

Business Interrupted and Justice Delayed? High Court to rule on business interruption insurance policies but affected businesses should seek advice now

Business Interruption policies

Most businesses have suffered considerable disruption as a result of the restrictions imposed as a consequence of the Covid-19 pandemic. Those who have business interruption (“BI”) policies may be covered for certain types of loss. The starting point in assessing whether a policyholder may be able to make a claim under the relevant BI policy is to carefully examine its terms.

Whilst each case will turn on its own facts, BI insurance cover for the losses flowing from Covid-19 is most likely to be triggered where the policy contains a non-damage BI extension for infectious diseases. A typical formulation contained in such clauses is to provide cover for the closure of part or whole of the insured’s premises by an order of a public authority as a result of a ‘notifiable’ human infectious disease.

On 5 March 2020, the UK Government listed coronavirus as a ‘notifiable disease’ which was thought to satisfy the requirements of many policies. Nevertheless, businesses have seen their BI claims rejected. Consequently, a number of action groups have been set up by policyholders to pursue claims against insurers including the Hiscox Action Group.

FCA Test Case

On 1 May 2020, the Financial Conduct Authority (“FCA”) announced that it intended to obtain court declarations as part of a test case, aimed at resolving any contractual uncertainty in respect of BI insurance cover.¹ A representative sample of 17 BI policy wordings have been selected to achieve this objective.

Following a review of all the information received, the policy wordings which best represented the key issues were selected and eight insurers have been invited to participate in the test case including Zurich Insurance plc and Royal & Sun Alliance Insurance plc.

The FCA is due to file its Claim Form and Particulars of Claim on 9 June with the insurers’ Defences due on 23 June 2020. The case itself will be heard by the High Court in the second half of July over the course of a 5 to 10 day hearing.

Expected Difficulties

The test case is unlikely to be a panacea for all affected businesses. For many, the proceedings brought by the FCA have simply come too late. Indeed, a judgment is unlikely to be handed down until at least August 2020.

In addition, it is also possible that any such judgment could be the subject of an appeal, again elongating the time for businesses to wait.

Irrespective, the policy wordings chosen by the FCA are necessarily limited. There will be a range of policies which are simply not covered by the test case. The FCA have also highlighted that the list of insurers identified is not exhaustive. It is likely that many other insurers will have policies that are affected by the test case.

Finally, the test case is highly unlikely to directly consider mis-selling claims that may arise against insurers and intermediaries as a result of ineffective BI policies.

What should businesses do?

Helpfully, the FCA have confirmed that the test action will not prevent individuals from pursuing issues through the courts or taking eligible complaints to the Financial Ombudsman (“FOS”). To avoid further delays, it may be prudent to consider commencing these actions in advance of the High Court judgment in the test case.

FOS

¹ <https://www.fca.org.uk/news/statements/insuring-smes-business-interruption>



The FOS have confirmed that they will deal with BI related complaints. The service is free to use and the FOS will consider complaints by a range of consumers and businesses including larger SME's i.e. firms with an annual turnover of under £6.5 million, and either an annual balance sheet total of under £5 million or fewer than 50 employees.

The FOS can provide a satisfactory outcome to disputes under £350,000 without businesses and consumers having to incur the costs of taking the matter to court. It is strongly advised, however, that those seeking redress from the FOS seek specialist advice prior to submitting a complaint to their insurer or intermediary.

Mis-selling Claims

Claims could be brought by businesses who have been mis-sold policies that purported to cover BI but do not provide appropriate coverage, contrary to the representations, advice and/or recommendations of an insurer or intermediary. It is important that evidence is collated and legal advice sought as soon as practicable in relation to these potential claims pending the judgment in the test case.

At Forum, we have a wealth of experience in assisting clients with mis-sold insurance policies and other financial products. Our team of expert barristers can assist in helping businesses and consumers to navigate the legal and regulatory options available for redress.

Contact Us

If you or your clients have any legal issues relating to the above matters, please do get in touch with us at clerks@forumchambers.com