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# Coronavirus: business interruption insurance



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## Summary

Business interruption insurance compensates policy-holders for costs arising from events that close or severely disrupt operations. The coronavirus pandemic led to many claims, as well as disputes about whether and how far policies did (or should) provide cover for losses.

## Demands for Government action

Many businesses wanted the Government to declare the novel coronavirus a notifiable illness and to order businesses to close. They expected that this would allow them to claim under business interruption policies. The UK Government made Covid-19 a notifiable disease on 5 March 2020 and advised many businesses to close on 16 March.

## The importance of policy wording

But the insurance industry warned that few policies were likely to provide cover, even if the Government forced businesses to close. Over the previous decade or so, insurers had redrafted policy wording to exclude diseases not explicitly named.

The Government and the industry advised businesses to refer to the specific wording of their policies. Businesses could also consider [the other forms of support available](#).

## Disputes and legal action

Many policy-holders argue that the wording in their policies is not clear or seems to permit claims, although their insurers have argued the opposite. Small businesses can complain to the Financial Ombudsman Service (FOS) about this.

The Financial Conduct Authority (FCA) noted that few policy-holders were likely to be covered. It sought a judgment on a set of specific policy wording from the High Court. The court delivered its judgment in September 2020, largely ruling in favour of policy-holders. In January 2021, after an appeal, the Supreme Court also found in favour of policy-holders.

## The future

Some commentators noted that the scale of the disruption is such that the industry would not in any event be able to cover the losses. This might, they argue, be a case where the State should take charge, or at least seek a public-private partnership.

# 1 Government actions and statements

Potential business interruption claims tended to rely on specific Government actions – most notably the declaration of notifiable diseases and requirements to cease operating or trading.

The Government declared Covid-19 a notifiable disease in England on 5 March 2020<sup>1</sup>, bringing England into line with Scotland (22 February)<sup>2</sup> and Northern Ireland (28 February)<sup>3</sup>. It was declared a notifiable disease in Wales on 6 March.<sup>4</sup> This change meant that all confirmed or suspected cases must be reported to government authorities.

On 16 March, the Prime Minister made a statement advising the public to observe social distancing, to work from home if possible and to “avoid pubs, clubs, theatres and other such social venues”.<sup>5</sup>

The following day, while announcing [the wider package of government support to businesses](#), the Chancellor asserted that “changed medical advice” would be sufficient to allow claims from businesses with “a policy that covers pandemics”. He went on that “for those businesses that do have a policy that covers pandemics, the Government’s action is sufficient and will allow them to make an insurance claim against their policy.”<sup>6</sup>

The then shadow Chancellor, John McDonnell, urged more “clarity” in the Government’s position. He asked whether the Chancellor would “make it clear to the insurance companies that those in the hospitality sector—the pubs, the clubs, the theatres, the festivals—are closing on the instruction of the Government?”. He stated that doing that would mean that “most of them, even if they do not have ‘pandemic’ in their insurance policies, will be covered.”<sup>7</sup>

The Chancellor confirmed that the insurance industry had agreed that it would equate the Government’s “advice” with a “ban” on the operation of these sectors. He said that “the insurance industry will honour insurance

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<sup>1</sup> Department of Health and Social Care, [Coronavirus \(COVID-19\) listed as a notifiable disease](#), 5 March 2020 (accessed 12 November 2021)

<sup>2</sup> Scottish Government, [Coronavirus becomes notifiable disease in Scotland](#), 22 February 2020 (accessed 12 November 2020)

<sup>3</sup> Northern Ireland Department of Health, [Covid-19 becomes a notifiable disease in Northern Ireland](#), 28 February 2020 (accessed 15 November 2021)

<sup>4</sup> The Health Protection (Notification) (Wales) (Amendment) Regulations 2020, [No. 232 \(W. 54\)](#)

<sup>5</sup> Prime Minister’s Office, [Prime Minister’s statement on coronavirus \(COVID-19\): 16 March 2020](#) (accessed 15 November 2021)

<sup>6</sup> HC Deb, 17 Mar 2020, [c932](#)

<sup>7</sup> *Ibid.*, [c934](#)

contracts that would have been triggered if the advice had been to ban certain things, rather than it being advisory not to do them.”<sup>8</sup>

Notably, the Chancellor’s response did **not** indicate that “most” businesses would now be able to claim on their insurance, as had been suggested by the Shadow Chancellor. As discussed below, this reflects somewhat differing expectations of business interruption insurance that would influence stakeholder priorities and reactions.

On 23 March, the Prime Minister made a further statement that converted general advice into an instruction – and so began the lockdown.<sup>9</sup>

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<sup>8</sup> HC Deb, [c936-937](#)

<sup>9</sup> Prime Minister’s Office, [Prime Minister’s statement on coronavirus \(COVID-19\): 23 March 2020](#) (accessed 15 November 2021)

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## 2

## Early business priorities and reactions

At the start of the crisis, many businesses urged the Government to declare Covid-19 a notifiable disease and to order the closure of businesses. They believed that this would enable them to make claims under business interruption and cancellation policies.<sup>10</sup>

But it was not clear how many businesses had insurance policies that would actually pay out should the Government do this – and this matter was missed in some discussion.

The BBC went on to note that the “government has bowed to pressure and changed its stance on insurance to cover firms for coronavirus losses in England”. The Government said that “this will help companies seek compensation through their insurance policies in the event of any cancellations they may have to make as a result of the spread of the virus.”

