

UK Supreme Court decides important judgment on Business Interruption Insurance

by Joseph Lewin

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The Supreme Court has delivered its judgment today in the landmark business interruption insurance test case brought by the Financial Conduct Authority (“FCA”).

The ruling is important for business interruption policy holders who may have faced detrimental business effects from the COVID-19 pandemic lockdown and restrictions. It provides much needed guidance on business interruption policy cover for organisations struggling with the economic consequences of the pandemic.

At the start of the pandemic, a number of insurance providers had adopted a restrictive approach to paying out for business interruption caused by the COVID-19 crisis. The FCA brought the test case in its role as representative of policyholders, in order to determine issues of principle relating to policy coverage and causation under sample business interruption insurance wording relating to business interruption losses suffered as a result of the COVID-19 pandemic. To conduct this analysis, the Court considered 21 policy wordings from eight different insurers.

On 15 September 2020, the High Court at first instance found in favour of the FCA on the majority of the key issues, including finding that:

- most disease clauses in the sample policy wordings do provide cover;
- some prevention of access clauses do provide cover, but coverage will depend on the precise wording of the clause and exactly how the business was impacted by the COVID-19 pandemic; and
- the pandemic, as well as the Government and public response to it, caused the business interruption losses.

The FCA and six out of the eight defendant insurers appealed the decision of the High Court. The insurers appealed the conclusions set out above for some of the sample policy wordings, but the Supreme Court dismissed those appeals. The Supreme Court

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has however substantially allowed the FCA's appeals, including finding that:

- cover might be available for partial closure, as well as for full closure of premises, and for mandatory closure orders that were not legally binding; and
- valid claims under business interruption policies should not be reduced because the loss would have resulted from the pandemic in any event.

As a result of the Supreme Court's findings, more policyholders will have valid claims under business interruption policies for COVID-related losses. In addition, some policyholders may receive higher pay-outs.

The decision will be welcomed by business interruption policy holders who have been impacted by the COVID-19 pandemic.

With regard to the next steps, the FCA is going to release a set of questions and answers to help policyholders to understand the test case. In addition, the FCA is going to publish a list of business interruption policies that may respond to the pandemic, based on data collected from insurers.

The FCA's Executive Director, Consumers and Competition commented on the Supreme Court's ruling as follows:

"Coronavirus is causing substantial loss and distress to businesses and many are under immense financial strain to stay afloat. This test case involved complex legal issues. Our aim throughout this test case has been to get clarity for as wide a range of parties as possible, as quickly as possible, and today's judgment decisively removes many of the roadblocks to claims by policyholders."

On 22 January 2021, the FCA released a "Dear CEO letter" outlining its expectations of insurers following the Supreme Court judgment in the business interruption test case. The letter set out the FCA's expectations as to how it expects insurers to handle affected claims now that a final outcome has been reached. In particular, it expects them not to treat policyholders unfairly, to act in their best interest and not to delay payment of claims or to exacerbate the financial pressures on them. In summary, the FCA requires insurers to:

- promptly reassess all business interruption policies affected by the case, including those previously rejected or not fully paid;
- reassess all complaints related to policy wording;
- notify policyholders promptly of the outcome of such assessments;
- make necessary adjustments to any settlement offers that were made but not accepted by policyholders prior to 15 January 2021;
- provide the FCA with information on all affected policies;
- not to include the period between 17 June 2020 and the date of issue of the Supreme Court judgment when relying on time limits for claims;
- take a pragmatic, transparent and consistent approach in their loss adjusting processes to avoid creating additional delays to payment; and
- consider the making of interim payments where the claim is accepted either in part or

in full but elements of the calculation or agreement on final settlement remain outstanding.

Where the FCA see that insurers are not meeting its expectations, it will not hesitate to use the full range of its regulatory powers to ensure compliance.

Please contact Tim Maloney or Matthew Blower for more information.

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