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COVID-19: Business Interruption Insurance Claims – the Developing Tension in the UK

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On 17 March 2020, in announcing an "*unprecedented*" range of measures designed to support businesses through the COVID-19 pandemic, the UK Chancellor of the Exchequer, Rishi Sunak, said that "*for those businesses which do have [an insurance] policy that covers pandemics, the government's action is sufficient and will allow businesses to make an insurance claim against their policy*". In practice, however, many policyholders have experienced difficulties in successfully asserting claims against insurers for business interruption losses. A number of major insurers and their representative bodies have stated their belief that, in most cases, business interruption policies will not respond to losses caused by (i) COVID-19; or (ii) the UK Government's response to COVID-19. In turn, a number of policyholder action groups have stated their intention to pursue litigation against insurers for business interruption losses arising from COVID-19, and the Financial Conduct Authority ("FCA") has taken steps to seek clarification from the English courts on the interpretation of certain common policy provisions.

In this article, we will: (i) look at the current landscape and the respective positions and actions of the insurers and their representatives, policyholders and the FCA; and (ii) consider the legal issues which have contributed to the developing tension between those on each side of the debate.

The position of the insurance industry and their representatives

Individual insurers and insurance associations alike have made public representations that they do not consider themselves to be liable under most business interruption policies for losses allegedly caused by COVID-19. On 17 March 2020, the Association of British Insurers (the "ABI") said in a statement that, irrespective of government closure orders, "*the vast majority of firms won't have purchased cover that will enable them to claim on their insurance to compensate for their business being closed by the Coronavirus.*" Standard business interruption cover, the ABI claimed, is intended to respond to "*physical damage at the property*", and not forced closure of businesses by authorities.

Similarly, on 1 April 2020, the Chartered Institute of Loss Adjusters ("CILA") published a paper giving guidance on claims relating to the pandemic. The paper, they noted, was "*especially necessary given statements by the government and the press to the effect that losses caused by Coronavirus will be covered. In most cases they will not.*"

Individual insurers have also stated their views publicly. For example, Hiscox UK published a press release on 22 April 2020 disclosing that, on the basis of disruption caused by restrictions on travel and mass gatherings continuing for a six month period, it expected to pay net claims totalling up to $150 million (potentially rising to $175 million if the restrictions lasted more than six months). Hiscox reiterated

the position it had taken in previous statements, namely, that its core small commercial package policies "*do not provide cover for business interruption as a result of the general measures taken by the UK government in response to a pandemic*".

Separately, on 21 April 2020, it was reported that the UK insurance industry had formed a steering committee of senior UK insurance executives who will work to develop an industry reinsurance fund to address pandemic risk. It was reported that the steering committee will work with "*Pool Re*", the mutual reinsurer established in cooperation with the UK government, which provides guarantees to insurers for policyholder claims arising from acts of terrorism, to propose "*an industry pandemic response to both the government and the country*". Although the contemplated scheme currently appears to be forward-looking, as opposed to targeting COVID-19-related losses, the establishment of the steering committee provides a clear indication of the perceived impact of pandemic losses on insurance and reinsurance providers.

The emergence of policyholder action groups

As a result of the difficulties being faced by many policyholders in making claims, various groups of policy holders have formed action groups and have stated that they are considering taking legal action in the English Courts against certain insurers. To date, such action groups have included groups representing dentists, owners of nightclubs, pubs and bars, restaurants and hotels, and businesses in the childcare provision sector. Subject to steps that the FCA is planning to take, about which more below, the UK may therefore see group litigation arising from insurers' refusal to assume liability for COVID-19-related business interruption losses.

The policyholders and their action groups will have noted the recent French decision in which the Paris Court of Appeal is reported to have ruled that AXA was required to pay a restaurant owner its claims under business interruption insurance cover for two months' worth of revenue losses caused by the government order to close bars and restaurants in light of COVID-19.

