



# COVID-19 and Business Interruption Insurance

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The impact of the novel coronavirus (“COVID-19”) pandemic has been unprecedented. Aside from the devastating human tragedy, the virus has inflicted significant disruption to businesses and organisations across the globe. In the UK, the government has taken drastic steps to curtail the virus’s spread, including imposing a nationwide lockdown on the evening of 23 March 2020, after having already ordering pubs and restaurants to close a few days earlier.

It is no surprise that not-for-profit organisations have been hugely impacted by these measures. Where not-for-profit organisations are facing shortfalls as a result of the forced closure of their stores or as a result of large scale fundraising events being cancelled, it is likely that organisations are turning to their insurance policies.

The purpose of this memorandum is to provide an overview of: (i) relevant actions being taken in the context of business interruption insurance cover, and (ii) guidance for non-profit organisations as they consider what steps to take in the context of their insurance policies.

It is important that each not-for-profit organisation seeks independent legal advice given that there is no one “standard” insurance policy and whether or not there is cover under an insurance policy will be fact specific.

## Business Interruption Insurance - Overview

By way of an overview - business interruption cover is designed to protect organisations from losses sustained following an event that prevents the business from operating. Such cover will be divided into two types: (i) damage; and, (ii) non-damage. The former requires there to be physical damage to property (e.g., following a fire or flood) – business interruption policies will almost inevitably cover losses arising from “damage”.

Non-damage business interruption, though, is designed to assist businesses when there is no physical damage to the property. This can cover situations where a police cordon set up in the vicinity of the premises, due to a serious crime incident or terror attack, stops people visiting the premises. Unlike physical damage – it is less common for business interruption policies to cover “non-damage” loss.

COVID-19 will likely only fall under non-damage.

## Common issues facing insureds in making business interruption claims

As above, there is no “standard” business interruption policy, and there will likely be myriad wordings open to not-for-profit organisations. In addition, the impact of COVID-19 will be specific for each not-for-profit organisation.

Nonetheless, there are likely to be certain similarities between insurance policies. As mentioned above, almost all policies will include physical damage clauses under business interruption insurance, which covers damage typically resulting from a fire or flooding, amongst other things. Other policies, although less common, will additionally contain cover for non-damage interruption, which is the most relevant for COVID-19 related losses.

Common/relevant clauses include:

1. **non-damage denial of access clauses**, are one of the more common ways that not-for-profit organisations may be able to claim under their business interruption policies. These wordings are typically designed for interruptions caused as a result of access to the insured premises being blocked/hindered by an 'incident'. Such clauses are more likely to have been drafted with one-off events of serious violence or a single act of terrorism in mind rather than a sustained and ongoing change to the way we live our lives.
2. **disease clauses**, are another common way that not-for-profit organisations may be able to claim following losses as a result of COVID-19. Typically, these wordings are designed for interruptions caused as a result of the occurrence of a 'notifiable disease'. The 'notifiable disease' is typically defined under the policy by reference to a list of diseases which the policy covers. It is important to ensure that COVID-19 is not excluded under such clauses.

Both denial of access and disease clauses are also normally limited in time and/or distance. Most policies also include a distance limit, requiring that there was an "incident" or "occurrence" within the 'vicinity' or sometimes more specifically within a one or 25-mile radius for example, of the insured's premises. It is an area of much debate as to how to determine the meaning of these words in the context of COVID-19, and the onus is on the insured to prove that the terms are satisfied. It was unclear how insureds are expected to determine incidents or occurrences of the coronavirus in their area, without really knowing what those words mean. The FCA's test case (see below), however, has shed light on specific issues such as the meaning of an 'incident', 'vicinity' and 'occurrence'.

3. **public authority clauses**, whereby a local or governmental authority requires closures. Organisations may be able to make the argument that whilst their properties have not been damaged, their use has been prevented as a result of the government requiring that employees work from home where they can and mandating that the population to stay away from public spaces. As with the non-damage denial of access clauses though, these terms are also likely to include language such as 'event', 'incident' or 'vicinity'.
4. **Loss and causation**, each insurance policy will define "loss". It is important for full consideration to be given to that definition as it will set the foundation for what (if anything) can be claimed on the insurance policy. For example, does the definition cover: (i) loss from income from shops? (ii) loss from income due to event cancellation?; (iii) both (i) and (ii)?

## Steps a not-for-profit organisation should take

As set out at the beginning of this memo, a not-for-profit organisation should seek independent legal advice given: (i) the differences in policy wordings; and (ii) the fact specific nature of insurance claims.

