



FCA BI Test Case - post appeal

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FCA compliance consultants

- * BIBA/AMII Compliance Manual
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Today's event

- Thank you to your LI for hosting
- Verbal and chat forum questions welcome
- Please complete the feedback survey
- You will get the slides
- Feel free to connect with me on **LinkedIn**.



What I will cover

1. Introduction
2. Summary of Supreme Court Appeal
3. What insurers should have done
4. FOS decisions
3. Your duties as a broker + ICOBS



Learning objectives

This talk will give you an insight into:-

- An update on the FCA's test case on Business Interruption Insurance
- Why compliance with ICOBS is important now more than ever



Just bear in mind

- There is a lot of detail and I will attempt to highlight some of the **KEY** pieces of information (inevitably slides are rather word heavy...)
- Please also refer to the FCA BI pages
- This is my personal 'take' (as an insurance practitioner) and is not formal advice so please take up whatever professional help you may need
- Happy to do all my talks in-house



1st Poll

**Who do you
work for?**



2nd Poll

Post judgment?



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'I've been ghosted by my insurer'

By James Graham
Radio 5live
26 May



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Testing and vaccine push in north-west England
Extra support - including surge testing and vaccine buses - are provided to Covid hotspot areas.
11 minutes ago

Lockdown lifting - the four key numbers
8 hours ago

Queen not asked about Lilibet name - Palace source

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Covid-19: Less than a quarter of pubs confident of surviving three months

19 hours ago Comments

Coronavirus pandemic



Top Stories

Testing and vaccine push in north-west England
Extra support - including surge testing and vaccine buses - are provided to Covid hotspot areas.
13 minutes ago

Lockdown lifting - the four key numbers
8 hours ago

Queen not asked about Lilibet name - Palace source

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Business Interrupted

Insurers were told to pay up. So why have thousands of businesses not received covid-related insurance payouts? And the shortages hitting construction sites and DIY projects.

15 days left to listen
53 minutes

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Sponsored

The Supreme Court's decision has been awarded the way of the policyholder. We can now help get you the payout you deserve.

FORM ON FACEBOOK
Recover losses incurred. Learn More

Business Interruption Claims
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Has your business been affected by Covid-19? Have you got Business Interruption insurance? You may be due a payout £££
Even if you have had your claim denied, we can help! ... See more

700+ POLICIES
60 COMPANIES

FREE POLICY CHECK

HAVE YOU HAD YOUR CLAIM DENIED?

BUSINESS INTERRUPTION CLAIMS

FORM ON FACEBOOK
Business Interruption Free Policy Check Apply Now

B.I.I Claims Team
Sponsored

Were you forced to close your business due to Covid - 19? The Supreme Court has ruled that you may now be eligible for a Business Interruption Insurance payout.
We will ensure you receive the correct payout on your policy.
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Claim through your business insurance for the losses you've suffered this year. Our panel of solicitors will conduct a FREE assessment of your insurance policy. If eligible, they will help quantify your losses to ensure you get the MAXIMUM payout you deserve... See more

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Free Business Interruption Claims Assessment Learn More
Stratton Richards (a trading name of Fernard Ltd.) is a claims management c...

Background

- Wordings evolved from damage cover to cover all manner of BI incl disease (either all notifiable or a specific list)
- FCA's aim was to clarify key issues of contractual uncertainty (not everything was considered)
- **SC looked at only 11 wordings from 6 insurers**
- Wider principles to apply to 370,000 policyholders, 700 types of policy written by 60 insurers
- What would insurers have expected to happen if a disease was discovered or if there was a denial of access and what has happened since March 2020?



Initial thoughts...

The Supreme Court has recognised that insurers were wrong to argue that:-

1. Coverage was applicable only if there were narrow local restrictions
2. They could deny claims because the cover had not been intended to be provided
3. As the interruption, and therefore losses, would have happened in any event

- The judgment is legally binding on the insurers that were parties to the test case but also provides authoritative guidance for the interpretation of similar wordings

- We are now definitely in "new territory"



- Momentous
- Isn't insurance is an economic necessity?
- A common sense attitude has prevailed - "what would a reasonable person have understood the language of the contract to mean?"
- Why did this have to go all the way to the SC?
- Are claims being expedited?
- FOS considering no doubt lots of complaints
- Declarations now published
- Insurers to cover the FCA's costs



Since the pandemic struck?

