

BUSINESS INTERRUPTION INSURANCE TEST CASE

PROPOSED ASSUMED FACTS

1. INTRODUCTION

The following set of assumed facts has not been tailored to the specific policies to be selected but represents an overview of what the FCA currently perceives to be a range of possible fact patterns for policyholders, and in particular SME businesses, affected by the current situation. It is intended as a useful and neutral document, with high-level fact scenarios, and in a form flexible enough to enable more detailed factual scenarios (arising in respect of particular businesses and policies) to be considered within its framework. It specifically takes into account scenarios which insurers, policyholders and brokers have put forward.

The methodology adopted is intended to cover the following variables in respect of policies:

- a) the type of business and type of government interference by reference to the nature of the advice and/or guidance and/or mandate given to specific businesses and the categories in the Health Protection (Coronavirus, Business Closure) (England) Regulations 2020 (“**21 March Regulations**”) and the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (“**26 March Regulations**”, together with 21 March Regulations, the “**Regulations**”) (Categories 1-7 in the assumed fact patterns below);
- b) single use and mixed use (hybrid) premises;
- c) the type of location of the business (city, town, rural, etc) which may be relevant to variable (d) below;
- d) incidence of disease by reference to the insured location, if a specific proximity requirement is imposed by the policy wording;
- e) opening, closure and downturn permutations – i.e. whether a business stayed open, timing of any closure (e.g. before/when/after it was advised to do so and/or was required to do so) or suffered a downturn in business prior to/after such advice or requirements;
- f) the nature of any local authority or police intervention if a requirement for such is imposed by the policy wording; and
- g) the nature of loss suffered, e.g. business/physical restrictions at premises; increased cost of working; reduced footfall; cancelled or postponed bookings; reduced turnover; or general lost revenue from being unable to conduct business (at all or to the usual degree).

The assumed fact patterns do not seek to address loss of rent claims expressly or multiple insured locations (since the litigation has a primary focus on SME policyholders rather than larger commercial organisations with multiple branches) or multiple business interruptions. The rulings of the Court on the other assumed fact patterns will still have value in interpreting cover for these scenarios.

Whilst the assumed fact patterns are assumed to relate to businesses in England, they can be readily adapted to businesses in Scotland, Wales and Northern Ireland where similar advice was given and legislation enacted save that there are minor differences in the dates when COVID-19 became notifiable, regarding the enforceability of the 2-metre rule (in Scotland & Wales), listed businesses (though these are extremely minor) and guidance given by devolved governments (e.g. “stay alert” versus “stay at home”, etc.)

These fact patterns are intended to highlight the sorts of issues that arise and will need to be tested, to the extent that facts are relevant at all to these issues. For some key issues of construction it will not be necessary to refer to the nature of the business at all (e.g. questions as to whether Covid-19 was a ‘danger’ or whether it was ‘manifested within 25 miles of the premises’). For those issues that do depend to an extent on the nature of the business (primarily whether ‘access’ to the business was ‘prevented’ and similar) it is envisaged that these issues will be tested not primarily by reference to any test cases or detailed agreed facts as to a business’s history, but rather by reference to general characteristics of how a business was affected by legislation (e.g. the business was required to close by a particular part of the Regulations). It is not envisaged that there will be a specific formal ‘salon’ or ‘church’ fact pattern, or that mention of a business type below indicates that that nature of business will specifically be considered or businesses not mentioned will not. It is intended that the issues will be resolved at a level of abstraction permitting read across to as many businesses as possible (e.g. by reference to whether a business was required to close by a particular part of the Regulations). There will, however, need to be further dialogue with insurers to agree upon the precise formulation of any ‘fact patterns’ and the degree of specificity they require.

2. OVERVIEW OF APPROACH

The table below represents an overview of the general approach to be taken to assumed facts. Note it is not to be read directly horizontally across each row, but rather to take the applicable type of business/type of government interference, then to consider its use (single/mixed), location, then disease incidence, etc across each column. Some of the available permutations set out in the table will not apply on particular policy wordings: notably, the opening/closure/impact permutations will often be heavily dependent on the type of business and/or government advice/action, as set out in more detail in the section below the table. The table is not intended to cover all scenarios; instead, as stated, it is an overview of the variables involved in the analysis.

