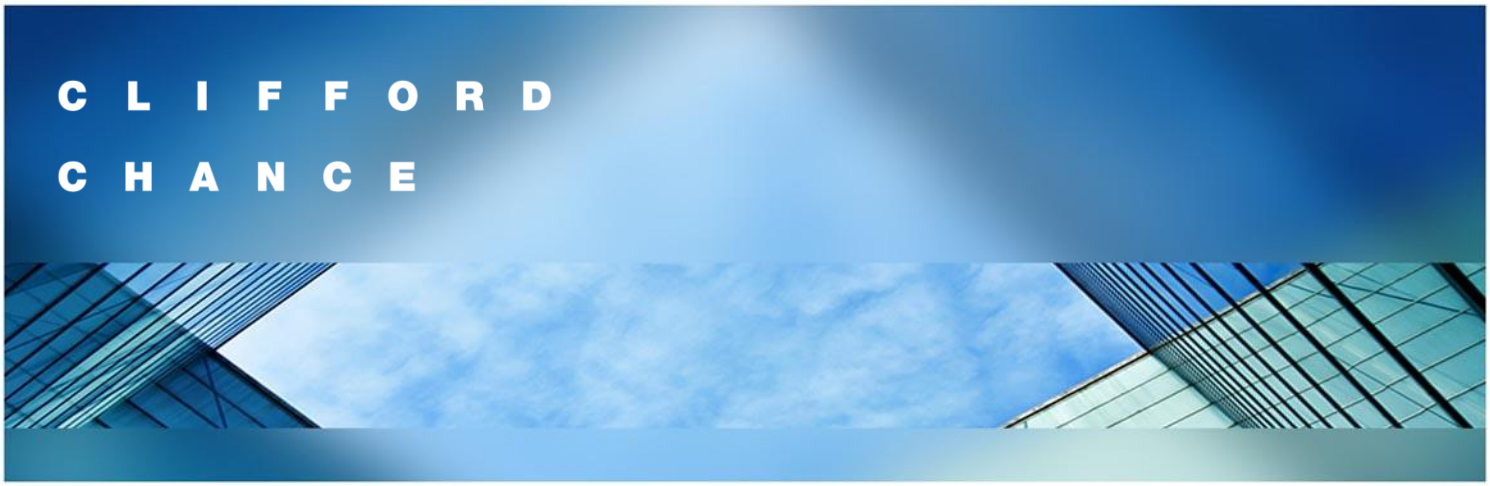

BUSINESS INTERRUPTION INSURANCE COVID 19 – BATH RACECOURSE

The High Court has recently handed down judgment in the latest of a long line of insurance cases concerning cover for business interruption losses arising in the Covid-19 pandemic. In this article we consider the issues arising, which will be significant both to those with Covid interruption-related insurance claims and with liability insurance claims more generally. In this case, the Court held that an insured with "at the premises" business interruption cover could recover up to the policy limit separately for each premises where there was a case of Covid-19 which caused loss, meaning significantly more cover was available to them than Insurers were arguing for.

Key issues

- On the wording before the Court, the "any one loss" limit was to apply per premises (rather than per insured) and per covered restriction. Other parts of the Policy, including definitions, were to be interpreted consistently with that.
- The phrase "any other competent authority" is not limited to organs of the state or statutory bodies. In context, it encompasses bodies with regulatory power and authority in the relevant sphere which have exclusive jurisdiction over their respective industries and the power to impose binding restrictions.
- The Policy's arbitration clause, which was engaged where liability was "otherwise admitted", entitled the Claimants to pursue their claims to final judgment in the Courts. It did not "kick in" at a later stage once liability issues had been resolved.

WRITING STYLE

In *Bath Racecourse Company Ltd v Liberty Mutual* [2025] EWHC 1870 (Comm), the High Court was considering a claim to recover losses suffered by the insured when their businesses were interrupted in the Covid pandemic. The principal issues dealt with were:

- The operation of the common provision providing that disputes are to be determined by arbitration where liability is "otherwise admitted",
- The meaning of "competent authority", and
- How the policy limits apply in the particular policy.

The judgment will have wider implications for many insureds. It is also a timely reminder that successful claims are being made under insurance policies for losses arising from the Covid-19 pandemic, but insureds who have not yet brought claims may find them time barred in early 2026, when the six year limitation for contractual claims will expire.

BATH RACECOURSE

The Claimants, all within the Arena Racing group, operate racecourses, greyhound tracks, golf clubs, hotels, and a pub across England and Wales. Two Claimants provide ancillary services and media rights management. The Defendants are three major insurers.

The Claimants held a composite Material Damage and Business Interruption Policy for the period 1 January to 31 December 2020, which included a 'denial of access' business interruption BI extension.

During the Covid-19 pandemic, their businesses suffered significant losses as a result of closures and restrictions imposed by government and industry regulators (the British Horseracing Authority ("**BHA**") and the Greyhound Board of Great Britain ("**GBGB**")). It was not in dispute that the policy was triggered- earlier proceedings (*Gatwick Investment Ltd v Liberty Mutual Insurance Europe SE* [2024] EWHC 124 (Comm)) had resolved certain issues, including that each Claimant was entitled under the denial of access extension to £2.5m of cover per "any one loss". The case was concerned with a number of follow-on issues, including how the "any one loss" limit applied in practice.