The FCA's intervention

The FCA appeared initially to have endorsed the position taken by insurers and their representative bodies. In a 'Dear CEO' letter issued to insurers on 15 April 2020, the FCA said that "*[b]ased on our conversations with the industry to date, our estimate is that most policies have basic cover, do not cover pandemics and therefore would have no obligation to pay out in relation to the Covid-19 pandemic.*"

However, perhaps in response to the growing uncertainty and industry disquiet, and potential for substantial litigation, the FCA has since taken a more interventionist approach. On 1 May 2020, the FCA announced that it intended to "*seek legal clarity*" on the interpretation of certain business interruption policies, by way of court action "*designed to resolve a selected number of key issues causing uncertainty*". In the litigation, the FCA and their legal team will attempt to put forward the best possible arguments on behalf of policyholders.

A representative sample of policy wordings (which can be seen here) will be considered by the court, along with the FCA's proposed assumed facts, proposed issues, and proposed questions for determination. The wordings which will be considered are taken from policies sold by insurers including Hiscox, Zurich, and MS Amlin, who have all entered into a framework agreement with the FCA governing the procedure. As part of the agreement, the insurers have acknowledged the aim to have the case

heard before the end of July. If the timetable proves feasible, a lot of the uncertainty facing insureds could be resolved in a matter of weeks.

Central legal issues in business interruption cases

A key cause of the uncertainty is that business interruption policy terms, or more commonly, extensions to existing policies which cover business interruption losses, often require a 'trigger' for the policy to respond, with such triggers including (i) physical damage to premises; (ii) denial of access to premises; or (iii) in some cases, the occurrence of a specified type of disease. The interpretation of each of these triggers is subject to considerable uncertainty (although we note the intention for the FCA's court action to reduce that uncertainty). Although the interpretation of each policy will depend on its specific wording, we consider each of these three triggers below.

Physical damage

On an ordinary understanding of the phrase, it may be argued that, in many cases, the pandemic has not caused "*physical damage*" to business premises. However, the English authorities regarding what does and does not constitute "*physical damage*" do not speak with one voice. For instance, in *Quorum v Schramm (no. 1) [2002] 1 Lloyd's Rep IR 292*, the claimant brought a claim against the respondent insurer for damage to a picture sustained during a fire at a storage warehouse. Although there was no visible damage to the pastel surface or general appearance of the drawing, it was shown that the intense heat and humidity caused by the fire had caused deterioration of the painting's condition on a sub molecular level which constituted "*direct physical damage*". On this basis, the relevant insurance policy was held to cover the loss in the painting's value caused by the fire.

However, a different approach was taken in *Pilkington United Kingdom Ltd v CGU Insurance plc [2004] 1 Lloyd's Rep IR 891*. In that case, the Court of Appeal found that defects in glass at Waterloo station did not constitute physical damage to the terminal in which the glass was installed, notwithstanding that the defects impaired the usefulness of the glass, because "*damage requires some altered state*". In this case, the defect was restricted to the glass and did not do any physical harm to the terminal. The applicable policy, covering only damage to the terminal building, did not therefore provide cover in respect of the defects in the glass.

In their paper of April 2020, CILA argued that the confirmed presence of coronavirus on an insured premises *would* likely constitute property damage for the short period in which the virus survived. However, CILA also noted that testing capacity was likely to be insufficient for such rigorous testing of premises, which, even if successful, would only establish damage lasting for a matter of days. CILA concluded therefore that such a claim would be difficult to make out.

The 'short period of physical damage' approach accords with the judgment of the High Court in *Losinjska Plovidba v Transco Overseas Ltd (The Orjula) [1995] 2 Lloyd's Rep 395*. In this case, a ship was contaminated with hydrochloric acid, requiring decontamination cleaning works. It was held that, although there was no permanent alteration to the state of the ship, the fact that work needed to be done to the ship before it was operational indicated that physical damage had been done. In the case of coronavirus, contaminated premises might be unusable for several days after contamination (although mitigation obligations may require that the premises are decontaminated as quickly as possible rather than waiting for the virus to die). However, some business interruption policies triggered by property damage contain a "waiting period", namely, a period of hours or days after the interrupting event during

which the insurer is not yet liable for the business's losses. This period may be longer than the maximum known life of the virus on surfaces, meaning that the insurer may not be liable for losses at all during the short period of contamination.

