Browne Jacobson

Covid BI litigation (Autumn 2023): Insurance coverage disputes update

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Stonegate v MS Amlin, Liberty Mutual and Zurich

On 24 November 2023 it was reported that Stonegate, the UK's largest pub group, had settled its claims over Covid BI losses.

The case was heard by the Commercial Court last year with Mr Justice Butcher giving his judgment on 17 October 2022.

Stonegate had been seeking £1.1bn from insurers under the Marsh Resilience wording, arguing that it was entitled to separate £2.5m limits of cover for each of its 760 premises. Insurers had argued that Stonegate was entitled to one £2.5m limit for the entirety of the group.

The case had also considered whether Stonegate had to give a credit for various government support payments it had received during the pandemic, including Furlough and Business Rate Relief.

In his decision at first instance, Mr Justice Butcher rejected Stonegate's arguments on the per premises issue and found that its claim was subject to multiple limits, rather than a single limit (as insurers had argued) or per premises (as Stonegate had argued). He also held that Stonegate did have to give credit for the various government support payments it had received, most importantly for insurers, including Furlough.

Both Stonegate and insurers appealed to the Court of Appeal, with the appeal due to be heard in the week commencing 27 November, together with the appeal in the Various Eateries v Allianz proceedings. Stonegate settled with insurers shortly before the appeal.

The settlement of the Stonegate matter, along with the earlier settlement in July 2023 in the Greggs v Zurich claim, leaves only the Various Eateries appeal to proceed in the Court of Appeal on issues of occurrence and aggregation. The appeal was heard week commencing 27 November.

The Furlough issue is not being appealed in Various Eateries. However, that issue is being raised again in several other ongoing cases, so continue to watch this space.

World Challenge Expeditions Limited v Zurich Insurance Company Ltd [2023] EWHC 1696 (comm)

On 7 July 2023, the Commercial Court handed down a BI related decision requiring Zurich to pay what could amount to nearly £10m in cancellation fees even though, on the true construction of the policy, there was only cover available for irrecoverable costs.

The court held that, having handled the cancellation claims in a particular way under the policy for the previous four years, Zurich was estopped from denying that it provided cover on that basis.

Background

World Challenge Expeditions Ltd ('WCE') is a specialised travel company which provides ‘challenging’ expeditions worldwide for students. From 2012 to 2016, WCE had travel insurance, including cancellation cover, with RSA. From 2016 to 2020, it obtained similar cover with Zurich under a Corporate Personal Accident and Business Travel Policy, which was in force from 1 April 2019 to 31 March 2020.

As a result of Covid-19, WCE was obliged to cancel nearly all its planned expeditions and repay nearly £10m that it had received by way of deposits and advance payments.

WCE believed that it was insured under its policy in respect of any deposits which it had to refund because (in its view) both RSA and Zurich had historically settled WCE’s cancellations on this basis, albeit no payments had ever been made as they had all come within the deductible.

Zurich argued that, on the true construction of the policy, WCE should only be indemnified for irrecoverable costs paid out by WCE to third parties (such as flights and accommodation) and on that basis, it was entitled to recover less than £150,000.

The Commercial Court had to decide: (1) the correct construction of the policy, and (2) whether Zurich was precluded or estopped from denying the policy provided the coverage that WCE thought it had.

Cancellation claims prior to Covid-19

From the inception of cover in 2016, Zurich had agreed with WCE that in relation to cancellation payments WCE would submit claims under the cancellation cover to Zurich. Zurich’s claims handling team would then validate each claim under the policy (in accordance with WCE’s Terms and Conditions), agree quantum, collate the figures to track the deductible, and then authorise WCE to make payment. Cancellation claims thereafter were consistently handled in that manner.

Impact of Covid-19

At the beginning of 2020, Covid-19 started to affect travel. On 27 February 2020, WCE emailed Zurich asking them to confirm that, where they were required to cancel trips and refund customers, they would submit a claim to Zurich and, once the £100,000 deductible was reached, Zurich would then provide cover thereafter. Zurich did not respond to the email.

There followed a series of correspondence and meetings between the two companies. WCE wanted clarity on its insurance position as it wanted to let its customers know whether the trips were being cancelled.

