COVID 19 AND BUSINESS INTERRUPTION INSURANCE

The Times reported on 15 April 2020 that the FCA has issued a warning to insurers that they must act promptly and fairly in assessing and, where liability is accepted, paying claims for business interruption. This begs the question whether the claims are validly made under the policy.

It has also been widely reported that a number of insurers take the view that BI claims made on the basis of losses arising from the current pandemic are not covered. Various arguments are being advanced by insurers.

Given the scale of the damage to the UK economy which the pandemic continues to cause, it is unsurprising that a large number of claims has already arisen. We can expect considerable litigation, not least because individual claims will turn on their particular facts and the precise policy wording employed. Further, the problems associated with these claims place a spotlight on the potential liability of brokers. Nonetheless, certain general points and themes can be discussed at a high level.

This note is the first in a series from Hailsham Chambers addressing insurance implications from the current situation. It describes very briefly the nature of BI insurance and then considers the first issue arising: is the cover engaged?

Business Interruption Insurance: the essentials

BI insurance is a specific form of insurance whereby the insurer undertakes to pay for lost profit and/or additional business expenses caused by an insured peril. If specific BI cover is not in place, the insured cannot recover for such losses under a standard policy (**Maurice v Goldsborough, Mort & Co** [1939] AC 452; **Lewis Emanuel & Son v Hepburn** [1960] 1 Ll Rep 304).

The usual drafting technique for BI cover can be shortly described. The insuring clause will provide that the insurer will pay in respect of loss of income (wholly or in part) and additional cost of working caused to the insured's business in consequence of an occurrence which takes place within the policy period. There follows a list of specified occurrences.

The policy will then set out a formula for the calculation of the lost income.

To succeed in its claim, the insured must show that the loss of income was caused by the occurrence in question, such that issues can arise as to the commercial and trading position of the insured before the relevant occurrence took place. On appropriate facts, the insurer can argue that the losses were in fact caused by poor trading conditions/inappropriate management decisions etc. Such an argument was raised, but did not fall for decision, in **IF PC Insurance v Silversea Cruises** [2004] Ll Rep IR 696 (claim by cruise ship operators alleging loss derived from the 9/11 terrorist attacks). Issues relating to causation and quantum will be covered in our second briefing note.

Coverage: has there been an "Occurrence"?

Property Damage

BI cover is perhaps most often written as an add on to a property damage policy; thus the cover arises when there is loss of or damage to property or premises. For example, if a business buys a policy to cover the rebuild cost of a factory in the event that it burns down, then it might also buy insurance to cover lost profits whilst the factory is being rebuilt. But insurers would argue that sort of policy would not cover Covid-19 related claims, since the virus does not cause loss of, or damage to, property.

That said, it might be argued by an insured that the prohibition on use of premises and closure of businesses arising from the lockdown[1] does equate to a loss of property since one cannot use the premises and therefore cannot trade from them. As has been famously observed:

> *"Loss" is a word whose meaning varies widely with the context in which it is used. If a man said to you: "I have lost my wife", you would understand him to mean one thing outside the maze at Hampton Court and another outside an undertakers in the high street."*[2]

One can foresee that some Judges – and perhaps even more Ombudsman - might be sympathetic to the idea that in the unique circumstances of this situation "Loss of property" arises from the lockdown and this engages the BI cover.

A stronger argument for the existence of "damage" might arise if an infected employee attended a workplace prior to lockdown, touched surfaces and thus potentially made the place unsafe causing a pre-lockdown closure pending a deep-clean. This situation could more readily be understood as damage to property which then engages an attached BI extension. After all, the Supreme Court has held that an asymptomatic condition called platinum salt sensitisation was an actionable personal injury[3]. Why shouldn't, the argument might go, the infectious droplets of sweat and breath from a carrier, be property damage? In 1995 Mance

[1] And given statutory force by the Health Protection Coronavirus, Restrictions (England) Regulations 2020
[2] Sir Martin Nourse in **Tektrol v Hanover** [2005] EWCA Civ 845
[3] Dryden v Johnson Matthey [2018] UKSC 18.