- Insurers tightened wordings and covid is most definitely excluded
- Clearly then a recognition as to how weak the original wordings were
- Bear in mind we have had 3 full lockdowns and the judgment concerned the first one
- The future of BII + notifiable disease cover?
- A need for a PandemicRe?



Worst hit sectors?

- Airlines + Tourism + Hotels (still)
- Arts + Theatres + Entertainment (still)
- Hospitality (still)
- High Street retail
- Hair + Beauty
- Face to face business activities



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Business interruption insurance

First published: 12/05/2020 | Last updated: 14/07/2021 | [See all updates](#)



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Find out about how we have been obtaining legal clarity on business interruption (BI) insurance during the coronavirus (Covid-19) crisis. We'll update this page with information on what we've done and are doing

The coronavirus pandemic has led to widespread disruption and business closures resulting in substantial financial loss. Many customers have made claims for these losses under their BI insurance policies. There has been widespread concern about the lack of clarity and certainty for some customers making these claims, and the basis on which some firms are making decisions in relation to claims.

Related information

[Supreme Court judgment in the BI insurance test case](#)

[Policy checker](#)

[Policyholder FAQs](#)

[Business interruption calculator](#)

Claims data

- Insurers have submitted their data on their progress with BI claims. We have decided to publish, at an individual firm level, the number of:
 1. BI claims where the insurer has received all the information required to enable them to calculate the total value of the claim
 2. BI claims for Covid-19 related loss that have been accepted
 3. BI claims where the insurer's decision as to whether there is a valid claim is pending
 4. unsettled BI claims where an interim/initial payment has been made to the policyholder or their representative
 5. BI claims where an offer of final settlement has been made, accepted by the policyholder, and paid in full



Payments to 5 July

- The aggregate value of the interim/initial payments made for the 4,975 unsettled claims where such payments have been made is **£309m**
- The aggregate value of the payments made for the 18,958 claims where final settlements have been agreed and paid is **£567m**
- This means that 23,933 policyholders out of the 40,351 who had had claims accepted, had received at least an interim payment
- FCA estimated 370,000 policyholders...



1. Summary of the Supreme Court Appeal



Supreme Court Appeal

- i. Causation
- ii. Disease clauses
- iii. Prevention of access clauses
- iv. Trends clauses
- v. Pre-trigger losses



Crux of judgment

- Insurers' appeals were unanimously dismissed despite insurers saying that pandemics were not BI and that policies were never written or priced to cover this
- Policies will provide cover for BI caused by the occurrence of a notifiable disease
- + competing causes will be covered
- + claims cannot be reduced due to covid pre-triggering a downturn
- However, each policy still needs to be considered against the detailed judgment to work out what it means for that policyholder but bear in mind the national response was the same everywhere



The screenshot shows the homepage of the Bure Valley Railway website. At the top, there is a teal header with the railway's logo and name, a search icon, a phone number (01263 733858), and a navigation menu. The main content area features a large photograph of a red steam locomotive pulling a train through a green landscape. Overlaid on this image is the text 'TRAINS START RUNNING FROM 11TH JULY - SEE NEW TIMETABLE' and 'PRE BOOKING ADVISABLE DUE TO REDUCED CAPACITY'. Below the image, there are three buttons: 'OPENING TIMES', 'ONLINE BOOKING AVAILABLE' (highlighted in a yellow box), and 'DAILY TIMETABLE'. A URL is visible in the bottom left corner.

BURE VALLEY RAILWAY | Call: 01263 733858

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TRAINS START RUNNING FROM 11TH JULY - SEE NEW TIMETABLE

PRE BOOKING ADVISABLE DUE TO REDUCED CAPACITY

OPENING TIMES | **ONLINE BOOKING AVAILABLE** | DAILY TIMETABLE

<https://www.bvrw.co.uk/#null>

Section 2 - Business interruption – optional cover

Additional covers and limits


Automatically included?

