Covernotes

What does the Supreme Court Ruling mean for Business Interruption Policyholders?

The Supreme Court ruling handed down 15th January 2021[1] on the FCA's (Financial Conduct Authority) Business Interruption Test Case, has opened the door for what the FCA says will be claims from "thousands" of policyholders, due to "many of the roadblocks" having been removed by the court's final judgement.[2] So what is the reality for businesses who bought Business Interruption (BI) cover?

In the view of one of the insurers whose BI claims decisions were challenged by the FCA, fewer than one-third of its 34,000 policyholders will have policies that may respond.[3] The devil will be in the detail and businesses which purchased only standard business interruption cover (which does not include any 'non-damage' cover extensions) will continue to find themselves unable to claim.

The test case only focused on specific non-damage extensions within business interruption policies and in three key areas – notifiable diseases, denial of access due to the actions of the government or local authorities and policies with various hybrid wordings capturing all non-damage extensions into a single hybrid cover. If a policy does not mention any of these areas, it is unlikely to offer any compensation to a policyholder.

Should a policy contain these non-damage extensions, it does not automatically mean that the policy will trigger. Certain policies have cover for 'Notifiable disease on the premises'. This wording was not included in the test case as it was considered to be clear and unambiguous, effectively to cover the event, there needed to be a case of COVID-19 evidentially on the premises and the business interruption loss had to flow from that specific case. Whilst we understand that some policyholders have had claims for deep cleaning and a day or two of business interruption paid, in general losses do not result from a specific case on the premises but more correctly the necessary action taken by government to protect the public and the NHS.

Secondly, several policies which have notifiable disease cover are restricted to a specific listing of diseases, sometimes over 40 diseases may be mentioned. Unfortunately, COVID-19 would never be included as it is a new disease and not one which they could have quantified and modelled outcomes of.

The policies which have the possibility of triggering are those that extend to 'any notifiable disease' and give coverage for that disease within a defined vicinity of the insured premises (typically 25 miles). These types of wordings were looked upon favourably by the Supreme Court who interpreted these wordings as widely as they were able.

As mentioned above, some policies also include cover for denial or hindrance of access to the premises on the instructions of government or statutory body. Some policies can trigger in certain circumstances, though the majority of these clauses require there to be an incident / event within the neighbourhood, and again there is no cover for action at national level. The court did push the envelope on these clauses to try and exploit cover and has widened the denial of access to include

[1] https://www.supremecourt.uk/cases/docs/uksc-2020-0177-judgment.pdf
[2] https://www.fca.org.uk/news/press-releases/supreme-court-judgment-business-interruption-insurance-test-case
[3] https://www.insurancebusinessmag.com/uk/news/breaking-news/insurance-industry-reacts-to-business-interruption-test-case-outcome-243793.aspx

'hindrance' and also has included government advice as a possible trigger, but in reality, only a small number of policies will have direct cover for government action, without the need for a local event to have happened.

Whilst the non-damage extensions are almost always sub-limited, over and above this, it is necessary for a business to have the right level of business interruption loss of revenue, gross profit or in certain circumstances, increased cost of working cover, if it is to have a chance of a successful claim. If all these areas are ticked, it will still require an examination of the individual wording within the policy, and consideration of the specific circumstances of the loss as it relates to the policyholder before it can be determined whether a claim could be successful.

Whilst the FCA has now created a policy checker facility[4], to help smaller businesses determine whether their BI policy might pay out, even their guide comes with the caveat that everything depends on the individual policy wording. Previously, the FCA talked of there being 700 types of BI policy, provided by 60 different insurers. Its test case focused on just 21 policy wordings, the majority of which were of a type designed for SME policyholders.

Another issue is that, whilst the 112-page Supreme Court judgement creates the basis on which insurers should pay claims, if certain conditions are met, it does not and could not offer any advice on how much should be paid as this is specific to each client and their individual policy and circumstances, However as the Supreme Court officially overturned the case of 'Orient Express Hotels -v- Generali which had previously restricted claims for 'wide area damage', the FCA believes "more policyholders will have valid claims and some pay-outs will be higher." There will still be much ambiguity.

