



BI covid claims - where are we now?

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Today's event

- Thank you to your LI for hosting
- Verbal and chat forum questions welcome
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What I will cover

1. Introduction
2. Summary of Supreme Court Appeal
3. Various cases before the courts
4. What insurers should have done
5. FOS decisions
6. Have brokers been negligent?



Learning objectives

This talk will give you an overview of:-

- Various court cases;
- FOS decisions in key areas - specified illnesses, on premises cover, plague, etc;
- Claims payment statistics;
- The advice process/what does this mean for clients/PII cover.



Just bear in mind

- There is a lot of detail and I will attempt to highlight some of the **KEY** pieces of information (inevitably slides are rather word heavy...)
- This is my personal 'take' (as an insurance practitioner) and is not formal advice so please take up whatever professional help you may need
- Happy to do all my talks in-house



Quick polls



1. Introduction



Background

- Wordings evolved from damage cover to cover all manner of BI incl disease (either all notifiable or a specific list)
- FCA's aim was to clarify key issues of contractual uncertainty (not everything was considered incl the very contentious issue of covid on the premises)
- **SC looked at only 11 wordings from 6 insurers**
- Wider principles to apply to 370,000 policyholders, 700 types of policy written by 60 insurers
- What would insurers have expected to happen if a disease was discovered or if there was a denial of access and what has happened since March 2020?



Initial thoughts...

The Supreme Court recognised that insurers were wrong to argue that:-

1. Coverage was applicable only if there were narrow local restrictions
2. They could deny claims because the cover had not been intended to be provided
3. As the interruption, and therefore losses, would have happened in any event

- The judgment is legally binding on the insurers that were parties to the test case but also provides authoritative guidance for the interpretation of similar wordings

- We are now definitely in "new territory"



- Momentous
- Isn't insurance is an economic necessity?
- Mismatch in expectation between what insureds thought they were covered for vs what their actual insurance was supposed to do (on reflection!)
- SC - "what would a reasonable person have understood the language of the contract to mean?"
- Why did this have to go all the way to the SC?
- FOS complaints reducing
- Some notable court cases however...
- When will all this end?



UK nations

- Key differences between England, Wales, Scotland and Northern Ireland
- What premises could open and when
- And the restrictions placed on them
- And the restrictions placed on us, e.g. masks
- Same type of business could be affected very differently depending on where located and could arguably be covered under the same policy



Claims data to 7 March

- 2,798 interim payments of **£303m**
- 31,478 claims settled at **£1.046bn**
- 42,340 claims have been made
- Data now to be submitted every 6 months
- What happened to the rest as FCA estimated 370,000 policyholders had NDBI cover?
- Howden estimated worldwide insured losses at **£33bn**



2. Summary of the Supreme Court Appeal



Supreme Court Appeal

- i. Causation
- ii. Disease clauses
- iii. Prevention of access clauses



Crux of judgment

- Insurers' appeals were unanimously dismissed despite insurers saying that pandemics were not BI and that policies were never written or priced to cover this
- Policies will provide cover for BI caused by the occurrence of a notifiable disease
 - competing causes will be covered
 - claims cannot be reduced due to covid pre-triggering a downturn
- However, each policy still needs to be considered against the detailed judgment to work out what it means for that policyholder



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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**.

'Crisis' appeal as heritage railway loses £765k in year

 Stuart Anderson



Published: 10:56 AM January 25, 2021



Accepted

£ 115,000



i. Causation

- SC found that causation could be satisfied when the insured event, along with other linked events, all caused one inevitable result
- As a result, local cases of covid + worldwide pandemic + actions, measures and advice of the government + reaction of the public in response to the disease = **one** proximate cause resulting in interruption to a business
- “Absurd” arguments from insurers
- Proximate cause envelope pushed to its maximum?



ii. Disease clauses

- Disease clauses will cover BI resulting from local cases of covid and the wider pandemic and the resulting actions and should be treated as one cause
- Disease clauses will therefore respond to BI caused by government action in response to the disease, provided there has been at least one occurrence of the illness within the specified radius