That being said, there are certain additional steps a not-for-profit can take:

1. **Review the specific policy.** It is important that not-for-profit organisations review their specific policy wordings and understand their obligations, as each will be different.
2. **Time limits.** As part of the review of the policy, not-for-profit organisations should carefully review the notification provision in their policy and, in particular, the time by which a notification is to be made to the insured (the policy wording will differ but it is likely to include words to the effect that the insurer must be notified within a certain time period of “circumstances likely to give rise to a loss”).
3. **Discuss the position with your broker.** A not-for-profit organisation’s broker should also be contacted to discuss the situation. Not only is it likely that any notification would have to be made through the broker, but the broker is “your” broker – in that they are there to provide advice to a policyholder.
4. **Record any shortfalls and losses.** As a result of any obligation to notify the insurer of any shortfalls in funding suffered as a result of the ongoing pandemic, it will be essential that not-for-profit organisations have full and detailed information regarding their losses. It is crucial that this information is duly recorded.

## Things to consider if a claim is rejected

Not-for-profit organisations have many different options that they could explore, depending on the particular type of organisation in question:

- Make a formal complaint to the relevant insurance company. There will be a complaints procedure set out in the insurance policy.
- Depending on the value of the claim, raise a complaint with the Financial Ombudsman Service.
- The policy is likely to have a dispute resolution clause contained in it. For example, the policy may require the insurer and the not-for-profit organisation to engage in mediation in an attempt to resolve the dispute. This requirement may be a pre-condition to being able to commence litigation (or arbitration) (see next step).
- What would likely be seen as a last resort, litigation or arbitration (the policy will almost certainly have a jurisdictional clause which sets out if the parties are to litigate or arbitrate).

## Ongoing actions

There are various actions that are currently underway which will provide general guidance as to the interpretation of insurance policies.

First, the FCA has stepped in to assist businesses and organisations generally with business interruption coverage. The FCA brought a test case before the High Court against eight insurers, examining a selection of different policy wordings. The judgment was handed down in September 2020 and is likely to be subject to an appeal. The High Court's judgment provided some instructive points for policyholders, particularly in relation to the common issues faced.

1. "Events", "Incidents", and policies that refer to a small radius (e.g., 1 mile): generally, these wordings are to be interpreted more restrictively, denoting a more specific or localised incident causing the loss. As such, a specific incident of COVID-19 is likely to be required to be shown as having caused the loss (rather than COVID-19 being rampant throughout the UK), which is likely to be difficult considering the government measures in response to COVID-19 have, for the most part, been nationwide. The judgment is, therefore, likely to restrict potential claims where such wording exists.
2. "Occurrence", "Vicinity" and policies that refer to a large radius (e.g., 25 miles): generally, the court was favourable to policyholders where the policy specifies a large area, or an 'occurrence' within the 'vicinity' of the premises. In such a case, 'vicinity' could, in fact, be the whole of the UK. Furthermore (and unlike point 1, above) it seems unlikely that a policyholder would have to demonstrate that the loss was caused by a specific occurrence of COVID-19 within the relevant radius. Rather (and in the context of a "Notifiable Disease"), provided: (i) loss was suffered as a result of COVID-19 restrictions; and, (ii) there was a case of COVID-19 (being the "Notifiable Disease") within the relevant radius, the policyholder may be able to make a recovery under the policy.
3. Loss and causation: of particular benefit to policyholders is the interpretation of whether COVID-19 can be said to have caused loss. The court concluded that in order to determine the cause (and when calculating the indemnity under the policy), the counterfactual comparison is between one where there is no COVID-19 at all (and, therefore, no government restrictions) and the current position (i.e., with COVID-19 throughout the UK and wide-ranging government restrictions).

Second, "action groups" have formed as the COVID-19 crisis has continued. These "action groups" are groups of similar businesses that have "joined" together to bring claims for non-payment of business interruption insurance claims against various insurers. There are specific criteria that will need to be met in order to join any such action group, but not-for-profit organisations should consider this option and make all necessary and reasonable enquiries about joining such an action group.

Please be reminded that the strength of any claim will depend on the particular policy in question.

## Renewal

Not-for-profit organisations also need to consider COVID-19 in the context of insurance renewals. Not only will care have to be taken to provide accurate information as to the impact of COVID-19, a careful review of the various policy exclusions needs to be undertaken. In all likelihood, there will be a specific COVID-19 exclusion. However, such an exclusion could be framed in broader terms, excluding matters that were previously covered and so fully understanding the policy exclusions is crucial.

## Conclusions

To summarise, not-for-profit organisations should take steps to review their policies and engage their broker and, if necessary, independent lawyers. The ability to successfully claim under a business interruption policy will be entirely dependent on the wording in place and the underlying facts.

The outcome of the FCA test case brings guidance to not-for-profit organisations on the specific types of wordings that may be contained within their policies, and provides a framing for potential claims under the policies in the future. Whether the case is to be appealed, and the outcome of that appeal, is as yet unknown.