On the plus side for insured BI policyholders, the Supreme Court ruling has instructed insurers to widen their interpretations when paying claims, if any of the key areas highlighted above are included within the policy. For an applicable policy wording an insured policyholder now only must prove there was at least one case of COVID-19 within their policy's specified radius e.g. 25 miles, to potentially satisfy a policy condition, as the Court believed localised cases had to be linked to the wider COVID-19 situation, when assessing impacts on businesses.[5]

Another good outcome for clients with qualifying policies is that any restrictions placed on a business, which prevented 'access to the premises, do not have to have been legally enforced. The Prime Minister's March 20 2020 instruction for many businesses to close was deemed a sufficient denial of access situation, but policyholders must study their policy's own wording in relation to "actions" and "instructions" by those in authority and provide strong evidence of losses attributable to these. Definitions such as "inability to use" and "prevention of access" may need to be interpreted by a claims expert.

Insurers are also not now allowed to reduce a claim according to any loss of business that had already occurred before a denial of access-type "instruction" was issued by an authority. Businesses can also make a claim if just part of their operation was affected. For example, if they managed to keep one service operating, such as a takeaway, they can still potentially make a successful claim for lost revenue on eat-in dining, if other conditions are satisfied.

So, what is the current situation for business interruption policyholders? Summarising the case, the FCA's legal firm, Herbert Smith Freehills LLP has stated that the ruling, "improves the position significantly beyond that which was already established by the High Court judgement." It has added that the Supreme Court "gave broader interpretation to key coverage words in the prevention of access / hybrid wordings." It is now for policyholders to assess whether their policies contain such wording and for insurers to review their policies and seek to follow the Supreme Court's ruling, if policyholders satisfy its conditions.

The starting point should be to look for the key triggers on which the FCA focused within your policy – disease and denial of access in particular – and then contact your broker for guidance if you discover any wording relating to these. You can legally appoint an expert to fight your corner, if necessary. Despite the ruling, the debates that lie ahead are not likely to be easy ones and such representation may be required.

If you wish to discuss the vital and all-important wording that you believe you have found within your policy, we are here to try to make your case. Unfortunately, unless you have these extensions within your Business Interruption policy, there is nothing at all that your broker can do to champion a claim.

> "For an applicable policy wording an insured policyholder now only must prove there was at least one case of COVID-19 within their policy's specified radius e.g. 25 miles"

[4] https://www.fca.org.uk/firms/business-interruption-insurance/policy-checker
[5] https://hsfnotes.com/insurance/2021/01/15/supreme-court-hands-down-judgment-in-fcas-covid-19-business-interruption-test-case/

Overseas Trade: what to consider in 2021

So far in 2021, we have not only seen the continuation of the worldwide pandemic crisis but also the final arrival of a full Brexit. With all of the pressures and changes, what key things should businesses consider, if carrying out business globally, or in the EU?

December 2020 demonstrated the extent to which shipping delays can impact on goods in transit, with seafood cargo a particular victim of French port closures. Whilst goods held up in port should continue to be covered by their insurance policy, still being deemed to be 'in transit', cargo deterioration claims, or those for loss of customer orders due to delay, typically require physical goods loss or damage to have occurred before they can be validated.

With food, a trigger such as refrigeration machinery breakdown often has to be proved to be the cause of the loss. 'Delay' and 'inherent vice' are often specific policy exclusions in the many policies written using the Institute Frozen Food Clauses (A) as the insuring clause, according to the insurer.[6] Therefore, a supply chain breakdown is typically not a reason for a successful policy claim.

The exceptions to this general rule may be found in the liability sections of policies held by hauliers and freight forwarders. Here, the cover may protect against claims brought against the policyholder. The best advice is for those faced with such an action to seek the advice of their broker, so that specific policy wording can be examined, to assess its scope.

Despite delay exclusions within marine cargo policies, this insurance protection is acquiring huge importance. Cargo theft has been increasing worldwide[7] and thieves are benefiting from COVID-19 disruptions to shipping schedules, changes of port and, at times, a switch in transportation method, where cargo is diverted for carriage by land, rather than by sea, for instance.[8] Warehouse thefts are rising sharply and the attractiveness of certain cargoes[9] to thieves – particularly those related to PPE – is evident. Having robust Marine Cargo insurance in place may never have been so vital, no matter what transportation method you use.