The report also noted that the Association of British Insurers (ABI) had said the Government's decision “was unlikely to apply retrospectively” and that “standard business insurance policies are designed and priced to cover standard risks, not those that are very unlikely, such as the effects of Covid-19”. It urged policy-holders “to check the small print of their policies.”<sup>11</sup>

As the BBC report noted, the insurance industry was warning that few businesses would be covered at all. But not all reporting included the industry's caution. *The Mirror*, for instance, stated that “[t]he official designation means that companies will be able to claim on their insurance for cancellations they have been forced to make because of Covid-19.”<sup>12</sup>

Reporting often highlighted other barriers rather than the general issue of non-coverage. For instance, in another article from 4 March, the BBC highlighted other stipulations – although the article later went on to quote industry cautions about the wording and general exclusions:

Thousands of businesses may not be able to claim for losses incurred by the coronavirus outbreak, despite the reclassification of the disease.

On Wednesday the government said it would declare coronavirus as a “notifiable disease”, a classification required by many insurance policies.

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<sup>10</sup> BBC News, “[Government clarifies coronavirus insurance stance](#)”, 4 March 2020 (accessed 2 November 2021)

<sup>11</sup> [Ibid.](#)

<sup>12</sup> *The Mirror*, “[Coronavirus declared a 'notifiable disease' by government in boost for worried firms](#)”, 4 March 2020 (accessed 2 November 2021)

But the Association of British Insurers says most business insurance policies are still "unlikely" to cover losses.

Many policies will only cover firms if the virus is found on-site.

Several insurers are telling customers that they should check the detail of their policy to see whether they are covered.

It has left businesses worried about expected virus-related losses.

Lara Lloyd from Totnes in Devon runs residential art courses and trips abroad. Her family-run business, Coombe Farm Studios, has already had a number of cancellations.

Her insurer told her that they would pay for loss of profits caused by the occurrence of disease on-site, and then only if the premises are closed on the order or advice of "a competent authority".<sup>13</sup>

The Prime Minister's advice to "avoid" establishments on 16 March led to complaints from businesses that they had been left "in limbo". Although they faced dramatic falls in trade, they would need an outright "ban" to enable them to make claims on business interruption and cancellation insurance policies, as *The Times* reported:

Kate Nicholls, chief executive of UK Hospitality, a trade body for the hospitality industry, said that Mr Johnson's stance was "catastrophic for businesses and jobs".

She added: "The government has effectively shut the hospitality industry without any support, and this announcement will lead to thousands of businesses closing their doors for good, and hundreds of thousands of job losses. This latest advice leaves the industry in limbo, with no recourse to insurance."<sup>14</sup>

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<sup>13</sup> BBC News, "[Businesses could still lose out on coronavirus insurance claims](#)", 4 March 2020 (accessed 2 November 2021)

<sup>14</sup> *The Times*, "[Coronavirus pandemic: Plea to remain at home 'catastrophic' for pubs and clubs](#)", 17 March 2020 (accessed 2 November 2021)

### 3

## The insurance industry's position

Since the issue first arose the Association of British Insurers had stressed that most businesses were unlikely to have cover for pandemics. They urged customers to refer to the specific wording of policies and to discuss the matter with their insurers or brokers, as set out in a statement and associated guidance on 4 March:

Does standard business interruption insurance provide cover for businesses who are not able to operate due to the effects of Covid-19?

- Insurance for business interruption resulting from Covid-19 is likely to be rare. Businesses who are concerned about the impacts of Covid-19 should check the scope of their cover, and check with their insurance adviser or broker. Standard business insurance policies are designed and priced to cover standard risks and are therefore unlikely to provide cover for the effects of global pandemics like Covid-19.
- Businesses may have chosen to purchase cover that will specifically provide for business interruption arising from 'notifiable diseases'. However, this type of extension is not commonly included as standard.

[...]

Are there any other extensions to business interruption that may provide cover?

- Some coverage may exist if the business has purchased a 'non-damage, denial of access' extension to a business interruption policy. Again, purchase of these extensions tends to be rare and this is not generally covered under standard business interruption policies.
- Generally, 'denial of access coverage' applies to cordoned off areas and loss of trade resulting from a denial of access to the premises (e.g. as a result of a police cordon). If a business is forced to close or is told to close by an appropriate authority or is cordoned off, this could trigger a claim under a 'non-damage, denial of access

business' interruption extension if the infectious disease cover is unspecified or if it includes Covid-19.<sup>15</sup>

*Insurance Age* reported a number of insurers' approaches on 9 March. Axa explained its approach to the question of notifiable diseases as follows, highlighting that this approach would exclude claims arising from a new pathogen:

Axa said in a statement: "In general, when our Business Interruption policies provide an extension in cover for infectious diseases, they list the diseases by name. Only for those diseases will they compensate for financial losses resulting from premises having to close.

"Our wordings don't refer to a general class of notifiable diseases, but they name each disease individually. When Covid-19 was added to the list of notifiable diseases in England, it did not change policy coverage."

It stated that UK insurers use this precise approach of naming individual diseases rather than referring to a group because they cannot cover risks that they can't assess.<sup>16</sup>

### 3.1 The industry's earlier review of policy wording

Commentators from within the industry have maintained that insurers had recast general wording of policies to minimise their exposure to pandemics. *The Financial Times*, for instance, reported the industry's confidence that it had learnt from the earlier experience of the Sars outbreak – "typically" adding infectious diseases to lists of exclusions from coverage in policies:

"The insurance industry foresaw what we are seeing now," says Eric Dinallo...[of] law firm Debevoise & Plimpton. "The insurance companies managed this exact risk and exposure appropriately."<sup>17</sup>

The report went on to note that while add-ons that provided such coverage had been available, they hadn't been popular. In addition, they were "designed for localised outbreaks of infection" – such as a restaurant employee spreading norovirus – rather than the effects of a pandemic.

