

BUSINESS INTERRUPTION INSURANCE TEST CASE

PROPOSED ASSUMED FACTS

9 JUNE 2020

1. INTRODUCTION

The following set of *assumed facts*¹ 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 [SI 2020/237](#) (“**21 March Regulations**”) and the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 [SI 2020/350](#) (“**26 March Regulations**”), together with [the 21 March Regulations](#), the “**Regulations**”) (Categories 1-7 in the ~~assumed fact patterns~~ [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 [\(in whole or part\)](#) to conduct business ~~(at all or to the usual degree)~~.

¹ [As defined in the Framework Agreement para 1.3.](#)

The ~~assumed fact patterns~~ 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~~ Assumed Fact Patterns will still have value in interpreting cover for these scenarios.

Whilst the ~~assumed fact patterns~~ 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.~~

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. It is important for the Court to be aware of the wide range of different circumstances to which the policies apply. The Assumed Facts Patterns are intended to provide an overview of the various contexts within which the relevant policy terms operate. They provide a basis for considering and testing arguments. Insurers have proposed detailed specific factual scenarios to supplement the Assumed Fact Patterns. At the appropriate time (likely to be after service of Defences) the FCA will engage in further dialogue with insurers to consider whether it may be appropriate and helpful to the Court for there to be a limited number of simplified but instructive factual scenarios agreed for use by the Parties in their respective submissions to assist in the argument on one or more of the issues before the Court. If so, these are best developed in light of the issues as pleaded by all parties. However, any such dialogue will not prevent the Court from hearing argument concerning the potential application of the policy terms to a wide variety of businesses and entities in a wide variety of circumstances, to ensure the judgment can be applied to as many businesses as possible. Mention of a business type below does not indicate that that business will specifically be considered or that other businesses not mentioned will not be considered.

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 and is subject to the agreed facts.²

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 <u>an extent to</u> 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) – <u>subject to agreed facts</u>	Loss of revenue/income <u>Loss of footfall for (part of) business allowed to remain open (such as takeaway restaurant)</u>
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,	Mixed use (i.e. one use was permitted and one use was prohibited or	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	Local authority or police or similar did not issue guidance or take action (where relevant under the policy) – <u>subject to agreed facts</u>	Increased/additional costs of working

² As defined in the Framework Agreement para 1.2.

concert hall, betting shop, gym, leisure centre; from 26 March 2020 hairdressers and prescribed other businesses]	restricted - e.g. supermarket incorporating café, physiotherapy clinic incorporating a gym)			guidance and government order		
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 before e.g. 21 March 2020 Reduced footfall after e.g. 21 March 2020
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						

<p>mail orders (Category 4: Regulations unlisted retail).</p> <p>[e.g. clothes shop, other goods/services retail business not listed in Schedule 2, Part 3 to the 26 March Regulations]</p>						
<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 (with limited exceptions) 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>						

[e.g. nursery, primary school, secondary school, sixth form college, community college, university, place of worship]						
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3. **DRAFT ASSUMED FACTS** **FACT PATTERNS**: DETAILED DELINEATION OF VARIABLES AND ANALYSIS³

CATEGORY 1: REGULATIONS PART 1 BUSINESS

(~~Summary~~ Provisional summary of government interference, subject to agreed facts: 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 ~~4~~ early March 2020 as a result of [~~self-isolation and~~] and [voluntary social distancing] and/or [social distancing ~~advice~~ on 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)-] [and/or][a general reduction in turnover over the preceding 3 weeks].
 - 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 advice/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.].

³ All Assumed Fact Patterns are subject to the agreed facts.

CATEGORY 2: REGULATIONS PART 2 BUSINESS

(~~Summary~~ Provisional summary of government interference, subject to agreed facts: 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 ~~4~~ early March 2020 as a result of [~~self-isolation~~ ~~and~~] and [voluntary social distancing] and/or [social distancing ~~advice~~ on 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)-] [and/or] [a general reduction in turnover over the preceding 3 weeks].
 - c) It closed on 21 March 2020, or 26 March 2020 for some businesses.
6. Local authority or police did/did not issue advice/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~~ Provisional summary of government interference, subject to agreed facts: 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~~urgent dental centre⁴, 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 ~~4~~early March 2020 as a result of [~~self-isolation~~~~and~~] and [voluntary social distancing] and/or [social distancing ~~advice~~on 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 advice/guidance and/or take relevant action ~~and this was causative as required under the policy in general/in relation to the area/in relation to the business~~
7. The business suffered loss due to [e.g. loss of revenue or increased cost of working, etc.].

⁴ Other dental practices were effectively closed by a range of measures (including regulatory measures) taken by a combination of the NHS, the Chief Dental Officer and the Care Quality Commission, which took effect between 25 and 30 March 2020 (subject to the agreed facts, as defined in the Framework Agreement para 1.2).

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

(~~Summary~~ Provisional summary of government interference, subject to agreed facts: 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 ~~4~~ early March 2020 as a result of [~~self-isolation~~ ~~and~~] and [voluntary social distancing] and/or [social distancing ~~advice~~ on 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~~ Local authority or police [~~did/did not~~] issue ~~advice~~ advice/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~~ Provisional summary of government interference, subject to agreed facts: The Regulations ~~are silent — neither expressly required to close nor expressly permitted to remain open~~ did not require business to close but government advice was not to travel to work unless necessary. 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 ~~4~~ early March 2020 as a result of [~~self-isolation~~ and] and [voluntary social distancing] and/or [social distancing ~~advice~~ on advice].
 - b) It closed entirely [partially] 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 advice/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~~ Provisional summary of government interference, subject to agreed facts: 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~~ early March 2020 as a result of [~~self-isolation and~~] and [voluntary social distancing] and/or [social distancing ~~advice~~ on 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 advice/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~~ Provisional summary of government interference, subject to agreed facts: 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 ~~4-early~~ early March 2020 as a result of [~~self-isolation-and-~~] and [voluntary social distancing] and/or [social distancing ~~advice~~on advice].
 - b) It closed entirely [partially] 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 vulnerable children and/or online lessons.
5. Opening/closure/impact permutations for places of worship:
 - a) It suffered a reduction in revenue from ~~4-early~~ early March 2020 as a result of voluntary 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~~ Local authority or police [~~did/did not-~~] issue advice/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.].

Comparison Details	
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Date & Time	09/06/2020 18:27:28
Comparison Time	2.78 seconds
compareDocs version	v4.3.300.65

Sources	
Original Document	Proposed Assumed Facts .docx
Modified Document	Final Assumed Facts - 9 June 2020.docx

Comparison Statistics	
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Deletions	28
Changes	44
Moves	10
Font Changes	0
Paragraph Style Changes	0
Character Style Changes	0
TOTAL CHANGES	144

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Deletions	
<u>Moves / Moves</u>	
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Character Style Changes	
Inserted cells	
Deleted cells	
Merged cells	
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