

BI Insurance, Covid 19 and the 25 Mile Radius

Jeffrey Gruder QC

1. The Covid 19 pandemic has wrought destruction on the profits of so many businesses. Can business interruption insurance policies present a possible lifeline to keep struggling businesses afloat?
2. Whether insurers are liable to pay under such policies depend, of course, on the detailed policy terms. Many policies only provide an indemnity where there is physical damage to the premises insured or, in the case of those policies where there is an infectious disease extension, to loss of profits caused by an infectious or notifiable disease occurring at the actual business premises insured. Such policies will probably be of little or no use to insureds in the present crisis.
3. However, there are policy forms which appear to provide a more encouraging prospect for hard pressed insureds. One policy form has this particular infectious disease extension, providing cover in the following circumstances:

Infectious disease, murder or suicide, food or drink or poisoning

Loss resulting from interruption of or interference with the business in consequence of any of the following events:

- a) *any occurrence of a notifiable disease at the premises or attributable to food or drink supplied from the premises;*
 - b) *any discovery of any organism at the premises likely to result in the occurrence of a notifiable disease;*
 - c) ***any occurrence of a notifiable disease within a radius of 25 miles of the premises;***
 - d) *the discovery of vermin or pests at the premises which cause restrictions on the use of the premises on the order or advice of the competent local authority;*
 - e) *any accident causing defects in the drains or other sanitary arrangements at the premises which causes restrictions on the use of the premises on the order or advice of the competent local authority;*
 - f) *any occurrence of murder or suicide at the premises;*
4. Subparagraphs (a),(b), (d), (e), and (f) all provide cover in circumstances where loss results from an occurrence or event actually taking place on the insured premises. These heads of cover are likely to be of limited use in the present crisis.
 5. However, subparagraph (c) is in a different category. Coverage is not restricted to the consequences of an event actually occurring at the insured premises. Indeed there need not be an occurrence at the premises at all. There is cover if loss is as a consequence of any occurrence of a notifiable disease within a radius of 25 miles of the insured premises. No doubt this cover was introduced to provide an indemnity where the presence of a notifiable disease even some distance away from the insured premises causes a proven drop off, or even a total cessation of trade.
 6. At 6.15pm on 5 March 2020, a statutory instrument was made into law that added COVID-19 to the list of notifiable diseases and SARS-COV-2 to the list of notifiable causative agents.

