

Business Interruption Insurance: Are you covered?

MARK ASPIN DIRECTOR AND HEAD OF DISPUTE RESOLUTION
PROVIDES USEFUL INFORMATION ON BUSINESS INTERRUPTION
INSURANCE.

As some areas of commerce – at least tentatively – look to restarting operations over the coming weeks, those businesses which have been totally closed over the past weeks will be looking forward to seeing an income stream restarting.

Whilst income has been reduced (or stopped) and places of work closed, many businesses have been looking at their insurance policies to see if they are insured within their business interruption (BI) insurance cover. It's an area that has generated press interest as well.

Back on 15 April, the Interim Chief Executive of the Financial Conduct Authority (FCA) wrote to insurance companies with a focus on what the Authority expecting for processing BI claims. This contained a potentially worrying statement for those insured:

“Based on our conversations with the industry to date, our estimate is that most policies have basic cover, do not cover pandemics and therefore would have no obligation to pay out in relation to the Covid-19 pandemic.”

However, the key words are “estimate” and “basic cover”. What actually needs to be remembered is that each individual policy wording is different – and each individual insurance claim needs to be assessed separately.

An insurance policy is, in legal terms, a contract and the principles of determining what is and what is not covered are long established in law. The test of interpretation is *“what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean”*.

Subsequent case law has made it clear that if the words of a contract are clear, that meaning generally is given effect. Surrounding circumstances are not readily invoked – especially retrospectively. Onerous clauses have an increased burden on the insurer relying on them.

So far, there is no England & Wales specific cases on the question of whether or not BI cover includes a pandemic. Some foreign courts have looked at similar areas which may prove helpful to our courts, but will not be binding. Therefore, the FCA have indicated that they intend to apply to court to seek a declaration on “key relevant cases” on “specific policy clauses”. Insurance companies have been asked to respond to this by Friday 15 May.

This will no doubt provide some guidance and answers in respect of some specific policies. However, it cannot provide an answer to every single case, which still needs to be interpreted on their own merits.

Therefore, if you believe your business has BI insurance which *should* cover any current reduction in the income, make sure you do submit a claim in accordance with your notification process – any delay here could result in a separate ground to refuse cover; and co-operate with your insurers in providing information requested. If indemnity is declined, don't hesitate to take specific legal advice on your exact policy wording. Whilst the FCA intended court action may remove some ambiguity, the FCA guidance is clear that it does not preclude anyone else taking separate action including by way of complaint through the Financial Ombudsman Scheme.

If you would like more information about the issues raised in this article please contact Mark Aspin on 01228 516666.