Following Brexit, haulage companies (and coach tour operators, when permitted to travel), have new rules to follow with regard to European travel. A wide range of vehicle and tax-related documentation must now be carried onboard, including a paper (hard copy) version of a Green Card – a document issued by an insurer, to prove the vehicle has valid insurance.[10] A trailer also requires its own Green Card. Green Card holders must also make plans carefully over the time of insurance renewal, if a new policy will take over from an existing one, whilst the vehicle is in Europe. In that case, two Green Cards are required – one for proof of insurance policy one and the second to prove another policy now covers the vehicle.

Passport validity[11] is another area requiring careful checking and operators should also review their drivers' European Health Insurance Cards (EHICs), which have traditionally provided medical treatment benefits in Europe. EHICs are valid up to their current expiry dates, but must then be replaced by Global Health Insurance Cards (GHICs).[12] Unlike the EHIC, these are not valid in Norway, Iceland, Liechtenstein or Switzerland and do not offer quite as many benefits. Operators should apply for new GHICs around two weeks before their EHIC expires and not use these as an alternative to travel insurance purchase. It should be noted that neither EHICs or GHICS cover any private healthcare costs. In

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[6] https://www.nmu.co.uk/port-disruption-a-one-off-incident-or-a-precursor-to-brexit/
[7] https://www.tapa-global.org/news-detail-view/recorded-cargo-crimes-in-emea-up-1147-in-2019-to-8548-incidents-with-losses-exceeding-EUR137-mil.html
[8] https://www.aviationbusinessnews.com/cargo/tapa-warns-of-spike-in-cargo-theft-as-coronavirus-lockdown-lifts/
[9] https://www.nmu.co.uk/wp-content/uploads/2020/07/Cargo-Theft-Amid-the-COVID-19-Outbreak_07.20.pdf
[10] https://www.gov.uk/vehicle-insurance/driving-abroad
[11] https://www.gov.uk/guidance/passport-rules-for-travel-to-europe
[12] https://www.bbc.co.uk/news/world-europe-44850972

many parts of Europe, private services, including ambulances, are part of the general medical infrastructure, so having travel insurance, to cover such private medical costs, as well as many other aspects of travel, is vital.

If you are a sales representative, taking samples into Europe, you have another piece of paperwork to embrace – an Admission Temporaire (ATA) Carnet application.[13] This covers the transit of many types of product (though not all), through 77 countries[14], for temporary use, such as at a sales meeting or exhibition. An ATA Carnet avoids customs charges being incurred for goods and simplifies passing through customs as a business traveller.

Applications can be made online from the London Chamber of Commerce and Industry[15] but list all the goods you wish to take on business trips at once, as you cannot add extra goods later and would need a separate carnet for additions.

Exporters need to check carefully on the various permissions, licences and certificates they require, which are often country specific. They also need an EORI (Economic Operators Registration and Identification number) number starting with GB, to export goods from England, Wales or Scotland. If moving goods to or from Northern Ireland, they may need one starting with XI.[16] An application takes five to ten minutes but there could be a five-working-day delay in receiving the number, if checks are required. Ensure enough time is allocated.

The Government website carries much information on the post-Brexit permissions exporters require. Just remember that any exported goods also need the right goods-in-transit insurance protection to be in place and that other covers should be discussed with us, to prevent loopholes and possible financial losses as you carry out your trade.

Insurance claims: is it time to get an expert in your corner?

According to leading claims experts, there are insurance lessons needing to be learned from COVID-19 and the way in which the industry has handled the claims of insured policyholders. Criticism of the way in which certain insurers have handled Business Interruption (BI) claims may have left clients questioning the value of having insurance protection. Clarity when it comes to insurance policy coverage has risen in importance.

While the main area of business insurance to have come under scrutiny has been BI insurance, the same need for claims transparency applies in other areas too – business buildings insurance protection being another significant one but not the only other cover where wordings given need to be clearly understood by all parties who may become involved.

Negotiating the maze of policy exclusions and terminology can take years of training through industry bodies, such as the Chartered Institute of Insurance (CII) and the Chartered Institute of Loss Adjusters (CILA). Understanding the actual extent to which a policy delivers coverage, and whether or not a claim has any validity, often requires expert help.