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<sup>15</sup> ABI, "[ABI comment on Coronavirus and commercial insurance](#)", 4 March 2020 (accessed 9 March 2020). The original text is now available at Barnes Roffe, "[Covid 19: Insurance](#)" (accessed 2 November 2021)

<sup>16</sup> *Insurance Age*, "[Axa confirms position on coronavirus business interruption coverage](#)", 9 March 2020 (accessed 2 November 2021)

<sup>17</sup> *Financial Times*, "[Business disruption insurance: can it help with coronavirus?](#)", 6 April 2020 (accessed 2 November 2021)

Nevertheless, not all policy wording (even if intended to do so) excluded claims arising from such wider events, [as highlighted by the Financial Conduct Authority](#).

## 3.2 Principles for dealing with claims

The ABI published a set of principles that insurers should follow when dealing with claims from policy-holders who have valid cover:

While the majority of customers will not have purchased cover for the effects of COVID-19 on their business, where cover does apply, ABI members have a clear set of principles for the handling of these claims to reassure customers at this uncertain time, clarifying and reinforcing existing best practice in claims handling. Business interruption claims can, in general, be complex to assess and determine quantification.

They often require a clear understanding of the business and how it was operating before the interruption, however, insurers are experienced in dealing with these issues and in supporting their customers through this process.

1. Business interruption claims can require specialist expertise, so insurers will ensure clear, accurate and timely communication with customers when dealing with these claims.
2. Insurers will support their customers throughout the claims process, with dedicated teams of experts and appropriate resources to manage the volume and complexity of COVID-19 business interruption claims.
3. Insurers will clearly explain to their customers what information is needed to enable the swift assessment and quantification of their business interruption claim.
4. Insurers recognise that cash flow is critical for the survival of businesses at this time. Where a customer's policy covers certain losses for business interruption as a result of COVID-19, insurers will pay the claim as soon as they receive evidence to support this.
5. Insurers will seek, where possible, to make interim or part payments where claims are ongoing.
6. These interim or part payments will flow from the claim and evidence presented, helping to relieve some of the more immediate pressures that customers are facing
7. Where an insurer receives evidence in support of a valid claim for business interruption that clearly shows that the policy limit for the

claim will be exceeded, they will make payment to the customer up to the maximum policy limit for that claim without undue delay.

8. Insurers will promote a culture of providing timely support to their customers, with the involvement and oversight of senior or executive level representatives where appropriate, enabling business customers with cover to put plans in place to deal as best they can with the most pressing issues.
9. Where an insurer reaches a decision not to pay a claim, they will notify their customer promptly and set out their reasons in full in plain English. This should include details of the insurer's complaints procedure.
10. Where customers are not satisfied, their complaints will be dealt with by insurers promptly and be considered by a person or persons with expertise in the subject matter who was not involved in the original decision. Where a firm is unable to resolve a complaint, customers will be given clear information about their option to take their complaint to the Financial Ombudsman Service and/or seek independent legal advice.<sup>18</sup>

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<sup>18</sup> ABI, "[ABI Principles for Handling Business Interruption Claims related to COVID-19](#)" (accessed 2 November 2021)

## 4 How many policy-holders were covered?

It was not clear how many holders of business interruption insurance had policies that would enable them to make a claim relating to the pandemic. As well as absolute figures relating to the total number of policies, it became increasingly clear that policy wording varied and, in some cases, was open to dispute.

On 17 March 2020, the same day that he had asserted that the Government's actions had enabled businesses to make claims, the Chancellor acknowledged that "very few businesses actually have the requisite [pandemic] insurance."<sup>19</sup> For those businesses, the Chancellor said that the [non-insurance-related measures he'd announced](#) would help.

On 19 March, John Glen, Economic Secretary to the Treasury replied to an urgent question from Kate Green MP about policies' approach to notifiable diseases. While emphasising that he was discussing the matter with the industry, he noted that "5% [of businesses] take out insurance for non-specified diseases, and 5% for specified diseases".<sup>20</sup>

As part of the Treasury Committee inquiry into the economic impact of coronavirus,<sup>21</sup> the Chair, [Mel Stride, wrote to the ABI](#) on 25 March 2020. He asked how much the industry expected to pay in business interruption claims, and how members were dealing with such claims.

In [its full response on 23 April](#), the ABI emphasised its commitment to supporting customers, but also the scale of demands that the industry faced:

ABI members estimate they will pay £1.2 billion in claims to policyholders as a result of Covid-19 covering losses by customers for business interruption, travel, events, weddings and school trips. Working estimates of the breakdown of the £1.2 billion are £900m for business interruption, £275m for travel insurance and £25m for events, weddings and school trips. If the period of business closures and travel restrictions continue well into the summer it is reasonable to expect this number would rise further.

It added:

[W]e are also painfully aware that the majority of businesses are uninsured for global pandemics, as is the case throughout continental Europe and North America. Although ABI members expect to pay £900

<sup>19</sup> HC Deb 17 Mar 2020, [c941](#)

<sup>20</sup> HC Deb 19 Mar 2020, [c1150](#)

<sup>21</sup> Treasury Committee, [Economic impact of coronavirus](#) (accessed 15 November 2021)

million in business interruption claims, most policyholders are not covered for pandemic losses. We recognise this is a very worrying time for those businesses and agree strongly that the UK should examine public-private partnership models to find a lasting solution that can provide more extensive and more affordable coverage in future for businesses wishing to purchase insurance against pandemics.

Nevertheless, some policy-holders questioned whether the wording of some policies did in fact exclude claims. As reported by Law 360, at least one class action was being prepared by April:

Companies are considering a class action lawsuit against [Hiscox Insurance](#) over failure to pay business interruption claims relating to the government-imposed coronavirus lockdown, despite policies they argue are “unambiguous” in offering protection.

PR company Media Zoo said on Sunday that itself and “dozens” of other businesses who have also had [claims](#) refused are coordinating a response, which may be in the form of a class action or a complaint to the [Financial Ombudsman Service](#).

The company’s policy wording says [business interruption](#) claims can be made if a public authority makes the business premises unusable due to “an occurrence of any human infectious or human contagion disease.”

