



# FCA BI Test Case - the judgment

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## Branko Ltd

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## Today's event

- Thank you to your LI for hosting
- Participation is **very** much encouraged
- Verbal and chat forum questions welcome
- Please complete the feedback survey
- You will get the slides
- Feel free to connect with me on **LinkedIn**.



## What I will cover

1. Why does it matter
2. The judgment
3. Insurer Dear CEO
4. Your duties as a broker + ICOBS



## Learning objectives

This talk will give you an insight into:-

- The result of the FCA's test case on Business Interruption Insurance
- Why compliance with ICOBS is more important now more than ever



## Just bear in mind

- There is a lot of detail and I will attempt to highlight some of the **KEY** pieces of information
- Please refer to the FCA BI pages for further information
- This is my take on the judgment and is not formal advice so please take up whatever professional help you may need
- Happy to do this talk in-house



# 1<sup>st</sup> Poll

## Who do you work for?



Neutral Citation Number: [2020] EWHC 2448 (Comm)

Case No: FL-2020-000018


IN THE HIGH COURT OF JUSTICE  
BUSINESS AND PROPERTY COURTS  
QUEEN'S BENCH DIVISION  
FINANCIAL LIST

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 15/09/2020

Before:

LORD JUSTICE FLAUX  
MR JUSTICE BUTCHER



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INSURANCE NOTES
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## Judgment handed down in FCA's COVID-19 business interruption insurance test case

**CATEGORIES**

This post is part of the following categories:

MISCELLANEOUS

SEPTEMBER 15, 2020

**1. Headline summary**

The High Court has today handed down [judgment](#) in the COVID-19 Business Interruption insurance test case of *The Financial Conduct Authority v Arch and Others*. Herbert Smith Freehills represented the FCA (who was advancing the claim for policyholders) in the case, which considered 21 lead sample wordings from eight insurers. Following expedited proceedings, the judgment brings highly-anticipated guidance on the proper operation of cover under certain non-damage business interruption insurance extensions.

While different conclusions were reached in respect of each wording, the Court found in favour of the FCA on the majority of the key issues, in particular in respect of coverage triggers under most disease

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# 2<sup>nd</sup> Poll

## Have you had a BI claim accepted?



## Initial thoughts...

- This has caused shockwaves and the clarity of wordings is paramount
- Intentions must be clearly articulated - you can't say notifiable diseases are covered and then contradict this by saying pandemics are not
- The judgment lays down clarity but insurers have a LOT of work to do:-
  - Assess all wordings against 7 categories of business to determine what they had to do in line with advice or regulations (some insurers have been paying)
  - Communicate with claimants and policyholders
  - Consider further reputational damage if they appeal as it appears exposure is sustainable



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## Business interruption insurance

First published: 15/05/2020 | Last updated: 20/10/2020 | [See all updates](#)



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Find out how we are seeking legal clarity on business interruption (BI) insurance during the coronavirus (Covid-19) crisis. We'll update this page with information on what we've done and are doing.

The coronavirus pandemic has led to widespread disruption and business closures resulting in substantial financial loss. Many customers have made claims for these losses under their BI insurance policies. There has been widespread concern about the lack of clarity and certainty for some customers making these claims, and the basis on which some firms are making decisions in relation to claims.

### Related information

[High Court judgment in the BI insurance test case](#)

[High Court declarations in the BI insurance test case](#)

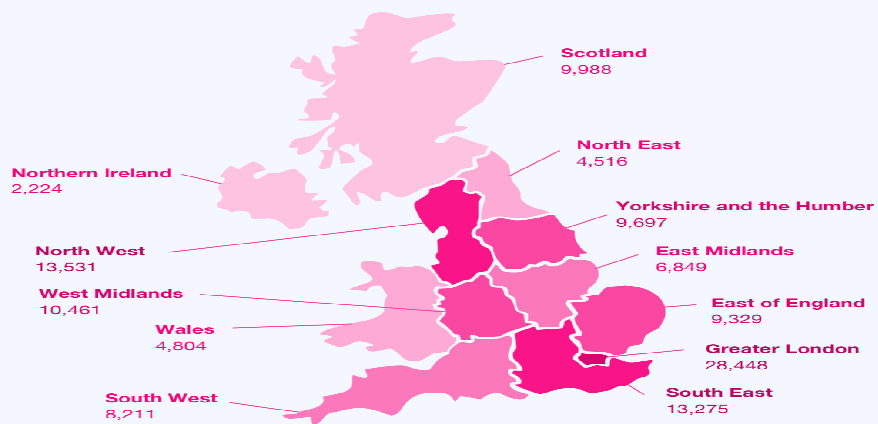
[Representative Sample of Policy Wordings \(updated 9 June 2020\)](#)

