, firstly, because a member of his staff contracted COVID-19 and, secondly, because subsequently, the Government ordered the closure of the hospitality business altogether as a general precaution.

¹ Page (P) 148. During the sitting of 3 October 2022, the Service Provider informed the Arbiter about the change of name of ArgoGlobal SE to RiverStone Insurance (Malta) SE

² P. 3

The Complainant is asking the Arbitrator to order the Service Provider to pay him for the sustained losses of 50K plus.

Having seen the reply of the Service Provider³ whereby in summary and in substance it stated that:

The Complainant had submitted a claim in November 2020 for business interruption losses arising from COVID-19. This claim was submitted to CP Adjusting Ltd (CPA) who acted on the Service Provider's behalf under a delegated arrangement that included claims and complaints handling.

The claim was initially declined and communicated to the Complainant on 12 January 2021 on the basis of the policy wording that COVID-19 was not covered as a named disease within the definition of 'Notifiable Diseases' within the policy and, therefore, coverage had not been triggered. The claim was not one where the final resolution of the Financial Conduct Authority (FCA) test case would determine the outcome. This was because the wording of the policy was materially different from the wording the High Court was considering in the test case.

The complaint relates to the claim declination under the policy wording and the definition of 'Notifiable Disease'. This is defined in the policy endorsement which is acknowledged by the Complainant's legal representative 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 twenty-five miles of the Premises, which by reason of the abnormal number of cases causes prospective guests to refrain from making bookings for accommodation, or gives legal grounds for guests to cancel bookings for accommodation already made.'

Notifiable Disease - illness sustained by any person resulting from any of the following: Acute Encephalitis ... Cough or Yellow Fever.

The Complainant asserts that as there are no express general or specific exclusions in the policy of disease similar to or including COVID-19, a proper interpretation of *Notifiable Disease* must include COVID-19.

³ P. 146-147

The Service Provider further submitted that the review of the complaint concluded that because of the wording of the Policy Endorsement, and because none of the FCA test cases included policies that specified a list of diseases as part of their definition of *Notifiable Diseases*, it was a fair outcome that the claim had been declined.

The Policy was issued in March 2020 after the start of the pandemic when business interruption events were occurring, and the endorsement wording was designed to ensure foreseeable losses would not be covered.

Therefore, the Complaint should be rejected.

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.⁴

The Arbiter is presented with two interpretations. The Complainant states that since the Policy does not generally or specifically exclude business interruption due to COVID-19, he should be considered as covered under the Policy.

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 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 Arbiter notes that the question is basically one relating to the definition of *Notifiable Disease*. The Service Provider contends that the Endorsement in the

⁴ CAP. 555 of the Laws of Malta, Art. 19(3)(b)

policy specifies a closed list of diseases, and COVID-19 is not one of the listed diseases.

The specific wording of the policy

When COVID-19 broke out, the Financial Conduct Authority (FCA) brought a test case before the High Court and, later on, the case was referred to the Supreme Court. The case was *Financial Conduct Authority v Arch Insurance (UK) Limited & ors [2021] (FCA Test Case)*.⁵

While the High Court and the Supreme Court considered a number of policies brought before them, they also pronounced certain important principles. Although this judgment 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 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.

The Arbitrator is also of the view that he has to consider the specific policy merits of this case with particular reference to what constitutes a *notifiable disease*.

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

'Human infectious or contagious disease only'.⁶

Then under section A2- *Business Interruption, Description of Additional Covers*,⁷ *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*

⁵ <https://www.supremecourt.uk/cases/docs/uksc-2020-0177-judgment.pdf>

⁶ P. 54

⁷ P. 59

- *Occurring within 25 miles of the Premises ...*’.

However, the document entitled **‘100% Proof Policy Changes 2020 Endorsement’**,⁸ which states that it formed an integral part of the policy, changed the definition of the term *Notifiable Disease*

Under the section of Definitions,⁹ 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 Encephelitis, Anthrax ... or Yellow Fever.’

The list includes a whole list of diseases but does not include COVID-19.

An Exhaustive or a Demonstrative List

The Arbiter considered the case *Rockliffe Hall vs Travelers Insurance Co.*,¹⁰ 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 judgement¹¹ 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:

‘illness sustained by any person resulting from any of the following ...’.¹²

⁸ P. 126

⁹ P. 127

¹⁰ <https://www.judiciary.uk/wp-content/uploads/2021/04/CC-2020-NCL-000011-Rockliffe-Hall-Limited-v.-Travelers-Insurance-Company-Limited-170221.pdf>

¹¹ *Singapore Airlines Ltd v Buck Consultants Ltd* [2011] EWCA Civ 1542; [2012] 2 Costs L.O. 132 at [19];

¹² Arbiter’s emphasis

The list of diseases that follows does not include COVID-19. The words 'any of the following' close the list.

The Arbiter therefore concludes that the list is exhaustive and does not include COVID-19.

Decision

The Arbiter notes that the parties do not dispute the wording of the Endorsement and, since the Endorsement does not include COVID-19 as a Notifiable Disease, the Arbiter cannot uphold the complaint.

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

Dr Reno Borg

Arbiter for Financial Services