7. Accordingly, by 23 March 2020, when the government lockdown was ordered, there were occurrences of a notifiable disease (Covid 19) within a radius of 25 miles of , at the very least, many of the premises insured under this form of policy wording. After all, Covid 19 was a pandemic which was rampaging in most parts of the UK by that time. It is apparent that the figures for actual cases of Covid 19 from early March 2020, if not earlier, drastically understated the number of Covid 19 infections amongst the populace, not only because many cases were asymptomatic, but also because of the absence of an efficient and effective testing programme.
8. No doubt insurers will say that the cover was not intended to cover a pandemic. What the insurers subjectively intended the wording to cover is neither here nor there. The answer will be provided by the proper construction of the wording of the policy. However, there is nothing in the wording which restricts cover to circumstances where there is a single instance of a notifiable disease within a 25-mile radius of the insured premises. Cover is available where loss of profits is caused by multiple occurrences of a notifiable disease within the 25-mile radius. Equally there is nothing in the wording which provides that cover is only available where the occurrence of a notifiable disease is limited only to areas within a radius of 25 miles of the premises. There is no exclusion of cover if there are occurrences of notifiable diseases not only within the 25-mile radius, but also similar occurrences outside the 25-mile radius. Common sense would lead to the conclusion that if there are multiple occurrences of a notifiable disease within the 25-mile radius, there are likely to be other occurrences outside that area. Nature does not work in watertight compartments, especially where notifiable diseases, spread by viruses, are concerned
9. Insurers may seek to raise causation arguments of the kind which were successful in Orient-Express Hotels v Generali [2010] Lloyd's Rep IR 531. That case concerned a hotel in New Orleans that was badly damaged in Hurricane Katrina. It made a claim on its Business Interruption policy, which covered it for loss of gross revenue due to interruption to the business "directly arising from Damage," being damage to the hotel itself. The unusual feature of the case was that, while the hotel was indeed out of action because of the damage it had suffered, during that same period New Orleans itself was effectively closed as a result of the widespread damage to the city. Insurers argued successfully that the policy required the causative link between the damage to the hotel and the revenue losses to be established on a "but for" basis. Because of the closure of the city, the claimant was unable to establish that "but for" the damage to the hotel it would not have suffered the revenue loss, since no one would have come to the hotel (even if undamaged in any event). As a result, it did not recover on this part of its Business Interruption cover.
10. Insurers might seek to argue that the losses incurred by the insured did not result from interruption of or interference with the business in consequence of any occurrence of a notifiable disease within 25 miles of the premises but from a combination of cases within and outside the 25 mile radius, indeed, in some cases, many hundreds of miles from the insured premises. The prospects of success of such an argument may depend on the facts of any particular case. It is a matter of degree. For example, if the insured premises are in a remote part of the UK, where there are just one or two cases of Covid 19, it might be argued that the losses arose not from the presence of the very small number of cases within 25 miles of the insured premises, but rather from measures taken to curb and control a rampant outbreak of very large numbers of cases, very far from the insured premises.
11. This contention would have far less force in the case of e.g. the closure of a bar or restaurant in Central London where there were large numbers of cases of Covid 19 within a 25-mile radius which extended to include towns such as Watford, St Albans, Slough, Harlow, Dartford, Sevenoaks, Epsom and Woking, to give a few examples. The fact that there were numerous cases outside the 25-mile radius does not detract from the fact that premises in London which were closed down were

at the epicentre of the pandemic in the UK¹. If there had been no instances of Covid 19 within a 25-mile radius of premises in Central London, would they have been shut down? Probably not, if only because the absence of any cases of Covid 19 within 25 miles of e.g. Central London would have meant that it was unlikely there was a serious pandemic necessitating a general lockdown.

12. In addition, as discussed above, the cover contemplates the presence of substantial outbreaks of infectious diseases, both inside and outside the 25-mile radius. There is no exclusion which precludes cover when the losses arise from a combination of infectious diseases both inside and outside the 25-mile radius, although the insured must show that the loss suffered is as a consequence of any occurrence of a notifiable disease within a radius of 25 miles of the insured premises. It could be argued that the loss suffered is as a consequence of two causes, namely instances of the occurrence of Covid 19 inside and outside the 25-mile radius. If the instances of Covid 19 within the 25-mile radius are sufficiently substantial (e.g. in the case of premises in Central London), cases within the 25 mile radius could be said to be a proximate cause of the loss suffered, albeit another proximate cause of loss might be said to be cases outside the 25-mile radius.
13. So long as the numbers of cases within the 25-mile radius are sufficiently substantial, it might be argued that the cases within 25 miles of the premises have a greater causative effect than those occurring more than 25 miles away, since the presence of infectious diseases close to the premises is likely to have greater causal potency than examples much further away. But in any event, there is a well-established principle in insurance law that:

“ There may be more than one proximate (in the sense of effective or direct) cause of a loss. If one of these causes is insured against under the policy and none of the others is expressly excluded from the policy, the assured will be entitled to recover”.

(see e.g. The Miss Jay Jay [1987] 1 Lloyd’s Reports 32)

In these circumstances, so long as the presence of infectious diseases within the 25-mile radius was a proximate cause of loss, it is irrelevant that the presence of infectious diseases outside the 25-mile area was also a proximate cause of loss since there was no relevant exclusion.