- Given the historic level of confirmed cases, these disease clauses should respond where covid has occurred within the required distance and, as a result, they should be entitled to cover
- Illness needs to be manifested by a person within XX miles of the premises
- SC - what is rational, clear and simple to apply
- Most unreasonable to 'bury' exclusions (RSA)



iii. Prevention of access

SC reached the same conclusion as it did for the disease clauses

The appeals focussed on:-

1. The nature of the public authority intervention to trigger the clause, in particular, was legal force required
2. The nature of the prevention or hindrance



Nature of intervention

- SC did not accept that a restriction must always have legal force before it can fall within the description
- SC “restriction imposed” may include instructions in anticipation that legal measures will follow shortly afterwards or will do so if restrictions not followed
- An instruction by a public authority may amount to a “restriction imposed” if in clear enough terms to allow reasonable certainty as to what compliance requires
- In most cases the relevant instructions would be directed at the insured premises/use of them



Insurer learning outcomes?

- Has any of this had a bearing?
- Has anything been done to re-establish trust?
- Clarity in wordings - once you establish your intentions, define what is meant carefully and ensure the whole wording is clear and understood by **all** parties
- We had three lockdowns and businesses may still not be back to 2019 levels
- Is everything being done to expedite claims?
- Time for a PandemicRe?



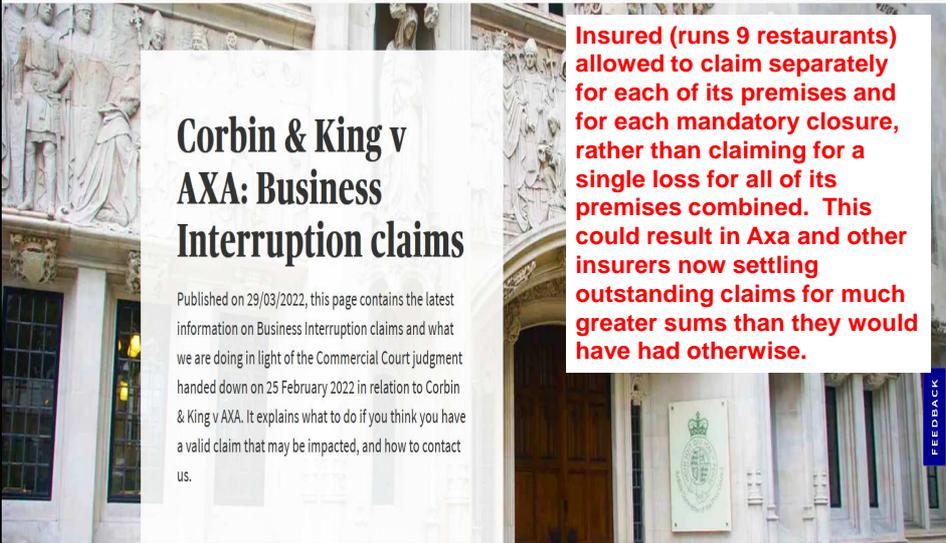
3. Court cases



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Home page / Insurance and coronavirus (COVID-19) / Corbin & King v AXA: Business Interruption claims



Corbin & King v AXA: Business Interruption claims

Published on 29/03/2022, this page contains the latest information on Business Interruption claims and what we are doing in light of the Commercial Court judgment handed down on 25 February 2022 in relation to Corbin & King v AXA. It explains what to do if you think you have a valid claim that may be impacted, and how to contact us.

Insured (runs 9 restaurants) allowed to claim separately for each of its premises and for each mandatory closure, rather than claiming for a single loss for all of its premises combined. This could result in Axa and other insurers now settling outstanding claims for much greater sums than they would have had otherwise.

FEEDBACK

Overview of the claim and judgment

As a reminder, Non-Damage Denial of Access (NDDOA) clauses were considered in the FCA's Test Case back in July 2020. The first instance Court ruled that a clause in respect of government actions in response to a 'danger or disturbance' within 1 mile of the insured premises did not cover Covid claims. This was not appealed to the Supreme Court. See more on the [FCA Test Case](#).