Bomb hoax £500,000 in total in any one period of insurance.	✓
Unspecified suppliers £250,000 or 10% of the sum insured, whichever is the less, for any one loss	✓
Unspecified customers £250,000 or 10% of the sum insured, whichever is the less, for any one loss	✓
Storage at other locations £100,000 any one loss	✓
Essential personnel £25,000 in total in any one period of insurance	✓
Exhibitions £100,000 in total in any one period of insurance	✓
Failure of utilities supply £250,000 any one loss	✓
Failure of utilities supply – terminal ends - £250,000 any one loss	✓
Fines, penalties and damages £25,000 in total in any one period of insurance	✓
Loss of attraction £250,000 whichever is the lesser for any one loss	✓
Motor vehicles £500,000 in total in any one period of insurance	✓
Notifiable disease, vermin, defective sanitary arrangements, murder and suicide £500,000 in total in any one period of insurance	✓
Prevention of access – non damage	✓
Prevention of access	✓
Rental charges	✓
Transit £25,000 any one loss	✓

Section 2– Business Interruption

12. Notifiable disease, vermin, defective sanitary arrangements, murder and suicide


consequential loss following:

- a)
 - i. any occurrence of a **notifiable disease** at the **premises** or due to food or drink supplied from the **premises**;
 - ii. any discovery of an organism at the **premises** likely to result in the event of a **notifiable disease**;
 - iii. any **notifiable disease** within a radius of twenty five miles of the **premises**; 

13. Prevention of access

consequential loss as a result of **damage** to property within a 1 mile radius of **your premises** which prevents or hinders the use of the **premises** or access to it.
The maximum **we** will pay in total in any one **period of insurance** is stated in the **schedule**.

14. Prevention of access – non damage

consequential loss resulting solely and directly from an interruption to **your business** caused by an incident within a 1 mile radius of **your premises** which results in a denial of access or hindrance in access to **your premises** during the **period of insurance**, imposed by any civil or statutory authority or by order of the government or any public authority, for more than 24 hours. 

The maximum **we** will pay in total in any one **period of insurance** is stated in the **schedule**.

'Crisis' appeal as heritage railway loses £765k in year

 Stuart Anderson



Published: 10:56 AM January 25, 2021



Current offer

£198,000



i. Causation

- SC found that causation could be satisfied when the insured event, along with other linked events, all caused one inevitable result
- As a result, local cases of covid + worldwide pandemic + actions, measures and advice of the government + reaction of the public in response to the disease = **one** proximate cause resulting in interruption to a business
- “Absurd” arguments from insurers
- Proximate cause envelope pushed to its maximum?



ii. Disease clauses

- Disease clauses will cover BI resulting from local cases of covid and the wider pandemic and the resulting actions and should be treated as **one** cause
- Disease clauses will therefore respond to BI caused by government action in response to the disease, provided there has been at least one occurrence of the illness within the specified radius



- Given the historic level of confirmed cases, these disease clauses should respond where covid has occurred within the required distance and, as a result, they should be entitled to cover
- Illness needs to be manifested by a person within 25 miles of the premises
- SC - what is rational, clear and simple to apply
- Most unreasonable to 'bury' exclusions (RSA)



iii. Prevention of access

SC reached the same conclusion as it did for the disease clauses

The appeals focussed on:-

1. The nature of the public authority intervention to trigger the clause, in particular, was legal force required
2. The nature of the prevention or hindrance



Nature of intervention

- SC did not accept that a restriction must always have legal force before it can fall within the description
- SC “restriction imposed” may include instructions in anticipation that legal measures will follow shortly afterwards or will do so if restrictions not followed
- An instruction by a public authority may amount to a “restriction imposed” if in clear enough terms to allow reasonable certainty as to what compliance requires
- In most cases the relevant instructions would be directed at the insured premises/use of them



iv. Trends clauses

- Trends clauses (part of quantification machinery) are intended to ensure that indemnity is not reduced or inflated by factors unrelated to the cover
- Insurers said they were not liable for losses which would have occurred regardless of the insured peril
- SC considered this as a form of exclusion and no deductions are to be made for matters which are “inextricably linked” - covid and various consequences will not be trends or circumstances



v. Pre-trigger losses

- Many insureds suffered a downturn in business due to covid before the insured peril was triggered and insurers said this should be taken into account as a trend and deducted from the claim
- SC decided that indemnity is there to ensure the insured's financial results are the same as what would have been achieved had the insured peril (+ underlying or originating cause) not occurred
- Insurers should focus on what would have been earned had there been no covid ignoring any revenue drop prior to the policy being triggered



Insurer learning outcomes?

