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COVID-19, business interruption and short-term insurance

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The outbreak of Covid-19 has lead governments across the globe to introduce wide-ranging measures to curb the spread of the deadly disease. This unprecedented occurrence caught the world unawares. In South Africa, extensive lockdown regulations were issued on 18 March 2020 in terms of the Disaster Management Act 57 of 2002. An update and amendment to these regulations were published on 25 March 2020. These regulations will remain in force throughout and after the lockdown until such time as the President confirms that South Africa is no longer in a state of emergency.

Business owners were hard hit by forced closures and, unfortunately, not all businesses are able to find alternative ways to survive, such as online orders and deliveries. Many have dusted off their unread insurance policies to establish whether Covid-19 is a risk that is covered by business interruption (BI) insurance. This article sets out the legal position and takes a cursory look at the position in the United Kingdom (UK) and the United States of America (USA).

Whether a business is in fact covered for BI ultimately depends on the nature of the policy and the wording thereof. A comprehensive policy will, for instance, cover all aspects of a business, including the assets and the liabilities. Such a policy may specify the amount of stock-in-trade insured, the extent to which assets such as motor vehicles and cash on the premises are insured, and a number of other matters connected to the business.

Comprehensive insurance or 'all risk' insurance are, in fact, misnomers. This is because policies usually, if not always, contain extensive exclusionary clauses, which means that policies that cover BI may exclude certain risks. One such example is an exclusion of BI due to insolvency or business rescue. It is also possible for a policyholder to only procure insurance against lost wages caused by BI. The cover therefore depends on the way in which the policy is structured.

The insurance contract must be interpreted to establish whether BI is covered. It is customary for contracts, including insurance policies, to include a definition section. This section of the contract explains key concepts, possibly including BI. If the policy does define BI, it is necessary to establish whether the risk that materialised falls within the definition of BI or not. If the contract does not specifically define BI, this phrase (or risk) must be interpreted by giving the words their ordinary, grammatical meaning. It follows that BI is seen as the disruption of commercial activities. Another clue in the policy is the context of the entire document. BI is often specified as being linked to damage to property. For example, if a fire damaged a factory, forcing it to close down pending repair work being performed, it is clear that the ordinary commercial activities of the factory had been interrupted and the secondary loss is therefore the loss of income from the factory. Examples abound and many advertisements for BI insurance specifically make the link between such occurrences and damage to property. In the absence of statutory arrangements such as prudential,

mimimum standards for certain kinds of policies, parties are free to arrange their affairs as they see fit and the contract is the source of the arrangement that exists between the parties. It is therefore not a given that BI insurance is limited to instances where there is physical damage to property.

If a careful reading of the policy reveals that the insured may institute a claim for BI because of Covid-19, it goes without saying that the insured may institute a claim. Generally speaking, a policyholder who so alleges that a risk had occurred for which a policy provides cover must prove that there is a valid contract of insurance, that any suspensive conditions have been fulfilled, that the risk insured against had materialised (BI due to Covid-19), that there was a loss, and that the loss was proximately caused by the risk insured against.

The policyholder who wants to institute a claim for BI must notify the insurer of the claim as soon as possible and must do so in accordance with the procedures prescribed by the insurer. Upon receipt of the claim and supporting documentation, the insurer has a duty to make a decision. The Policyholder Protection Rules (PPRs) in terms of the Short-term Insurance Act (GN R1128 in GG 26853 of 30 September 2004, as amended by GN R1213 in GG 33881 of 17 December 2010) place a number of duties on insurers. An insurer must accept, reject or dispute a claim or the quantum of a claim for a benefit under a policy within a reasonable period after receipt (rule 7.4(a)) and the insurer must further within 10 days of taking any such decision, in writing, notify the policyholder of its decision (rule 7.4(a)).

If the insurer rejects the claim, the notice must indicate the reasons for its decision, namely to dispute the claim or to dispute the quantum of the claim. The insurer must communicate that the insured may, within a period of at least 90 days after the date of receipt of the notice, make representations to the insurer in respect of its decision.