# 1. Why does this matter?



## Restaurants, Pubs and Cafés Affected by the Easing of Lockdown on 4th July

114,484 companies



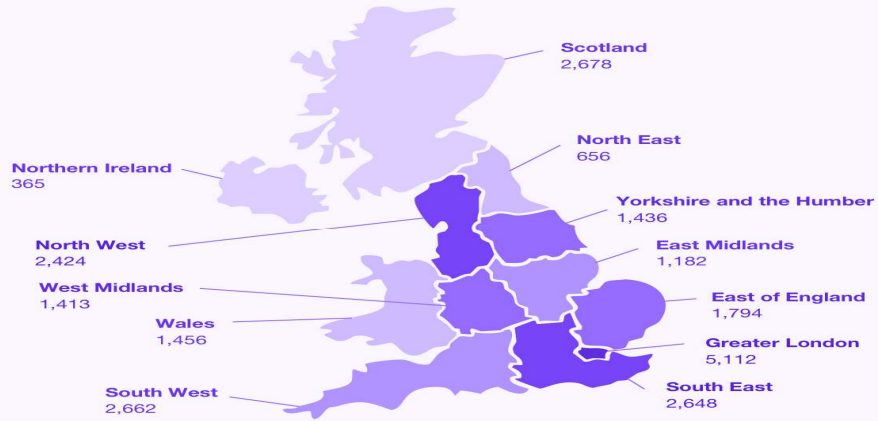
Classifications shown are from SIC 2007 Sections:

- 561: Restaurants And Mobile Food Service Activities
- 56101: Licensed Restaurants
- 56102: Unlicensed Restaurants and Cafés
- 56103: Take Away Food Shops and Mobile Food Stands
- 58302: Public Houses And Bars

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## B&Bs, Hotels and Campsites Reopening

23,826 companies

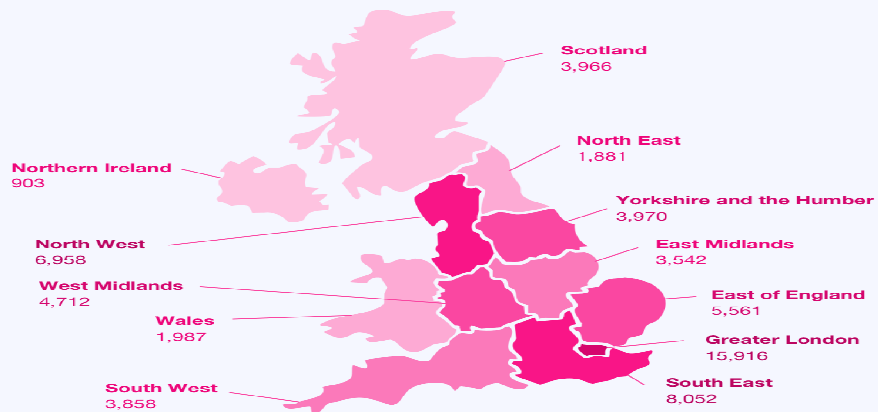


Classifications shown are from SIC 2007 Sections:  
 5510: Hotels and Similar Accommodation  
 5530: Camping Grounds, Recreational Vehicle Parks and Trailer Parks  
 5520: Holiday and other short stay accommodation  
 55201: Holiday Centres and Villages

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## Gyms, Hairdressers, Beauty Salons and Leisure Centres Reopening

61,306 companies



Classifications shown are from SIC 2007 Sections:  
 9802: Hairdressing And Other Beauty Treatment  
 9311: Operation Of Sports Facilities  
 9313: Fitness Facilities

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IN THE HIGH COURT OF JUSTICE  
BUSINESS AND PROPERTY COURTS  
COMMERCIAL COURT (QBD)  
FINANCIAL LIST  
FINANCIAL MARKETS TEST CASE SCHEME  
BETWEEN

CLAIM NO: FL-2020-000018

THE FINANCIAL CONDUCT AUTHORITY

Claimant

-and-

- (1) ARCH INSURANCE (UK) LIMITED
- (2) ARGENTA SYNDICATE MANAGEMENT LIMITED
- (3) ECCLESIASTICAL INSURANCE OFFICE PLC
- (4) HISCOX INSURANCE COMPANY LIMITED
- (5) MS AMLIN UNDERWRITING LIMITED
- (6) QBE UK LIMITED
- (7) ROYAL & SUN ALLIANCE INSURANCE PLC

## Appeal

- Consequential hearing took place on 2 October and declarations made as to what extent the policies in the representative sample respond
- Appeal to the Supreme Court - FCA + 6 insurers + Hiscox Action Group
- Points - quantum, mandatory force of law, total closure and incident/event

IN THE SUPREME COURT OF THE UNITED KINGDOM  
ON APPEAL FROM  
THE HIGH COURT OF JUSTICE  
BUSINESS AND PROPERTY COURTS  
COMMERCIAL COURT (QBD)  
FINANCIAL LIST  
FINANCIAL MARKETS TEST CASE SCHEME  
Neutral Citation: [2020] EWHC 2448 (Comm)  
BETWEEN