A TYPE OF BUSINESS AND TYPE OF GOVERNMENT ADVICE/ACTION	B SINGLE/ MIXED USE	C TYPE OF LOCATION	D DISEASE INCIDENCE	E OPENING/ CLOSURE/ IMPACT PERMUTATIONS	F LOCAL AUTHORITY/ POLICE ADVICE/ACTION	G NATURE OF LOSS/ CIRCUMSTANCES
Businesses which public was advised not to attend, and were then mandated to close save that can stay open to extent sell food or drink for consumption off the premises (Category 1: Regulations Part 1 Business). [e.g. restaurant, café, bar, public house]	Single use	Urban (e.g. city or town)	COVID-19 within specified proximity	Closed or applied restrictions or suffered an adverse business impact before government guidance	Local authority or police or similar issued guidance or took action (where relevant under the policy)	Loss of revenue/income
Businesses which public was advised not to attend and were then mandated to close (Category 2: Regulations Part 2 Business). [e.g. from 21 March 2020 cinema, theatre, nightclub, concert hall, betting shop, gym, leisure centre; from 26 March	Mixed use (i.e. one use was permitted and one use was prohibited or restricted - e.g. supermarket	Rural (e.g. village or more remote rural location)	COVID-19 not within specified proximity but beyond it	Closed or applied restrictions or suffered an adverse business impact between government guidance and government order	Local authority or police or similar did not issue guidance or take action (where relevant under the policy)	Increased/additional costs of working

2020 hairdressers and prescribed other businesses]	incorporating café, physiotherapy clinic incorporating a gym)					
Businesses expressly permitted to stay open (Category 3: Regulations Part 3 Business). No express restrictions. In England guidance and in Scotland and Wales a requirement to take reasonable measures to ensure compliance with the 2-metre rule. [e.g. convenience store, off-licence, supermarket, pharmacy, hardware store, petrol station, car repair garage, taxi business, dry cleaner, dentist, optician, chiropractor or other medical or health services, veterinary surgeon or pet shop]			Not relevant as <i>relevant term</i> does not require incidence of COVID-19	Closed or applied restrictions or suffered an adverse business impact on or after date of government order	Not relevant as <i>relevant term</i> refers directly to government action	Reduced footfall
Unlisted retail businesses offering goods for sale or hire advised to close, then mandated to close other than for deliveries or services in response to telephone, online or mail orders (Category 4: Regulations unlisted retail). [e.g. clothes shop, other goods/services retail business not listed in Schedule 2, Part 3 to the 26 March Regulations]						

<p>Other unlisted service business neither expressly required to close nor expressly permitted by the Regulations to remain open (Category 5: Regulations unlisted services).</p> <p>[e.g. manufacturer, accountancy firm, law firm, other service business not listed in the Regulations]</p>						
<p>Hotels, cottages, holiday accommodation advised to close, then mandated to close (Category 6: Hotels or other holiday accommodation).</p> <p>[e.g. hotel, cottage or bungalow, bed & breakfast, hostel, holiday apartment, home, campsite, caravan park or boarding house]</p>						
<p>Nursery or educational establishment or place of worship (Category 7: Nursery or educational establishment or place of worship).</p> <p>[e.g. nursery, primary school, secondary school, sixth form college, community college, university, place of worship]</p>						

3. DRAFT ASSUMED FACTS: DETAILED DELINEATION OF VARIABLES AND ANALYSIS

CATEGORY 1: REGULATIONS PART 1 BUSINESS

(Summary of government interference: Public advised not to attend from 16 March 2020; closed by 21 March Regulations, save can stay open to extent sells for consumption off the premises. Guidance also produced on 11 May 2020 on how businesses should run their operations safely, including in relation to eight different types of business, in turn including (relevant to this category) restaurants offering takeaway or delivery.)

1. The business is a [restaurant, café, bar, public house].
2. It is in an [urban/rural] location.
3. There was incidence of COVID-19 [within a specified proximity/beyond that/not relevant to policy term].
4. Opening/closure/impact permutations:
 - a) It suffered a reduction in turnover from 1 March 2020 as a result of self-isolation and social distancing advice.
 - b) It closed prior to 21 March 2020, and it is asserted that this was because of COVID-19 in the locality and/or governmental or other advice (e.g. from a trade body).
 - c) It closed fully on 21 March 2020, having no facility to sell for consumption off-premises, alternatively choosing not to sell for consumption off-premises.
 - d) It closed to eat-in customers on 21 March 2020 but continued to sell for consumption off-premises.
 - e) It stayed open to the extent permitted but suffered a downturn in business due to a more limited operation (e.g. due to needing to follow social distancing requirements, such as adhering to 2 metres between customers, customers and staff and staff members, or because it could only operate a takeaway service).
5. Local authority or police [did/did not] issue guidance and/or take relevant action in general/in relation to the area/in relation to the business and this was causative as required under the policy.
6. The business suffered loss due to [e.g. loss of revenue, increased cost of working, etc.]

