Business Interruption Insurance and COVID-19

Financial Conduct Authority (FCA) Test Case Update

Opening by Neil Harrison, Global Chief Claims Officer

On behalf of Aon plc, I am delighted to be able to introduce this update on the recent UK Supreme Court ruling in the case brought by the Financial Conduct Authority, the FCA, against several Insurers who provide business interruption coverage as part of broader property related policies.

This is a presentation intended for, and provided to, Aon clients, and the comments we will make are in our capacity as an insurance broker.
Our comments do not represent legal advice which we, as a firm, do not provide.

Before we move into a summary of the Supreme Court's decision, it is important for us to remind you that for any policyholder, it is their specific insurance policy wording, and the specific circumstances of their business interruption loss that will ultimately determine whether or not a claim made against Insurers under the policy will be paid.

It is also important for us to remind you that even if your policy does provide coverage for business interruption, you will need to provide financial information to validate your loss.

Our aim is to provide you not only with a summary of the Supreme Court decision, but also with sufficient information to allow you to consider the potential merits and outcome of any insurance claim you have submitted or may consider submitting.

The Supreme Court ruling, delivered on 15th January 2021 after a leapfrog appeal from the High Court and an expedited hearing, brings definitive guidance on the proper operation of insurance cover under certain non-damage business interruption insurance extensions. It brings a level clarity to policyholders and Insurers alike.

The judgments are binding on the Insurers in relation to the sample policies under consideration. All Insurers across the UK market are also required to apply the judgements to other policies with similar wordings/coverage.

After the communication of the decision, the FCA made clear its expectation of Insurers with regard payment of valid claims.

Let's now look at the headlines of the Supreme Court decision.

The Court split their interpretation of the selected wordings into three distinct groups:

1. **Disease clauses:** These provide cover for business interruption arising from the occurrence of a notifiable disease within the vicinity or a specified radius of the insured premises.

2. **Prevention of Access/Public Authority clauses:** These provide cover where there has been a prevention or hindrance of access to or use of the premises due to government or local authority action or restriction.

3. **Hybrid wordings:** As the name implies, these are a combination of the Disease and Prevention of Access clauses and provide cover due to restrictions imposed on the premises caused by a notifiable disease.

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Paul Taylor, Leader of Aon UK's Technical COVID-19 Claims Team

This is a highly complex topic, and my intention is to provide you with a short and usable summary. I can't be definitive with regard to any specific insurance policy or any specific claim situation for all the reasons Neil has explained.

The headline is that the Supreme Court found in favour of the FCA, and therefore in favour of policyholders, on all material points of the High Court Judgment that had been appealed. It is important to remember that some issues on which the High Court found against policyholders were not appealed by the FCA. However, in very simple terms, the judgment has broadened the circumstances in which policyholders may recover their losses compared with those allowed by the High Court, particularly those bringing claims under prevention of access and hybrid wordings.

In relation to the **"Disease Wordings"**, the Supreme Court construed the disease clauses more narrowly than the FCA. However, for various reasons including its findings on causation, the Supreme Court held that policyholders' claims are still covered under the disease wordings provided that the policyholder could establish a relevant case of Covid-19 which had occurred before the Governmental measures had come into force.

The Supreme Court considered an RSA policy ("RSA 3") as an exemplar clause. This clause (like many other disease clause wordings) covered business interruption losses resulting from any occurrence of a notifiable disease within a specified radius (typically 25 miles) of the insured premises. The court interpreted the clause as covering business interruption losses resulting from COVID-19 provided there had been an occurrence (meaning at least one case) of the disease within the geographical radius of the insured premises by the time that the measures were put in place .

Moving on now to **prevention of access and hybrid wordings:**

- The FCA successfully appealed the High Court's narrow interpretation of clauses requiring public authority restrictions to have been placed or imposed on the insured premises. The High Court had said that only restrictions with the "force of law" could meet such a requirement, but the Supreme Court disagreed. It held an instruction from a relevant authority can amount to a "restriction imposed" if it was in clear and mandatory terms which indicate to a reasonable person that compliance is required without recourse to legal powers.

- The example given by the Court was the Prime Minister's mandatory instructions to certain businesses to close on 20 March 2020 would trigger coverage regardless of whether the instructions could be legally enforced.

- The Court also found the term "inability to use" premises did not mean a complete inability to use them but could also cover an inability to use part of them i.e. the business did not have to be completely closed in order for the policyholder to trigger its BI cover. It is enough that part of the premises was closed (even if the policyholder could access it for some purposes). It would also suffice if the policyholder could not use the whole or part of the premises for a discrete business purpose.