THE FINANCIAL CONDUCT AUTHORITY

## 2. The judgment



### The judgment

1. Crux
2. Key dates
3. The wordings - disease and prevention of access
4. Trends clauses
5. Causation
6. Prevalence



# 1. Crux of judgment

- The court ruled that the majority of businesses who hold NDBI and closed due to the pandemic are entitled to be compensated (21 lead policies, 700 types of policy and 60 insurers)
- Insurers should reflect on the clarity provided and, irrespective of any possible appeals, consider the steps they can take now to pay claims
- It also provides persuasive guidance for the interpretation of similar policy wordings and claims, that can be taken into account in other court cases including rest of UK, by the FOS and by the FCA in looking at whether insurers are handling claims fairly



- The test case was not intended to encompass all possible disputes, but to provide clarity on key contractual uncertainties and causation issues. It does not determine how much is payable but provides the basis for doing so
- FCA have published guidance setting out expectation that, following final resolution of the test case (including any appeals), insurers should apply the judgment in re-assessing all outstanding or rejected claims and complaints
- FCA have issued a statement on considerations that should be taken into account when applying deductions of government support received by policyholders



- The judgment says that most, but not all, of the disease clauses provide cover
- Certain denial of access clauses will provide cover but this depends on the detailed wording of the clause and how the business was affected by the Government response to the pandemic
- The test case has also clarified that the covid pandemic and the Government and public response were a single cause of the covered loss, which is a key requirement for claims to be paid even if the policy provides cover
- Insurers did try to say that pandemics were not BI and that policies were never written or priced to cover this
- Each policy needs to be considered against the detailed judgment to work out what it means for that policy. Policyholders with affected claims should have had an update from their insurer by 22<sup>nd</sup> Sept



## 2. Key dates

- **3 March:** UK covid action plan
- **5 March:** covid becomes a notifiable disease in England/Wales
- **11 March:** WHO declares covid to be a pandemic
- **16 March:** Gov directs people to stay at home, stop non-essential contact and unnecessary travel, work from home where possible, and avoid social venues
- **20 March:** Gov directs various categories of business to close, such as pubs, restaurants, gyms etc (given legal effect by Regulations coming into force on **21 March**)
- **23 March:** Gov announces lock-down involving closure of further businesses including all non-essential shops and restrictions on individual movement (given legal effect by Regulations coming into force on **26 March**)



## What did this mean?

- The court found that the announcements given by the Government on 16, 20 and 23 March 2020 constituted “*advice*” rather than mandatory instructions
- The regulations issued by the Government on 21 and 26 March 2020 were held as forming mandatory instructions and gave legal force to the requirements for many businesses to close
- This means that policies with the “*advice*” wording may provide cover for loss resulting from the Government announcements on 16, 20 or 23 March 2020
- However, businesses may only be covered for loss resulting from the 21 and 26 March 2020 regulations if their policy requires Government “*action*” or “*restrictions*” to have “*prevented*” access



## 3. The wordings

- Disease wordings:** provisions which provide cover for BI in consequence of or following or arising from the occurrence of a notifiable disease within a specified radius of the insured premises
- Prevention of access/public authority wordings:** provisions which provide cover where there has been a prevention or hindrance of access to or use of the premises as a consequence of government or other authority action or restrictions



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## Section 2 - Business interruption – optional cover

Additional covers and limits	Automatically included?
Bomb hoax £500,000 in total in any one period of insurance.	✓
Unspecified suppliers £250,000 or 10% of the sum insured, whichever is the less, for any one loss	✓
Unspecified customers £250,000 or 10% of the sum insured, whichever is the less, for any one loss	✓
Storage at other locations £100,000 any one loss	✓
Essential personnel £25,000 in total in any one period of insurance	✓
Exhibitions £100,000 in total in any one period of insurance	✓
Failure of utilities supply £250,000 any one loss	✓
Failure of utilities supply – terminal ends - £250,000 any one loss	✓
Fines, penalties and damages £25,000 in total in any one period of insurance	✓
Loss of attraction £250,000 whichever is the lesser for any one loss	✓
Motor vehicles £500,000 in total in any one period of insurance	✓
Notifiable disease, vermin, defective sanitary arrangements, murder and suicide	✓
£500,000 in total in any one period of insurance ★	✓
Prevention of access – non damage	✓
Prevention of access	✓
Rental charges	✓
Transit £25,000 any one loss	✓

## Section 2– Business Interruption

### 12. Notifiable disease, vermin, defective sanitary arrangements, murder and suicide


**consequential loss** following:

- a) i. any occurrence of a **notifiable disease** at the **premises** or due to food or drink supplied from the **premises**;
- ii. any discovery of an organism at the **premises** likely to result in the event of a **notifiable disease**;
- iii. any **notifiable disease** within a radius of twenty five miles of the **premises**; 

### 13. Prevention of access

**consequential loss** as a result of **damage** to property within a 1 mile radius of **your premises** which prevents or hinders the use of the **premises** or access to it.  
The maximum **we** will pay in total in any one **period of insurance** is stated in the **schedule**.

