Business Interruption Insurance Claims

LITIGATION & DISPUTE RESOLUTION UPDATE MAY 2020

A common reality for most businesses throughout the UK is that their doors remain closed from the effect of Covid-19. Although the UK's government scheme provides employees with 80% of their wages, there is no such provision for the loss of revenue businesses are suffering.

As part of managing this risk, many businesses will now need to turn to their insurance policies, and particularly, business interruption insurance (BII). However, it is increasingly clear that some of the big insurers are unwilling to pay out.

Just because an insurer is unwilling to pay out, this does not mean you have no further recourse. It may be that an action could be brought against the insurer for breach of contract, the remedy for which could include damages.

This article looks at some of the issues and how to pursue a BII claim.

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1. How do insurers avoid paying out, when businesses have paid for BII cover?

When you bought the policy, the insurer will normally have provided a policy and schedule. These documents form a contract between business and insurer, whereby the insurer agrees to pay out for certain events.

The policy wording is very important and often describes in detail what they will and will not cover. From 2003, some insurers have deliberately excluded SARS like diseases, thereby excluding the current situation. The starting point is to look carefully at the wording. A lot of policies look to indemnify businesses for loss of revenue only where there is a manifestation of a disease at the premises.

If this is so, and unless employee(s) contracted Covid-19 at work, this is likely to provide an escape from indemnification to insurers. The policy may also look to limit its liability for BII claims.

Most BII policies are based upon 'gross profit', and some may look to limit the indemnity period to a length of time, say 12 months. It is crucial to look at the individual policy wording. We can help with this.

2. What can I do about an insurer refusing to indemnify?

The Court is primarily interested in the wording of the contract, as expressly agreed between the parties, in determining any claim. The starting point is for us to assess that wording, to see whether any actionable claim exists. It may be that the insurer has refused to indemnify by incorrect, unfair interpretation of the wording. If this is so, a claim could be brought for breach of contract by the insurer.

The Court will look at what was intended by the parties from the wording of the contract, to determine if the insurer is incorrect to withhold payment. How the Courts do this however can vary.

Although contracts are often interpreted based upon the straightforward meaning of the words, Judges have the ability to take a commercial 'common-sense' approach, which is not always the same as the literal meaning. This means Judges can interpret the wording of an insurance policy, where the insurer may be looking to evade its obligations, and determine that this was not what was intended.

The Court interprets insurance policies in accordance with commonly understood contractual provisions, with reference to what they're actually there for – to protect business livelihood.

Where there is any ambiguity in the contract, it may be possible to ask the Court to interpret it in favour of the business rather than the insurer, who has had more of an ability to avoid that ambiguity. Contracts of insurance, while often appearing opaque, are enforceable in law with all remedies normally available to contractual claims.

3. What is the process for bringing a claim against an insurer?

Again, the best place to look first is the policy wording, which may provide a specific procedure the business should follow. Failure by the business to comply with any procedure or mitigate its losses may of itself be a breach of contract.

As insurance policies are contracts, the usual contractual remedies apply: termination, damages, an Order for specific performance. The quickest remedy may be to apply to Court for specific performance by way of injunction, to compel an insurer to pay out in a short period of time. The difficulty is always the cost of litigation and how to go about doing that. The most short notice and urgent way of obtaining a remedy is an injunction for specific performance.

Alternatively, it is necessary to commence proceedings for breach of contract, seeking damages, an Order for specific performance and costs. It may be that the issues could be dealt with on a Summary Judgment basis as opposed to running to trial.

This means you can apply at any time before trial for Judgment in advance, you may not have to wait to trial and therefore avoid incurring costs all the way up to trial. Further and alternatively, if BII has been mis-sold to your business, or where policies operate unfairly, you could pursue a complaint to the Financial Ombudsman Service.

Businesses should also now take this time to look closely at any other insurance policies held, to see if they are fit for purpose and/or may assist in any way in the current circumstances

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If your business has the benefit of BII and you are facing difficulty relying upon it, we can help. To discuss further call our expert Litigation and Dispute Resolution Team on **03300 585 222** or by e-mail at **info@btmk.co.uk** and our website address is **www.btmk.co.uk**