“We took out the Hiscox business interruption insurance believing the company would honor its obligations,” said Rachel Pendered, Media Zoo’s managing director. “To find out that it has no intention of doing so simply because it is going to be expensive is shocking.”

Hiscox said the policy would only be triggered by “certain specific events at, or local to, the premises.” The insurer said its policies were not designed to cover the extraordinary circumstances caused by the pandemic.

“Like terrorism and flood, which have government-backed insurance schemes, pandemics like coronavirus are simply too large and too systemic for private insurers to cover,” a spokeswoman for Hiscox said.<sup>22</sup>

The Financial Conduct Authority soon sought greater clarity about the wording of policies through [a test case](#) at the High Court. The FCA estimated that 370,000 policyholders...holding 700 types of policies issued by 60 insurers...may be affected by the outcome of the test case”,<sup>23</sup> but it wasn’t clear **what proportion of all business interruption policies** this represented.

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<sup>22</sup> Law 360, [Hiscox Could Face Class Action Over COVID-19 Response](#), 14 April 2020 (accessed 15 November 2021)

<sup>23</sup> FCA, [Supreme Court judgment in FCA’s business interruption insurance test case](#), 15 January 2021 (accessed 5 November 2021)

## 5 Regulatory responses

### 5.1 The Financial Conduct Authority

The FCA set up a [webpage](#) where interested businesses can keep up to date and sign up for email updates.

Amid the continuing concern and uncertainty about the extent of business interruption insurance coverage, the FCA wrote to insurers<sup>24</sup>, reminding them of the FCA’s wider expectations about treatment of customers during the crisis. The FCA also accepted that few customers would be eligible to claim on business interruption policies:

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. While this may be disappointing for the policyholder we see no reasonable grounds to intervene in such circumstances.

In contrast, there are policies where it is clear that the firm has an obligation to pay out on a policy. For these policies, it is important that these claims are assessed and settled quickly.

The letter went on to recommend making interim payments where appropriate. Referring to potential legal action about disputed wording, the FCA noted that smaller firms might find it easier and more efficient to use the [Financial Ombudsman Service’s complaints procedure](#).

On 1 May 2020 the FCA signalled its intention “to bring relevant cases to court as soon as possible for an authoritative declaratory judgment regarding the meaning and effect of some... insurance policy wordings where there remains unresolved uncertainty.” It said that it was “working to identify a sample of cases representative of all the most frequently used policy wordings that are giving rise to uncertainty, where it would be appropriate for us to bring such proceedings.”<sup>25</sup>

On 15 May 2020 the FCA called for affected businesses to send them examples of disputed policy wording by 20 May 2020. As a result, it identified a range of sets of wording to be considered by the High Court. The High Court heard the case in July and handed down its judgment on 15 September, as discussed in [the next section](#).

<sup>24</sup> FCA, [Insuring SMEs: business interruption](#), 15 April 2020 (accessed 8 November 2021)

<sup>25</sup> FCA, [FCA statement - insuring SMEs: business interruption](#), 1 May 2020 (accessed 8 November 2021)

## 5.2

# The Financial Ombudsman Service

The [Financial Ombudsman Service \(FOS\)](#) can help some micro-enterprises, small businesses and charities resolve disputes with their insurer. It has published general information about how financial businesses should consider claims arising the coronavirus pandemic,<sup>26</sup> as well as more specific guidance on business interruption insurance claims.

The latter reiterates the FCA's wider advice and asks insurers to provide explanations of exclusions and to consider what is "fair and reasonable":

When we consider a complaint, we want to determine what is fair and reasonable in all the circumstances of the individual complaint. There are many different types of BII [business interruption insurance] policy, each of which has different relevant terms, and the circumstances of each complaint are different.

[...]

We take into account all applicable regulations, rules and law. This includes [the Supreme Court's judgment](#) that was issued following [the test case](#) taken by the industry regulator, the Financial Conduct Authority (FCA).<sup>27</sup>

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The FOS has published [some examples of its decisions on business interruption insurance claims](#). It also has [a wider database of its decisions](#).

While this means that the FOS's approach **may** be wider, it nevertheless closely reflects the FCA's approach and – more recently – wider legal decisions.

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<sup>26</sup> Financial Ombudsman Service for small businesses, [Covid-19 \(coronavirus\): Important information for small businesses](#) (accessed 15 November 2021)

<sup>27</sup> Financial Ombudsman Service for small businesses, [Business interruption insurance](#) (accessed 8 November 2021)

## 6 The test case

The “FCA test case” involved a review of sets of policy wording relating to business interruption. The High Court largely found in favour of the policyholders in September 2020. After an appeal, the Supreme Court also found in their favour in January 2021.

### 6.1 The High Court case

The test case did not affect most policies. Insurers should have contacted customers whose policies were.

In July 2020, the High Court considered a range of sets of policy wording submitted by the FCA, but also brought in submissions made by the [Hiscox Action Group](#) and [Hospitality Insurance Group Action](#).

The main focus of the case was how policies had referred to situations involving:

The test case did not affect most policies. Insurers should have contacted customers whose policies were.

- disease outbreaks in the vicinity (or not) of affected premises
- “denial of access” on the basis of law or instructions to close made by public authorities
- “hybrid clauses” – which combine these two aspects

The case would also consider “trends clauses” – that is, whether and how insurers should take into account the likely effect on trading if the business hadn’t suffered the insured peril (but the pandemic had nevertheless led to a reduction in demand).<sup>28</sup>

Eight defendants agreed to be part of the test case:

- Arch Insurance (UK) Ltd
- Argenta Syndicate Management Ltd
- Ecclesiastical Insurance Office Plc
- MS Amlin Underwriting Ltd
- Hiscox Insurance Company Ltd
- QBE UK Ltd
- Royal & Sun Alliance Insurance Plc

<sup>28</sup> Herbert Smith Freehills, [Judgment handed down in FCA’s COVID-19 business interruption insurance test case](#), 15 September 2020 (accessed 8 November 2021)

- Zurich Insurance Plc<sup>29</sup>

The FCA has published a wide range of documents and summaries of actions and of the case itself.<sup>30</sup> These included [a list of policies that might be affected by the outcome of the case](#).<sup>31</sup> The FCA estimated that they accounted for 370,000 individual policies.