JUDGMENT

"Any One Loss" Limit

The Policy provided for "at the premises" business interruption cover on the following terms:

> "If Damage as defined in Section 1 occurs at The Premises to property used by the Insured for the purpose of The Business and causes interruption of or interference with The Business at The Premises the Insurer will indemnify the insured as follows…"
>
> "This Section extends to include any claim resulting from interruption of or interference with The Business carried on by The Insured at The Premises in consequence of…
>
> (b) action by the Police Authority and/or the Government or any local Government body or any other competent authority following danger or disturbance within a one mile radius of The Premises which shall prevent or hinder use of The Premises or Access thereto"

The main battleground in the case was how many limits applied, with the Claimants arguing for multiple limits.

The starting point, as established in the Gatwick Investment decision, was that the "any one loss" limit applies per Claimant, reflecting the composite nature of the Policy.

As to how many limits each Claimant could claim, they put forward alternative positions on how may limits they should be entitled to. The Court rejected the Claimants' argument that each cancelled or restricted race should be treated as a separate loss for which a separate limit is available. If the police were to instruct that a particular stand could not be used as a result of some local danger or disturbance, and that instruction remained in place for several weeks or months, there would be a single trigger event and loss calculation even if the financial impact was felt more keenly on particular days when there would have been races.

The Claimants' alternative argument was that there should be a limit per premises (racecourse, hotel, or golf course) for each relevant measure or action, and this argument was accepted. This outcome was rooted in the Policy wording. The judge said that much turns on the meaning of "the Premises" which featured in multiple parts of the insuring clause (above) and was defined as:

> "*…any premises owned occupied or used by the Insured or where goods or records are stored or worked upon or services provided by others on behalf of the Insured anywhere in Great Britain Northern Ireland the Channel Islands or the Isle of Man including whilst in transit in Great Britain Northern Ireland the Channel Islands or the Isle of Man.*"

The Judge noted that "the Premises" could be read as referring to all the places owned or used by the relevant insured. Here, however, it was to be read in a different way in order to make the cover work. It was to be understood as referring to each particular place of business which has been prevented or hindered by the action of the relevant authority. If it were not read in that way, there would be cover even if the action affected the use of some other insured location despite there being no actual prevention or hindering of the use of the specific building which happened to be within a one-mile radius of the danger or disturbance. That is not how this 'denial of access' cover and its particular trigger would have been intended to work.

"Competent Authority"

The nature of the Claimants' business meant that it was not only the actions of the relevant governments which interfered with their businesses. As sporting venues, they also needed to comply with regulations issued by the sporting bodies which regulated their activities. An issue therefore arose whether those bodies, the BHA and GBGB, were "competent authorities" and the Court held that they were. Therefore, losses arising from actions taken by them were also insured.

The Court ruled that the phrase "any other competent authority" is not limited to organs of the state or statutory bodies. In context, it encompasses bodies with regulatory power and authority in the relevant sphere, such as the BHA and GBGB, which have exclusive jurisdiction over their respective industries and the power to impose binding restrictions.

The Court rejected the Insurers' argument that only public or statutory bodies could qualify, finding that a reasonable policyholder in the Claimants' position would expect industry regulators to be included within the term.

The Court emphasised that the Policy was designed for the racing and leisure sector, and the regulatory role of the BHA and GBGB was central to the business risks insured.

Arbitration Clause

Finally, an issue arose as to the scope of the Policy's arbitration clause. This provided that pure quantum disputes were to be arbitrated, with the result that other disputes were to be litigated. The clause, variants of which are found in many policies, reads as follows:

"*If any difference shall arise as to the amount to be paid under this Certificate (liability being otherwise admitted) such difference shall be referred to an arbitrator to be appointed by the parties in accordance with the statutory provisions in that behalf for the time being in force. Where any difference is by this condition to be referred to arbitration the making of an award shall be a condition precedent to any right of action against the Insurer.*"

The dispute involved questions of both liability and quantum. However, the Insurers had argued that the arbitration clause could “kick in” at a later stage once liability issues had been resolved. They, understandably, withdrew this argument at the hearing, instead arguing that the clause would apply if separate proceedings were later brought to determine quantum.

The Court confirmed that the jurisdiction of the Court is determined at the date of issue of proceedings. If, at that point in time, the dispute does not relate purely to quantum then the arbitration clause does not apply. Here, as there remained substantial disputes as to coverage and the application of limits, the precondition for the arbitration agreement to operate (i.e., that liability is "otherwise admitted") had not been satisfied at the time proceedings were commenced.

Accordingly, the Claimants are entitled to pursue their claims to final judgment in the High Court, and the arbitration clause does not prevent this.

Comment

The judgment comes in a line of policyholder-friendly judgments relating to coverage of Covid-19 BI losses. The decision in relation to the "any one loss" limit concerned the wording and fact pattern before the Court and will be welcomed by policyholders making claims in similar circumstances. The decision also provides helpful guidance regarding the scope of arbitration clauses relating to 'pure' quantum disputes.

The courts continue to hear Covid-19 cases, but the six year period for bringing them will soon expire. Insureds who may originally have thought they had no cover may wish to revisit that view in light of recent cases.

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