After the test case concluded, the Corbin & King restaurant group issued proceedings against AXA Insurance UK plc (AXA) claiming that AXA's "danger or disturbance" NDDOA wording did cover losses arising from the government restrictions on its business in response to the pandemic. The case went to trial at the end of January 2022 and the judgment handed down on 25 February held that the NDDOA clause in AXA's policy did in certain circumstances provide cover for losses where access to the insured premises was restricted or hindered due to government action in response to the pandemic. AXA is not appealing this decision and are working through the impact of this judgment on all NDDOA claims. ★

What to do if you think you now have a valid claim in relation to your NDDOA clause?

If your policy includes the "danger or disturbance" clause as an operative cover and you have previously made a claim, you will be contacted shortly with a letter explaining what you need to do if you wish to pursue your claim.

If your policy includes the "danger or disturbance" clause as an operative cover and you have not previously made a claim but now wish to do so, please email us on biclaims@axa-insurance.co.uk quoting your policy number and stating that you wish to notify a claim. We will then explain what you need to do next.

FEEDBACK

What are you saying to policyholders who might be affected by this?

All policyholders whose policy includes the "danger or disturbance" clause as an operative cover and who have previously made a claim will receive a letter explaining what they need to do if they wish to pursue their claim.

Please see further information on what we have done following the [FCA's Business Interruption test case](#).

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FEEDBACK

NEED TO KNOW

- The court ruled that Corbin & King was covered for pandemic losses under a non-damage denial of access clause. Until now, claims made under this type of clause have mostly been declined by insurers.
- Claimant lawyers say that the judgment opens the door to potential challenges of other insurers' declinatures where similar wordings were used.
- The specific language used in prevention or denial of access clauses varies in many ways between insurers. One important way in which wordings differ is the stipulated type of authority whose action restricts action.
- Insurers have remained resolute in their position where they previously declined claims under prevention or denial of access clauses, meaning establishing cover – if that is a possibility – will be a matter for the courts or the ombudsman.

The Corbin & King business interruption judgment has the potential to open up insurers to further and more costly claims, but with multiple factors at play there is no guarantee others will win out.

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Greggs ups Covid BI claim against Zurich to £150m ahead of trial next week

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Stonegate alleges 'obliteration of cover' while insurers say it has got policy terms 'fundamentally wrong' in closing submissions

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Football clubs step up BI court case against insurers

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Covid BI claim lodged by Premier League football clubs rests on 'mistaken approach', say insurers



Harry Curtis

23 Aug 2022

Indicative reading time: @ 3 minutes

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Get in touch

General thrust...

- Marsh/RSA4 wording (multiple insurers)
- Stonegate (pub chain), Greggs and FA contend they suffered multiple losses but insurers deny this and argue there was only one relevant single business interruption loss
- Each claimant suffered a separate single business interruption loss for each of the events
- £1.1bn claim by Stonegate alone
- Cases heard back to back by the same court
- Three perils – disease, enforced closure and prevention of access



**Money on
the table...**

**i think
i've had
enough
of this.**

**Or have
we had
enough??**



4. What should insurers have done



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22 January 2021

Dear CEO,

Business Interruption (BI) Insurance

On 15 January, the Supreme Court handed down its judgment on the BI test case. Our aim was to get clarity for as wide a range of parties as possible, as quickly as possible, and the judgment achieves this.

I am grateful for the work of the 8 insurance firms that were parties to the case, as well as all firms impacted by the test case, who co-operated from a shared desire to quickly achieve clear outcomes for policyholders and insurers and avoid protracted litigation. I am also grateful that the Courts delivered the judgment quickly. The speed with which it was reached reflects well on all parties.

Dear CEO 22 Jan 2021

- All claims must be re-assessed in light of SC judgment and valid claims to be paid ASAP
- Following the judgment some claims are now valid (or they should be paid more) and a re-visit is now needed (incl complaints)
- Slow payment should not exacerbate financial pressures
- Cover may now also be available for partial/mandatory closure orders that were not legally binding
- Valid claims should now not be reduced where paid on the basis that a loss would have resulted in any event



- Insurers should consider late claims especially where delay has not compromised their position
- Pragmatic, transparent and consistent approach is now needed rather than creating additional barriers or delays
- August 2020 statement on deductions for some types of government support (grants) but still no certainty re furlough deductions
- Where further legal proceedings occur to clarify any remaining areas of uncertainty the insurer should bear the costs of the insured and should not seek to recover any of their costs in this process (FOS limit £6.5m turnover)



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Government, insurers and FCA must provide clarity on BI furlough deductions if the courts cannot, says FSB

Harry Curtis
29 Aug 2022
Indicative reading time: 3 minutes

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So?