The High Court handed down its [judgment](#) on 15 September 2020. The court generally ruled in favour of the policy-holders. Its decision was binding on specific sets of wording examined (subject to appeal). But the situation was not entirely straightforward. For instance, the court accepted that policy wording from Zurich and Ecclesiastical Insurance excluded claims.<sup>32</sup>

Herbert Smith Freehills, who worked with the FCA on the case, published a summary of the judgment. This noted:

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 and ‘hybrid’ clauses, certain denial of access/public authority clauses, as well as causation and ‘trends’ clauses. The judgment should therefore bring welcome news for a significant number of the thousands of policyholders impacted by COVID-related business interruption losses.<sup>33</sup>

The FCA noted the potential wider relevance of the judgment and its own expectations of insurers involved:

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 in Scotland and Northern Ireland, by the Financial Ombudsman Service 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 resolve some key contractual uncertainties and causation issues to provide clarity for policyholders and insurers. The judgment does not determine how much is payable under individual policies, but provides the basis for doing so, subject to any appeal.

We have published [guidance](#) setting out our expectation that, following final resolution of the test case (including any appeals), insurers should

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<sup>29</sup> Financial Conduct Authority, [Business interruption insurance](#), 26 July 2021 (accessed 8 November 2021)

<sup>30</sup> Financial Conduct Authority, [Business interruption insurance](#), 26 July 2021 (accessed 8 November 2021)

<sup>31</sup> Financial Conduct Authority, [List of business interruption policies: 15 July 2020](#) (accessed 15 November 2021)

<sup>32</sup> Financial Times, [Insurance policyholders win Covid-19 High Court test case](#), 15 September 2020 (accessed 8 November 2021)

<sup>33</sup> Herbert Smith Freehills, [Judgment handed down in FCA’s COVID-19 business interruption insurance test case](#), 15 September 2020 (accessed 8 November 2021)

apply the judgment in (re-)assessing all outstanding or rejected claims and complaints which may be affected by the test case (except complaints that have been referred to the Financial Ombudsman Service). On [15 July](#), we published an updated list of policies with claims that may be affected.

Whilst the test case does not determine the quantification of any BI claims payments, we have issued a [statement](#) on considerations that should be taken into account when applying deductions of government support received by policyholders.<sup>34</sup>

In a separate press release, the FCA reiterated that “[e]ach policy needs to be considered against the detailed judgment to work out what it means for that policy”, and that policy-holders “with affected claims can expect to hear from their insurer within the next 7 days” (that is, by 22 September). While the judgment would not determine how much should be paid out, it would “provide much of the basis for doing so”. Policy-holders would be free to settle outstanding claims before the outcome of any appeal, should they wish to do so.<sup>35</sup>

*Insurance Journal* reported a range of early reactions to the judgment, including some general estimates of the financial cost to the industry, with most regarding the cost as “manageable”, particularly once reinsurance was taken into account. The article also reported some wider lessons for the industry:

“Clients deserve clarity, and the fact that this case had to take place at all is a rebuke to our industry and the often obscure language we use,” commented Christopher Croft, CEO, London & International Insurance Brokers Association.

There is speculation over possible appeals by insurers but also some doubt. “While some appeals may arise, it is possible that, for the sake of the insurance industry’s reputation, and due to the fact that claims are manageable (especially considering lower claims frequency on other lines of business), the insurers may decide to pay and move on,” analysts at Berenberg Capital Market wrote.

[...]

Lloyd’s of London said it welcomes the test case judgement for bringing coverage clarity and said it will “carefully consider” the implications for

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<sup>34</sup> Financial Conduct Authority, Business interruption insurance, 15 December 2020. This text has now been superseded.

<sup>35</sup> Financial Conduct Authority, [Result of FCA’s Business Interruption test case](#) (press release), 15 September 2020 (accessed 8 November 2021)

its customers as well as its impact on the Lloyd's market, which it said retains less than 2% of the overall UK property SME market.<sup>36</sup>

## 6.2

## Appeal to the Supreme Court

The FCA, six insurers and the Hiscox Action Group applied to appeal to the Supreme Court on various points.<sup>37</sup> The appeal was heard in November 2020 and the judgment was handed down on 15 January 2021.

The FCA's legal team published [an overview of the case](#).

In general terms, the Supreme Court found in favour of the FCA and policyholders.<sup>38</sup> The Supreme Court came to different conclusions on some aspects of the case, but its overall judgment tended to increase the number of relevant policies that might provide cover. The judgment decided that both "disease" and "denial of access" clauses responded to the same underlying cause – the pandemic itself. It also determined that certain businesses that were partly closed should be able to claim.<sup>39</sup> Herbert Smith Freehills summarised the implications for (relevant) policy-holders as follows:

The judgment brings very good news for policyholders. It improves their position significantly beyond that which was already established by the High Court judgment. Although the Supreme Court construed the disease clauses more narrowly than the High Court, it gave broader interpretations to key coverage words in the prevention of access / hybrid wordings (especially as to partial closure of a business) and, most significantly, its findings on causation mean that it will be very challenging for insurers to deny cover, or reduce an indemnity otherwise due to an insured, on the basis that losses that would otherwise be covered under the policy would have resulted in any event from uninsured perils whose underlying cause is the Covid-19 pandemic. This will have significant implications in real terms for the indemnities received by policyholders.<sup>40</sup>

In a press release, the FCA highlighted the prospect of progress with outstanding claims:

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

<sup>36</sup> [Insurance Journal, Insurers, Policyholders, Analysts React to UK's COVID-19 Business Interruption Ruling](#), 15 September 2020 (accessed 10 November 2021)

<sup>37</sup> Herbert Smith Freehills, [Insurance notes: Supreme Court hands down judgment in FCA's Covid-19 Business Interruption Test Case](#), 15 January 2021 (accessed 10 November 2021)

<sup>38</sup> [The FCA v Arch Insurance Ltd & Others \[2021\] UKSC 1](#)

<sup>39</sup> Many accounts of the case give the example of a restaurant that could continue to offer a take-away service, but not dine-in services.