### 14. Prevention of access – non damage

**consequential loss** resulting solely and directly from an interruption to **your business** caused by an incident within a 1 mile radius of **your premises** which results in a denial of access or hindrance in access to **your premises** during the **period of insurance**, imposed by any civil or statutory authority or by order of the government or any public authority, for more than 24 hours. 

The maximum **we** will pay in total in any one **period of insurance** is stated in the **schedule**.

#### Consequential loss

Loss resulting from interruption of or interference with the **business** carried on by **you** at the **premises** following **damage** to property used by **you** at the **premises** for the purpose of the **business**.

#### Damage(d)

Physical accidental loss of or destruction of or damage to the property insured.

#### Indemnity period

The period beginning when **damage** occurs, and ending when the results of the business cease to be affected because of the damage, but not exceeding the **maximum indemnity period**.

**However for the Notifiable disease additional cover the following definition applies:**

the period during which the results of the **business** will be affected following the loss, discovery or accident beginning:

- a) in the case of a), d), e) and f) with the date of the loss or discovery; or
- b) in the case of b) and c) with the date from which the restrictions on the **premises** are applied and ending not later than the **maximum indemnity period** after that.

60

#### Notifiable disease

Illness sustained by any person resulting from:

- a) food or drink poisoning; or
- b) any human infectious or contagious disease (excluding Acquired Immune Deficiency Syndrome (AIDS)) an outbreak of which the competent local authority has stipulated will be notified to them.

## i. Disease wordings

The policies in this category were written by RSA, Argenta, MS Amlin and QBE. Whilst they were all slightly different, they were, with two exceptions, in a form that provided cover for loss resulting from:

- interruption or interference with the business
- following/arising from/as a result of
- any notifiable disease/occurrence of a notifiable diseases/arising from any human infectious or human contagious disease manifested by any person
- within 25 miles/1 mile/the “vicinity” of the premises/insured location



- Two QBE policies specifically required the business interruption to be “*in consequence of*” an “*event*” within a certain radius of the business’ premises
- The court found that this wording did require the loss to result from specific cases of covid occurring within the relevant radius
- Businesses holding policies with such wording will need to show that local occurrences of covid caused their loss, rather than the national pandemic
- This will be a difficult distinction for businesses forced to close as a result of national government measures rather than local restrictions





- Specified diseases - cholera, dysentery, leprosy, malaria, measles, meningitis, mumps, plague, rabies, rubella, scarlet fever, tuberculosis, typhoid fever, viral hepatitis, and whooping cough (does not include covid, or for that matter, SARS)
- *Any occurrence of a **specified disease** being contracted by a person at the **premises** or within a radius of 25 miles of the **premises***
- ***We shall only be liable for the loss arising at those premises which are directly affected by the occurrence, discovery or accident***
- *order or advice of the competent local authority*
- Closure of or restriction on the use of the premises was due to government order or advice as a result of the occurrence of covid, an infectious disease, so the infectious disease carve-out applied and there was no cover under either of the EIO wordings



- Insurers argued that cover only applied if the disease only occurred in the relevant locality
- The FCA argued this was incorrect - covid outbreak in the relevant policy area was an indivisible part of the disease + the disease occurring in a very large number of places (insured peril is a composite one)
- The court agreed with the FCA's analysis, concluding that the proximate cause of the BI was the notifiable disease + each of the individual occurrences was a separate but effective cause of the national actions
- This is significant for businesses as it means they will not need to point to specific local outbreaks



- The outbreak of disease is the “occurrence” of the disease in the relevant policy area (there only needs to be one person infected with covid within the applicable radius whether or not diagnosed)
- Has the disease gone away/is the business still interrupted?
- Definition of disease per policy? Up to date?
- Severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) is the name of the new virus (11 Feb 2020). This name was chosen because the virus is genetically related to the coronavirus responsible for the SARS outbreak of 2003. Whilst related, the two viruses are different.