- Has any of this had a bearing?
- Clarity in wordings - once you establish your intentions, define what is meant carefully and ensure the whole wording is clear and understood by **all** parties
- We have had three lockdowns and businesses may still be interrupted - how have those claims been handled?
- Is everything being done to expedite claims?



2. What should insurers have done



Final guidance: Business interruption insurance test case - proving the presence of coronavirus (Covid-19)

3 March 2021

Prevalence

- HC did not make any findings of fact as to where covid has occurred or manifested and this was not appealed by the FCA nor insurers
- Insurers conceded that the categories of evidence put forward by the FCA - specific evidence, NHS and ONS Deaths Data and reported cases - are in principle capable of demonstrating the presence of covid
- Insurers did not suggest that absolute precision is required and that otherwise claims will fail but that a reliable method would suffice
- FCA guidance issued 3 March



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22 January 2021

Dear CEO,

Business Interruption (BI) Insurance

On 15 January, the Supreme Court handed down its judgment on the BI test case. Our aim was to get clarity for as wide a range of parties as possible, as quickly as possible, and the judgment achieves this.

I am grateful for the work of the 8 insurance firms that were parties to the case, as well as all firms impacted by the test case, who co-operated from a shared desire to quickly achieve clear outcomes for policyholders and insurers and avoid protracted litigation. I am also grateful that the Courts delivered the judgment quickly. The ~~speed with which it was reached reflects well on all parties~~

Dear CEO 22 Jan 2021

- All claims must be re-assessed in light of SC judgment and valid claims to be paid ASAP (although most policies still won't cover NDBI losses)
- Following the judgment some claims are now valid (or they should be paid more) and a re-visit is now needed (incl complaints)
- Slow payment should not exacerbate financial pressures
- Cover may now also be available for partial/mandatory closure orders that were not legally binding
- Valid claims should now not be reduced where paid on the basis that a loss would have resulted in any event



- Insurers should not include the period from 17 June 2020 to 14 July 2021 when relying on any time limits or for any delay in making a claim
- Pragmatic, transparent and consistent approach is now needed rather than creating additional barriers or delays
- August 2020 statement on deductions for some types of government support (grants)
- Where further legal proceedings occur to clarify any remaining areas of uncertainty the insurer should bear the costs of the insured and should not seek to recover any of their costs in this process (FOS limit £6.5m turnover and compensation capped at £355,000)
- Thoughts and interpretation of the impact had on your business and the wider sector will be sought



Insurance **POST**
Government hits out at insurers over grant deductions from BI claims



Emmanuel Kenning

[@InsPostbod](#)

28 Sep 2020

Indicative reading time: 1 minute

John Glen MP, economic secretary to HM Treasury, has rebuked insurers deducting government grants from business interruption claims payments and warned of further action.

"It is the government's firm expectation that grant funds intended to provide emergency support to businesses at this time of crisis are not to be deducted from business interruption insurance claims," he stated.

Glen, *pictured*, noted that the effect of making the deductions – [an issue previously reported on by Post](#) – was that rather than supporting businesses and protecting jobs during the pandemic "taxpayer funds are being channelled into savings for insurers".

He called on providers making deductions to "respect the spirit" of the

Finalised guidance

Business interruption insurance test case: Finalised guidance for firms

June 2020

- 6.3 Insurers should publish sufficient details with appropriate prominence and signposting to keep all policyholders with relevant non-damage business interruption policies updated about the test case and its implications for potential claims under their policies. Insurers may publish this information on the firm's website or by other general means. This information should be published promptly after 17 June 2020.

So?

- Insurers should ensure all valid claims are identified
- Brokers should seek to support to progress claims quickly and they should consider whether it is fair, and in the policyholders' best interests, to notify them if they reasonably consider that they may have a claim under their policy
- If claims are delayed (incl interim payments) compensation could become payable under Enterprise Act 2016 (has this caused any insolvencies?)
- Certain businesses remain under threat and the general reaction post March has been to exclude rather than engage (but that is insurance!)
- Reputation has been badly damaged



3. FOS decisions



Key issues

1. Damage only cover
2. Specified diseases
3. Plague
4. At the premises
5. Did not buy the right cover



Damage only cover

DRN-2689087



The complaint

A company I'll refer to as D have complained that Aviva Insurance Limited unfairly turned down their business interruption insurance claim after they were forced to close due to the Covid-19 pandemic.

