**Business Interrupted? The High Court delivers its judgment in the FCA Test Case**

**Business Interruption polices**

Most businesses have suffered considerable disruption and loss as a result of the restrictions imposed as a consequence of the Covid-19 pandemic. Those who have business interruption (“BI”) policies may be covered for certain types of loss. The starting point in assessing whether a policyholder may be able to make a claim under the relevant BI policy is to carefully examine its terms.

Whilst each case will turn on its own facts, BI insurance cover for the losses flowing from Covid-19 is most likely to be triggered where the policy contains a non-damage BI extension for infectious diseases. A typical formulation contained in such clauses is to provide cover for the closure of part or whole of the insured’s premises by an order of a public authority as a result of a ‘notifiable’ human infectious disease.

**FCA Test Case**

The FCA brought a test case based on a sample of policy wordings from eight insurers and argued on behalf of policyholders that clauses containing terms such as ‘disease’ and/or ‘denial of access’ should provide cover for the circumstances caused by the Covid-19 pandemic and that the trigger for cover is the cause of the ensuing losses.

The High Court handed down its judgment today which found in favour of the FCA. The judgment is long and complex but in summary it says that most of the so called ‘disease clauses’ and ‘denial of access clauses’ in the sample provide cover. In the case of denial of access clauses, it will depend on the detailed wording of the clause and how exactly the Government’s lockdown measures affected individual businesses i.e. whether the business was fully or partially closed as a result of those measures.

It is important to note that the eight defendant insurers were found to be liable under some but not all of the 21 types of policy wording which were considered as part of the test case. Therefore, it is imperative for policyholders to seek professional advice on whether their policy wording mirrors the clauses which were found to be triggers in the judgment.

It is possible that the decision will be appealed but the FCA have said that this should not prevent policyholders from settling their claims with their insurer prior to the outcome of any appeal. Insurers may, however, take a different view and seek to delay payments in respect of claims.

**What Can Businesses Do Now?**

The test case is potentially very helpful for those policyholders with the above mentioned clauses. The FCA estimates that there are 370,000 policyholders with policies which might be affected by the outcome of this case.

However, for many businesses this judgment may already be too late and there are likely to be a large number of policies which are not covered by the test case.

Helpfully, the FCA have confirmed that the test action will not prevent individuals from pursuing issues through the courts or taking eligible complaints to the Financial Ombudsman (“FOS”). To avoid further delays, it may be prudent to consider commencing these actions in advance of any appeal of the judgment in the FCA test case.

**FOS**

The FOS have confirmed that they will deal with BI related complaints. The service is free to use and the FOS will consider complaints by a range of consumers and businesses including larger SME’s i.e. firms with an annual turnover of under £6.5 million, an annual balance sheet total of under £5 million, or fewer than 50 employees.

The FOS can provide a satisfactory outcome to disputes under £350,000 without businesses and consumers having to incur the costs of taking the matter to court. It is strongly advised, however, that those seeking redress from the FOS seek specialist advice prior to submitting a complaint to their insurer or intermediary.

**Mis-selling Claims**

Claims could be brought by businesses who have been mis-sold policies that purported to cover BI but do not provide appropriate coverage contrary to the representations, advice and/or recommendations of an insurer or intermediary. It is important that evidence is collated and legal advice sought as soon as practicable in relation to these potential claims pending the judgment in the test case.

At Forum, we have a wealth of experience in assisting clients with mis-sold insurance policies and other financial products. Our team of expert barristers can assist in helping businesses and consumers to navigate the legal and regulatory options available for redress.

**Contact Us**

If you or your clients have any legal issues relating to the above matters, please do get in touch with us at [clerks@forumchambers.com](mailto:clerks@forumchambers.com)