- Critically, cover was not limited to outbreaks wholly within the relevant policy area because:
  - (a) the wordings did not expressly state that the disease should **only** occur within the relevant policy area
  - (b) those diseases which are notifiable include those capable of being widespread and of a nature which will engage a response by national (not just local) bodies
- Cases within the relevant policy area are not therefore independent of, and a separate cause from, cases outside the relevant policy area and that vicinity can include all of England & Wales



## ii. Prevention of access

Written by Arch, Ecclesiastical, Hiscox, MS Amlin, RSA and Zurich and wordings provide cover for loss resulting from:

- Prevention/denial/hindrance of access
- Due to actions/advice/restrictions of/imposed by order
- A government/local authority/police/other body
- Due to an emergency likely to endanger life/neighbouring property/incident within a specified area

The court concluded that these clauses were to be construed more restrictively than the majority of the Disease Clauses (findings provide some cover for some insureds under some wordings)



## Key factors

- The location and nature of the emergency/incident and the causal relationship between it and the relevant authority's action:
- The court considered "emergency in the vicinity", "danger or disturbance in the vicinity", "injury in the vicinity" and "incident within 1 mile/the Vicinity" were all requirements that assumed something specific which happens at a particular time and in the local area
- The court therefore concluded that such wordings were intended to provide **narrow localised cover**. As such, for cover to apply, the action of the relevant authority would have to be in response to the **localised occurrence** of the disease and general action taken in response to the pandemic would not suffice



## The nature of the actions/advice/order

- The announcements on 16, 20 and 23 March were characterised as **advice**, rather than **mandatory instructions**, thus potentially engaging clauses with “advice” wordings. Similarly they could amount to an “action” in the context of a clause that contemplated hindrance of use
- An “action” by an authority, which “prevents” access, requires steps which **have the force of law**, since only steps which have the force of law will prevent access. Similarly a restriction “imposed by order” conveys a restriction that is mandatory not merely advisory. As such, the **Regulations** issued by the Government on 21 and 26 March may trigger cover
- Cover for as long as the orders are in force



The required effect of the authority’s action on access to the premises:

- A number of policies required there to have been “prevention” of access. Where that was the case, although physical prevention was not required, there had to have been a closure of the premises for the purposes of carrying on the business

The required effect on the business:

- The court considered that “interruption” did not require a complete cessation of the business but was intended to mean “business interruption” generally - a question of degree



- Whether cover is available will turn very closely upon the precise terms of the policy
  - The application of the government advice and Regulations to the insured's particular business
  - Whether the business was directly mandated to close or affected as a result of the more general "stay at home" requirements and thus induced to close (lower footfall would not demonstrate prevention of access however)
- Prevention means it is impossible to carry on the existing business because of some lawful requirement - businesses which entirely changed their nature might be OK but otherwise prevention is required (and in line with the regulations)



- The 26 March Regulations required restaurants to close but continued to allow takeaway. So where they only offered sit-in food, the order could amount to a "prevention of access" because it closed the premises for the purposes of its existing business
- By contrast, a restaurant that offered sit-in *and* takeaway services would only have its business partially impaired. As such, there may not be a "prevention of access"
- Two restaurants with the same "prevention of access" wording insurance cover, both of which have had to close their premises to sit in customers, could therefore find themselves with different coverage positions



## 4. Trends clauses

- Trends clauses operate to adjust the amount paid out under policies in light of what would have been achieved if the insured peril had not occurred
- Court considered that the starting point is that compensation should put the insured back in to the position it would have been had the composite insured peril not occurred
- This was a critical issue as the value of any cover could be negated (closure/reduction of revenue before the trigger dates in anticipation of closure)
- How then to measure the loss if legislation kicked in after the dates (23 v 26 March) but before the business closed and what about continuation of loss?



- Insurers contended that the insured peril should be narrowly defined - in relation to a disease wording it was argued that the insured peril was the local occurrence of the disease alone
- Other effects of the pandemic + associated government measures could be set up as part of the counterfactual (i.e. a different scenario) as a business "trend" to reduce the claim (i.e. deducting their contribution to the loss BUT they generally caused the loss!)
- The result in practice may be that the insured's indemnity is negligible (cover would be illusory so all counterfactuals should be stripped out!)



## 5. Causation

- Insurers argued that in reality there were multiple causes of loss, such as the virus itself, its impact on public confidence and economic activity, and the other measures imposed by the UK Government aside from its order to close premises
- Insurers therefore argued that it cannot be shown that a business would not have suffered loss but for the occurrence of covid near the premises or, alternatively, but for the Government restrictions
- They suggested that businesses may still have been adversely impacted by, for example, consumer concerns about entering into shops



- The court dismissed the insurers' arguments and agreed with the FCA's construction of causation. It held that covid + the actions, measures and advice of the government + the reaction of the public in response to the disease should all be treated as one composite cause
- Businesses ideally should have records to demonstrate how they were affected by i) the pandemic, ii) government measures and iii) public reaction
- As well as lost revenue figures, information demonstrating how consumers and suppliers were adversely affected, and the resulting impact this had on the business, will help show that covid caused the loss



## 6. Prevalence

- The court did not make any findings of fact as to where covid has occurred or manifested
- Insurers conceded that the categories of evidence put forward by the FCA - specific evidence, NHS Deaths Data, ONS Deaths Data and reported cases - are in principle capable of demonstrating the presence of covid
- Insurers did not suggest that absolute precision is required and that otherwise claims will fail but that a reliable method would suffice



