



RiskBox



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What the Supreme Court ruling really means for businesses

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Written by Michael Henderson, Director of RiskBox

The Supreme Court ruling this month is a big victory for business owners who found themselves turned away by insurers back in March 2020. But misleading media coverage around the decision is creating confusion and false hope for those who were unfortunately never eligible to claim in the first place.

It's hardly surprising: the Supreme Court ruling is a dense (trust me, I've read it!), 112-page document, and even then it leaves some questions unanswered. However, I wanted to set the record straight on a few key points, particularly around who can claim and what they can claim for.

Please note the below is not an exhaustive summary, as our affected clients are all with Hiscox and this report focuses on those policies only

A bit of background...

The judgement relates to Business Interruption (BI) insurance. Traditionally, BI is premises-specific and relies on physical damage, although policies normally include some extensions that allow certain situations to be covered. Two of these, crucially, include:

1. Public Authority

This is when certain authorities forcibly close your premises. This would normally be due to a serious incident, such as a murder or E. coli outbreak, but many insurers haven't been clear on what exactly 'Public Authority' situations entail. Through vague wording, certain insurers have exposed themselves to these valid claims made as a result of lockdown.

2. Denial of Access

This is usually defined as being unable to get to a premises due to damage in the immediate area (i.e. an access road has been closed off because of a collapsed building). However, some insurers (including Hiscox) include Non-Damage Denial of Access and, again, haven't been clear on what they mean by that.

So, when a number of our clients (almost all in hospitality) were unable to open their premises in March 2020, we were passionate from day one about helping them claim what they were entitled to. And when the insurers said that COVID-19 wasn't covered, we fought that decision – even submitting a 20-page document to the Financial Conduct Authority (FCA) outlining why we felt these policies should respond...

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The case – and what's changed

When the FCA began legal proceedings against insurers in July 2020, the High Court agreed with the main principle: that businesses who had taken the right insurance, whose premises were forcibly closed because of COVID-19 and whose revenue was decimated due to their inability to use those premises, should be eligible for payment under their policy compensation. However, insurers and the FCA appealed; the latter because they felt the High Court hadn't gone far enough to protect the interests of those deemed eligible.

And that's why the Supreme Court ruling is such a big win for those affected. It not only upholds the original High Court decision around eligibility, but goes one step further by changing a few specific details in favour of those making a claim:

1. It curbs those insurers that are trying to avoid paying claims for venues that partially closed, e.g. a restaurant that pivots and offers takeaway services
2. It makes it harder for insurers to reduce the claim amounts paid, as they cannot make big deductions from the COVID-19 downturn just prior to lockdown under what are called 'trends' clauses. This was a welcome surprise, as although we agreed it was morally correct, we felt that insurers might have been backed on that.
3. It means some affected businesses should be able to claim for lost revenue from before the actual lockdown itself. Again, this was another pleasant and unexpected surprise.

Back when we filed our report to the FCA, we were adamant about eligibility but acknowledged that insurers would likely only pay out a proportion of the revenue lost. The Supreme Court's decision means businesses that have pivoted the use of their premises won't lose out, and claimants should receive the full amount of the compensation they're entitled to.

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So, who can claim?

As I've explained, nothing has really changed around who can claim: the most important eligibility factor is having premises that you've been unable to access and operate due to COVID-19. That means, if you work or are able to work remotely, it's unlikely that you can claim.

Under Business Interruption, **you still can't claim** for things such as:

- Client terminating a contract
- Client reducing services taken and therefore subsequent spend
- Client failing to pay your fees
- Client going insolvent and leaving bad debts
- Inability to use other people's premises
- Inability to carry out work away from your premises
- Reduced new business opportunity
- General downturn of the economy

This is where the media has, in my eyes, given people false hope.

What the ruling does mean is that businesses (such as bars, restaurants, salons, hairdressers, gyms and museums) who have been unable to open are able to claim vital compensation. This is providing that they have Business Interruption insurance with the relevant, unclear extensions I talked about earlier. It offers certainty that compensation is due, as well as hopefully a bigger payout.

There are still a few things that need clarity, such as whether each lockdown will be considered a separate event or what government assistance should be included within claims calculations, but this will become clearer as claims progress through the system.

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What happens next?

The FCA is going to produce a set of declarations regarding the Supreme Court decision. They'll also publish a Q&A document to help insurers, brokers and claimants understand where they stand. Meanwhile, insurers such as Hiscox will now be obliged to contact those that have claimed, with a view to progressing the claim and stating whether they believe the policy now responds.

Patience is needed, as we expect it will take a few weeks before any payments are made, but we hope things will start moving before the end of January 2021. And, as ever, we're working closely alongside our clients to keep them informed. We know how important it is to make sure that insurers have all the information they need to provide the compensation we've waited so long for!

To find out more about any of the points raised here, please [get in touch](#).



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