Mrs W, a director of D, has brought the complaint on D's behalf.

What happened

D hold a business interruption insurance policy with Aviva. D claimed on their policy after they were required to close due to the Government's actions in response to the Covid-19 pandemic.

Aviva turned down D's claim as it said the policy covered business interruption due to damage to property or premises and Covid-19 hadn't caused damage as defined in the policy.

The business interruption section of D's policy provides cover for interruption or interference to their business resulting from:

★ *Damage to property used by You at The Premises for the purpose of The Business occurring during the Period of Insurance caused by any of the following Contingencies...*

The policy defines damage as "Physical loss, destruction or damage".

As this term would require physical loss, destruction or damage to property used by D at their business premises, I don't think it provides cover for D's claim for closure as a result of the Government's response to the pandemic. I'm not aware that Covid-19 caused any damage to property used by D, as defined in the policy.

Extensions for prevention of access and loss of attraction

The policy also has extensions to the business interruption section, which covers 'Damage'

*(1) at the premises or situations or
(2) to the property*

described below by any Contingency as applying to such premises, situations or property, which results in interruption or interference with The Business.

★ Prevention of access and loss of attraction are listed as contingencies, and provide cover, as set out above, for Damage to:

Property within one mile of the boundary of The Premises which physically prevents or restricts access to or use of The Premises.

Property or premises within one mile of the boundary of The Premises, which directly results in a reduction in the Turnover (or Revenue, Fees, or Rentals as insured by this Section) of The Business.

These extensions would require there to have been damage to property or premises within one mile of D's premises, and for that damage to have physically prevented or restricted access to D's premises or resulted in a reduction in D's turnover. It is not clear that Covid-

Specified diseases + plague

DRN-2687631



The complaint

A company which I'll refer to as M complains that Allianz Insurance Plc ("Allianz") unfairly declined a claim under M's business protection insurance policy.

Mrs W who is a director of M brings the complaint on M's behalf.

What happened

M holds a business protection insurance policy with Allianz. Mrs W made a claim on that policy to cover M's losses arising out of the closure of M due to the national government-imposed lockdown in response to the Covid 19 pandemic.

Allianz declined the claim because it said M didn't have cover for the losses it was claiming for. Mrs W didn't agree and thought the policy should cover M for its losses. She said she thought the policy wording for specified illnesses meant that M's claim should be covered, that Covid 19 wasn't excluded under the terms of the policy and that M had a recorded case

"Specified Illness" is defined as:

"illness sustained by any person resulting from:

...

b Acute Encephalitis, Acute Poliomyelitis, Anthrax, Chickenpox, Cholera, Diphtheria, Dysentery, Leprosy, Leptospirosis, Malaria, Measles, Meningococcal Infection, Mumps, Ophthalmia Neonatorum, Paratyphoid Fever, Plague, Rabies, Rubella, Scarlet Fever, Smallpox, Tetanus, Tuberculosis, Typhoid Fever, Viral Hepatitis, Whooping Cough or Yellow Fever an outbreak of which the competent local authority has stipulated shall be notified to them." ★

Having considered the list of illnesses in the policy, I'm not persuaded this section provides M with cover in the circumstances as Covid 19 isn't one of the specified illnesses. I realise that Covid 19 wasn't something Allianz would have known about when the policy was drafted, but I don't think that changes my findings. I'll explain why. ★

There are other policies that were on the market that do provide cover for the present pandemic. These are usually policies that cover all notifiable diseases, which are set out and updated on a Government defined list. Whereas M's policy sets out a specific list of the illnesses which are covered by the policy. And having reviewed the policy wording, there is nothing which implies that it provides cover for other illnesses, including any new illnesses which might emerge. And there are several illnesses that the policy doesn't cover, including SARS (which is another type of Corona★). So I think the purpose of the policy is to provide cover in the event of the specific illnesses listed and I don't think the policy can or should fairly be interpreted as covering any illnesses that aren't specified in the list set out

I've also considered whether Covid 19 might fall under 'Plague' which is one of the illnesses specified in the list of illnesses covered, but I don't think it does. The policy doesn't define 'Plague', but it does have a specific medical classification and is an infectious disease in its own right. Plague appears as a specified disease in the Government's list of notifiable diseases and is caused by a specific bacterium. In contrast Covid 19 is a viral infection. So, having considered the position carefully I am satisfied that the capitalised term 'Plague' used in the policy was intended to only cover the recognised medical illness Plague. ★