The good news is that such help is available to policyholders and they have the legal right to appoint their own expert in claims negotiations with an insurer. The insurer's negotiator is typically known as a loss adjuster, whilst the policyholder's representative is usually called a loss assessor. Some of the companies who offer representation to policyholders refer to themselves as loss adjusters, however.

Their service can be accessed either by taking out a Loss Recovery Insurance policy, which will cover any expenses incurred in using their professional expertise for claims likely to be over £5000 in value, or by opting for an option that may appeal more to a smaller business and which offers 10 hours of support. Other loss assessors will either take a commission or, charge nothing for their loss assessing and property reinstatement management service, if they can instruct and oversee vetted contractors, appointed to carry out the required property repairs

Instructing your own loss assessor can have many advantages. It takes the strain off your shoulders and relieves the stress of trying to deal with a claim that has the potential to become complicated and involved and

[13]hhttps://www.gov.uk/taking-goods-out-uk-temporarily
[14]hhttps://www.gov.uk/guidance/countries-that-accept-ata-carnets
[15]https://www.gov.uk/guidance/apply-for-an-ata-carnet
[16]https://www.gov.uk/eori

where you would be better served with expert advice. It provides you with someone in your corner, who speaks insurance language and who can expertly translate it. It also gives you the reassurance of knowing the extent of your true policy entitlement. Your loss assessor cannot extend your cover beyond that which you have paid for, but can try to ensure that you gain a fair settlement, according to the cover which you did buy.

Feeling that you have been compensated fairly for your losses can create a greater feeling of positivity within the business and help you swiftly move on from a claim. Having a lingering feeling that you were under-compensated can have the opposite effect.

Loss assessing experts emphasise that timing and expertise are everything in claims. You can access their support from the first notification of loss – the point at which you first realise you have a claim – or from some other point during the process. You can also instruct a loss assessor if you have had a claim rejected and believe that the decision was an unfair one.

Claims almost always involve a stressful situation, of one sort or another, so having a means to steer yourself through the process, as painlessly as possible, can be advantageous. A loss assessor's aim will be to get their client back to their pre-loss state as soon as possible.

If you recognise the advantages of this type of cover, you can talk to us about Loss Recovery Insurance, which will step in when you need help with a claim, or the other options that you have, should a claim be experienced but you have no policy in place.

Having the peace of mind of knowing that you have an expert on hand, to provide loss mitigation advice and to help minimise your loss, through a rightful settlement, can make all the difference and get your business back on track quickly. Whilst there will be an insurance excess to pay, at least you will know that everything possible was done to give you the full compensation that your policy wording entitled you to claim.

Product Liability Risks in the Fight Against COVID-19

The pandemic has deeply affected many aspects of business life, including insurance requirements, cover terms and limits. However, one area potentially being overlooked, amidst a euphoria surrounding UK vaccine rollouts, is the latent risk, which some businesses have often unwittingly adopted, whilst assisting the fight against COVID-19.

Tackling a global health crisis has seen resources within clinical trial environments, pushed to never before seen limits through a combination of the overriding necessity to find health solutions, the need to respond to Government demands and a desire to satisfy public expectation.

Drugs companies have asked Governments to directly indemnify them against possible future product liability actions. A process taking an average of 12 years – that of moving a drug from concept to approved-for-patient-use status, has been achieved in less than a year. All companies have the issues surrounding the drug Vioxx in their consciousness – a drug which was in use for five years, before links to strokes and cardiovascular problems became apparent. Thousands of deaths occurred and litigation event of almost $5 billion emerged.[17]

As a leading insurer highlights, COVID-19 has not suspended product liability laws and organisations must ensure that patient safety is not compromised. Defences against future liability claims in the field of life sciences could be protracted and financially damaging.

Whilst this is a major consideration for vaccine developers and product owners whose drugs are being tested against the disease, it also has ramifications for companies that threw themselves into the war on COVID-19, by converting products or processes, to create a wide range of possible solutions, from ventilators and hand gels, to PPE and protective screening.

Many such products were produced under Emergency Use Authorisations (EUAs), which facilitated their market entry, by bypassing standard authorisation processes.[18] With these sometimes taking a year, there simply was not time to approve products urgently required.

