Carriers' inconsistent approach to BI claims is a 'major issue' for the market

27 Apr 2021 | **ANALYSIS**

by Rasaad Jamie | rasaad.jamie@informa.com

Differing instructions to adjusters on how to interpret wordings and quantum for almost identical BI claims from different insurers are producing very different outcomes for clients

LOSS ADJUSTERS WARN OF A NUMBER OF GREY AREAS AND CHALLENGES AHEAD AS COVERAGE OF THE TEST CASE FOCUSED ON SMALL BUSINESSES

Source: Yau Ming Low/Alamy Stock Photo

The decision last year by the UK Financial Conduct Authority (FCA) to bring the Covid-19 business interruption test case has been widely applauded by the market, despite the challenge to insurers. This is not least because the ruling in January this year by the UK Supreme Court, which held that the majority of the wordings reviewed would respond in favour of the policyholder, brought much-needed clarity in an incredibly short timescale.

For example, shortly after the ruling, the London & International Insurance Brokers' Association (Liiba) pointed to the situation in the US, where commercial policyholders are looking at the prospect of years of litigation before they reach a similar position to the one the FCA has achieved in a matter of months.

For Liiba, the message from the Supreme Court to insurers in the UK could not be clearer: policies must be issued in such a way that clients know not only what risks are covered, but also know what risks are excluded.

The Supreme Court ruling has been equally welcomed by loss adjusters, which describe the judgment as robust and as sufficiently wide-ranging to enable the market to review and respond to most points. Indeed,

the depth of analysis provided by the judges in the ruling and the appeal is regarded as extremely useful for adjusters and other specialists working in the field of insurance claims.

But adjusters also warn of grey areas and challenges ahead. To begin with, much of the coverage of the test case has focused on the impact on small businesses, but there are also a number of larger corporate policyholders whose insurance coverage will be affected by the decision. The ruling, adjusters warn, is also likely to trigger disputes between carriers and their reinsurers as a consequence of insurers having to increase their Covid-19-related business interruption loss estimates.

In addition, the Supreme Court only focused on the scope of the coverage of two common non-damage business interruption extensions to property insurance policies: for a notifiable disease causing illness within a specified radius of the insured premises; and the prevention of access to the insured premises by a competent authority (that is, the lockdown measures imposed by the government). And, while the court provided detailed comment on the coverage of the two policy extensions, it did not rule on how to calculate the quantum of the claims. According to the judges, each case needed to be considered on its own particular merits.

Policy checker

To put pressure on insurers to settle quickly, the FCA has launched an online policy checker application, which enables policyholders to compare their policy wordings to the 21 policies examined in the test case to see if their policy will cover business interruption losses due to Covid 19. In addition, the regulator has also launched a tracker showing how quickly insurers are responding to claims and what the outcome is.

While the depth of analysis provided by the judges is very helpful to loss adjusters, for the typical small to medium-sized enterprise (SME) policyholder, the highly technical appeal judgment, which runs to 112 pages, is very difficult reading. "Problems are more likely to arise from a lack of clarity on the part of policyholders, given the impression from some commentators all business interruption losses will be covered," Damian Glynn, director and head of financial risks at Sedgwick, says.

For example, specified disease cover will not respond, as Covid-19 did not exist at the time the lists were drafted. Disease at the premises cover will not respond to losses flowing from the government measures imposed on businesses as a result of the disease, as confirmed by the Financial Ombudsman Service for small businesses, which has the power to settle disputes between SMEs and providers of financial services, including insurers.

Against this background, the offer of a policy checker by the FCA is seen as a very helpful and easy way to encourage policyholders to get clarity regarding the details from their own specific policy wording. It may also help them to avoid jumping to assumptions based on newspaper headlines, according to Terri Adams, a director in the specialist adjusting practice at Charles Taylor Adjusting.

"It is clear the FCA is identifying ways to be very proactive and helpful for claimants, while still acknowledging many will be undoubtedly be disappointed on cover," Adams says.

Other adjusters, however, point out that, in their experience, the FCA coverage checker does not prevent a policyholder who receives a "no" from the FCA checker still sending in a claim to the insurer to have the answer validated which obviously adds to the sheer volume of claims that are being dealt with.

"An insurance policy is a contract between the insured and the insurer, therefore it is for the insurer to say there is no cover. Although they can delegate this responsibility to adjusters on instruction which they are doing in certain instances with these claims," Sue Taylor, director of Sue Taylor Ltd and co-author of The Basic Business Interruption Book published by the Chartered Institute of Loss Adjusters (Cila) and a contributor to Riley on Business Interruption, the latter being the standard text in the field.