A call took place on 9 April 2020 which was attended by both sides. In an email circulated to the participants by WCE immediately after the call (the contents of which were strongly contested by Zurich at trial) it was noted that Zurich’s position on cover at that time was that the refunds would be claimable in full under the policy, subject to any refunds available from WCE’s suppliers.

WCE then provided a spreadsheet of claims which showed that most of the deposits received from customers had been used to fund the programming element of the trip and the third-party and in-country costs came at a much later date. This meant that Zurich’s outlay was unlikely to be mitigated by recovery from third parties.

On 22 April 2020, Zurich sent a position paper noting that the intention of the policy was only to cover irrecoverable costs and not WCE’s trading profit or business interruption losses. WCE responded that this was contrary to the way in which cover had operated up to that point and was in apparent disregard of the earlier confirmations that the customer refunds were covered in full.

Decision of the Commercial Court

Policy construction

Mrs Justice Dias was satisfied that there was no objective basis for a belief at Zurich that the refunds represented irrecoverable third-party costs beyond a corporate understanding of the wording of the policy. It was obvious that WCE was claiming the amount of the refunds and Zurich’s task was to validate each cancellation claim before a refund could be authorised. As a result, WCE was never asked about third-party costs in relation to cancellations post April 2016. Further, neither the claims handlers nor the underwriters particularly cared what the refunds represented as the amounts were relatively low and fell within the deductible.

Notwithstanding this course of dealing, Mrs Justice Dias concluded that, on its true construction, the policy only indemnified WCE's irrecoverable third-party costs up to the amount of the refunds it was obliged to make to customers. The mere fact that the claims handlers may have been settling claims on an incorrect basis did not mean that settlement on that basis had somehow become part of any legitimate factual matrix so as to affect the construction of the Policy. WCE's argument that the course of dealing between the parties entirely changed the basis of cover was a bold submission – tantamount to arguing for a variation by conduct – which she was unable to accept.

The only way in which the WCE's claim could succeed, therefore, was on the alternative case of estoppel.

Estoppel

In relation to WCE's case on estoppel, Mrs Justice Dias found that there was a common assumption that both WCE and the Zurich claims handlers understood that WCE was covered for its customer refunds.

Zurich never suggested prior to April 2020 that cover was only in respect of irrecoverable costs and by agreeing claims in the amount of the refunds and setting them against the deductible, Zurich conveyed that they shared WCE's assumption as to the scope of cover.

In considering whether it would be inequitable for Zurich now to resile from that common assumption, Mrs Justice Dias considered the following:

1. The course of dealing giving rise to the shared assumption stretched back nearly four years.
2. Responsibility for the continuation of the incorrect assumption rested almost entirely with Zurich.
3. Zurich had every opportunity to identify WCE's erroneous understanding of the cover but failed to do so.
4. The overriding impression was that Zurich's employees operated in compartmentalised silos.
5. The assumption was made that refunds represented irrecoverable third-party costs and this persisted without anyone making any real attempt to investigate whether it was correct or not.
6. Nobody really focused on this because the cancellation was a small part of the overall cover and there had never been any danger of exceeding the deductible.
7. Once the issue was identified on 17 March 2020, no steps were taken to investigate the matter for weeks.
8. No one warned WCE that it had incorrectly understood the policy, even though it was clear that getting clarification was a matter of the utmost importance.

For all the above reasons, the Judge concluded that Zurich was estopped from denying that WCE was entitled to be indemnified under the policy for its customer refunds subject only to giving credit for any recoveries.

Comment

Unusually in the context of Covid BI claims, this decision is important not because of what it says regarding the interpretation of insurance policies to cover Covid BI claims but more because of its examination of the doctrine of estoppel in a claims handling context.

It serves as a useful reminder to insurers and their claims handling teams to make sure that they all understand the scope of cover provided under their policies and keep this under review to ensure that they are handling claims in accordance with the policy wording.

It is not difficult to see how lots of small claims that fall within a deductible may not necessarily draw the attention of more senior claims managers and underwriters that have the technical knowledge and experience to identify where there may be mistakes as to policy coverage.

Although Mrs Justice Dias' comments provided a rather harsh indictment of the way that Zurich had dealt with the claims handling process, there are lessons to be learnt from her criticisms.

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