Finally, whilst I appreciate it's possible that 'Plague' could be interpreted on its widest dictionary definition as an 'infectious disease', 'affliction' or 'pestilence', I think that doing so would render the list Allianz has set out, redundant. That's because it would cover most of the specified illnesses set out within it, so it would be pointless to list them as Allianz has. So overall, I think the fact that Plague is listed separately in the policy and is different in nature to Covid-19 is enough for me to determine that Covid 19 does not fall within the term 'Plague' in the policy and I don't think it would be fair and reasonable in all the circumstances to treat the policy as if it did.

Mrs W says that Covid 19 isn't excluded under the terms of the policy and I have considered this. However I think the policy has a defined list of illnesses that it provides cover for under this section – so any illnesses that aren't on the list wouldn't be covered under that section of

At the premises

DRN-2539279



The complaint

Mrs R has complained that HDI Global SE unfairly turned down her business interruption insurance claim, after her business was affected by the Covid-19 pandemic.

What happened

Mrs R holds a business interruption insurance policy with HDI. She claimed on her policy after her business was affected by the Government's actions in response to the national pandemic.

HDI said that the policy wouldn't provide cover for Mrs R's business interruption if it was due to the national coronavirus crisis, rather than an outbreak at the premises. As Mrs R didn't indicate that someone at the premises had Covid-19, HDI turned down her claim.

As Mrs R was unhappy with HDI's response, she brought her complaint to our service. She felt HDI should pay her claim.

The most relevant part of the policy covers interruption or interference in consequence of:

- a) closure or restrictions placed on the **Premises** on the advice of or with the approval of the Medical Officer of Health for the Public Authority as a result of a **Notifiable Human Disease** occurring at the Premises

The policy defines Notifiable Human Disease as:

An illness sustained by any person caused by

- a) *food or drink poisoning*
b) *any human infectious or contagious disease*

an outbreak of which the competent public authority has stipulated shall be notified to them

Covid-19 is a notifiable disease, but I don't think this extension covers Mrs R's claim. I say that because the policy requires the closure or restrictions to Mrs R's premises to have been as a result of a case of the notifiable disease occurring at the premises. Mrs R hasn't indicated that anyone at the premises had Covid-19. Instead, her business was affected by the Government Act in response to the national pandemic. ★



I understand that one of Mrs R's employees had to isolate after their child had Covid-19, but there isn't anything to indicate that her employee, or anyone else, had Covid-19 at her premises.

FOS mentions the broker

DRN-2539566



The complaint

A community interest company I'll refer to as C have complained that Ecclesiastical Insurance Office Plc turned down their business interruption insurance claim. Mr Y, director of C, has complained on C's behalf.

What happened

C hold a charity protect insurance policy with Ecclesiastical. C claimed on their policy after they were required to close due to the Government's actions in response to Covid-19.

★ Ecclesiastical said that the policy didn't cover C's claim because they didn't have business interruption insurance as part of their policy.

C thought they did have business interruption insurance, but said that if they didn't then another part of the policy should cover their claim, due to the losses they'd experienced. C brought their complaint to our service.

cover that C bought. I've also looked at the insurance proposal form. This lists the same areas of cover as the schedule and doesn't include business interruption. This further indicates that C didn't buy business interruption insurance as part of the policy. ★

I understand C feels that they wanted to buy business interruption insurance. However, as the policy was sold by a broker, I'm not able to make a finding on what happened during the sale in this decision. If C is unhappy with the way the policy was sold they would need to complain about that separately to the broker. ★

C haven't indicated which terms in the other parts of the policy they feel should cover their claim. I've looked at the policy and I don't think the areas of cover, that I've mentioned above, cover the interruption to C as a result of the pandemic and the Government's related actions. I say that because they cover other types of risks, such as legal disputes.

C have referred to the FCA's test case. However, not all policies and policy terms were considered as part of the test case. And I don't believe C's claim would be impacted by this, as C didn't have business interruption insurance cover.

