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For attention
Tshwane Tourism Association Members

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To whom it may concern

THE ARGUMENT AGAINST THE NON-PAYMENT OF INSURANCE CLAIMS OF CONTINGENT BUSINESS INTERRUPTIONS & CANCELLATION OF BOOKINGS

As a specialist insurance broker in the hospitality sector, we've been knee-deep in the controversies on behalf of our clients around the non-payment of Business Interruptions insurance claims. We have made it our business to research the insurers' reasons for rejecting claims, and our findings offer some strong arguments in favour of policyholders and dispels many of the insurers' arguments for not paying claims.

In this, I must acknowledge the significant contributions made by Professor Robert Vivian, professor of Finance and Insurance at Wits University, who is undoubtedly the leading academic in the field.

Although our opinions have been researched properly, and most of the insurance principles have a long and well-documented history, we acknowledge the fact that some of our views are still untested. Covid-19 brings new, untested waters.

BACKGROUND

1. Business Interruptions (BI) cover is only available to policyholders who have selected and paid for this section under their policies. If this cover was not selected, then there is no possibility of a claim.
2. Most commercial BI policies do not contain Loss of Bookings or Contingent BI contagious disease cover extensions. These extensions are typically only found in specialist hospitality insurance products.
3. Hospitality insurance policy wordings are not all exactly the same. The various insurers have developed their own features and conditions. Each policy wording version must therefore be scrutinised on its own merits when determining cover. For the purposes of this paper, we are only considering the most widely used policy wording.



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4. In terms of these specific wordings, there are two possible sections where policyholder could claim for Covid-19 related loss of revenue:
 - 5.1 Cancellation of Booking extension
 - 5.2 Contingent BI extension – infectious and notifiable diseases
- 6 The policy wording, schedule and proposal form make up the contract of insurance, and is the only contract policyholders and insurers may rely on when determining liability. No other interpretive memorandums are of any consequence. We must concern ourselves with the contract of insurance only.

POLICY INTERPRETATIONS

7 Cancellation of Booking extension

- 7.1 The insurance under this item is limited to the loss of the value of deposits received for the booking of accommodation in consequence of returning such deposits following curtailment of the bookings due to a range of causes listed, including “...*the compulsory quarantine or jury [duty] in a court of law applying to the guest or any person with whom the guest has arranged to travel*”.
- 7.2 Cancellations of bookings, as set-out in the policy are covered if a guest cancels because the guest has been placed in compulsory quarantine. The insurers are relying on the definition of the word “*quarantine*” as found in the Disaster Management Act. If that definition is applied to the insurance contract, it is argued, then the claim does not fall within that definition.
- 7.3 There is no basis in law to import a definition from an Act of Parliament into the insurance contract unless it is so defined in the contract of insurance itself. So, the insurer cannot evoke a definition found elsewhere in the world into the insurance contract. If the word is not defined in the insurance contract it retains its normal every day meaning (not even the dictionary meaning, although the dictionary meaning may assist to establish what is the normal every day meaning.) Thus, the insurers’ reliance on the definition found in the Disaster Management Act cannot be sustained. The use of the word quarantine must be given its normal every day meaning in the context of what has factually happened. What has happened in South Africa factually, is that persons have been separated from society as a whole to prevent the spread of the virus. The very purpose of quarantine is to do exactly that; people are isolated to prevent the spread of the disease. That falls squarely within the concept of quarantine as understood by the man in the street. This is especially true in the case of Covid-19 since it is known that it is asymptomatic in many, if not most cases. Also, the word quarantine is qualified by the word “*compulsory*”. The lockdown is compulsory quarantine. Persons in South Africa were confined by law to their home as a result of a contagious disease. If guests had a booking, they would not be able by law to leave their houses to fulfil that booking. The extensions continues “or jury [duty] in a court”. Jury duty was of course abolished in South Africa in the 1960s, but it is the same idea. By law a person is confined to a place and cannot take up the booking. So the claim falls within the four corners of the extension. The reliance of insurers on the definition in the Disaster Management Act is bad in law.

8 Contingent Business Interruption – infectious and notifiable disease

- 8.1 Typical policy wordings (summary) under this extension are:



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“Infectious Diseases...

*Loss as insured by this section resulting in interruption or interference to the Insured’s business due to...
notifiable disease occurring at the Insured’s premises (or within a 50km radius of the Insured’s premises).”*

and

Infectious Diseases...

