

1. A judgment has been handed down recently in the Western Cape High Court (Café Chameleon CC v Guardrisk Insurance Company Ltd) concerning a business interruption (BI) claim by a policyholder. What is the significance of the judgment?

The policyholder, a restaurant owner, instituted an application against its insurer asking the Court to direct the insurer to indemnify it under the BI section of its policy for losses suffered as a result of the interruption and consequent financial losses caused by the COVID-19 pandemic and lockdown regulations imposed by Government. The policy, in this case, included an extension which provided cover for, amongst other things, losses suffered due to a notifiable disease occurring within a radius of 50 kilometres of the premises. The Court found that the insurer is liable to indemnify the policyholder under this extension for the policyholder's financial losses suffered due to the interruption or interference of its business following the COVID-19 outbreak and the lockdown regulations. This judgment will be appealed by the insurer.

2. Do all products available in the market have extensions such as the one decided upon by the Court in the judgment?

No, not all products have this extension. The policy referenced in this specific court case is a policy that provides cover for the hospitality and leisure industry. Apart from including an extension of cover for notifiable diseases, these types of policies include cover under the BI section for risks which may be particular to the hospitality industry. By way of example, the BI section of these policies often includes extensions (or provide optional extensions) for losses suffered as a result of interference or interruption of the business due to:

- Loss of attraction;
- Certain animal attacks;
- Cancellation of bookings; and,
- The loss of a liquor licence.

3. The Financial Sector Conduct Authority (FSCA) published a press release on 9 July 2020 wherein it comments on the recent judgment and advises "all affected insurers to action BI insurance claims in line with the communication". What are the implications of this communication?

The FSCA has previously sent out a communication (dated 12 May 2020) in which it distinguished between two broad categories of policies. The one category consists of those policies offering the "standard" type of BI cover which, in the main, provides cover for actual physical (material) damage and the other category consists of those policies which include extensions for, amongst other things, infectious / contagious diseases.

In terms of the "standard" type cover, the FSCA commented as follows:

*"... it is clear that the large majority of BI policies relate to **standard BI insurance** where a policyholder should, in terms of the policy, **prove physical damage to the business premises** covered under the policy. The Authorities are of the view that an insurer would be obliged to **indemnify** a policyholder for loss of income **only if a policyholder is able to prove physical damage**, together with other requirements of the cover being met in order for a claim in respect of this cover to be honoured by an insurer." [our emphasis]*

The distinction between the two broad categories of BI cover is important as the FSCA's subsequent communication (dated 18 June 2020) again mentions the two categories and addresses only the latter, i.e. those policies that have extensions that could, potentially, give rise to claims due to COVID-19. The extensions addressed in the communication include, amongst other things:

- Infectious, contagious or notifiable diseases within a particular radius;
- Infectious, contagious or notifiable diseases at particular premises;
- Closure or restrictions placed on the premises by the authorities as a result of an infectious or contagious disease;

The recent press release, equally, seeks to address those policies with the appropriate non-material damage extensions and the FSCA expresses its opinion on the recent judgment which, again, concerns a claim made under a policy with a “notifiable disease” extension. The press release stipulates that policyholders will only be able to make claims if “... they have satisfied the requirements of their specific policy ...” and “... the FSCA advised all affected insurers to action BI claims in line with the communication.”

4. What is the extent of the BI cover afforded in CIB’s policies? How is the cover different to the products being mentioned in the press?

Our present commercial product offering, in terms of which BI cover can be taken up, typically follows the wording of the more traditional cover (or “standard” type BI cover) available in the market. The BI section in our commercial policies does not include extensions for infectious, contagious or notifiable diseases or the closure or restrictions placed on the business by authorities.

Our commercial product suite operates on a “perils” basis. The operative clause of the BI section* requires that the loss suffered by the policyholder must result from a peril listed in a particular section of the policy (such as fire, lightning or storm). In addition to this, actual physical (material) damage to the property insured, in terms of the policy, must result from such peril for a valid claim to be made.

Certain of our commercial buildings products, operate on an “all risk” basis. These policies indemnify the insured for losses suffered as a result of damage to the insured property. Damage is defined as accidental physical sudden and unforeseen loss of or damage to the insured property. In terms of the BI section* of the policy, “damage” (as defined) is required.

While there are extensions which provide cover for losses suffered by the policyholder due to, for example, prevention of access to the policyholder’s premises, these extensions, in the main, remain subject to the prevention resulting from physical damage to property (as set out in the operative clause of the BI section).

A claim will not be covered by the policy merely because there is no explicit wording excluding the cover. The starting point is that the policy only provides cover for those claims that fall within the operative clause of that particular section of the policy.

*Please refer to the BI section of our policy wording for the exact description of the cover provided.

5. What do I tell a policyholder who insists on submitting a claim?

Policyholders should not be dissuaded from submitting claims, however, it would be advisable to explain the basis of cover afforded in terms of the policy and to distinguish the basis of cover from those policies including extensions that may operate to provide cover for BI losses suffered due to COVID-19. By openly communicating with policyholders, it provides the opportunity to manage expectations and limit frustration following the declinature of a claim after time and effort spent.

6. After a claim has been made, why does CIB ask for details about the claim and the loss suffered?

We are under an obligation to ensure we assess claims appropriately and fairly, based on the correct information. The description provided, relating to the nature of the loss, is often brief and we therefore must ensure that we understand the nature of the claim before making a determination as to whether a claim should be indemnified in terms of the policy. The questions posed for BI claims intimated due to the lockdown are brief and concise to ensure we are in receipt of the minimum information necessary to consider the claim.

7. What process can policyholders follow should they be dissatisfied with the services provided or the outcome of their claim?

The details for submitting complaints to us or the insurer are set out in the policy schedule as are the details for the relevant regulatory bodies.

In relation to regulatory bodies, the policyholder may approach the Ombudsman for Short-Term Insurance (OSTI) or the Ombudsman for Financial Service Providers (FAIS Ombud) if the complaint relates to financial services provided by a financial services provider.

In a press release issued by the OSTI on 2 June 2020, the CEO confirmed that one of the types of covers that the office decided not to deal with are loss of profits claims due to the complex nature of the cover and because specific expertise are required which the office does not possess. The CEO goes on to say in the press release that the OSTI will continue to deal with each complaint on its own merits and that the OSTI is at liberty to decide whether a complaint is complex or requires particular expertise and whether the office can or cannot deal with it.

8. Will a claim which occurred during the lockdown period for business interruption losses be covered if there is physical damage to property or damage caused by a peril and will the lockdown be considered in adjusting the claim?

If the claim falls within the operative clause and business interruption losses are suffered as a result of that specific damage causing event, the claim will be dealt with in terms of the business interruption section of the policy.

In terms of the business interruption section of the policy wording, the policyholder will have to prove that the interference to the business / business interruption loss suffered was as a result of the damage causing event and not as a result of the lockdown. The question to ask is how the policyholder's business would have performed but for the damage causing event. The policyholder will have to distinguish between the loss it suffered due to the damage causing event and the lockdown.

The impact of the lockdown will therefore be taken into account in considering a claim for business interruption losses.

9. Will claims for deterioration of stock be covered during the lockdown period?

In terms of the standard commercial policy wording which operates on a peril basis, claims for deterioration of stock will only be covered if:

- (a) The deterioration was caused by a peril under the relevant section of the policy under which it is insured; and,
- (b) The stock is physically damaged due to a specific peril insured against; or
- (c) There is specific cover for or a specific extension that covers deterioration of stock and the requirements of the section / extension have been met.

Please do not hesitate to get in touch with us if you have any further queries.