4. Broker's duties



Broker's duties

- **Assessing the insured's needs**
- Not obtaining insurance
- Not obtaining the insurance the insured wanted
- **Not obtaining insurance meeting the insured's needs**
- Not exercising discretion in a reasonable way
- Failing to act with reasonable speed
- Liabilities associated with Non-Disclosure
- Liabilities associated with Misrepresentation
- **Not advising adequately on the existence of and terms of cover**
- **Other failure to give competent advice**
- Liabilities during the currency of the policy
- Failure in respect of notification and in respect of claims

Based on Jackson & Powell Professional Liability Chapter 10.



Demands and needs



ICOB5 5.2.2

R

01/10/2018



(1) Prior to the conclusion of a *contract of insurance* a *firm* must specify, on the basis of information obtained from the *customer*, the demands and the needs of that *customer*.

(2) The details must be modulated according to the complexity of the *contract of insurance* proposed and the type of *customer*.

(3) A statement of the demands and needs must be communicated to the *customer* prior to the conclusion of a *contract of insurance*.

[Note: articles 20(1) and 20(2) of the *IDD*]

ICOB5 5.2.2A

G

01/10/2018

A *firm* may obtain information from the *customer* in a number of ways including, for example, by asking the *customer* questions in person or by way of a questionnaire prior to any *contract of insurance* being proposed.

ICOB5 5.2.2B

R

01/10/2018

When proposing a *contract of insurance* a *firm* must ensure it is consistent with the *customer's* insurance demands and needs.

[Note: recital 44 to, and article 20(1) of, the *IDD*]

ICOB5 5.2.2C

G

01/10/2018

ICOB5 5.2.2BR applies whether or not advice is given and in the same way regardless of whether that contract is sold on its own, in connection with another *contract of insurance*, or in connection with other goods or services.

ICOB5 5.3 Advised sales

Suitability

ICOB5 5.3.1

R

01/10/2018



A *firm* must take reasonable care to ensure the suitability of its advice for any *customer* who is entitled to rely upon its judgement.

Advice on the basis of a fair analysis

ICOB5 5.3.3

R

01/10/2018



If an *insurance intermediary* informs a *customer* that it gives:

(1) advice on the basis of a fair analysis, it must give that advice on the basis of an analysis of a sufficiently large number of *contracts of insurance* available on the market to enable it to make a recommendation; or

(2) a *personal recommendation* on the basis of a fair and personal analysis, it must give that *personal recommendation* on the basis of an analysis of a sufficiently large number of insurance contracts available on the market to enable it to make a *personal recommendation*;

and in each case, it must be in accordance with professional criteria, regarding which contract of insurance would be adequate to meet the customer's needs. [Note: article 20(1) third paragraph of the *IDD*]

Personalised explanation

ICOB5 5.3.4

R

01/10/2018

Where a *firm* provides a *personal recommendation* (other than in relation to a *connected travel insurance contract*) the *firm* must, in addition to the statement of demands and needs, provide the *customer* with a personalised explanation of why a particular *contract of insurance* would best meet the *customer's* demands and needs.

[Note: article 20(1) third paragraph of the *IDD*]

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Derivations & destinations

IC OBS 6.1 Providing product information to customers: general ↗

Ensuring customers can make an informed decision: the appropriate information rule

IC OBS 6.1.5
R
01/10/2018

(1) A *firm* must ensure that a *customer* is given appropriate information about a policy in good time and in a comprehensible form so that the *customer* can make an informed decision about the arrangements proposed.

(2) The information must be provided to the *customer*:

(a) whether or not a *personal recommendation* is given; and

(b) irrespective of whether a *policy* is offered as part of a package with:

(i) a non-insurance product or service (see IC OBS 6A.3 (Cross-selling)); or

(ii) another *policy*.

(3) Appropriate information is both objective and relevant information, and includes *IPID information*.

What level of information needs to be provided?

A *firm* must ensure that the level of appropriate information provided takes into account the complexity of the *policy* and the type of *customer*.

[Note: article 20(4) of the *IDD*]

IC OBS 6.1.6B
R
01/10/2018

The level of information required will vary according to matters such as:

(1) the knowledge, experience and ability of a typical *customer* for the *policy*;

(2) the *policy* terms, including its main benefits, exclusions, limitations, conditions and its duration;

(3) the *policy's* overall complexity;

(4) whether the *policy* is bought in connection with other goods and services including another *policy* (also see IC OBS 6A.3 (cross selling));

(5) distance communication information requirements (for example, under the distance communication *rules* less information can be given during certain telephone sales than in a sale made purely by written correspondence (see IC OBS 3.1.14 R)); and

(6) whether the same information has been provided to the *customer* previously and, if so, when.

