

# Business interruption insurance and Covid-19

Presented by Oliver Newman & David Giles

# Introduction

- ▶ Covid-19 has caused widespread disruption and devastating losses to businesses across the UK
- ▶ Many businesses are seeking to rely on business interruption insurance as a way to recover some or all of those losses
- ▶ Insurance companies, facing huge losses themselves in this unprecedented situation, are fighting to avoid paying out
- ▶ The FCA is bringing a test case on an accelerated basis to try and resolve some of the uncertainties

# The relevant principles

- ▶ There are always going to be two issues in any claim:
  - ▶ What is the correct interpretation of the contractual terms of the insurance
    - ▶ This is a matter of contractual interpretation
    - ▶ Given that the vast majority of insurers will use standard terms, the interpretation of these terms will start to be settled by early litigation, including the FCA case
  - ▶ What were the facts in a specific case, does a given business come under the cover of a particular term, and if so, to what extent
    - ▶ It is likely that once the test case litigation settles the interpretation questions, the focus will be on this second issue

# What we are intending to cover

- ▶ We will discuss briefly some of the key issues in relation to interpretation of terms
- ▶ We will then look at some of the key evidential issues that claimants are likely to face, intending to give you some guidance to take back to clients to advise them as to how to prepare for making a claim, including the question of causation

# Issues of interpretation

- ▶ Per standard rules of contractual interpretation, the meaning of the wording in a contract is to be construed objectively. The subjective intention of the insurance provider, or the reason why a policy was worded in a particular way, is irrelevant.
- ▶ Key questions are likely to be:
  - ▶ What does 'damage' cover?
  - ▶ What amounts to prevention, denial or hinderance of access or inability to use the premises? What level of disruption amounts to interruption?
  - ▶ Is there a meaningful distinction between restrictions caused by local disease occurrence and nationwide steps taken due to the pandemic?

# General points of interpretation

- ▶ Words will be given their ordinary meaning, but will be understood in the context of the contract *Leo Rapp Ltd v McClure* [1995] 1 Lloyd's Rep 292
- ▶ If words are defined in the contract, that definition will prevail *Re George and Goldsmiths' and General Burglary Insurance Association* [1899] 1 Q.B. 595
- ▶ If the words are ambiguous, they will be construed *contra proferentem* so that any reasonable ambiguity in the wording will be construed in favour of the insured *Cornish v Accident Insurance Co Ltd* [1889] 23 QBD 453
- ▶ The contract will be construed in accordance with sound commercial principles and good business sense *Turner v Manx Line* [1990] 1 Lloyd's Rep 137
- ▶ The contract will be construed in line with the purpose of an insurance contract, accordingly policy exclusions are generally interpreted narrowly, and insuring clauses widely *Manchikalapati and others v Zurich Insurance* [2019] EWCA Civ 2163

# The question of 'damage'

- ▶ Many insurance policies will insure against 'damage' to the premises
- ▶ Of course, Covid-19 is unlikely to have caused physical damage to a business premises
  - ▶ However, the courts have previously held that under the term "loss destruction or damage due to contamination" the costs of cleaning or decontaminating the property was recoverable *Outokumpu Stainless Ltd v AXA Global Risks (UK) Ltd* [2007] EWHC 2555 (Comm)
  - ▶ Damage can be temporary and such that the property had to be washed by a specialist cleaner before it could be put in a usable condition *Losinjiska Plovidba v Transco Overseas Ltd v Ors* [1995] C.L.C. 1325
- ▶ As such, where an individual who has tested positive has entered business premises requiring a specialist deep clean, such costs may be recoverable

# How much disruption is enough disruption?

- ▶ Common terms include that there has to have been “prevention, denial, or hindrance of access or inability to use the premises”
- ▶ Insurance companies have argued that this term was not triggered unless the business was ordered to and did close completely and that unless it ceased to trade completely, its activities were not interrupted
- ▶ In essence, the argument is that a business is only interrupted when subject to mandatory and total closure
- ▶ This is of course something that few businesses will be able to show, certainly for any substantial period