- Have all valid claims been identified?
- Brokers should seek to support to progress claims quickly and they should consider whether it is fair, and in the policyholders' best interests, to notify them if they reasonably consider that they may have a claim under their policy
- If claims are delayed (incl interim payments) compensation could become payable under Enterprise Act 2016 (has this caused any insolvencies?)
- Reputation has been badly damaged – allegations re non-payment of valid claims



5. FOS decisions



What is Business interruption insurance?

Business interruption insurance (BII) covers loss of income suffered by a business because it has had to close or restrict its activities due to certain events.

The Covid-19 pandemic has caused many businesses' activities to be interrupted and income to be lost. Some of these businesses had business interruption insurance (BII) policies and have made claims to their insurer. However, policies vary significantly and while some businesses have been covered in the circumstances of their claim, others haven't.

On this page

1. What is Business interruption insurance?
2. Types of complaint we see
3. What we look at
4. How to complain
5. Putting things right
6. Case studies
7. Example decisions
8. Other useful resources

Insurers have turned down business interruption insurance claims for many different reasons, including:

- There was no business interruption term in the policy
- The policy only provided cover where the interruption was caused by a disease on a list of specified diseases – and this didn't include Covid-19
- The policy only provided cover where the interruption was caused by a case of Covid-19 at the premises and there was insufficient evidence to demonstrate that was the case
- The policy only provided cover in the context of a public emergency in the local area which restricted access to the premises



specifically:

Demonstrating a case of Covid-19 "at the premises"

It is for the customer ("the claimant") to provide evidence which supports their claim.

Although there were many cases of Covid-19 in the UK in March 2020, there was not widespread testing and many other viruses with similar symptoms, such as flu and colds, continued to circulate. For us to determine that, on the balance of probabilities, there was a person with Covid-19 at the premises in the relevant period prior to the interruption, we would require good evidence that Covid-19 was present and not another disease.

So far, we have seen very few claims where that evidence has been provided. We have issued many decisions where we have not upheld the complaint because there has been insufficient evidence to demonstrate a case of Covid-19 at the premises in the relevant period.



On this page

1. What is "at the premises" cover in a BI policy?
2. What we look at
3. Example decisions
4. Technical desk
5. Information for small businesses





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The Supreme Court judgment

The Supreme Court did not consider 'at the premises' policies in the test case brought by the FCA. However, it did consider policies which require a case of Covid-19 within a specified radius of the insured premises (for example, within a mile or 25 miles of the premises).