## Implications?

- The judgment could bring welcome news to a large number of policyholders, particularly those with Disease wordings (wording dependent)
- Those with Prevention of Access may also find themselves with cover (if their circumstances satisfy the requirements of their wordings)
- Clearly time will be needed to fully digest the judgment but none of this will be quick as insurers need to consider if any of the findings apply to their wordings and what else needs to be considered for the insured to establish and prove a valid claim (aside from quantum!)
- Indication that insurers are starting to re-consider declined claims (lots have been paying)





# 3. Insurer Dear CEO



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18 September 2020

Dear CEO,

**Business Interruption (BI) Insurance**

On Tuesday, the High Court handed down its judgment on the BI test case. The objectives of the BI test case have and continue to be to achieve clarity as quickly as possible for policyholders and insurers on whether certain BI policies and wordings respond to the Covid-19 pandemic. This judgment is a critical step in obtaining that clarity.

#### Claims handling

We believe that insurers should reflect on the clarity the judgment provides and, irrespective of any possible appeals, consider the steps they can take now to progress claims of the type that the judgment says should be paid. This should include taking all reasonable steps to ensure that all those claims are ready to be paid and settled at the earliest possible opportunity after any relevant appeals.

Insurers should analyse the scope of any appeal. They should then, under Chapter 5 of our [Guidance](#), consider the implications for their relevant non-damage BI policy wordings where they have determined that the test case may affect the outcome on claims generally, including questions of causation.

Where insurers have policy wordings which were:

- affected by the test case, but
- where the relevant questions in the test case are not subject to any appeal,

then they should, in accordance with Chapter 7 of our [Guidance](#) (and the Financial Ombudsman Service's (FOS) expectations for complaints accepted by them), reassess all potentially affected claims/complaints, unless the claim or complaint has been properly settled on a full and final settlement basis. If the FOS has accepted the complaint, the insurer should keep the FOS fully informed.

Where insurers have policy wordings which were:

- affected by the test case, and
- the relevant questions in the test case are the subject of an appeal,

then we expect insurers to continue to progress claims of the type that the judgment says should be paid, as described above, so that they are as progressed as possible when any appeal judgment is handed down.

#### Government support

Insurers should consider our August 2020 [statement](#) on the deductions that some insurers have been making from claims payments for some types of Government support policyholders have received during the pandemic. This statement highlighted particularly that insurers need to consider the appropriateness of such deductions on a case by case basis in the context of their policy, and treat their customers fairly in accordance with [Principle 6](#). It set out the need for insurers to consider individually the precise terms of the policy, the claim and how the policyholder applied any government support they received.

We also noted that the treatment of any forms of Government support as income for tax purposes may well differ from how the support should be assessed under a BI policy. Tax considerations typically do not form any part of the calculation of losses for business interruption policies. We therefore do not consider the Government's treatment of the Small Business, Retail, Hospitality and Leisure or Local Authority Discretionary grants for tax purposes is a proper basis for insurers treating those payments as turnover under the policies. Nor do we see that insurers can apply these amounts as savings against fixed business expenses. This is because the amounts received are not attributable to any particular business expense and policyholders will have used the grants in any number of ways. We expect firms to have explicitly considered the treatment of the various forms of government support

Insurance **POST**

## Government hits out at insurers over grant deductions from BI claims



Emmanuel Kenning

[@InsPostbod](#)

28 Sep 2020

Indicative reading time: 1 minute

**John Glen MP, economic secretary to HM Treasury, has rebuked insurers deducting government grants from business interruption claims payments and warned of further action.**

"It is the government's firm expectation that grant funds intended to provide emergency support to businesses at this time of crisis are not to be deducted from business interruption insurance claims," he stated.

Glen, *pictured*, noted that the effect of making the deductions – [an issue previously reported on by Post](#) – was that rather than supporting businesses and protecting jobs during the pandemic "taxpayer funds are being channelled into savings for insurers".

He called on providers making deductions to "respect the spirit" of the

### Communicating with policyholders

Insurers should communicate directly and as soon as possible with policyholders who have made claims/complaints potentially affected by the judgment to explain the next steps. Under Chapter 6 of our [Guidance](#), insurers should provide at least an initial update on the implications of the judgment by 22 September 2020. We know the level of detail that insurers can provide at this stage, when the scope of any appeal is known, and how quickly they can communicate the full implications for each policyholder will depend on their particular policy wordings and the implications of the judgment for those wordings. We expect insurers to provide the clearest information that they are able to at the earliest opportunity.

### Providing us with information on affected policies

Under Chapter 5 of our [Guidance](#), insurers should update the information they previously provided to us. We will give further details on how they should do that once we know the scope of any appeal.