J (as he then was) said that whether there was damage depended, in part, on whether there had been "injury impairing value and usefulness" of the property in question and the need for work and money to bring it back to a usable condition.[4] He held that a spillage of hydrochloric acid on a shipdeck, which did not cause any alteration to the deck but which did need to be washed off, constituted damage. A visit to a place from an infected person could well satisfy this test.

Infectious or Notifiable Diseases

Claims arising from Covid-19 would more naturally arise from an "occurrence" to do with infectious or notifiable diseases. Sometimes the policies require there to be a "notifiable disease" but sometimes there is a specific list of diseases (Axa and NG say that their policies tend to adopt this approach). If the policy lists diseases and if (as is likely) Covid-19 is not on the list, insurers will argue that the relevant occurrence has not occurred and there will not be insurance. But if the policy lists a disease or condition with similarities to Covid-19 (Middle East Respiratory Syndrome or SARS for instance) an insured might run a scientific argument that there is sufficient overlap such that Covid-19 is caught.

If the policy simply applies to "notifiable diseases" then in England and Wales the position is governed by the Health Protection (Notifiable Diseases) Regulations 2010. These regulations:

1. Set out a list of "notifiable diseases"; and
2. Oblige a registered medical practitioner who has a patient suffering from (or deceased as a result of) any of the diseases listed in schedule 1 to notify the relevant local authority of that fact. The notification is then passed to the Health Protection Agency.

Covid 19 was added to the list of notifiable diseases by amendment of the regulations, which amendment took effect at 6.15pm on 5 March 2020.

It has been held in Hong Kong (in a case arising from the SARS outbreak of 2003) that a disease is only notifiable if the relevant government regulations make its notification to the authorities mandatory. The fact that there may have been an opportunity, a discretion or even a non-mandatory request from the authorities to notify at some earlier stage is not sufficient: **New World Harbourview Hotel v Ace Insurance** [2012] Ll Rep IP 537 (HK Final Court of Appeal).

The first question is whether the Court will construe the policy as covering notifiable diseases which are within the Regulations:

a) At the time of inception of the policy;
b) At the time the period of loss commenced; or

[4] The Orjula [1995] 2 Lloyds LR 395, 399

c) By the time when the claim was made.

Position (a) is likely to be adopted by insurers. If that argument were accepted, then almost all Covid-19 related claims would fail, given how recently the disease has become notifiable. The insurer would contend that a pandemic arising from a "new" disease was not a matter which the parties had in contemplation when the bargain was made. It would also be likely to contend that its premium levels and possibly other terms of the policy were designed by reference to an analysis of the existing list of notifiable diseases. Insurers do not appear to have taken this point in the **New World Harbourview** case.

The insured's main riposte is likely to be (assuming that the wording does not deal with the point specifically) that it was open to insurers to make it clear that a notifiable disease had to be so notifiable at the date of inception, alternatively to insert an exclusion relating to new or emerging diseases. The insured could also argue that pandemics (especially involving mutations of the influenza virus) have occurred in the past: Spanish flu in 1918-19 and the more recent SARS outbreak spring to mind. Thus the possibility of "new" diseases could have been foreseen and insurers could and should have worded their policies with this in mind. Indeed, a search of the insurance press shows periodic discussion about the extent of cover provided by BI policies around the time of foot and mouth, avian flu and swine flu. Insureds are likely to rely on this

As to (b), this interpretation is supported by the **New World Harbourview** case: see per Sir Anthony Mason at paragraphs 43-45. He held that in that case the claim could only be made for loss arising on or after the date when the HK authorities designated SARS as notifiable. If that case were followed here, a claim could only be made for losses arising after 5 March 2020 (although it also appears from **New World Harbourview** that a "partial" claim for loss could be made: that is to say, the insured could recover loss from 5 March 2020 even if it were shown that the losses had already commenced.

Sir Anthony took the view that SARS was not, before the date on which it was so designated, a notifiable disease. He concluded that loss caused before that date by SARS was caused by a disease that was not notifiable.