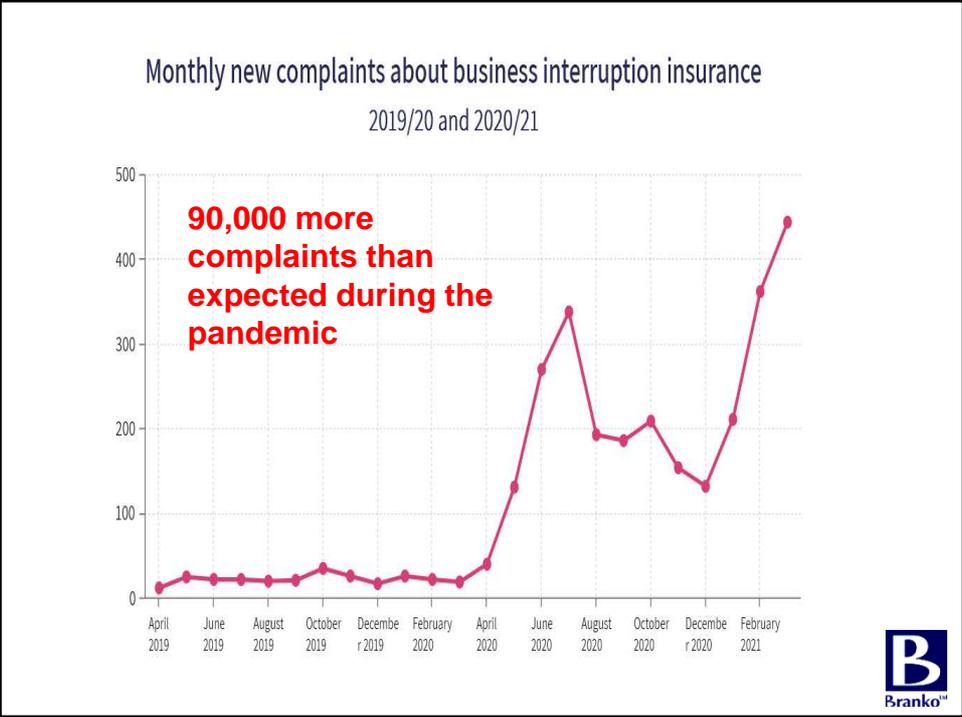
The Supreme Court found that, in principle, each case of Covid-19 within the specified radius of the premises which had occurred in the relevant period prior to the government measures to restrict transmission could be a contributing cause of those measures. Policyholders could therefore recover the losses caused throughout the period of interruption caused by those measures (subject to any limits in the policy).

In our view, the causative effect of a case at the premises can be the same as that of a case within a radius of the premises, and therefore the period of cover provided by an 'at the premises' policy can also be the duration of the government measures - rather than, for example, a short period for cleaning. We will consider the individual facts of each case, as well as the policy wording, before reaching a decision.

It has been necessary for us to form a view on the application of the Supreme Court judgment to 'at the premises' policies in order to resolve the disputes brought to us, but we will continue to review this position in light of any further court decisions or guidance which is issued.

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1. What is "at the premises" cover in a BI policy?
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Key issues

1. Damage only cover
2. Specified diseases
3. Plague
4. At the premises
5. Did not buy the right cover



Damage only cover

DRN-2689087



The complaint

A company I'll refer to as D have complained that Aviva Insurance Limited unfairly turned down their business interruption insurance claim after they were forced to close due to the Covid-19 pandemic.

Mrs W, a director of D, has brought the complaint on D's behalf.

What happened

D hold a business interruption insurance policy with Aviva. D claimed on their policy after they were required to close due to the Government's actions in response to the Covid-19 pandemic.

Aviva turned down D's claim as it said the policy covered business interruption due to damage to property or premises and Covid-19 hadn't caused damage as defined in the policy.

The business interruption section of D's policy provides cover for interruption or interference to their business resulting from:

★ *Damage to property used by You at The Premises for the purpose of The Business occurring during the Period of Insurance caused by any of the following Contingencies...*

The policy defines damage as "Physical loss, destruction or damage".

As this term would require physical loss, destruction or damage to property used by D at their business premises, I don't think it provides cover for D's claim for closure as a result of the Government's response to the pandemic. I'm not aware that Covid-19 caused any damage to property used by D, as defined in the policy.

Extensions for prevention of access and loss of attraction

The policy also has extensions to the business interruption section, which covers 'Damage'

*(1) at the premises or situations or
(2) to the property*

described below by any Contingency as applying to such premises, situations or property, which results in interruption or interference with The Business.

★ Prevention of access and loss of attraction are listed as contingencies, and provide cover, as set out above, for Damage to:

Property within one mile of the boundary of The Premises which physically prevents or restricts access to or use of The Premises.

Property or premises within one mile of the boundary of The Premises, which directly results in a reduction in the Turnover (or Revenue, Fees, or Rentals as insured by this Section) of The Business.

These extensions would require there to have been damage to property or premises within one mile of D's premises, and for that damage to have physically prevented or restricted access to D's premises or resulted in a reduction in D's turnover. It is not clear that Covid-

Specified diseases + plague

DRN-2687631



The complaint

A company which I'll refer to as M complains that Allianz Insurance Plc ("Allianz") unfairly declined a claim under M's business protection insurance policy.

