Who bears the pain? Establishing the Claim

Nigel Cooper QC & Stephanie Barrett

7 April 2020

Overview

In these days of lockdown and enforced business closures due to COVID-19, businesses large and small are suffering unprecedented disruption and, collectively, vast amounts of income are being lost. It is therefore unsurprising that business interruption insurance and other forms of cover which might allow recovery of lost revenue are under specific scrutiny, both in specialist circles and more widely. Much of the discussion is focused on the question of coverage, namely whether the pandemic constitutes a triggering event for cover under commonly available forms of business interruption insurance. There are also difficult issues surrounding causation, for example in the context of broader lockdowns affecting a wide area rather than just the insured's business.

However, alongside these issues in principle, claims will also inevitably involve detailed consideration of whether the losses claimed can in fact be established. Questions of claims cooperation, how claims are calculated, and whether there is evidence to support the claim are likely to be critical. Once again, the starting point is the policy terms, which will commonly contain specific provisions addressing each of these issues. The cases discussed below emphasise the importance of complying with those provisions. While insurance regulators may be emphasising the need for insureds to be treated fairly, this does not mean that insurers can or should be expected to depart from policy requirements, especially in a commercial context. Further, while it is perhaps trite to say, the better prepared a claim is, the more likely it is to be accepted and resolved within a reasonable time-frame.

Claims Co-operation Clauses

Policies often contain clauses which set out the insured's duties in respect of notification, provision of evidence and co-operation with insurers in respect of claims. In some cases, compliance with the requirements of these clauses are expressly made conditions precedent to recovery. The potential hazards for an insured are therefore obvious.

For instance, policies often have specific requirements in terms of claims notification, such as strict time limits to notify insurers once a policyholder becomes aware of damage, loss or claim or the provision of written "particulars of claim" within a certain time-frame.

Once a claim has been correctly notified, the insured may then be subjected to obligations to co-operate with insurers in order to assist them in investigating the claim. The policy may specify certain categories of documents which an insured is required to provide. There may also be more general obligations to provide documents demanded by insurers and otherwise to co-operate with them. Subject to the specific requirements agreed in the policy, the cases suggest that insurers' requirements regarding supporting documentation for a claim must be reasonable (see e.g. per Tuckey J at p. 553 in ***Napier v UNUM*** [1996] 2 Lloyd's Rep. 550).

Even if there are no specified time-limits in the policy, it is implicit that notification or co-operation must take place within a reasonable time. If the insured does not co-operate within a reasonable time then it is possible that their claim fails, even if the delay has not caused insurers any prejudice (see ***Shinedean Ltd v Alldown Demolition (London) Ltd and Axa Insurance UK Plc*** [2006] Lloyd's Rep. IR 846). Prompt engagement is therefore key.

A recent salutary lesson for insureds in this context is ***Ted Baker Plc v AXA Insurance UK plc*** [2017] 1 Lloyd's Rep. I.R. 682. In ***Ted Baker*** the well-known fashion retailer and wholesaler ("TB") made a claim following a series of stock thefts by an employee. TB notified insurers of their claim and presented the required written particulars of it within the contractual time limit. However, the claims co-operation clause in the relevant policy also required TB to provide all evidence "reasonably required" by insurers for the purpose of investigating or verifying the claim, compliance with which was a condition precedent to liability. Insurers asked TB to provide certain documents, including various accounts, but TB failed to do so. Although it was held that the other requests for documents were not "reasonable", TB acknowledged that the accounts were "reasonably required". The failure to provide these documents was a breach of the claims co-operation clause and

therefore a breach of condition. On the facts of Ted Baker, insurers were estopped from relying upon this breach (and, as discussed below, TB lost for other reasons), but otherwise a substantial claim would have been lost.

Although an insurer's demands may be subject to considerations of "reasonableness", erring on the side of inclusivity and adopting a co-operative approach will be critical to establishing a successful claim. As recognised in ***Ted Baker***, insurers are not generally under a duty to warn the insured that they need to comply with policy conditions. In the case of COVID-19, where the situation continues to develop, an ongoing duty of co-operation may require further information and assistance to be provided on a rolling basis.