The other aspect, according to Taylor, is the FCA checker is being used in many instances to check coverage in relation to insurers that were not party to the judgment and some insurers are raising this as an issue.

As things stand business interruption adjusters and forensic accountants are deeply involved in the resolution of quantum in these claims. Adams describes the volume of SME claims at present in the UK market as exceptional. However, she does not expect the situation to continue for an extended period as the FCA is pressing for rapid progress to settlement now the appeal is concluded.

The situation is a steep learning curve for the market, according to Glynn. "The pragmatism in dealing with large volumes of claims via automated portals, one of the major lessons from the pandemic, may well help in dealing with future surge events," he adds.

Quantum wars

Richard Cameron-Williams, a partner in the forensic accounting and valuation services practice at BDO, who has followed the test case closely, says the situation will lead to an outbreak of business interruption "quantum wars", the title of a series articles he has published over the past year about the implications of the FCA test case for the market.

The market, he says, now faces the considerable task of applying the framework set out by the judgments to the individual circumstances of many thousands of claims to calculate the quantum of each of each of the claims.

This process, he points out, is also likely shine a light on areas of the judgment that will require further clarification. At the moment, the two key areas where loss adjusters require further clarification are whether the Supreme Court judgment gives rise to the potential for multiple limits of loss occurrences or locations and the treatment of furlough.

However, the more immediate challenge for market, according to Cameron-Williams, is the fact that three months later there are still only draft declarations from the Supreme Court judgment, "so even now we are not in a position whereby what the judgment says is agreed by all parties. Until that is resolved, it's difficult to say whether there will be other areas that then require further clarification", he says.

However, the pressure on carriers to settle quickly represents a significant challenge for business interruption insurers, given the prevailing uncertainty, Taylor says. In any business interruption claim, when it comes to calculating quantum, there are always differing views. "You can have a loss adjuster and a forensic accountant appointed by and answering to the insurer," she says.

"In addition, there can be a claims consultant/assessor, frequently with a loss adjusting background, and forensic accountant appointed by, and answering to, the policyholder. They will, in most cases, come up with two very different answers in relation to quantum, based on the instructions they have received from their principals as to the interpretation of the information provided," Taylor adds.

A business interruption claim consists of two key questions: one, is the claim covered by the policy? And two, the calculation of quantum. There is no point moving on to the second part unless the answer to the first part is "yes", Taylor says.

"The first part of the claim is all about words and the second is all about figures. But the Supreme Court Justices considered the meaning of the words, in various wording forms, in order for the first question to be answered, but said in relation to the quantum, each case needed to be considered individually," she points out.

Different interpretations

The issue with words and figures, particularly given the complex nature of business interruption claims, is they can both be interpreted slightly differently, depending on how you look at them, Taylor argues. “And that is the issue for the market at the moment. In many instances adjusters, are being given differing instructions, from their various principals on how to interpret the words and the quantum, on what on the face of it, could be two almost identical claims from two different insurers, producing very different results. This inconsistency of approach from insurers is a major issue for the market.”

What is clear is the FCA test case will radically transform the scope of coverage in the business interruption insurance market going forward, including the review of all existing insurer and broker wordings.

For Neil Baldwin, executive director at McLarens, the impact of the Supreme Court ruling will extend much further, particularly in a hardening market, with insurers changing their approach to rating and to the acceptance or otherwise of bespoke wordings or clauses.

With increased ratings, brokers and customers placing their business directly will need to consider their approach to insurance as their risk-transfer mechanism, Baldwin argues.

“We may see more self-insured retention arrangements through placement with captives or higher deductibles, less covers written on an ‘all-risks’ basis, less attraction to bolt on additions to standard covers, and finally a growth in parametric covers for certain types of peril or risk,” Baldwin says.

Parametric covers could prove to be particularly attractive to the market on notifiable disease exposures, given the fact less cover is being written at present as a direct consequence of the Covid-19 pandemic. “Insurers may lower the cover threshold for risks they are prepared to write directly, so co-insurance arrangements may feature more highly. Insurers may also want to exert greater control on bespoke wordings prepared by managing general agents and brokers,” Baldwin says.

Loss adjusters and forensic accountants could also see their roles transformed in the future. “There will always be a role for loss adjusters and forensic accountants but, as we have seen over the last 30 years or so, the nature and scope of the roles will inevitably change. There may be more customers seeking direct relationships with loss adjusters to help them manage their self- insured retentions. And there will be an ever-increasing place for experienced professionals, including the increased use of technology by loss adjusters and forensic accountants, to manage new and emerging business interruption risk exposures,” Baldwin adds.