<sup>40</sup> Herbert Smith Freehills, [Insurance notes: Supreme Court hands down judgment in FCA's Covid-19 Business Interruption Test Case](#), 15 January 2021 (accessed 10 November 2021)

possible, and today's judgment decisively removes many of the roadblocks to claims by policyholders.

We will be working with insurers to ensure that they now move quickly to pay claims that the judgment says should be paid, making interim payments wherever possible. Insurers should also communicate directly and quickly with policyholders who have made claims affected by the judgment to explain next steps.

As we have recognised from the start of this case, tens of thousands of small firms and potentially hundreds of thousands of jobs are relying on this. We are grateful to the Supreme Court for delivering the judgment quickly. The speed with which it was reached reflects well on all parties.<sup>41</sup>

Huw Evans, Director General of the ABI, welcomed the "clarity" of the judgment:

Insurers have supported this fast-track legal process every step of the way and we welcome the clarity that the judgment will bring to a number of complex issues. Today's judgment represents the final step in the appeal process.

The insurance industry expects to pay out over £1.8bn in Covid-19 related claims across a range of products, including business interruption policies. Customers who have made claims that are affected by the test case will be contacted by their insurer to discuss what the judgment means for their claim. All valid claims will be settled as soon as possible and in many cases the process of settling claims has begun. Some payments have already been made where valid business interruption claims have not been impacted by the test case ruling.

We recognise this has been a particularly difficult time for many small businesses and naturally regret the Covid-19 restrictions have led to disputes with some customers. We will continue to work together as an industry to ensure customers have the clarity they need when it comes to what they can expect from their business insurance policies.<sup>42</sup>

Hiscox also welcomed the clarity of the judgment but noted that it applied to a minority of its policies:

The Supreme Court largely confirms the outcome of the High Court's ruling that, except in rare circumstances, cover is restricted to Hiscox policyholders who were mandatorily closed. Fewer than one third of Hiscox's 34,000 UK Business Interruption policies may respond as a result.

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<sup>41</sup> Financial Conduct Authority, [Supreme Court judgment in FCA's business interruption insurance test case](#) (press release), 15 January 2021 (accessed 10 November 2021)

<sup>42</sup> ABI, [Supreme Court verdict on business interruption insurance test case](#), 15 January 2021 (accessed 11 November 2021)

We welcome the clarity that the Judgment provides and the processing of claims has begun. Any issues not addressed by the Judgment will be assessed on a case-by-case basis as part of the normal insurance loss adjustment process for claims. This will apply to all government restrictions, whether national or local, provided that a relevant policy was in force at the start of the relevant lockdown period.<sup>43</sup>

Some observers, though, highlighted lessons for the insurance industry about how they express and market cover:

“That this decision delivers final clarity on the issue of business interruption is to be welcomed. The FCA is to be congratulated on the speed with which the test case process has allowed us to reach this point. But clients deserve this transparency at the point of purchase – not after a legal battle,” emphasized Christopher Croft, CEO of the London & International Insurance Brokers’ Association (LIIBA).

“The industry’s reputation has been damaged by the debate over exactly what is or is not insured, and we need to think hard about how we redress that and introduce absolute clarity into the product our customers buy. Everyone in the insurance value chain needs to be committed to ensuring that customers understand exactly what it is they are getting, in language they recognise and presented in a way which makes sense to them,” Croft continued.<sup>44</sup>

Mel Stride, Chair of the Treasury Committee, urged speedy resolution of outstanding claims:

“This ruling will be welcomed by many businesses who are struggling through the pandemic; it may provide a lifeline for many of them.

“As the Treasury Committee has been urging, it’s right that the FCA will now ensure that valid claims are paid by insurers as quickly as possible.”<sup>45</sup>

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<sup>43</sup> Hiscox, [Hiscox Ltd response to Supreme Court Judgment](#) (press release), 15 January 2021 (accessed 11 November 2021)

<sup>44</sup> *Insurance Journal*, [Initial Reactions to UK Supreme Court’s Ruling on Business Interruption Claims](#), 15 January 2021 (accessed 11 November 2021)

<sup>45</sup> Treasury Committee, [Mel Stride comments on Supreme Court ruling on business interruption insurance](#), 15 January 2021 (accessed 11 November 2021)

## 7

# Resolving outstanding claims

While the outcome of the test case provided some legal clarity, the variation in policy wording nevertheless meant that resolving outstanding claims would not necessarily be straightforward.

The FCA has continued to issue and update guidance, some of it dating from before the case itself. This is indexed on the FCA's business interruption insurance webpage.<sup>46</sup> Some of the main links are:

- A [general policy checker and FAQs](#), as well as [a more targeted list identified by insurers](#), that help customers to determine whether their own policy is covered by the judgment
- Examples of the [types of policy wording](#) considered in the test case
- [Guidance on proving “the presence of coronavirus”](#) – a condition of various policies
- Data about [progress towards settling claims](#)
- The FCA's [“Dear CEO letter” of 22 January 2021](#), which sets out general expectations about how insurers should manage outstanding claims (including dealing with wider government business support, as discussed below)

## 7.1

# Taking account of wider government support

One of the more vexed questions involved in calculating insurance payouts has been how to take account of various forms of government relief that policy-holders have received during the pandemic. There is no simple solution to this matter.

