

22 January 2021

Dear CEO,

Business Interruption (BI) Insurance

On 15 January, the Supreme Court handed down its judgment on the BI test case. Our aim was to get clarity for as wide a range of parties as possible, as quickly as possible, and the judgment achieves this.

I am grateful for the work of the 8 insurance firms that were parties to the case, as well as all firms impacted by the test case, who co-operated from a shared desire to quickly achieve clear outcomes for policyholders and insurers and avoid protracted litigation. I am also grateful that the Courts delivered the judgment quickly. The speed with which it was reached reflects well on all parties.

Following the Supreme Court judgment, I want to be clear on the FCA's next steps and our expectations of insurers (including managing agents) to maintain this pace and ensure that all businesses with valid BI claims receive the payments due to them as soon as possible.

We are working with the other parties to the test case, and the Supreme Court, to enable the Court to issue its declarations in the light of the judgment, which will summarise the various elements of the judgment for the policy wordings considered by the Supreme Court. We will update our [BI webpage](#) with these declarations as soon as possible.

It remains the case that most SME BI policies are focused on property damage and only have basic cover for BI as a consequence of property damage, so are unlikely to pay out in relation to the Covid-19 pandemic and its effects. However, some policies providing cover for BI from other causes, in particular infectious or notifiable diseases and non-damage denial of access and public authority closures or restrictions, do provide cover for these events.

We believe the Court judgments in the test case give all insurers the clarity they need to now conclude their claims processes with the large majority of their BI customers. We encourage all insurers to do so as quickly as possible. In some cases the judgment will mean that previously rejected claims (and complaints) are now valid or that the value of customers' valid claims will have changed. We expect you to be clear on these points and on your next steps as you write to all your policyholders with affected claims or complaints over the coming week.

Our [Dear CEO letter](#) on BI insurance in April 2020 set out our expectations of insurers for BI policies where the insurer has an obligation to pay. We also note the key role that insurance brokers and other insurance intermediaries have in working with insurers to ensure that policyholders' valid claims are progressed as quickly as possible. Our objective remains to ensure that slow payment does not continue to exacerbate financial pressures on policyholders.

It is essential that insurers reassess and settle claims quickly in the light of the Supreme Court judgment, including making interim payments on policies where the claim has been accepted (either in full or in part) but elements of the calculation or agreement on the final settlement remain outstanding. This is consistent with the wider objectives of the FCA to support business and consumers during the current coronavirus situation.

Claims handling

The Supreme Court judgment means that:

- cover may be available for partial closure of premises (as well as full closure) and for mandatory closure orders that were not legally binding
- valid claims should not be reduced because the loss would have resulted in any event from the pandemic
- two additional policy types provide cover, taking this to a total of 14 wordings from the representative sample of 21

This will mean that more policyholders will have valid claims and some pay-outs will be higher.

All insurers should promptly reassess all BI claims affected by the test case in the light of the Supreme Court's judgment, including those previously rejected or not fully paid, in accordance with Chapter 7 of our [Guidance](#). When reassessing these claims, insurers should apply the judgments in the test case and inform the policyholder promptly of the outcome of the reassessment. Insurers should ensure that all valid claims are identified and that any necessary adjustments are made to any settlement offers (including full and final offers) that were made but not accepted by customers prior to 15 January 2021.

To treat customers fairly and act in their best interests, insurers should not include the period between 17 June 2020 and the date of issue of the Supreme Court's declarations when relying on any time limits within which policyholders must make potentially affected claims or take any other step under the terms of their policies, such as notifying circumstances in relation to a claim. Insurers should not limit any payment that may be due to a policyholder because of the time period that has elapsed before the potentially affected claim was made.

We expect all insurers to take a pragmatic, transparent and consistent approach to their interactions with policyholders over remaining evidence and loss adjusting processes that apply to individual claims, rather than these creating additional barriers or delays to paying valid claims. This includes in relation to evidence for proving the presence of Covid-19 for 'disease' coverage clauses.

We are currently consulting on our guidance for policyholders and insurers on proving the presence of Covid-19, having extended the time for comments on this

draft guidance from Monday 18 January to Friday 22 January 2021 for matters that are supplemental and arise from the Supreme Court judgment.

For affected claims where full and final settlements have been agreed, insurers should review the information provided to customers, to ensure that it was clear, fair and not misleading. Insurers should have informed policyholders about the test case and its implications when an offer to settle a potentially affected claim was made. Where this was done in a way that was clear, fair and not misleading and accurately reflected what the customer might have been eligible to claim had they waited for the outcome of the judgment, so that they could compare it with what they were offered, then the full and final settlement is likely to be binding, unless there are other circumstances suggesting otherwise. Where this is not the case, firms should identify this and consider what further actions are necessary, which are likely to include contacting the affected customer and making any residual payments.