CATEGORY 2: REGULATIONS PART 2 BUSINESS

(Summary of government interference: Public advised not to attend from 16 March 2020; closed by 21 March Regulations, others closed from 26 March 2020 by 26 March Regulations.)

1. The business is a [cinema, theatre, nightclub, concert hall, betting shop, gym, leisure centre; from 26 March 2020 hairdressers and prescribed other businesses].
2. It is [single/mixed] use.
3. It is in an [urban/rural] location.
4. There was incidence of COVID-19 [within a specified proximity/beyond that/not relevant to policy term].
5. Opening/closure/impact permutations:
 - a) It suffered a reduction in turnover from 1 March 2020 as a result of self-isolation and social distancing advice.
 - b) It closed prior to 21 March 2020, and it is asserted that this was because of COVID-19 in the locality and/or governmental or other advice (e.g. from a trade body).
 - c) It closed on 21 March 2020, or 26 March 2020 for some businesses.
6. Local authority or police did/did not issue guidance and/or take relevant action in general/in relation to the area/in relation to the business and this was causative as required under the policy.
7. The business suffered loss due to [e.g. loss of revenue, increased cost of working, etc.]

CATEGORY 3: REGULATIONS PART 3 BUSINESS

(Summary of government interference: Expressly permitted to stay open. No express restrictions on Part 3 businesses in the Regulations. In Scotland and Wales businesses had (under legislation) to take reasonable measures to ensure compliance with the 2 metre rule but this was not a requirement in England where it was in the form of guidance. Guidance also produced on 11 May 2020 on how businesses should run their operations safely, including in relation to eight different types of business, in turn including (relevant to this category, where specifically prescribed by Part 2, Schedule 3 to the Regulations) certain offices (e.g. for this category, post offices, funeral directors) and certain shops and branches (e.g. for this category, food retailers).)

1. The business is a [convenience store, off-licence, supermarket, pharmacy, hardware store, petrol station, car repair garage, taxi business, dry cleaner, dentist, optician, chiropractor or other medical or health services, veterinary surgeon or pet shop].
2. It is [single/mixed] use.
3. It is in an [urban/rural] location.
4. There was incidence of COVID-19 [within a specified proximity/beyond that/not relevant to policy term].
5. Opening/closure/impact permutations:
 - a) It suffered a reduction in turnover from 1 March 2020 as a result of self-isolation and social distancing advice.
 - b) It closed prior to 26 March 2020 and it is asserted that this was because of COVID-19 in the locality and/or governmental or other advice.
 - c) It closed on 26 March 2020.
 - d) It stayed open but suffered a downturn in business due to a more limited operation (e.g. emergency appointments only, needing to follow social distancing requirements) or cancellations or incurred additional costs of operating.
6. Where relevant, local authority or police did/did not issue guidance and/or take relevant action and this was causative as required under the policy.
7. The business suffered loss due to [e.g. loss of revenue or increased cost of working, etc.]

CATEGORY 4: REGULATIONS UNLISTED SHOPS OFFERING GOODS FOR SALE OR HIRE

(Summary of government interference: Closed by governmental announcements, guidance and advice on 16, 18, 22 and 23 March 2020, or by 26 March Regulations other than making deliveries or providing services in response to phone/online/mail orders. Guidance also produced on 11 May 2020 on how businesses should run their operations safely, including in relation to eight different types of business, in turn including (relevant to this category) factories/plants/warehouses, offices and contact centres, people delivering to other people's homes and shops and branches.)

1. The business is a [clothes shop, other goods retail business not listed in Schedule 2, Part 3 to the 26 March Regulations].
2. It is in an [urban/rural] location.
3. There was incidence of COVID-19 [within a specified proximity/beyond that/not relevant to policy term].
4. Opening/closure/impact permutations:
 - a) It suffered a reduction in turnover from 1 March 2020 as a result of self-isolation and social distancing advice.
 - b) It closed prior to 26 March 2020 and it is asserted that this was because of COVID-19 in the locality and/or governmental or other advice.
 - c) It closed fully on 26 March 2020, having no delivery or phone/online/mail order business, alternatively choosing not to deliver or provide services by phone/online/mail order.
 - d) It closed on 26 March 2020, but started or continued to deliver or provide services by phone/online/mail order.
5. The local authority or police [did/did not] issue guidance and/or take relevant action in general/in relation to the area/in relation to the business and this was causative as required under the policy.
6. The business suffered loss due to [e.g. loss of revenue or increased cost of working, etc.]