Mrs W who is a director of M brings the complaint on M's behalf.

What happened

M holds a business protection insurance policy with Allianz. Mrs W made a claim on that policy to cover M's losses arising out of the closure of M due to the national government-imposed lockdown in response to the Covid 19 pandemic.

Allianz declined the claim because it said M didn't have cover for the losses it was claiming for. Mrs W didn't agree and thought the policy should cover M for its losses. She said she thought the policy wording for specified illnesses meant that M's claim should be covered, that Covid 19 wasn't excluded under the terms of the policy and that M had a recorded case

"Specified Illness" is defined as:

"illness sustained by any person resulting from:

...

b Acute Encephalitis, Acute Poliomyelitis, Anthrax, Chickenpox, Cholera, Diphtheria, Dysentery, Leprosy, Leptospirosis, Malaria, Measles, Meningococcal Infection, Mumps, Ophthalmia Neonatorum, Paratyphoid Fever, Plague, Rabies, Rubella, Scarlet Fever, Smallpox, Tetanus, Tuberculosis, Typhoid Fever, Viral Hepatitis, Whooping Cough or Yellow Fever an outbreak of which the competent local authority has stipulated shall be notified to them." ★

Having considered the list of illnesses in the policy, I'm not persuaded this section provides M with cover in the circumstances as Covid 19 isn't one of the specified illnesses. I realise that Covid 19 wasn't something Allianz would have known about when the policy was drafted, but I don't think that changes my findings. I'll explain why. ★

There are other policies that were on the market that do provide cover for the present pandemic. These are usually policies that cover all notifiable diseases, which are set out and updated on a Government defined list. Whereas M's policy sets out a specific list of the illnesses which are covered by the policy. And having reviewed the policy wording, there is nothing which implies that it provides cover for other illnesses, including any new illnesses which might emerge. And there are several illnesses that the policy doesn't cover, including SARS (which is another type of Corona★). So I think the purpose of the policy is to provide cover in the event of the specific illnesses listed and I don't think the policy can or should fairly be interpreted as covering any illnesses that aren't specified in the list set out

I've also considered whether Covid 19 might fall under 'Plague' which is one of the illnesses specified in the list of illnesses covered, but I don't think it does. The policy doesn't define 'Plague', but it does have a specific medical classification and is an infectious disease in its own right. Plague appears as a specified disease in the Government's list of notifiable diseases and is caused by a specific bacterium. In contrast Covid 19 is a viral infection. So, having considered the position carefully I am satisfied that the capitalised term 'Plague' used in the policy was intended to only cover the recognised medical illness Plague. ★

Finally, whilst I appreciate it's possible that 'Plague' could be interpreted on its widest dictionary definition as an 'infectious disease', 'affliction' or 'pestilence', I think that doing so would render the list Allianz has set out, redundant. That's because it would cover most of the specified illnesses set out within it, so it would be pointless to list them as Allianz has. So overall, I think the fact that Plague is listed separately in the policy and is different in nature to Covid-19 is enough for me to determine that Covid 19 does not fall within the term 'Plague' in the policy and I don't think it would be fair and reasonable in all the circumstances to treat the policy as if it did.

Mrs W says that Covid 19 isn't excluded under the terms of the policy and I have considered this. However I think the policy has a defined list of illnesses that it provides cover for under this section – so any illnesses that aren't on the list wouldn't be covered under that section of

At the premises

DRN-2539279



The complaint

Mrs R has complained that HDI Global SE unfairly turned down her business interruption insurance claim, after her business was affected by the Covid-19 pandemic.

What happened

Mrs R holds a business interruption insurance policy with HDI. She claimed on her policy after her business was affected by the Government's actions in response to the national pandemic.

HDI said that the policy wouldn't provide cover for Mrs R's business interruption if it was due to the national coronavirus crisis, rather than an outbreak at the premises. As Mrs R didn't indicate that someone at the premises had Covid-19, HDI turned down her claim.

As Mrs R was unhappy with HDI's response, she brought her complaint to our service. She felt HDI should pay her claim.