In addition, the insurer must in its statutory notice inform the insured of his right to lodge a complaint in terms of the Financial Services Ombud Schemes Act 37 of 2004. Firthermore, if the relevant policy contains a 'time limitation provision for the institution of legal action', the insurer's notice must inform the insured of that provision and its implications for the insured 'in an easily understood manner' (7.4*(g)–(j)*). Finally, if the relevant policy does not contain a 'time limitation provision for the institution of legal action', the insurer's notice must inform the insured of the prescription period that will apply in terms of the Prescription Act 68 of 1969.

For policies that came into force on or after 1 January 2019, further protection is provided by rule 17(6) of the PPRs published under GN 1433 in *GG* 41329 of 15 December 2017). In addition to stipulating that an insurer must accept, repudiate or dispute a claim or the *quantum* of a claim within a reasonable period, it stipulates that an insurer must within 10 days of taking any decision referred to in rule 17.6.1, notify the claimant in writing of its decision. The latest PPRs also allow for the escalation of claims where difficulties arise.

As was indicated at the outset, policies may exclude BI by agreement and parties are free to limit the extent of cover for BI in which case there is no claim or a limited claim only. It is also possible that the intermediary or agent who sold the policy to the insured did not properly advise the policyholder as to the stipulations of the policy on BI as per sections 3 and 7 of the General Code of Conduct in terms of the Financial Advisory and Intermediary Services Act of 37 of 2002. If the lack of proper advice leads to a loss, the policyholder may bring a complaint to the Financial Advisory and Intermediary Services (FAIS) Ombud, provided that the *quantum* of the claim is less than R800 000 and the claim can be substantiated. The policyholder may approach a court directly.

The current position in the UK is interesting. The UK's leading insurer, Hiscox, allegedly issued policies for BI cover that state as follows:

'What is covered: we will insure you for your financial

losses and other items specified in the schedule resulting solely and directly from an interruption to your business caused by: public authority... your inability to use the venue due to restrictions imposed by a public authority during the period of insurance following: ...b. an occurrence of a notifiable human disease.'

According to the Glascow-based claims assistance firm CEC, the policy wording clearly covers commercial disruptions as the UK's Department of Health and Social Care added Covid-19 to the list of notifiable diseases and SARS-COV-2 to the list of notifiable causative agents (Ladbury A 'FCA tells insurers to pay valid BI claims as Hiscox responds to class action threat' *Commercial Risk Insurance and Risk Management News*). Hiscox is currently threatened with class action. In the meanwhile, Chris Woollard, interim Chief Executive Officer of the Financial Conduct Authority (FCA) (the UK's equivalent of the Financial Sector Conduct Authority), has stated that where policies do not cover BI there is no reasonable ground for the FCA to intervene. If there are valid policies (presumably such as the ones issued by Hiscox), Woollard stated that claims should be assessed and settled quickly. The position in the UK is very much the same as in South Africa, namely that compensation for BI due to Covid-19 depends on the contract between the parties and where cover is not excluded, insurers are expected to act swiftly in settling the claims. The application of these rules apply to the current pandemic in the same way it would to any other risk that triggers the insurers obligation to pay.

Meanwhile, in the USA, Congress is considering passing the Business Interruption Insurance Coverage Act, which was introduced on 14 April by California Democratic Representative Mike Thompson. This invasive statute aims to retroactively change BI policies across the US so that pandemic risks are no longer excluded. The understanding is that BI cover is intended to compensate businesses for lost revenue when they are forced to close. Whether this is done out of concern for American business or to win votes is an open question but such a bold move by a government is bound to spark controversy, no less because it makes serious inroads into freedom of contract.

The legal principles in South Africa are clear. Nevertheless, it is expected that there will be disputes that stem from BI policies. Time will tell whether insurers will apply the Treating Customers Fairly principles to valid claims and base their decisions on fairness and the law.

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