Government support

Insurers should consider our August 2020 [statement](#) on the deductions that some insurers have been making from claims payments for some types of Government support that policyholders have received during the pandemic. This highlighted how insurers need to consider the appropriateness of such deductions on a case by case basis in the context of their policy, and treat their customers fairly in accordance with [Principle 6](#). It set out the need for insurers to individually consider the precise terms of the policy, the claim and how the policyholder applied any government support they received.

Insurers should also consider the exchange of letters between the ABI and the Economic Secretary to HM Treasury, dated 25 September 2020, which sets out HM Treasury's expectations in relation to certain types of government support and the commitment made by some ABI members not to deduct this government support from BI claims payments due.

We expect insurers to have considered the treatment of government support at Board level and for this consideration and the conclusions reached to be appropriately documented. We will follow up with insurers individually where necessary and continue to consider the appropriateness of deductions of other forms of Government support when calculating BI losses and claims payments.

Complaints

Where insurers have policy wordings which were affected by the test case they should reassess all potentially affected complaints, including those they did not fully uphold, unless the complaint has been properly settled on a full and final settlement basis. If the Financial Ombudsman Service (Ombudsman) has accepted the complaint, the insurer should keep the Ombudsman fully informed.

When reassessing these complaints, insurers should apply the judgments in the test case and:

- inform the policyholder promptly of the outcome of the reassessment
- if the reassessment is for a potentially affected complaint where the insurer has already issued a final response under DISP 1.6.2R, issue a revised final

response informing the policyholder that the policyholder has a further 6 months to refer the complaint to the Ombudsman

To treat their customers fairly and act in their customers' best interests, insurers should not include the period between 17 June 2020 and the date of issue of the Supreme Court's declarations when relying on any time limits within which policyholders must refer potentially affected complaints to the Ombudsman.

Communicating with policyholders

Insurers should communicate directly and as soon as possible with policyholders who have made claims/complaints that are potentially affected by the Supreme Court judgment, to explain the next steps. Under Chapter 6 of our [Guidance](#), insurers should provide an initial update on the implications of the judgment by today.

We know that how quickly insurers can communicate the full implications for each policyholder will depend on their specific policy wordings and the implications of the judgment for those wordings. We expect insurers to provide the clearest information that they are able to, as soon as possible.

Providing us with information on affected policies

We will shortly send out a new data request for updated details of all BI policies that respond to the Covid-19 pandemic following the Supreme Court judgment, replacing the need for insurers to update the information provided to us under Chapter 5 of our [Guidance](#).

Additionally, we will request information from all affected insurers regularly on the progress of their non-damage BI claims. The data we will request includes total numbers and values of non-damage BI claims received, numbers and value of initial/interim payments, number of final settlement offers made and the total value of settlements made and reserves. It will also include numbers of Covid-19 BI claims related complaints received, resolved and outstanding. Our intention is to publish some of these data.

Further legal proceedings

Where there are further disputes that are the subject of legal proceedings firms should consider the significant costs faced by policyholders bringing legal proceedings to clarify any remaining areas of uncertainty. Firms should seek to narrow the issues in dispute to ensure that the litigation can proceed in the cheapest and quickest way possible, reflecting the firm's obligation to act fairly, honestly and professionally in the best interests of its customers.

If the firm obtains the benefit of a court's interpretation of the relevant policy wording in agreed test case litigation, and in consideration of the financial burden placed on those policyholders to bring proceedings to resolve the dispute regarding their claims, a firm should agree:

- to pay the reasonable costs of such policyholders, to be assessed in default of agreement
- should not seek its costs against these policyholders.

Where any further judicial decisions may have a wider impact for the interpretation of similar policies, then firms should take them into account in their claims and complaints handling.

Policies and perils outside the scope of the test case

The Supreme Court and High Court judgments may provide guidance for interpreting types of policies and their response to perils outside the scope of the test case. For example:

- the judgments may assist parties to interpret other types of policies that include similar clauses, such as wedding and landlord insurance;
- the judgments may provide helpful guidance as to the proper interpretation of the meaning of terms such as 'event', 'occurrence' and 'incident', and the meaning of 'competent local authority' (in cover clauses, based on the High Court's decision on the meaning in the exclusion clause in the Ecclesiastical policy);
- insurers should be aware of the impact of the Supreme Court overturning of the *Orient Express* case on the handling of their other claims in respect of other perils that result in wide area damage, such as flooding and hurricane risks.

The implications of the Supreme Court ruling wider than this test case will take some time to determine. In our engagement with firms over the coming months, we will ask for your thoughts and interpretation of the impact it has had on your business and the wider insurance sector.

In conclusion

The Supreme Court judgment on the test case has brought clarity and certainty for all parties. It is critical that this results in all insurers paying valid claims in full as soon as possible to support their customers during the current situation. Where we see that insurers are not meeting the expectations set out here, we will use the full range of our regulatory tools and powers to ensure they do so. We will also continue to co-ordinate closely with the Ombudsman.

Yours sincerely

Sheldon Mills

Executive Director