The most relevant part of the policy covers interruption or interference in consequence of:

- a) closure or restrictions placed on the **Premises** on the advice of or with the approval of the Medical Officer of Health for the Public Authority as a result of a **Notifiable Human Disease** occurring at the Premises

The policy defines Notifiable Human Disease as:

An illness sustained by any person caused by

- a) *food or drink poisoning*
b) *any human infectious or contagious disease*

an outbreak of which the competent public authority has stipulated shall be notified to them

Covid-19 is a notifiable disease, but I don't think this extension covers Mrs R's claim. I say that because the policy requires the closure or restrictions to Mrs R's premises to have been as a result of a case of the notifiable disease occurring at the premises. Mrs R hasn't indicated that anyone at the premises had Covid-19. Instead, her business was affected by the Government Act in response to the national pandemic. ★



I understand that one of Mrs R's employees had to isolate after their child had Covid-19, but there isn't anything to indicate that her employee, or anyone else, had Covid-19 at her premises.

26 pages to uphold the claim against Allianz

DRN-3026033



The complaint

Ms C, on behalf of R, has complained about Allianz Insurance Plc's handling of the claim made on R's retail insurance policy following an interruption to R's business in relation to the COVID-19 pandemic. Ms C is unhappy that the settlement of the claim has been limited and Allianz gave her misleading information during the course of the claim.

What happened

R operates as a hair salon and held a retail insurance policy underwritten by Allianz. In the week prior to 23 March 2020, one of R's employees had been working in the salon but reported symptoms of COVID-19, that she was experiencing, to NHS 111 - who told her to self-isolate on 22 March.

FOS mentions the broker

DRN-2539566



The complaint

A community interest company I'll refer to as C have complained that Ecclesiastical Insurance Office Plc turned down their business interruption insurance claim. Mr Y, director of C, has complained on C's behalf.

What happened

C hold a charity protect insurance policy with Ecclesiastical. C claimed on their policy after they were required to close due to the Government's actions in response to Covid-19.

★ Ecclesiastical said that the policy didn't cover C's claim because they didn't have business interruption insurance as part of their policy.

C thought they did have business interruption insurance, but said that if they didn't then another part of the policy should cover their claim, due to the losses they'd experienced. C brought their complaint to our service.

cover that C bought. I've also looked at the insurance proposal form. This lists the same areas of cover as the schedule and doesn't include business interruption. This further indicates that C didn't buy business interruption insurance as part of the policy. ★

I understand C feels that they wanted to buy business interruption insurance. However, as the policy was sold by a broker, I'm not able to make a finding on what happened during the sale in this decision. If C is unhappy with the way the policy was sold they would need to complain about that separately to the broker. ★

C haven't indicated which terms in the other parts of the policy they feel should cover their claim. I've looked at the policy and I don't think the areas of cover, that I've mentioned above, cover the interruption to C as a result of the pandemic and the Government's related actions. I say that because they cover other types of risks, such as legal disputes.

C have referred to the FCA's test case. However, not all policies and policy terms were considered as part of the test case. And I don't believe C's claim would be impacted by this, as C didn't have business interruption insurance cover.

6. Broker negligence

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Pound Gates faces £10 million lawsuit over pandemic losses – a "first" for brokers

by Micah Guiao
04 Jul 2022

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What's being alleged?

1. 70 nurseries and £10m claim against Ecclesiastical
2. In 2020, the High Court ruled that the policies, among others underwritten by Ecclesiastical with the same wording, did not provide cover as part of the FCA test case – FCA did not appeal this
3. Nurseries with policies from other insurers were able to claim for losses suffered as evidence that PG failed its clients
4. Other smaller/medium sized brokers should be able to relate to this
5. Will be expensive regardless

Fieldfisher are saying...

- Policyholders rely on their brokers to find them the best available insurance coverage at the most cost-effective price, and it is our contention that on this occasion the nurseries were badly advised by Pound Gates
- Hundreds of nurseries had insurance that did not cover them for their loss of earnings when the pandemic broke out and lockdowns were imposed, leaving each of them in a dire financial situation
- A key point is that other insurance brokers recommended different insurance policies with pandemic cover to childcare nurseries that did pay out for losses, with similar or in some cases cheaper premiums.