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<sup>46</sup> Financial Conduct Authority, [Business interruption insurance](#), 26 July 2021 (accessed 12 November 2021)

There is a tension between the principle of not paying policy-holders twice for the same loss and that of not allowing the taxpayer to subsidise insurers.

In August 2020, the FCA issued an early statement that “[w]here insurers have accepted liability, they should continue to handle and assess non-damage BI claims promptly and fairly, and to treat their customers fairly”.<sup>47</sup>

There are however various complications to interpreting and applying that statement consistently. First, unless they were to be separately tested in court, such decisions depend on agreement by individual insurance companies. Then there is the question of the differing ways that policies are written.

But there is a wider tension between the risk of paying policy-holders twice for their loss and that of allowing the taxpayer to subsidise costs to insurers.<sup>48</sup> As Lucy Pert of Hausfeld LLP wrote<sup>49</sup>:

...[A]ccording to the [principle of indemnity](#), an insurance contract compensates the insured for any damage, loss, or injury. The purpose of an insurance contract is to make the insured "whole" in the event of a loss. To the extent that a business has benefited from the Government COVID Assistance, it has not suffered a loss.

[...]

There are good public policy reasons why insurance companies should not be allowed to deduct such payments...[T]he Government COVID Assistance is funded by the taxpayer. If insurance companies are allowed to deduct these amounts from payments they are required to make, the British taxpayer is effectively subsidising the insurance industry and providing it with a windfall. This was not the basis upon which the Government COVID Assistance was made and not the basis up on which the British public have tacitly accepted that it must foot the bill.

On 25 September 2020, [the ABI wrote to the Economic Secretary to the Treasury](#), announcing that some insurers had agreed not to take some forms of government support into account in calculating payouts:

I am in a position to confirm that the 12 firms listed below will not be deducting the Local Authority Grant, the Small Business Grant and the Leisure/Retail/Hospitality grants, or their equivalents in Scotland, Wales and Northern Ireland, from any Covid-19 claims payments. In the minority of cases where this has already happened, each firm concerned will review these claims and reach out to claimants in relation to adjusting the settlement accordingly.

<sup>47</sup> Financial Conduct Authority, [Statement on non-damage BI settlements and deductions in relation to government support](#), 3 August 2020 (accessed 12 November 2021)

<sup>48</sup> For a summary of arguments for and against deduction see James Moorhouse, Society of Claims Professionals, [“Furlough payments”](#), 10 March 2021 (accessed 12 November 2021)

<sup>49</sup> Lucy Pert, Lexology.com, [“How Government COVID Assistance Causes Controversy in Business Interruption Insurance”](#), 8 April 2021 (accessed 19 April 2021)

The 12 firms are Aviva, Zurich, RSA, Allianz, Hiscox, Axa, Direct Line Group, Covea, Ageas, QBE, Ecclesiastical and Axa XL.

In reply, [John Glen “commended” the signatories and expressed his gratitude for the ABI’s efforts](#). But he went on to warn that the Government might review the situation if such deductions were to continue:

It is disappointing that not all insurers have signed up to this approach, when these deductions are quite clearly not in line with the intention of the support schemes. I strongly encourage those insurers who are making these deductions to follow this example, to respect the spirit of these government support schemes, and to consider the difficulties being faced by businesses during this time. I would appreciate the ABI’s continued support on this issue, both where deductions have already been made and in future claims settlements.

[...]

I am sure most firms will now abide by the intention of these support schemes. Nevertheless, if grant deductions continue to be made, the Government will consider further action to protect the financial support being issued to businesses.

In response to a Parliamentary Question in November from Ben Lake MP about NFU Mutual’s decision to continue making such deductions, Mr Glen reiterated that “it is the Government’s firm expectation that they are not to be deducted from business interruption insurance claims” and that he continued to monitor the matter.<sup>50</sup>

The FCA’s guidance – updated on 24 March 2021 – effectively reiterates the position that it has promoted since at least August 2020: that insurers should review the circumstances of individual policies and claims, and that it is unlikely that simplistic approaches would be appropriate:

### **Assessing whether it is appropriate to make deductions**

The insurer will need to assess this for some or all of each type of government support the policyholder received with a case by case assessment. The assessment should consider:

- the exact type and nature of the Government support
- how the policyholder used this support
- the type of policy and its precise terms, including any set methodology for calculating the value of a claim set out under the relevant section of the policy

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<sup>50</sup> [UIN118652](#)

Some of these factors will be specific to the case and claim. Even where it is appropriate in principle to deduct these amounts, a single, uniform approach to deductions is still unlikely to be appropriate. Insurers are likely to need to consider individually the precise details of the policy, the claim and how the policyholder used the Government support. How Government support is treated for tax purposes may differ from the way it is treated for calculating the loss under a BI policy.

### **Our expectations of firms**

We expect firms to take these matters into account when they calculate non-damage BI claims. We also expect them to reflect these matters appropriately in their communications with policyholders when making settlement offers and reaching settlement on relevant BI claims. We will consider how firms treat their policyholders in this way as part of our usual supervisory activities. We may intervene and take further actions where firms do not appear to be meeting our expectations and treating their customers fairly on these points.

[...]

Even if your policy is with a different insurer to those listed above, our views about the appropriateness of deducting small business grants still apply.<sup>51</sup>

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<sup>51</sup> Financial Conduct Authority, [Updated statement on non-damage BI settlements and deductions made for government support](#), 24 March 2021 (accessed 12 November 2021)

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## 8 The future: insurance companies or the State?

