

Business Interruption Insurance in the age of COVID-19



Introduction

1. What is business interruption insurance and why has COVID-19 caused so many issues;
2. The legal principles for interpretation of insurance contracts;
and
3. The likely arguments to be advanced by both insurer and insured.



What is business interruption insurance?

- Insurance for the loss of profits or additional expenditure caused by an insured peril
- To protect the balance sheet of the business due to unforeseen circumstances



Why has COVID-19 created confusion?

- There are a range of BI insurance policies available in the market with a variety of wording
- A basic BI insurance policy requires physical damage to property
- Some BI insurance policies can cover a range of perils that do not involve any physical damage to property (diseases, food-poisoning, lock-outs, interruptions to utility supplies and murders/suicide)
- Infectious diseases
- Non-Damage denial of access



How to interpret insurance contracts (1)

Insurance policies are to be construed according to the principles of construction generally applicable to commercial and consumer contracts

(*Cementation Piling & Foundations Ltd v Aegon Insurance Co Ltd* [1995] 1 Lloyd's Rep. 97 at 101)



How to interpret insurance contracts (2)

- the natural and ordinary meaning of the language used;
- where the parties have used unambiguous language, the court must apply it;
- any other relevant provisions of the contract;
- the overall purpose of the relevant clauses under contract as a whole;
- the facts and circumstances known or assumed by the parties to the contract at the time it was executed; and
- commercial common sense (in the context of the agreement of the provisions of the contract).

Rainy Sky SA v Kookmin Bank Co Limited 2011 1 WLR 2900 at paragraph [14]; ***Arnold v Britton*** [2015] AC 1619 at paragraph [15]; and ***Wood v Capita Insurance Services Limited*** [2017] AC 1173, paragraphs 10 to 14.



How to interpret insurance contracts (3)

When considering commercial purpose, in ***Arnold v Britton*** Lord Neuberger said at para.19:

“commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made”



How to interpret insurance contracts (4)

“It is also necessary that the Court should have regard to previous decisions of the Courts upon the same or similar wording. Parties to a commercial contract are to be taken to have contracted against a background which includes the previous decisions upon the construction of similar contracts”

Toomey v Eagle Star Insurance Co. Ltd [1994] 1 Lloyd’s Rep. 516
at 520, per Hobhouse LJ



How to interpret insurance contracts (5)

“The fact that a provision in a contract is expressed as an exception does not necessarily mean that it should be approached with a pre-disposition to construe it narrowly. Like any other provision in a contract, words of exception or exemption must be read in the context of the contract as a whole and with due regard for its purpose. As a matter of general principle, **it is well established that if one party, otherwise liable, wishes to exclude or limit his liability to the other party, he must do so in clear words;** and that the contract should be given the meaning it would convey to a reasonable person having all the background knowledge which is reasonably available to the person or class of persons to whom the document is addressed..”

Impact Funding Solutions v AIG Europe Insurance [2017] AC 73,
per Lord Toulson at para.35.



Arguments for Insurer

- Has the policy been triggered?
 - Denial of access extension
 - The Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020
 - Scottish Government Guidance
 - Infectious Disease
 - Vicinity requirement
- Causation



Arguments for Insured

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<https://www.fca.org.uk/publication/corporate/bi-insurance-test-case-fca-skeleton-argument.pdf#page=72>
- Causation



Questions?