### Summary

The High Court judgment on the test case has brought greater clarity and certainty for all parties. It is critical that this results in insurers paying valid and successful claims in full at the earliest possible date to support business and consumers during the current situation. Where we see that insurers are not meeting the expectations set out here, we will use the full range of our regulatory tools and powers to ensure they do so. We will also continue to co-ordinate closely with the Financial Ombudsman Service.

## Finalised guidance

### Business interruption insurance test case: Finalised guidance for firms

June 2020

- 6.3 Insurers should publish sufficient details with appropriate prominence and signposting to keep all policyholders with relevant non-damage business interruption policies updated about the test case and its implications for potential claims under their policies. Insurers may publish this information on the firm's website or by other general means. This information should be published promptly after 17 June 2020.

## So?

- Insurers should be doing whatever they can to consider any claims pending any appeal
- Sitting on your hands is not an option
- If claims are delayed compensation could become payable
- Businesses are still under threat
- General reaction post March is to exclude covid...
- Pandemic Re?

Further to MS Amlin's recent letter we continue to review the Financial Conduct Authority (FCA) test case judgment, assess the decisions made and how it impacts the claims we have received.

However, we understand how important it is to resolve this situation as quickly as possible and avoid any unnecessary delay in concluding **whether this affects our decision to decline your claim, and also your subsequent complaint.**

Therefore, although our review is still ongoing and we are unable to confirm cover in respect of your claim, we invite you **on a strictly without prejudice basis** (i.e. without prejudice to the policy position and all your rights) to let us know the total of the losses **you will be seeking to recover under your policy as a result of the impact of Covid 19 on your business,** together with all the evidence you seek to rely on in support - pre & post period of loss if applicable.

Standard turnover accounts;

Profit & loss accounts;

Expense accounts;

Order books (or equivalent) for 6 months pre lockdown and 6 months post lock down;

Diary/booking confirmations;

Records of Employee wages/Staff costs and records of Employee absence;

Details of any payments received under the Government Furlough Scheme and/or Small Business Grant Fund; and

Business decisions taken during this period.



## 4. ICOBS (is your bit right?)



# Broker's duties

- **Assessing the insured's needs**
- Not obtaining insurance
- Not obtaining the insurance the insured wanted
- **Not obtaining insurance meeting the insured's needs**
- Not exercising discretion in a reasonable way
- Failing to act with reasonable speed
- Liabilities associated with Non-Disclosure
- Liabilities associated with Misrepresentation
- **Not advising adequately on the existence of and terms of cover**
- **Other failure to give competent advice**
- Liabilities during the currency of the policy
- Failure in respect of notification and in respect of claims

Based on Jackson & Powell Professional Liability Chapter 10.



## Demands and needs



ICOB 5.2.2

**R**

01/10/2018



(1) Prior to the conclusion of a *contract of insurance* a *firm* must specify, on the basis of information obtained from the *customer*, the demands and the needs of that *customer*.

(2) The details must be modulated according to the complexity of the *contract of insurance* proposed and the type of *customer*.

(3) A statement of the demands and needs must be communicated to the *customer* prior to the conclusion of a *contract of insurance*.

[Note: articles 20(1) and 20(2) of the *IDD*]

ICOB 5.2.2A

**G**

01/10/2018

A *firm* may obtain information from the *customer* in a number of ways including, for example, by asking the *customer* questions in person or by way of a questionnaire prior to any *contract of insurance* being proposed.

ICOB 5.2.2B

**R**

01/10/2018

When proposing a *contract of insurance* a *firm* must ensure it is consistent with the *customer's* insurance demands and needs.

[Note: recital 44 to, and article 20(1) of, the *IDD*]

ICOB 5.2.2C

**G**

01/10/2018

*ICOB 5.2.2BR* applies whether or not advice is given and in the same way regardless of whether that contract is sold on its own, in connection with another *contract of insurance*, or in connection with other goods or services.

## ICOBS 5.3 Advised sales

### Suitability

**ICOBS 5.3.1** A *firm* must take reasonable care to ensure the suitability of its advice for any *customer* who is entitled to rely upon its judgement.

**R**

01/10/2018



### Advice on the basis of a fair analysis

**ICOBS 5.3.3** If an *insurance intermediary* informs a *customer* that it gives:

**R**

01/10/2018



(1) advice on the basis of a fair analysis, it must give that advice on the basis of an analysis of a sufficiently large number of *contracts of insurance* available on the market to enable it to make a recommendation; or

(2) a *personal recommendation* on the basis of a fair and personal analysis, it must give that *personal recommendation* on the basis of an analysis of a sufficiently large number of insurance contracts available on the market to enable it to make a *personal recommendation*;

and in each case, it must be in accordance with professional criteria, regarding which contract of insurance would be adequate to meet the customer's needs. [Note: article 20(1) third paragraph of the *IDD*]

### Personalised explanation

**ICOBS 5.3.4** Where a *firm* provides a *personal recommendation* (other than in relation to a *connected travel insurance contract*) the *firm* must, in addition to the statement of demands and needs, provide the *customer* with a personalised explanation of why a particular *contract of insurance* would best meet the *customer's* demands and needs.