To complete the picture, I would also like to speak briefly about three other important topics which have been the subject of commentary in the press and other forums:

- Causation - The Court decided it was not appropriate to apply the "but for" causation test in relation to Covid-19 claims under the relevant wordings. Insurers had argued that it is necessary to show that the loss would not have been sustained but for the occurrence of the insured peril (such as the occurrence of disease within a 25-mile radius in the case of a disease clause). They contended that, because the pandemic had resulted in the majority of the country being shutdown, policyholders would have suffered the same or similar business interruption losses even if the insured peril had not occurred. As a result, they argued there was no coverage for Covid-19 related BI losses. The Court disagreed and held there are instances where the "but for" test is inadequate i.e. where a series of events all cause a result, but none was on its own necessary or sufficient to cause that result. The example was given of 20 people pushing a bus over a cliff. In that hypothetical scenario the "but for" test would lead to the conclusion that nobody had caused the bus to fall off the cliff, whereas in fact the better analysis would be that each person's effort was an equal and effective cause of that result. This is an extremely significant finding.

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With regard to the ***"trends clause"*** the Supreme Court did not accept Insurers' argument that "trends clauses" required losses to be reduced to take account of the impact of the uninsured effects of Covid-19. In doing so, the Court overturned the Orient Express case which had been the basis on which BI claims had previously been assessed and which the High Court had decided to distinguish on the facts. This is a landmark decision which reduces the potential for unfairness on policyholders in situations where the damage to their property also affects a much wider area.

I would like to briefly mention some topics that the FCA test case – and therefore the Supreme Court decision – did not consider, but which will impact coverage and quantification of business interruption claims.

- Aggregation being one, therefore the number of sub limits of liability, deductibles, the number of losses / events or occurrences will be subject to further scrutiny. Clearly this will be important for policyholders with multiple premises and consideration of further local and national lockdowns.

- Disease at the premises being another. As the test case did not consider, and didn't make any ruling to Infectious or Notifiable Disease Clauses that respond to client's losses caused by occurrences of disease "at the insured premises".

- Deduction of Government Assistance. It is safe to say policyholders submitting claims will have no doubt benefited from a number of different forms of government assistance since the emergence of the pandemic. There are going to be a number of discussions points in terms of quantification, and whether or not Insurers will correct to adjust losses making such deductions. There is some useful information which has been published by the FCA on their website in their "Dear CEO" letter of the 18th September 2020 which could provide useful comments.

- Damages for Late Payment – The enterprise act 2016 introduced into law a new right for policyholders to claim damages for late payment of claims. This has never been tested by the courts, and therefore remains an outstanding issue. We would expect policyholders would have 2 obstacles to address for potential success, which would be proving they suffered further financial loss caused by the delay in settling the original claim, and secondly that Insurers caused an unreasonable delay.

Peter Wilkinson, Head of Claims, Aon UK

As many of you know, our COVID-19 technical claims team has been operational since March 2020. Since that time we have supported clients through the claim process and have been able to secure a significant number of claims settlements for various clients, with various policy wordings underwritten by various Insurers. While the recent UK Supreme Court decision represents a key milestone in the evolution of this topic, our strategy and focus remain unchanged.

- We are here to support any Aon client that wishes to submit a claim to Insurers.

- We are here to provide advice on the preparation and quantification of such claims.

- We are here to advocate for coverage and payments from Insurers on any valid claims.

Subsequent to the Supreme Court decision, we have commenced discussions with Insurers regarding individual policy wordings and all relevant open claims. In most instances, we continue to await formal feedback from Insurers, but we have already seen examples of Insurers stepping forward to pay claims now that the test case appeal has been concluded.

We applaud this approach from Insurers and truly believe it is the appropriate way to meet commitments to policyholders.

We know dialogue with Insurers will continue, and also recognize that some clients that have not yet submitted or formally quantified claims may now choose to do so. Again, through our claims team and broader account service teams, we are ready to engage in discussions with clients on this topic, and to provide appropriate support in the event that a decision is made to submit a claim.

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All Aon clients should be aware that beyond our team of UK based claims professionals, we are drawing upon expertise and resources from across our firm – from claims colleagues around the world, from broking leaders in UK and beyond, and from our most senior executives.

We are uniquely and ideally qualified and resourced to provide all Aon clients with the best level of service and the best achievable claims outcomes.

Closing by Neil Harrison, Global Chief Claims Officer

Despite the clarity the Supreme Court ruling brings with regard certain wordings, clauses and issues, business interruption, and specifically non-damage business interruption remains a complex topic and indeed it is a global topic.

Consistent with the approach we have taken in UK, in all other geographies we will continue to monitor all relevant legal and regulatory developments in the non-damage business interruption arena. With a test case under way in Australia and several law suits being filed in South Africa, France, Germany, Canada and US amongst others, this topic will evolve over a period of time.

We very much hope that the information we have provided has been of use to you. We encourage Aon clients to submit any follow up questions to your assigned members of our team.

Thank you again for your time, and for allowing us to serve you in the important capacity as your insurance broker.

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