Appendix 1

There are at least two key outstanding issues affecting large cohorts of policyholders.

Issue 1: Furlough

- Many policyholders received financial support from the UK government during the Covid-19 pandemic, including in the form of various types of grants, Business Rates Relief and the Coronavirus Job Retention Scheme ("CJRS" or "furlough").

- The treatment of government financial support received by policyholders in the calculation of a business interruption indemnity was a source of disagreement from the start.

- On 18 September 2020, the FCA wrote to insurers, setting out its expectations in relation to the treatment of government support, and confirming that it did not consider that the Small Business, Retail, Hospitality and Leisure or Local Authority Discretionary grants should be treated as turnover under the policies, nor applied as savings in the calculation of the BI indemnity.

- On 25 September 2020, the ABI wrote to the Economic Secretary to the Treasury to confirm that 12 insurers would not be deducting the Local Authority Grant, the Small Business Grant and the Leisure/Retail/Hospitality grants, or their equivalents in Scotland, Wales and Northern Ireland, from any Covid-19 claims payments. On the same date the Economic Secretary welcomed the decision, noting that "*The practice of making these deductions would mean that taxpayer funds are being channelled into savings for insurers, rather than supporting businesses to ride out the disruption brought on by this pandemic*."

- CJRS payments, on the other hand, have continued to be deducted by insurers in the calculation of BI indemnities.

- The position was first challenged by Stonegate Pub Company in its claim against MS Amlin, Zurich and Liberty Mutual Insurance. In the Commercial Court, Mr Justice Butcher found that CJRS payments were to be taken into account as savings in the calculation of the BI indemnity[1]. Permission to appeal was granted, but the case was settled before the appeal was heard.

- The issue was again raised in the joined cases of *Gatwick Investment v Liberty Mutual & ors and Bath Racecourse v Liberty Mutual & ors*[2]. In those cases, Mr Justice Jacobs at first instance followed Mr Justice Butcher's ruling in *Stonegate v MS Amlin*, again granting permission to appeal.

- On appeal, the Court of Appeal upheld Mr Justice Jacobs decision[3].

- On 20 June 2025 the Supreme Court granted permission to Bath Racecourse to appeal the Court of Appeal's furlough decision, on the basis that the appeal raises an arguable

[1] [2022] EWHC 2548 (Comm)

[2] [2024] EWHC 124 (Comm)

[3] [2025] EWCA Civ 153

point of law of general public importance which ought to be considered by the Supreme Court at this time.

- The policyholders' case in the appeals proceeds on the basis that CJRS payments should be treated in the same way as other grants, and that the terms of the policies in question do not permit them to be deducted from the calculation of the BI indemnity, since the wage bills for which the support was provided neither "ceased" nor "reduced". Further, the CRJS payments were not legally caused by the insured peril and so were not in consequence of it so as to render them relevant savings to be deducted.

- The Supreme Court will hear the appeals on 11 and 12 February 2026[4]. If the Supreme Court upholds the decision of the Court of Appeal, then no further action will be required.

- However, if the Supreme Court reverses the Court of Appeal's decision, Gatwick Investments and Bath Racecourse will be entitled to have their claims adjusted with no deductions made for furlough receipts. Insurers will also be bound to follow the Supreme Court's ruling in relation to any outstanding or future claims. However, even if any decision is handed before 20 March 2020, which appears unlikely, any entitlement on the part of policyholders to seek further compensation will quickly become time-barred in a majority of cases.

- The question also remains as to how policyholders whose claims have been previously settled with deductions for furlough are to be treated. Many policyholders, who in the majority of cases will not have been legally represented, have signed settlement agreement or other documents releasing insurers from any further liability. If the Supreme Court confirms that insurers' approach was wrong, those policyholders will lose out on compensation to which they were legally entitled, unless insurers revisit the previous claims settlements to make the appropriate adjustments.

- The FCA's support is therefore sought to ensure that insurers take steps to obtain fair outcomes for consumers. Insurers should be required to confirm, in the event that the Supreme Court reverses the position on furlough; (i) that they will implement the Supreme Court's decision in relation to previously-settled claims as well as outstanding claims; and (ii) that they will not raise limitation as a defence to any further claim advanced on this basis.

Issue 2: 'At the Premises' Disease clause – evidence of Covid-19

- In the FCA test case, the Supreme Court determined that the 'radius' disease clauses under consideration were capable of responding to losses caused by the Covid-19 pandemic, in part as a result of the Supreme Court's concurrent causation analysis.

- 'At the Premises' disease clauses were not considered by the court in the FCA Test Case, but were later found by both the Commercial Court and the Court of Appeal in *London International Exhibition Centre v RSA*[5] to function in exactly the same way as radius clauses. An occurrence of Covid-19 at the insured premises was to be regarded as a concurrent proximate cause of government action, and therefore loss, in the same way as an occurrence of Covid-19 within a specified radius of the premises.

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4 UKSC/2025/0068
5 [2022] EWHC 3235 (Comm), [2024] EWCA Civ 1026

- The ruling opened the door to many further claims by policyholders that had not previously had the opportunity to seek compensation for their Covid-19 BI losses.

- The matter of exactly how a policyholder may prove an occurrence of Covid-19 at its insured premises remains uncertain, and in many cases contentious. In relation to the early stages of the pandemic, and in particular in the lead up to the first national lockdown commencing on 23 March 2020, community testing was not widely available, and few policyholders therefore have access evidence of a positive test confirming that a person was infected with Covid-19.

- There is, in our experience, a wide degree of variance between the evidence that various insurers will accept as sufficient to discharge the policyholder's burden of proof in this regard.

- Many claims remain outstanding, and are unlikely to be concluded unless and until there is some degree of legal authority on the nature and degree of evidence that is sufficient.

- There is, at present, no case listed for trial that will test this issue, and there is therefore no prospect of legal clarity being achieved before March 2020 on this complex issue.

- The FCA's support is therefore sought to ensure that policyholders are treated fairly, by not being prevented from pursuing their claims, simply because a relevant limitation period has expired before they have had the opportunity to prove their claims with appropriate guidance from the court.

Stewarts
17 December 2025