**R**

01/10/2018

[Note: article 20(1) third paragraph of the *IDD*]

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## ICOBS 6.1 Providing product information to customers: general

### Ensuring customers can make an informed decision: the appropriate information rule

**ICOBS 6.1.5**

**R**

01/10/2018



(1) A *firm* must ensure that a *customer* is given appropriate information about a policy in good time and in a comprehensible form so that the *customer* can make an informed decision about the arrangements proposed.

(2) The information must be provided to the *customer*:

(a) whether or not a *personal recommendation* is given; and

(b) irrespective of whether a *policy* is offered as part of a package with:

(i) a non-insurance product or service (see *ICOBS 6A.3* (Cross-selling)); or

(ii) another *policy*.

(3) Appropriate information is both objective and relevant information, and includes *IPID information*

### What level of information needs to be provided?

**ICOBS 6.1.6B**

**R**

01/10/2018

A *firm* must ensure that the level of appropriate information provided takes into account the complexity of the *policy* and the type of *customer*.

[Note: article 20(4) of the *IDD*]

**ICOBS 6.1.7**

**G**

01/10/2018



The level of information required will vary according to matters such as:

(1) the knowledge, experience and ability of a typical *customer* for the *policy*;

(2) the *policy* terms, including its main benefits, exclusions, limitations, conditions and its duration;

(3) the *policy's* overall complexity;

(4) whether the *policy* is bought in connection with other goods and services including another *policy* (also see *ICOBS 6A.3* (cross selling));

(5) distance communication information requirements (for example, under the distance communication *rules* less information can be given during certain telephone sales than in a sale made purely by written correspondence (see *ICOBS 3.1.14 R*)); and

(6) whether the same information has been provided to the *customer* previously and, if so, when.

### Appropriate information for commercial customers

ICOB 6.1.7A

A firm dealing with a *commercial customer*.

G

01/10/2018

(1) may choose to provide some of or all of the appropriate information in an *IPID* (see *ICOB 6.1.10AR*), a *policy summary* or a similar summary if it considers this to be a comprehensible form in which to provide that information; and  
(2) should include the *IPID information* (regardless of whether an *IPID* itself is provided).

ICOB 6.1.9

Cancellation rights do not affect what information it is appropriate to give to a *customer* in order to enable him to make an informed purchasing decision.

G

06/01/2008



## Concerns for brokers

- **Mis-selling** - did you assess fully the client's requirements (were better wordings available/would anyone have wanted pandemic cover)?
- **Poor advice** - was the standard level of cover adequate (plus any optional extensions) and on what basis did you recommend the policy as suitable?
- Have wordings changed since March and how does this judgment affect the policies sold recently and future lockdowns? Does your advice reflect this?
- Unclear, misleading and misinterpreted **policy wordings** - who gets the blame?





## Practical steps for brokers?

- Update your risk register (this is a BIG risk)
- Have clients' solicitors already been in touch with you intimating claims?
- **PI insurance is harder to get covering covid and is much more expensive and you must have it covered to continue to advise clients**
- If you have an exposure how much is your excess and consider this part of TC2.4 (bear in mind the onerous financial resilience surveys)
- Ensure advice to clients over this becomes clearer (i.e. state pandemics will not be covered) and staff trained and up to speed (esp as WFH)



### More Resources:



Handbook Publications



Consultation papers,  
Discussion papers, Policy  
statements



Derivations & destinations



### Terms to be incorporated in the insurance

MIPRU 3.2.4

R

01/10/2018



The contract of professional indemnity insurance must incorporate terms which make provision for:

- (1) cover in respect of claims for which a *firm* may be liable as a result of the conduct of itself, its *employees* and its *appointed representatives* (acting within the scope of their appointment);
- (2) the minimum *limits of indemnity* per year set out in this section;
- (3) an excess as set out in this section;
- (4) appropriate cover in respect of legal defence costs;
- (5) continuous cover in respect of claims arising from work carried out from the date on which the *firm* was given *Part 4A permission* for the *insurance distribution activity* or *home finance mediation activity* concerned; and
- (6) cover in respect of *Ombudsman* awards made against the *firm*.

# 3<sup>rd</sup> Poll

**What are you  
going to do  
now?**



## Learning objectives

This talk will give you an insight into:-

- The result of the FCA's test case on Business Interruption Insurance
- Why compliance with ICOBS is more important now more than ever



## **Other events?**

- FCA's New Supervision Strategy for GI
- Culture and behaviour
- Financial resilience incl client money
- SMCR - have you done it all?



**Thank you for listening**

**Questions and debate please**

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