LAW & ORDER

in association with CLIFFORD CHANCE

Covid-19 business interruption losses will be difficult to claim

Even if an insured can establish a relevant triggering event has occurred, causation is likely to be a major hurdle to any recovery

Nigel Cooper
Quadrant Chambers

Predictions about the likely economic effect of Covid-19 are changing rapidly. No one yet knows when global restrictions will be eased or what their final effect on the business environment will be.

Unsurprisingly, the scale of losses is still impossible to state definitively. Against this background, it is equally unsurprising all insurance market participants are reviewing what cover is available. Inevitably, cover for business interruption is under specific scrutiny but many of the questions being asked in that context are also relevant to other forms of cover.

The essential message will inevitably be the same: look to the terms of the policy – or at least it will be if industry regulators do not seek to intervene; see further the article by Professor James Davey (*Insurance Day*, April 2, 2020) and consider the request by the New York Department of Financial Services that insurers authorised in the state provide details of their business interruption policies issued.

Nevertheless, in considering policy terms and any potential claims, a number of common themes are likely to emerge. There is already a lively discussion as to whether contamination of property with coronavirus can constitute physical damage. Indeed, there is already news of a case having been brought in New Orleans in which it is asserted contamination by Covid-19 is sufficient to constitute damage.

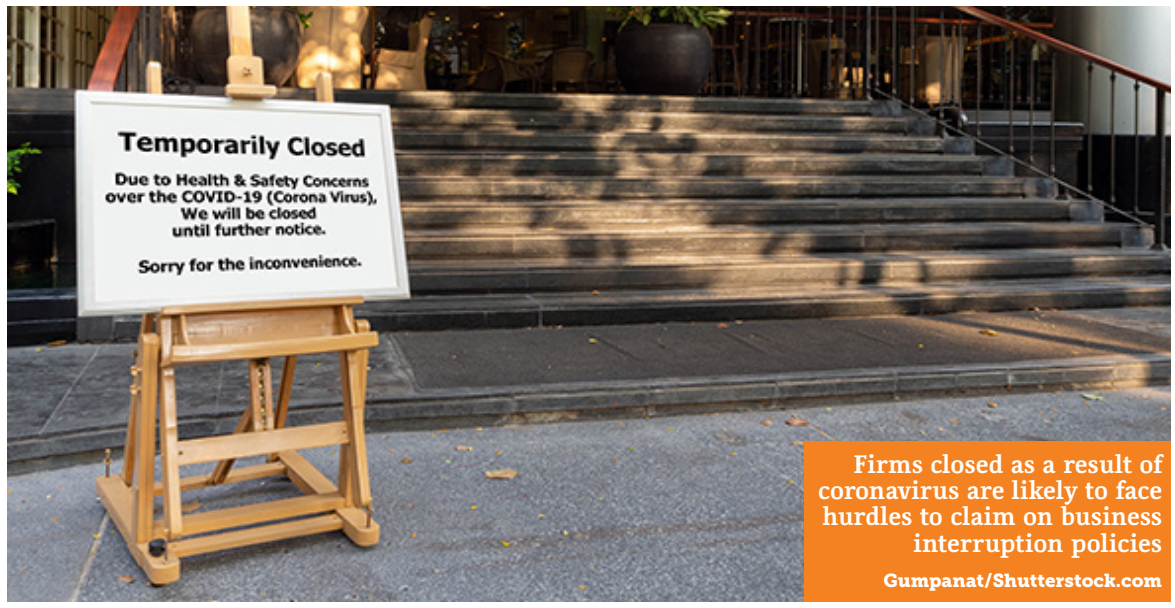
Previous case law regarding what constitutes a sufficient physical change to property to be damage is not always consistent but the presence of a contaminant on its own may be enough to amount to damage. Contamination by radiation, for example, has been held to be damage (*Outokumpu Stainless Ltd v Axa* (2008)), as has a spill of hydrochloric acid even though there was no proof any corrosive damage was done (*Losinjska Plovidba v Transco Overseas* (1995)). The fact specialist decontamination and repair was required was enough to justify a finding damage had been done.

Similarly, in an Australian case an electrical fuse was found to be property and was found to have been damaged once it tripped because it required time and resources to repair or replace it (*Mainstream Aquaculture v Caliden Insurance* (2011)).

However, there are good reasons to think even if contamination by infectious disease could constitute physical damage in principle, it will be very difficult to reach the relevant threshold with Covid-19. It will inevitably be a matter for expert and factual evidence, but some of the particular issues include establishing what property was in fact contaminated.

It would seem likely in the majority of cases the trigger for measures taken to decontaminate property and for any allied closure of a business will be the presence of one or more person who is subsequently diagnosed as having Covid-19 or believed to be at risk of having contracted Covid-19. In either case, the question is how does one establish the property was in fact contaminated rather than there being simply a fear of infection?

Another consideration is what measures were in fact necessary or reasonable as a consequence of any contamination. There is still uncertainty about how long Covid-19 remains infectious. These questions go to causation but are also relevant to whether the necessary threshold for physical damage has been met.