Even where physical damage is arguably caused (e.g. because an employee was infected with coronavirus on the premises, requiring the premises to close for decontamination), a policyholder's recovery may be severely limited if it can be shown that, but for the property damage, the company would still have suffered loss as a result of the wider economic shutdown. For example, in *Orient-Express Hotels Ltd v Assicurazioni Generalis SA [2010] EWHC 1186 (Comm)*, it was held that the insured, whose hotel had suffered physical damage as a result of Hurricanes Katrina and Rita, could not recover for business interruption losses. This was because the insured's business would have suffered significant losses in any event, as a result of potential customers not wishing to travel to New Orleans in the aftermath of those hurricanes.

Denial of access or closure

Some business interruption policies or extensions provide cover in cases where access to the policyholder's premises is denied, or where the premises are subject to an order for closure. In this respect, there may be debate as to whether the UK Government's exercise of its powers under the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 and the Coronavirus Act 2020 has caused the requisite "*denial of access*" or "*closure*" for the purposes of these policies. For example, in the Australian case *Cat Media Pty Ltd v Allianz Australia Insurance Ltd (2006) 14 ANZ Ins Cas 61-700*, it was held that the suspension of a company's manufacturing license, which did not prohibit access to or other use of the company's premises, did not constitute a closure of those premises.

Even where premises such as shops and restaurants have been ordered to close, there is arguably not a denial of *access*, or closure in the sense of *Cat Media v Allianz*, but rather a prohibition in carrying out business from the premises. It could be argued that members of the public have been, in practical terms, denied access to premises (given that the population was severely restricted in their movements), but whether or not this is sufficient to constitute a "*denial of access*" or "*closure*" will depend on the terms of the particular policy.

Requirement for an "infectious" or "notifiable" disease

Some policies or extensions may additionally provide cover in respect of business interruption caused by an "*infectious disease*". The typical scenario envisaged under this term is not a global pandemic, but rather a local outbreak of infectious disease (such as norovirus in a restaurant). If the term is defined in general terms in the policy (or more rarely, is not defined), it may include COVID-19. However, as is frequently seen, if the term is defined using a specified list of known infectious diseases, it will clearly not include COVID-19 (save, potentially, in very rare cases where it was specifically included in policies written in early 2020).

Other policies will respond to damage caused by the occurrence of a "*notifiable*" disease. COVID-19 became notifiable in England on 5 March 2020. A spokesperson for the Department of Health stated that "*[t]his will help companies seek compensation through their insurance policies in the event of any cancellations they may have to make as a result of the spread of the virus*". The designation in England was later than in other parts of the UK (it was made on 22 February 2020 in Scotland, and on 29 February 2020 in Northern Ireland).

However, even where covered, many policyholders will only be permitted to recover losses incurred in respect of events occurring after the date on which COVID-19 became notifiable. For example, in *New World Harbourview Hotel Co Ltd v Ace Insurance [2012] HKCFAR 120*, losses were only recoverable from the date on which SARS became mandatorily notifiable to the Hong Kong government. Moreover, the decreasing revenues caused by the disease prior to it being notifiable had to be taken into account when establishing the insurer's liability.

Concluding thoughts

The developing tension between insurers and policyholders regarding business interruption losses allegedly caused by COVID-19, and the UK government's response to it, has generated substantial public attention. Despite the strong public statements on each side of the debate, however, for many common business interruption policies or extensions, there is scope for uncertainty regarding whether business interruption losses caused by the COVID-19 pandemic are covered.

We note the FCA's attempt at facilitating certainty in this area through a relatively novel intervention. However, the utility of the FCA's steps in reducing further litigation may be limited by the sheer variety of policies in the market. In particular, policyholders or insurers whose specific policy wording differs from the representative wordings tested by the FCA may see the benefit of pursuing their own litigation, to allow them to make the strongest arguments on their own specific situation. There will also be cases with very complex fact patterns which present an additional challenge to interpretation of the relevant policies. In short, we anticipate that the proliferation of business interruption insurance cases over the coming years will likely be just one of the many ways in which the COVID-19 pandemic will seriously impact the English legal system.

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