### 8.1 Early responses

Giving evidence to the Treasury Committee about the March 2020 Budget<sup>52</sup>, Sir Charlie Bean of the Office for Budgetary Responsibility had referred to the potential role of the State as “insurer of last resort” in such extraordinary circumstances. He was referring to the role of state in protecting the economy overall:

There is a very good argument that the state should essentially be the insurer here. I have heard quite a lot of discussion on the radio programmes today and yesterday about wanting the Government to mandate bars and restaurants to close so that people can claim against their insurance policies. We seem to forget that insurers have limited pockets. You are talking about such a deep and widespread downturn here that all you are doing is passing the problem on to an insurer, who potentially may not be able to pay.

[...]

To me, this is exactly a case where the state should be stepping in to try to implement things that, as I say, minimise unnecessary damage to the supply side. The question of how you do that—and you have to do it quite quickly, ideally—is a much harder one, but you can at least start by agreeing what the objective is.

[...]

All the evidence we have from the financial crisis and things like this suggests that big, early action is better than half-hearted action or delay.<sup>53</sup>

Harriet Baldwin raised the question of insurers’ role and responsibilities in such a situation:

There will be a lot of businesses that have taken out business interruption insurance. If [insurers] then try to wriggle out of paying out on those

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<sup>52</sup> On 17 March and so in the period between the Government’s advice to the public to “avoid” certain venues and the announcement of lockdown.

<sup>53</sup> Treasury Committee, Oral evidence: Spring Budget 2020, [HC214](#), 17 March 2020, Q6

policies because coronavirus was not an identified condition and the state steps in and effectively becomes an insurer of last resort, the insurance industry is going to completely undermine its *raison d'être*. Therefore, it would not be in their long-term interest to wriggle out. Insurers need to do the responsible thing here and pay out on business interruption insurance, even though this is a completely unforeseen event.<sup>54</sup>

While he agreed with the importance of insurers meeting their responsibilities, Sir Charlie highlighted the practicalities and limits of such a response:

I do not have any disagreement that insurers should step up to their obligations, but there is a question about whether we should rely purely on privately provided insurance, because some businesses and some people will have it and some will not. As I say, there may be a question in some cases as to whether the insurers have deep enough pockets to be able to pay out. This is why, in some senses, you need the state to be there as the insurer of last resort against what is essentially an act of god.

You could say that you could foresee that there might be a pandemic at some time—we have actually talked about doing it as one of our risks in the *Fiscal Risks Report* – but the way it actually appears to be panning out raises questions about whether you can rely just on whatever there might be in the way of insurance that has already been taken out from the private sector. The state surely has to have a role there.<sup>55</sup>

Later the same day, the Chancellor reiterated the new focus on additional measures for businesses and noted his concern about suggestions that insurance companies should be required to pay out more widely for business interruption:

With regard to retrospectively changing insurance policies [...] that would most likely cause solvency issues with insurance companies, so it is perhaps not the most appropriate course of action, which is why we have several other measures for providing support directly to businesses in those circumstances. [...] it is important that we think more broadly about direct support.<sup>56</sup>

## 8.2

## Looking to the future

While the pandemic continues, the potential scale of claims and expectations for support suggests that future arrangements will have to consider different models if they are to be sustainable. Writing to the Chair of the Treasury

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<sup>54</sup> Treasury Committee, Oral evidence: Spring Budget 2020, [HC214](#), 17 March 2020, Q10

<sup>55</sup> [Ibid.](#)

<sup>56</sup> HC Deb 17 Mar 2020 [c941](#)

Committee on 23 April 2020, [the ABI declared its support for a public-private “arrangement”](#) such as those used by Pool Re to help manage the cost of insurance claims after incidents of terrorism.

The British Insurance Brokers’ Association made [similar comments](#) after the High Court’s judgment.<sup>57</sup>

While *The Financial Times* reported in September 2020 that the Chair of Pool had highlighted the importance of insurance in dealing with future disease outbreaks, the Treasury’s review of his organisation’s role had explicitly limited its role to “terrorism risk”.<sup>58</sup>

The UK is of course not alone in considering how to respond to this challenge. The OECD publishes and updates an overview of international responses to the question.<sup>59</sup> That in turn includes a useful summary of a proposal developed by Lloyd’s<sup>60</sup> that would over time enable the development of a government-backed response:

A set of working groups have been established to develop a proposal to establish *Pandemic Re* which would create a government-backed reinsurance pool. The initiative includes broad participation from across the UK insurance sector and intended to submit a proposal to the UK government in late 2020.<sup>61</sup>

The exercise proposed three stages:

- A ReStart programme that would “pool capacity” to support SMEs through “future potential waves” of the Covid-19 pandemic.
- A Recover Re over the medium to longer term, which would “collect premiums (under a policy that lasts multiple years) to be used to make payments to policyholders for non-damage business interruption after an event, including the current COVID-19 pandemic as well future pandemics or other perils that lead to business interruption”. The Government would shore up premium payment defaults and guarantee payouts until the pool was sufficiently established.
- A Black Swan Re over the longer term to provide coverage for systemic non-damage business interruption losses. It would be “backstopped” by a government guarantee.<sup>62</sup>

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<sup>57</sup> BIBA, [BIBA comment on FCA test case judgement](#), 15 September 2020 (accessed 12 November 2021)

<sup>58</sup> Financial Times, [UK reviews role of state-backed terror insurer as pressure grows for pandemic cover](#), 3 September 2020 (accessed 12 November 2021)

<sup>59</sup> OECD, [Responding to the COVID-19 and pandemic protection gap in insurance](#), 16 March 2021 (accessed 12 November 2021)

<sup>60</sup> Lloyd’s, [Supporting global recovery and resilience for customers and economies: the insurance response to COVID-19](#) accessed 12 November 2021)

<sup>61</sup> OECD, [Responding to the COVID-19 and pandemic protection gap in insurance](#), 16 March 2021 (accessed 12 November 2021)

<sup>62</sup> [Ibid.](#)

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