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.



How have needs been understood and was a better wording available?

In addition to the insurance described above, Section A2 is extended to cover:

DESCRIPTION OF ADDITIONAL COVERS EXCLUSIONS AND LIMITATIONS

Loss of *Income* occurring during the *Indemnity Period* resulting from

4.0 *Notifiable Disease*

An outbreak of any infectious or contagious disease

- occurring at the *Premises*, or,
- which is attributable to food or drink supplied from the *Premises*, or,
- occurring within 25 miles of the *Premises*, which, by reason of the abnormal number of cases,
 - causes prospective guests to refrain from making bookings for accommodation, ★
 - gives legal grounds for guests to cancel bookings for accommodation already made.

This extension is not operative in respect of Acquired Immune Deficiency Syndrome, (AIDS).

Check the following

1. Did you fully assess client requirements?
2. Was pandemic cover available and at what cost?
3. What market analysis did you undertake and were wider policy wordings/limits available to you?
4. How were any scheme wordings constructed?
5. Why did you recommend the policy as being suitable for that client?
6. Did you state the consequences of not following your advice?
7. If all this was done how can you then be blamed for insurer interpretation?



Practical steps?

1. Neither the pandemic/its financial effects are over - are there more claims/notifications to come through?
2. **Are you covered for covid under your PII?**
3. 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)
4. Ensure advice to clients over this is very clear i.e. state pandemics will not be covered and staff are trained and up to speed (esp if WFH)



Notification Form

SUP 15 Annex 4

(June 2020)

Firm name ("The Firm")

Firm Reference Number

Address

Professional indemnity insurance (PII) cover

For example:

- cover not renewed;
- cover exhausted; and
- cover does not meet FCA or PRA requirements. ★



SECTION E: PII Self-Certification [help](#) [?](#)

4. Professional Indemnity Insurance Details

Please complete the table below if the answer to Question 3 is "Yes", otherwise leave blank.

PII Basic Information

PII policy	Limit of indemnity received			Retroactive start date (if any)	Annualised premium (Sterling)	Insurer (from list)
	Mortgage advising/arranging	Non-investment insurance advising/arranging/dealing/assisting	Retail investment advising/arranging			
	A	B	C	D	E	F
1						

PII policy	Start date	End date	IMD firms should state their indemnity limits in		Aggregate	Delete
			Indemnity Limit (Single) in: Euros/Sterling/Unlimited	Single		
	G	H	I	J	O	K
1						

PII policy	Business line	Policy excess	Delete	PII policy	Policy exclusions	Delete
1				1		

Number of Business Lines to add:

Number of Policy Exclusions to add:

I must remind you in strong terms that given the requirement of PI insurance under MIPRI 3.2 is a minimum condition, the FCA's position is that firms which do not have this in place **should not be continuing to undertake new business until such insurance has obtained.**

Therefore, in order that I can be satisfied that you are seeking proactive remedy to this regulatory breach, please forward me a summary of the measures you have taken so far to obtain alternative PI insurance and the status of your discussions with individuals brokers/firms. **Please also indicate during what timescales you envisage you will have the correct coverage in place so that I assess whether I need to conduct a review of your firm's current permissions and whether these will require temporary suspension.**

Please provide this information to me by xx after which I will revert to you with determination of our intended action.



Manchester Underwriting

- Around 150 notifications but most have not progressed
- Several cases now being litigated with two in the £250K to £500K category and one at £1m+ and these businesses were badly affected by the pandemic (two of these only notified recently)
- Where there is cover, it's often sub-limited at a very low level in relation to the insured's loss (why was it sold then?)
- Claimants are arguing that the broker has been negligent in selling a policy that doesn't give the cover that was needed



Learning objectives

This talk will give you an overview of:-

- Various court cases;
- FOS decisions in key areas - specified illnesses, on premises cover, plague, etc;
- Claims payment statistics;
- The advice process/what does this mean for clients/PII cover.



Thank you for listening
Questions and debate please
www.branko.org.uk
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