# How much disruption is enough disruption?

- ▶ Of course, the countervailing argument, and that being run by the FCA, is that the combination of advice/instructions/announcements along with the Coronavirus Act 2020, put in place social distancing, self-isolation, lockdown, restricted trading and other activities, and promoted home working and staying at home
- ▶ These factors, when combined, mean that although there may not have been anything physically preventing business owners and their staff from accessing premises, it could not be said that such access was not prevented or hindered
- ▶ Similarly, 'interruption' would cover interruption with and to the business or the insured's usual activities given the normal pattern of business operations, such as restriction to a far more limited range of services than usual

# Local versus National

- ▶ Insurance companies have argued that the interference/interruption/loss did not 'follow' or 'result from' or were not 'solely and directly' caused by the necessary local disease occurrence or danger but instead were caused by the wide-area pandemic
- ▶ In short, where the policy contains a clause restricting recovery to a local problem (such that a health issue in the next town over should not lead to recovery) the argument is being run that there is no coverage for a national pandemic
- ▶ There are two approaches to disputing this, one is to look at actual and predicted occurrences of Covid-19 to argue that although a national issue, it's occurrence was such as to make it a local issue in every case
- ▶ The second is to argue that it is impossible to separate out these two issues (such that if national steps to stop the spread were not in place, it would have been a local health issue, requiring local steps to be taken)

# Causation

- ▶ One of the key issues that is going to repeatedly come up is causation and the 'but for' test, namely what would a business have made if it were not for Covid-19
  - ▶ Again, there are issues that are going to have to be resolved in the FCA litigation, namely the appropriate counter-factual
  - ▶ For instance, is the appropriate counter-factual where the business closure orders were not made, but social distancing and travel restrictions still applied?
  - ▶ Where the contractual wording deals with local issues, should the counter-factual deal with a lack of footfall in the shop but not the drop in orders due to a lack of retail and consumer confidence nationally?

# Practicalities

- ▶ The extent of an individual businesses' coverage will depend on the specifics of their insurance policy and general advice largely impossible
- ▶ Having said that, the scenario most likely to be covered are the costs involved in a professional deep clean required due the presence of an individual who has tested positive for Covid-19
- ▶ The FCA test case is expected to be heard in the second half of July, so no precipitate steps should be taken before the outcome of the case is known as the outcome is likely to affect most claims
- ▶ If any client believes they may have a claim, they should notify the insurance company of that fact as soon as possible to avoid technical coverage points being taken, even where the extent of loss is unclear

# Evidence gathering

- ▶ A clear and detailed chronology, placed against the timeline of the governments decisions, detailing the steps taken by the business and the impact of each change will invariably be a vital document, backed wherever possible by contemporaneous evidence (emails, text messages etc)
- ▶ Consideration of what steps were taken to mitigate loss and equally important why certain steps were not taken- for example, why did the business not pivot to take away/online ordering/open with social distancing measures
- ▶ Have business accounts on hand for 3 years prior to March 2020
- ▶ Any documents that exist detailing an operating plan for the business, including projected growth, investment and the like, should be identified and collected together
- ▶ Consideration should be given of general trends in existence leading up to March and how they would have affected the business
- ▶ Details of any contracts or projects affected. Where this involved discussions that did not turn into settled contracts, witness statements are likely to have to be taken as to the likelihood that the contract would have concluded but for the pandemic
- ▶ The extent of the local spread of Covid-19 may be important. If staff or customers have tested positive, early engagement in asking for evidence of such tests is likely to bear fruit

# Looking forward

- ▶ Information on the FCA test case can be found here:
  - ▶ <https://www.fca.org.uk/firms/business-interruption-insurance>
- ▶ We intend to do another webinar once the case has been decided to explain its consequences and how it will affect claimants.

# Contact Details

- ▶ Any Questions?
- ▶ THANK YOU

**You've been listening to Oliver Newman and David Giles**

**To instruct counsel, please contact:**

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