However, it might be argued that claims would lie from a period before Covid-19 was notifiable (point (c) above). Once it can be said, at the claim stage, that the loss arises from an occurrence known to involve Covid-19, it results from a notifiable disease. On this analysis, what is important is that the occurrence involved the virus, not the precise legal "status" of the virus at the time of the loss. This argument focusses on the nature of the disease and not the time at which it was designated notifiable. In support of this contention is the fact that the virus itself has not changed: merely its legal status. The insured might contend that the purpose of the requirement that the disease is notifiable is to define diseases which are of sufficient seriousness to restrict the scope of the cover to diseases which obviously damage

a business. If that is correct, what matters is the true nature of the virus as it was later designated, not the time of designation.

The Insured might contend that any other interpretation leads to odd results. BI cover is often provided for specific events. Suppose that:

a) The organisers of a horse racing meeting, due to commence on 5 April 2020, cancel it on 4 March 2020;
b) The Government designates Covid 19 as a notifiable disease on 5 March 2020;
c) The organisers of a rugby international due to take place on 10 March 2020 cancel it on 6 March 2020.

This scenario is plainly hypothetical, but, had it transpired, one might argue that, if the horse racing venue is not covered but the rugby organisers are covered, this is a somewhat arbitrary result. Furthermore, one might argue that the horse racing venue is being penalised for taking prudent measures in good time to protect public safety whereas the rugby authorities recover from insurers despite a late cancellation. Insurers would no doubt submit strongly that such considerations are not relevant to the construction and operation of a commercial contract: but would the Court be uninfluenced by them?

Some policies restrict cover to a situation in which there is an occurrence within a certain radius from the insured's premises. Such wording is intended to cover a case where there is a specific outbreak of a disease in a particular location. Two possible interpretations of such a clause can be mooted in relation to the pandemic: first, that there is no cover, because the present situation concerns a general outbreak of Covid-19 in the whole country, and second, that there is cover (on the assumption that the disease has effectively now spread nationwide).

It is understood that arguments are being raised by insurers to the effect that the pandemic itself is not an "occurrence". The thinking behind this argument appears to be that the word "occurrence" connotes a specific and limited instance of a notifiable disease in or near the insured premises.

The word "occurrence" will need to be construed in the context of the policy read as a whole, and so it is not possible to give a definitive answer. The argument looks on its face unattractive. The Collins English dictionary, for example, defines "occurrence" quite simply: "an occurrence is something that happens". It seems difficult to argue that there has not been an occurrence of Covid-19 and that the more limited meaning proposed above is incorrect.

As always, however, one does not look at the dictionary meaning of the word in isolation, but rather as it is employed in the context of the policy or the relevant section.

If the argument is being deployed in a clause dealing with limitations imposed by a public authority for a variety of reasons, it may gain some traction. So, for example, such "public authority" clauses might deal (as well as the case of a notifiable disease) with the closure of premises to permit the authorities to investigate a serious crime which occurred there, or the need for the environmental health authorities to investigate hygiene standards in the kitchen. These examples tend to suggest that the clause is directed at closure/denial of access to the particular premises as a result of a particular occurrence there. Accordingly, insurers would argue that the closure of a pub as a result of the general lockdown provisions does not give rise to a valid claim.

Denial of Access

Some policies have cover for "non-damage, denial of access" which would apply when a venue is closed for one reason or another outside of the insured's control. That type of wording is more common in policies dealing with venue hire and event spaces: sports venues, entertainment centres, conference organisers and the like. That is likely to cover losses arising out of the current situation although, again, it will be necessary to look at the precise wording.

Occupation & Inspection risks

Finally, many property damage policies require a certain level of human presence or occupation on site: security guards to protect against theft or fire; supervision of hazardous materials or to protect against machinery malfunction etc. In the case of a lockdown this may not be readily possible. The ABI says that insurers are often waiving this requirement for SMEs but plainly insureds need to be talking to their insurers about this since in the absence of specific agreement or waiver, there is a real risk that failure to comply will mean an exclusion applies. More pertinently, brokers need to be raising this with clients else themselves potentially face a risk of a claim. We intend to cover brokers in more detail in a subsequent note.

The above notes are not exhaustive and no doubt practical experience will generate other and different issues to be considered. But the law in this area seems set for fast-paced change.

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