Establishing the recoverable losses

Typically an insured will be entitled to recover defined financial losses suffered in a fixed period of indemnity. Whether this will be limited to loss of revenue or will include items such as mitigating costs or wasted costs will depend on the terms of the policy. So far as loss of revenue is concerned, where an insured is an established business with a regular turnover establishing the loss of income during the relevant period should be straightforward. However, even then it will be important to ensure that the necessary accounts and supporting documentation is available. As already highlighted above, even for established businesses, a failure to properly vouch the claim can lead to a risk of failure. In ***Ted Baker***, the claim failed because although the insured was able to establish liability, they were unable to prove that they had suffered any loss exceeding the policy excess. Similar difficulties in establishing the quantum of its claims were faced by the owners of a nightclub in ***Sugar Hut Group Ltd v. AJ Insurance Service*** [2014] EWHC 3352 (Comm). Although a professional negligence case, the issues in the case related to the quantum, which the club would have recovered under a business interruption policy had insurers not been entitled to avoid cover. The club advanced various claims for lost revenue and wasted expenditure, which succeeded in part but also failed to a significant extent because the club was unable or failed to provide sufficient supporting evidence of the losses claimed. The judgment is a stark reminder of the extent to which evidence will be required to make good claims if disputed.

The accounting position will clearly be more difficult where the business is young or in a state of transition. In particular, it may be difficult to gather together the necessary financial data to enable any meaningful comparison to be made with revenues earned prior to the indemnity period. Likewise if the insured had invested in the business, for example with improvements to facilities or staffing, and was expecting the fruits of those investments to accrue during the indemnity period, then it is unlikely that there will be actual data available to show what the effect of those improvements would have been. Consideration will instead need to be given as to whether forensically it is possible to do realistic projections of what the effect of the investments would have been and whether such evidence will satisfy the burden of proof.

'Trends' clauses assist in providing the contractual basis by which revenue calculations can be adjusted to allow for trends in the business or the happening of special circumstances. But they may also work against the insured, such that claims are reduced in light of evidence that even despite the triggering event the insured's income was declining or that the business was in financial difficulties; see ***Contact (Print and Packaging) Ltd v. Travelers Insurance Co. Ltd*** [2018] 1 Lloyd's Rep. I.R.295. Likewise, if there is evidence to show that, even without the interruption caused by the current lockdown, an insured would have been in financial difficulties, that is something which may have to be taken into account in calculating any insured losses. Perhaps more controversially but pertinent to the current situation, if there is evidence that external events would have caused the insured to lose revenue come what may, those events may be fatal to an insured's claim. In ***Orient Express Hotels Ltd v. Assicurazioni*** [2010] EWHC 1186, the court held that a hotel's claim for business interruption losses arising from hurricane damage to the hotel had to be assessed on the basis that, even if the hotel had not been damaged by hurricanes Katrina and Rita, the damage to the surrounding area was such that there would have been no paying guests staying in any event.

Alongside the legal principles discussed in the cases referred to above, it is notable that in many of the cases the court was prepared to accept that in principle an insured was entitled to recover its lost income but found that the evidential basis to establish those losses had not been made out. In other words, the cases highlight the importance of ensuring that, at the time a claim is presented, the investigative work has been done to support that claim with the necessary evidence.

This article has focussed on the need for claims cooperation and the difficulties which may be encountered in establishing a claim. Other aspects of the insurance challenges posed by Covid-19 are addressed in an article by Nigel Cooper QC in Insurance Day (to be published on 09 April 2020) and in a further Quadrant Chambers Insurance Bulletin by Poonam Melwani Q.C (to be published on 16 April). The former addresses issues relating to the trigger for business interruption and causation. The latter will address the law regarding events, occurrences and originating causes, matters which are particularly relevant in the context of deductibles and policy limits (whether annual or per event).

NIGEL COOPER QC

STEPHANIE BARRETT

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Nigel Cooper QC

"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)

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.

> view Nigel's full profile

nigel.cooper@quadrantchambers.com

Stephanie Barrett

"She is a fierce advocate." (Legal 500, 2019)

Stephanie's practice encompasses a wide range of commercial litigation and arbitration, but is primarily focused on dry shipping (especially charterparty and bill of lading disputes), shipbuilding and offshore construction, international trade, insurance, aviation/travel and energy. Her practice often involves cases of technical complexity, such as unsafe port claims, dangerous cargo claims and shipbuilding contract termination claims involving large numbers of defects. She undertakes drafting and advisory work in all areas of her practice. Stephanie also appears regularly (both as a junior and as sole counsel) in Commercial Court hearings and in commercial arbitrations on various terms including LMAA.

> view Stephanie's full profile

stephanie.barrett@quadrantchambers.com