Firms closed as a result of coronavirus are likely to face hurdles to claim on business interruption policies

Gumpanat/Shutterstock.com

Certain business interruption policies provide cover in respect of the consequences of infectious diseases but it would be rare for a policy to be written on terms that provide cover for losses caused by any infectious disease

Notifiable disease

Certain business interruption policies provide cover in respect of the consequences of infectious diseases but it would be rare for a policy to be written on terms that provide cover for losses caused by any infectious disease. Commonly, cover is provided in respect of a defined list of infectious diseases or in respect of notifiable infectious diseases.

The former will not include Covid-19 in the list. So far as the latter is concerned, the case law would suggest notification has to be compulsory as a matter of law to satisfy the requirement of being notifiable for business interruption cover (*New World Harbourview Hotel Company v Ace Insurance* (2012)). Covid-19 was made a notifiable disease in England on March 5 (Health Protection (Notification) Regulations 2010).

Even if the insured can establish a relevant triggering event has occurred, causation is likely to prove another major hurdle to any recovery. If a policy covers losses arising from physical damage, this would not on the face of it cover losses arising only from government restrictions.

In addition, the courts will be precise in applying the policy wording to the events that are said to have caused loss. In a case concerning losses suffered by a cruise line following the terrorist attacks on September 11, 2011, cover that responded on the happening of particular events that interfered with the line's scheduled itinerary was held not to cover revenue lost due to passengers cancelling their cruises (*IF P&C Insurance v Silversea Cruises* (2004)).

Furthermore, if lost revenue is to be assessed by reference to the income the insured might otherwise have made during the relevant period, questions may arise as to whether the losses claimed by an insured would have occurred in any event as a result of other measures to prevent the spread of the virus.

In a case concerning the effect of 2005's hurricanes Katrina and Rita in New Orleans, the insured was able to show it had suffered physical damage to its hotel. However, the court found there was no recoverable loss under a business interruption policy because during the relevant period there was such widespread damage to the surrounding area no one would have visited the hotel even if it had been undamaged (*Orient Express v Generali* (2010)).

The case shows the type of causation difficulties likely to arise in relation to claims made in respect of Covid-19, especially for policies that require physical damage to be a cause of the loss. Those difficulties may be enhanced if there is a gradual relaxation of control measures or customer behaviours change as a result of lockdown.

Finally, policies often contain detailed provisions as to how losses are to be calculated or as to the supporting documents required. Even if such provisions are not present, any insured would be well advised to be considering now what evidence it needs to preserve to show the income lost and how it was caused by the insured event. If that evidence is not available, recovery may well be denied (*Ted Baker v Axa Insurance UK* (2017)). ■

Nigel Cooper QC is a barrister at Quadrant Chambers

Quadrant CHAMBERS

"He's accessible, open-minded to suggestions, organised and easy to contact as well as a good advocate who knows which points to run."
(Chambers & Partners UK, 2020)

Nigel Cooper QC

Called: 1987 Silk: 2010

nigel.cooper@quadrantchambers.com

Nigel has a commercial practice predominantly covering the fields of shipping, energy and insurance/reinsurance law.

He appears before the business and appellate courts in England & Wales,and has a strong arbitration practice advising on and acting in disputes before all the main international and domestic arbitral bodies. Nigel accepts appointments as an arbitrator and has acted as a mediator and as a party's representative in mediations. He has experience of public inquiries having appeared for the government in three major formal investigations.

Nigel appears in a broad range of Insurance and Reinsurance disputes (both marine and non-marine), often raising issues of non-disclosure or misrepresentation, the proper construction of policy terms and the effect of condition survey warranties. Recent litigation include disputes in relation to coverage for piracy, the meaning of 'one occurrence' under a policy of ship operator cover and an on-going dispute over whether coverage under a marine hull policy extends to cover main engine damage. Nigel is counsel of choice for a major insurer advising on both particular high value coverage disputes and policy wordings.

Nigel has a specialist interest in (super)yacht insurance disputes and has previously advised the Treasury in connection with a retrocession dispute for sums in excess of £80 million.

A selection of matters in which Nigel has recently been instructed include:

- Currently advising on global coverage issues arising out of the coronavirus pandemic;
- Advising on coverage disputes relating to environmental damage, the impact of sanctions, the loss of goods in transit, insurers' exposure to third parties as a consequence of the insolvency of a multi-national shipping line, superyachts, collapse of terminal plant and machinery;
- Acting for insurers to obtain the dismissal of arbitration proceedings in circumstances where the proceedings were time-barred and stale;
- Providing strategic advice to an insurer in relation to claims worth in excess of US$100 million being brought in another jurisdiction;
- ***W.I.S.E. v. Grupo Nacional Provincial S.A***. [2004] 1 All ER (Comm) 495, [2004] 2 Lloyd's Rep. 483 - A review of the principles relevant to non-disclosure and waiver in the context of goods-in-transit insurance.

What the Directories Say

"Very commercial and practical in his advice." (Legal 500 Asia Pacific, 2020)

"He understands exactly what his clients want." (Legal 500 Asia Pacific, 2020)

"He's accessible, open-minded to suggestions, organised and easy to contact as well as a good advocate who knows which points to run." (Chambers UK, 2020)

"He's remarkably calm, cool and clear. He's good at judging the best way to pitch so as to get the best results." (Chambers UK, 2020)