SQUIRE PATTON BOGGS

Has the FCA Thrown a Lifeline to Struggling Tenants?

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Many businesses have been looking to their insurance policies in an attempt to recover some of the losses incurred as a result of the coronavirus disease 2019 (COVID-19) pandemic. Business interruption policies are, as a consequence, enjoying a place in the spotlight. Given that the World Health Organisation has only been aware of this new threat for 10 months, it is unsurprising that businesses have not previously given serious consideration to the effect of pandemics, and many insurers are keen to argue that losses are not covered by business interruption provisions. Fortunately, the Financial Conduct Authority (FCA) has brought a test case (the FCA Case) to offer some much-needed clarity. Its importance cannot be overstated. The decision could affect up to 700 types of policies across 60 different insurers and 370,000 policyholders.

The outbreak has affected both individuals and companies, regardless of sector or location. In particular, we have seen an increase in tensions between landlords and tenants where tenants' businesses have been closed during the lockdown and they have been unable to pay their rent. While this is a common issue across most sectors, the retail and hospitality sectors are among the hardest hit.

Business interruption insurance allows a policyholder to make a claim in circumstances where an insured risk has negatively affected trading. Although the effectiveness of such insurance will depend on the wording of each individual policy, the FCA Case looks at a range of wording found within such policies and provides reassurance to many businesses who otherwise believed that they were precluded from making a claim. Here, we take a look at some of the typical clauses considered and how they may be interpreted to support claims being made by (or on behalf of) policyholders, including struggling tenants and landlords.

Disease Clauses

Example

"Loss resulting from interruption or interference with the business in consequence of any of the following events: [list of diseases]."

The elements commonly included in disease clauses, and the court's comments on those factors, are detailed below. Depending on how the clause is worded, it is most likely to apply where the policyholder is looking to recover losses as a result of the nationwide lockdown (although it will also apply to more localised lockdowns).

- **Interruption or interference with business**

  The interruption to the policyholder's business will arise out of the occurrence of COVID-19 within the defined radius of the property in question (if applicable).

- **Following/arising from/as a result of**

  The business does not necessarily have to be directly disrupted by COVID-19; it is sufficient that the occurrence of COVID-19 either nationally or within the local area would cause disruption to the policyholder's business. However, if a policy includes the wording "as a consequence of" the outbreak, it is likely that this will be interpreted more narrowly and the insurance cover will be limited to whether the outbreak has happened within the local vicinity.

- **Any notifiable disease/an occurrence of a notifiable disease**

  The disease clause is triggered from the point at which there are cases in the relevant policy area, regardless of whether they were diagnosed. COVID-19 spread so rapidly throughout the UK that the clause is likely to have been triggered at more or less the same time for all policyholders. Where the policy contains a list of diseases that would trigger the clause, the court applied what is known as the *contra proferentem* rule. Essentially, this means that where there is any doubt or ambiguity, a clause will be construed against the person who put the clause forward (in this case, the insurer). For example, a clause that includes a list of exclusions will be read narrowly, meaning that COVID-19 is unlikely to be excluded.

- **Within [x] miles/in the vicinity of the premises**

  The occurrence of COVID-19 in the UK may be sufficient to trigger any clause requiring the "occurrence of a notifiable disease". This is because cover under the policy (depending on how it is worded) is capable of extending beyond the policy area. The nature of a disease such as COVID-19 is that it is capable of spreading nationally and not just locally.

Prevention of Access Clauses

Example

"An incident during the period of insurance within the vicinity of the business premises which results in a denial of or hindrance in access to the business premises imposed by the police or other statutory authority."

The elements commonly included in prevention of access clauses, and the court's comments on those factors, are detailed below. Generally speaking, a prevention of access clause will be more restrictive than a disease clause. This is because it will only be triggered where there is a response by an authority to a localised occurrence of COVID-19, rather than a response to the COVID-19 pandemic as a whole.

- **Prevention/denial/hindrance of access to the property**

  The action taken must result in an actual prevention of access to the property, but the business only needs to be interrupted by the closure, rather than completely closed down. The court looked at the example of restaurants to consider how the clause works in practice. Depending on how the policy is worded, a policyholder does not need to show the complete cessation of their business in order to claim (albeit the amount that they can claim will be reduced if they were still able to operate part of their business). For example, a restaurant that only offers table service would be prevented completely from using its property as a result of the COVID-19 lockdown. However, a restaurant that offers table service and a takeaway service would only be hindered from using its property.

- **Due to actions/advice/restrictions**

  The actions taken or restrictions imposed by the local authority/government need to be mandatory rather than advisory. There have been many guidance notes issued by the government throughout the COVID-19 outbreak, but restrictions will only become mandatory once they become enshrined in law.

- **Imposed by the government/local authority/police**
- **Due to an emergency likely to endanger life/incident within a specific area**

Key Takeaways From the FCA Case

The principles discussed in the FCA Case are general principles. Policyholders considering whether they can claim on their business interruption insurance will need to look at the specific wording of their policy and consider firstly whether their policy is limited to actions and occurrences taking place within the local area and secondly how COVID-19 and the decisions taken by the government/local authority have affected their business.

In particular, policyholders should consider what kinds of evidence they can present in order to prove that they are entitled to claim. The FCA Case says that the following will be sufficient evidence to trigger business interruption clauses:

- Specific evidence from, and reported cases within, the local area surrounding the property
- Data published by the NHS
- Data published by the Office of National Statistics

Other Considerations for Landlords and Tenants

Ideally, a landlord should consider its own insurance policies before taking actions to recover rent from tenants with FRI leases, particularly if they are unable to meet their lease obligations. However, most leases contain clauses allowing tenants to request copies of their insurance policies from their landlord.

Tenants being pressured to pay rent by their landlord should request copies of the insurance for the property and challenge their landlord if they believe that the landlord may be able to claim under its own business interruption policy. If the landlord is able to make an insurance claim, tenants may be entitled to recover that money from the landlord if they have a rent cesser clause within the insurance provisions in the lease.

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