IC OBS 6.1.7
G
01/10/2018

How have needs been understood and an appropriate policy sold?

In addition to the insurance described above, Section A2 is extended to cover:

DESCRIPTION OF ADDITIONAL COVERS EXCLUSIONS AND LIMITATIONS

Loss of Income occurring during the Indemnity Period resulting from

4.0 Notifiable Disease

An outbreak of any infectious or contagious disease

- occurring at the *Premises*, or,
- which is attributable to food or drink supplied from the *Premises*, or,
- occurring within 25 miles of the *Premises*, which, by reason of the abnormal number of cases,
 - causes prospective guests to refrain from making bookings for accommodation,
 - gives legal grounds for guests to cancel bookings for accommodation already made.

★

This extension is not operative in respect of Acquired Immune Deficiency Syndrome, (AIDS).

Check the following

1. Do you fully assess client requirements?
2. Was pandemic cover available and at what cost?
3. What market analysis did you undertake and were wider policy wordings/limits available to you?
4. Why did you recommend the policy as then being suitable for that client?
5. And did you state the consequences of not following your advice?
6. As wordings have changed since March 2020 how does this judgment affect the policies sold since then? Does your continuing advice reflect this?



Practical steps?

1. By now you will know how much of a risk this is to your business and claims/notifications should have come through
2. **PI insurance covering covid is much more expensive and you must have it covered to continue to advise clients (FCA notification)**
3. If you have an exposure how much is your excess and consider this part of TC2.4 (bear in mind the onerous financial resilience surveys)
4. Ensure advice to clients over this is very clear i.e. state pandemics will not be covered and staff are trained and up to speed (esp as WFH)



Notification Form

SUP 15 Annex 4

(June 2020)


Firm name

Firm Reference Number

Address

Professional indemnity insurance (PII) cover 

For example:

- cover not renewed;
- cover exhausted; and
- cover does not meet FCA or PRA requirements. 

SECTION E: PII Self-Certification [help](#) [?](#)

4. Professional Indemnity Insurance Details

Please complete the table below if the answer to Question 3 is "Yes", otherwise leave blank.

PII Basic Information

PII policy	Limit of indemnity received			Retroactive start date (if any)	Annualised premium (Sterling)	Insurer (from list)
	Mortgage advising/arranging	Non-investment insurance advising/arranging/dealing/assisting	Retail investment advising/arranging			
	A	B	C	D	E	F
1	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>

PII policy	Start date	End date	IMD firms should state their indemnity limits in		Aggregate	
			Indemnity Limit (Single) in: Euros/Sterling/Unlimited	Single		Indemnity Limit (Aggregate) in: Euro/Sterling/Unlimited
	G	H	I	J	O	K
1	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>

PII Detailed Information

PII policy	Business line	Policy excess	PII policy	Policy exclusions
1	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>

Number of Business Lines to add:

Number of Policy Exclusions to add:

I must remind you in strong terms that given the requirement of PI insurance under MIPRI 3.2 is a minimum condition, the FCA's position is that firms which do not have this in place **should not be continuing to undertake new business until such insurance has obtained.**

Therefore, in order that I can be satisfied that you are seeking proactive remedy to this regulatory breach, please forward me a summary of the measures you have taken so far to obtain alternative PI insurance and the status of your discussions with individuals brokers/firms. **Please also indicate during what timescales you envisage you will have the correct coverage in place so that I assess whether I need to conduct a review of your firm's current permissions and whether these will require temporary suspension.**

Please provide this information to me by xx after which I will revert to you with determination of our intended action.



Manchester Underwriting

- Most claims that we've received do not relate to wordings affected by the decision
- Brokers may well not be liable but we're going to be fighting a lot of claims still
- **And even where there is cover, it's often sub-limited at a very low level in relation to the insured's loss (why was it sold then?)**
- 90% clearly have no cover and the **claimant is arguing that the broker has been negligent in selling a policy that doesn't give the cover that was needed**



Learning objectives

This talk will give you an insight into:-

- An update on the FCA's test case on Business Interruption Insurance
- Why compliance with ICOBS is important now more than ever



Thank you for listening

Questions and debate please

www.branko.org.uk

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