14. It might be argued by insurers that the reasoning in the Orient Express case is adverse to the argument in the previous paragraph but that is not necessarily so for the following reasons:
- 1) Orient Express was an appeal under section 69 of the Arbitration Act 1996 and the argument based on the Miss Jay Jay was not made before the arbitration Tribunal, which did not deal with it.
 - 2) The judgment in the Orient Express case was influenced by the particular contractual provisions in the contract in question in that case i.e. the Trends clause. There may or may not be similar provisions in the policies in question today.
 - 3) Hamblen J treated the facts in the Orient Express case as an example as two concurrent independent causes of losses each sufficient by itself to cause the loss suffered by the assured i.e. there would have been no guests even if the hotel had not been damaged because of the chaos in New Orleans, and if New Orleans had not been in turmoil, the damage to the hotel would, by itself, have caused the loss claimed. He stated that the

¹ Indeed, in an interview given on 28 April 2020, Matt Hancock stated that the government gave thought to closing down London and the Midlands first of all, as they were most advanced in the number of cases but decided that the whole country was in it together

principle approved in the Miss Jay Jay has been applied in respect of concurrent interdependent causes, rather than in cases of concurrent independent causes.

- 4) In contrast to the Orient Express case, the present assumed claim is an example of concurrent interdependent rather than independent causes. The business interruption losses were caused by the numerous cases of Covid 19, both within and outside the 25-mile radius, combining together to create a situation where the business was forced to close. So long as the cases within the 25-mile radius can be categorised as a proximate cause, there should be coverage.
- 5) In addition, even if the above is incorrect, in paragraph 33 of the judgment in Orient Express, Hamblen J said:

“As a general rule the “but for” test is a necessary condition for establishing causation in fact. However, there may be cases in which fairness and reasonableness require that it should not be a necessary condition. This is most likely to be in the context of negligence or conversion claims, but I would accept that in principle it is not limited to tort or to particular torts. I would also accept that a case in which there are two concurrent independent causes of a loss, with the consequence that the application of the “but for” test would mean that there is no cause of the loss, is potentially an example of a case in which fairness and reasonableness would require that the “but for” test should not be a necessary condition of causation, particularly where two wrongdoers are involved. However, whether or not that is so will depend on all the circumstances of the particular case”

It might be argued that fairness and reasonableness should lead to a conclusion that the insured should be entitled to an indemnity where the cover contemplates the presence of substantial outbreaks of infectious diseases, both inside and outside the 25-mile radius.

15. Insurers could also contend that an insured’s losses have not arisen directly from the presence of a notifiable disease within the 25-mile radius but a government direction to close. However, in this respect as well, the present case is not precisely analogous to the situation in the Orient Express case. In that case there were concurrent causes of the loss; the specific damage to the hotel and the fact that New Orleans was a no-go area. In this case, the government direction was made as a consequence of the pandemic i.e. as a result of there being widespread occurrences of Covid 19 (both inside and outside the relevant 25-mile radius) and the risk of further extensive spread of Covid 19 unless a lockdown was ordered. The analysis of this argument is not dissimilar to the causation arguments considered in the previous paragraphs. Where the insured premises are in a remote location where there are a very small number of Covid 19 cases within a 25-mile radius, it might be said that the effective cause of loss was the government instruction to close rather than the minimal cases of Covid 19 within the 25-mile radius. However, again the position is very different if the insured premises was in e.g. Central London. The government instruction on 23 March 2020 was a response to, and prompted by, the rampant surge of Covid 19 within 25 miles of Central London, as well as other hot spots outside that area. It was not a concurrent independent cause of loss.
16. The upshot of this short discussion is that where insureds have business interruption insurance which provides cover in respect of “*loss resulting from interruption of or interference with the business in consequence of any occurrence of a notifiable disease within a radius of 25 miles of the premises*”, they have reasonably arguable prospects of recovery if their premises are situated in an area where have been extensive Covid 19 infections within the relevant 25 mile radius.

Jeffrey Gruder
Essex Court Chambers

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