UK Business Interruption Insurance and COVID-19

Financial Conduct Authority (FCA) Test Case Update - February 2021

Summary

This document is intended for, and provided to, Aon UK clients in our capacity as an insurance broker. Our comments do not represent legal advice which we, as a firm, do not provide. We remind all clients that it is their specific insurance policy wording, and the specific circumstances of their business interruption loss that will ultimately determine whether a claim made under a policy will be paid.

Concluding the business interruption test case brought by the Financial Conduct Authority (FCA) against several insurers, the Supreme Court issued a judgment on 15th January 2021. The judgment provided definitive guidance on the proper operation of insurance cover under certain non-damage business interruption insurance extensions. The FCA has since made clear its expectation of insurers with regard payment of valid claims.

Key features of the complex judgements, full versions of which can be found at https://www.fca.org.uk/publication/corporate/bi-insurance-test-case-judgment.pdf

The Financial Conduct Authority and others (Appellant/Respondents) v Arch Insurance (UK) Ltd and others (Respondents/Appellant) (supremecourt.uk) include the following:

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 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:** These are a combination of above and provide cover due to restrictions imposed on the premises caused by a notifiable disease.

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

- Policyholders' claims may be covered under **disease clauses** where they can establish a relevant case of COVID-19 which had occurred before the Governmental measures had come into force.
- Wordings that list specific covered diseases will not provide cover as COVID-19 was a new disease so will not be listed. Wordings that cover notifiable diseases or unspecified disease may provide cover
- **Prevention of access / Public Authority clauses** with wordings; "Emergency in the vicinity", "danger or disturbance in the vicinity", "injury in the vicinity" and "incident within 1 mile/the vicinity" as well as undefined "vicinity" clauses were generally intended to provide narrow, localised, cover and that action taken in response to the nationwide pandemic would not trigger cover under these clauses. Where the prevention of access or public authority clause does not contain localised language there may be cover where a policyholder can establish a relevant case of COVID-19 occurred before the government restrictions.
- Wordings requiring restrictions imposed by a public / statutory authority could be satisfied by an instruction that was in clear and mandatory terms even if it did not carry the force of law e.g 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 enforceable.

- "Inability to use" or "closure" language only requires a discrete part of the premises to be out of action or discrete business activity to be prevented from continuing.
- "Hindrance of use" and "interruption" can be proved even where all activities and parts of the premises can continue but a loss results from COVID-19, examples; need to work from home, increased safety measures, where social distancing or capacity limits were imposed but all business functions could still continue.

What losses can be claimed

- Losses resulting from all of the required elements of the insuring clause occurring in their proper sequence e.g. often the case(s) of COVID-19 must pre-date the Government measures which cause the loss
- Losses suffered that result from the restrictions imposed and not just as a result of the individual case of COVID-19 or cases of COVID-19 at the premises
- The "but for" test does not apply e.g "would the loss have been suffered but for the individual case of the disease at the premises" was not appropriate where a series of events all cause the result, instead losses suffered will be measured against the performance of the business had COVID-19 not happened at all.

Aon continues to support clients with strategic advice and claim advocacy on this complex topic. Through our dedicated team of COVID-19 Claims professionals we have secured settlements from several insurers on behalf of clients and are uniquely positioned to deliver results.

Thank you.

Peter Wilkinson
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In order for us to best answer any queries you have, please use the following points of contact:

General queries:
Aon Client Manager or Account Director

Open claims:
Contact your assigned claims specialist (Aon Claims Advocate)

New claims:
Please email the Aon claims team on claims.team@aon.co.uk