CATEGORY 5: REGULATIONS UNLISTED SERVICES

(Summary of government interference: The Regulations are silent – neither expressly required to close nor expressly permitted to remain open. Guidance also produced on 11 May 2020 on how businesses should run their operations safely, including in relation to eight different types of business, in turn including (relevant to this category) construction and other outdoor work, factories/plants/warehouses, laboratories and research facilities, offices and contact centres, people working in, visiting or delivering to other people’s homes, shops and branches and vehicle based businesses.)

1. The business is a [manufacturer, accountancy firm, law firm, recruitment agency, other service business not listed in the Regulations].
2. It is [single/mixed] use.
3. It is in an [urban/rural location].
4. There was incidence of COVID-19 [within a specified proximity/beyond that/not relevant to policy term].
5. Opening/closure/impact permutations:
 - a) It suffered a reduction in turnover from 1 March 2020 as a result of self-isolation and social distancing advice.
 - b) It closed and it is asserted that this was because of COVID-19 in the locality and/or governmental or other advice.
 - c) It continued but remotely in part or whole.
6. Local authority or police did/did not issue guidance and/or take relevant action in general/in relation to the area/in relation to the business and this was causative as required under the policy.
7. The business suffered loss due to [e.g. loss of revenue or increased cost of working etc.]

CATEGORY 6: HOTEL OR OTHER HOLIDAY ACCOMMODATION

(Summary of government interference: Advised on 24 March 2020 to “take steps to close for commercial use as quickly as is safely possible” and mandated to close by 26 March Regulations save for very limited category guests such as critical workers)

1. The business is a [hotel, cottage, bed & breakfast or other holiday accommodation].
2. It is [single/mixed] use.
3. It is in an [urban/rural location].
4. There was incidence of COVID-19 [within a specified proximity/beyond that/not relevant to policy term].
5. Opening/closure/impact permutations:
 - a) It suffered a reduction in turnover from 1 March 2020 as a result of self-isolation and social distancing advice.
 - b) It closed prior to 24 March 2020 due to governmental announcements (e.g. on 16 March 2020 for citizens to “stop all unnecessary travel”) and/or to protect employees/customers and/or because of a drop in turnover and/or because it could not safely operate.
 - c) It [did not close/closed] on 24 March 2020 on receipt of government advice.
 - d) It closed on 26 March 2020 when it was required to close.
6. Local authority or police did/did not issue guidance and/or take relevant action in general/in relation to the area/in relation to the business and this was causative as required under the policy.
7. The business suffered loss due to [e.g. loss of revenue or increased cost of working, etc.]

CATEGORY 7: NURSERY, EDUCATIONAL ESTABLISHMENT OR PLACE OF WORSHIP

(Summary of government interference: Announced on 16 March 2020 that non-essential contact, confined spaces and mass gatherings should be avoided. Further announced on 18 March 2020 that schools would close from after 20 March 2020 save for vulnerable children and children of critical workers. Power to close educational institutions and childcare premises conferred by section 37 and Schedule 16 of Coronavirus Act 2020. Places of worship required to close pursuant to regulation 5(5) of the 26 March Regulations save for funerals, to broadcast an act of worship or provide essential voluntary services or urgent public support services.)

1. The business is a [nursery, educational establishment or place of worship].
2. It is in an [urban/rural location].
3. There was incidence of COVID-19 [within a specified proximity/beyond that/not relevant to policy term].
4. Opening/closure/impact permutations for nursery or educational establishments:
 - a) It suffered a reduction in turnover from 1 March 2020 as a result of self-isolation and social distancing advice.
 - b) It closed prior to 21 March 2020, e.g. due to the governmental announcement on 18 March 2020.
 - c) It closed entirely on 21 March 2020, alternatively closed save for children of key workers and/or online lessons.
5. Opening/closure/impact permutations for places of worship:
 - a) It suffered a reduction in revenue from 1 March 2020 as a result of self-isolation and social distancing advice.
 - b) It closed prior to 26 March 2020, e.g. due to the government announcement on 16 March 2020.
 - c) It closed on 26 March 2020, save to the extent permitted to remain open (e.g. to conduct funerals).
6. The local authority or police [did/did not] issue guidance and/or take relevant action in general/in relation to the area/in relation to the business and this was causative as required under the policy.
7. The business suffered loss due to [e.g. loss of revenue or increased costs etc.]