*Loss as insured by this Section resulting in interruption or interference with the Business due to ... (d)
Notifiable Disease occurring within a radius of 40 kilometers of the Premises”*

- 8.2 The response by insurers to claims may be that the losses caused by the national lockdown are not an insured peril and are therefore not covered. Insurers will argue that the onus is on the insured to confirm that there was an infected person at or within the 40km / 50km radius of the insured premise, and that the presence of this infected person within such area was the direct cause of the loss of revenue. The insurer may argue that where the loss of revenue was due to government regulations such as the national lockdown, that these losses are not an insured event and are not covered in terms of the policy. If the reasons for cancellation of guests were due to the national lockdown and travel restrictions imposed by the national government, then the claim is not covered in terms of the policy contract.
- 8.3 What the insurer appears to be arguing is that the cause of the interruption was the action of the government and not the virus - or as normally phrased in insurance, the proximate cause of the loss was the lockdown and not the virus. This does not correctly reflect the doctrine of proximate cause. The policy is very clear - the insured event is a loss resulting from a notifiable disease It is not a loss caused by someone contracting the disease but the loss is caused by the existence of disease. The action of the government is a remote cause and not the proximate cause of the interruption. It is the disease which caused the government to introduce the lockdown. So the lockdown is the remote cause, not proximate cause of the loss. This issue has often been dealt with in the courts. In *Stanley v Western Insurance Co 1868 LR* in order to stop the spread of fire, the authorities destroyed a row of houses. The question arose was this a fire loss. The insurers argued the loss was not covered by a fire policy, since factually there was no fire loss, but the loss was caused by the independent action of the authorities when they decided to destroy the buildings. The buildings were not in fact damaged or destroyed by fire. The court would have none of that: “Any loss resulting from an apparently necessary and bona fide effort to put out a fire, whether it be by spoiling the goods by water, or throwing articles of fire out of window, or even the destroying of a neighbouring house by explosion for the purpose of checking the progress of the flames, in a word, every loss that clearly and proximately results, whether directly or indirectly from the fire, is within the policy.” If the authorities decide to shut the economy down because of the virus, and the virus is the insured event then the virus is the proximate cause of the insured interruption loss.
- 8.4 In regards to the infection of a person within a 40km / 50 km radius: According to the Ministry of Health, on 17 March 2020 there were 14 confirmed cases of Covid-19 in Gauteng (source: <https://sacoronavirus.co.za/wp-content/uploads/2020/03/coronavirus-update-17.03.20-final.pdf>). The exact location of these cases are unknown and not published, and it is unreasonable to demand that an insured must present verified evidence of a specific case when such evidence is normally unobtainable. Considering the population density and spatial distribution of the province, it is highly probable that any one or more Covid-19 cases will exist within 40km / 50km of the insured premises. However, irrespective of this reality, we understand that the insurers’ has interpreted the policy to require there must be an infected person within 40km / 50 km of the premises, and the presence of that person must be shown to have caused the loss. Factually, however, it is not what the policy wording requires. In the first instance it requires “*notifiable disease occurring within a radius of 40km / 50 km of the premises*”. The purpose of this

is the insurer does not want to face claims from instances occurring which are remote from the insured business. Since the entire country was put under lockdown, it follows that the assumption which the government worked on is the disease is present in the entire country. There are thus no remote outbreaks. Thus every business can be presumed to be within the 40km / 50 km radius of the disease. The second part of the wording makes it clear that actual cases are not necessary. What is necessary is *“an outbreak which the competent local authority has stipulated shall be notified to them”*. What is needed is “an outbreak” within 40km / 50 km of the business. The government has treated the country as a whole as being exposed to the virus.

- 8.5 Based on these arguments, the insured can contend that the insurers’ repudiation of claims are in fact incorrect and unfair.
- 8.6 The insured can also contend that the insurers’ narrow interpretations of the policy wording are in contravention of the “Treating Customer Fairly” principles.
- 8.7 Summary: The infectious reportable disease Covid-19 proximately caused the interruption or interference to the insured’s business resulting in the loss as insured, the notifiable disease is regarded to have occurred within the radius condition, and that the insured must have a valid and fair claim for loss of revenue under the Contingent Business Interruption section as defined.

These are our views. The full written paper of Prof Robert Vivian is available on request.

It is very important for policyholders to understand their rights and privileges in terms of their policies when faced with a claims repudiation. The contesting of repudiated claims are subject to prescription. Policyholders must act within such prescribed periods, failing which they would lose any rights to such claim. Insurers are compelled by law to inform policyholders about their rights and privileges in this regard when a claim is repudiated. Policyholders must be sure to act on it.

If you require any assistance, please contact me directly at willem@olivebrokers.co.za, or 083 327 8818, or 011 462 3393. You can also find out more about Olive Insurance Brokers at www.olivebrokers.co.za