[17] https://www.chubb.com/content/dam/chubb-sites/chubb-com/uk-en/business/life-science-in-the-era-of-pandemics/documents/pdf/5500_Chubb_LS_R5_Supply-chain_UK_Acc.pdf
[18] https://www.chubb.com/content/dam/chubb-sites/chubb-com/uk-en/business/life-science-in-the-era-of-pandemics/documents/pdf/5500_chubb_ls_r1_clinical-trials_final.pdf

What many manufacturers may not have realised, is that they bear a regulatory responsibility for these products. For their entire lifespan, these products are now a potential liability for these businesses and it is their duty to monitor and maintain them.

EUAs only allowed such products to be used during the pandemic, so manufacturers must withdraw them from use thereafter. In the meantime, they should reduce their risk, by ensuring correct product usage and no adaptations or uses other than those intended. Given the pressures faced by hospital staff, however, product manufacturers will probably find it difficult to ascertain how their products are being used in practice.

The advice is for manufacturers to issue as many visible 'warnings' as possible, notifying authorities and any direct purchasers about correct product usage, reminding them of any possible negative effects of adaptations of that use and putting clear instructions for use on their websites. Keeping evidence of this is vital for any future defence, should a patient or their family sue in future.

Knowing what stock is still in circulation after the pandemic, and how to recall it or insist on its withdrawal from use, is also problematic but an issue that must be tackled. Similarly, if a product had a shelf-life and that has expired, or is due to, this must also be addressed, through communication to customers who may still be holding stock.

In some instances, Governments may have taken on the risk. Some manufacturers are protected through two Crown indemnities[19], which the UK Government introduced, to prevent manufacturers of Rapidly Manufactured Ventilator Systems facing product liability actions. It is worth checking whether your product has this protection.

However, others will not be protected in this way and, although there is a thought that governments may establish their own financial compensation schemes, through which to directly compensate victims of rushed procedures and products or drugs that slipped through quality controls, nothing is definite at present.

For now, product manufacturers need to take all steps to ensure their quality management systems are robust and that instructions in relation to the use of their products are clear. They have a duty of care over the maintenance of their products and should find means of delivering on this legal expectation and encouraging users to keep maintenance top of mind.

A conversation with your individual insurance broker about Product Liability and Recall Insurance is advised, if these covers are not in place and you are putting products into the market. The current situation is complex and that usually means that risks are elevated and more complicated than might be perceived. Analysing what yours are, is a good strategy, whatever type of product you produce.

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[19]Crown Indemnity is the practice of the organisation taking on the risk rather than the medical personnel, like a Surgeon or Nurse. In normal practice this would be the NHS Trust, in Covid-19 the Government has taken on this responsibility - https://www.hempsons.co.uk/news-articles/indemnity-cover-need-know/

Preventing Process invalidating your Construction Risk requirements

Construction site managers continue to suffer pressures from two main areas in early 2021 – the requirement to keep their risk management in order, despite an ever-changing pandemic picture and the ongoing issue of obtaining relevant insurance cover at an affordable price.

COVID-19 site safety and the management of employees, sub-contractors and other workers in on-site situations, continues to be taxing. Those site managers who believed they could rely on site access cameras to take temperatures and check for COVID-19, have instead had to just use these to restrict entry to site and check face mask wearing on arrival, following strict Government warnings about the use of devices that have no medical validity.[20]

Given the age profile of the majority of construction workers and contractors, vaccination rollout will not be removing employee sickness and absence challenges for some time. Despite the need to progress with projects falling behind schedule, where potential financial losses under contractual terms could be experienced, construction managers should be very aware that the law does not allow pressure to attend work to be exerted on staff – no matter how open the site may be – if they have COVID-19 symptoms or a requirement to self-isolate. Fines can result, if an employer forces workers to attend the workplace.[21]

With the pandemic having governed daily life for nearly a year, construction firms have to have put their COVID-19 risk management process into practice. Social distancing, the staggering of site arrivals and departures, the establishment of work 'teams' and the operation of one-way entry and exit routes, plus strict controls on the numbers of staff in toilets, rest rooms, canteen areas, shower blocks and other communal facilities at any one time and the regular cleaning of shared tools and equipment, should all be second nature by now.

Enhanced washing facilities should have been increased or developed as part of site planning; face masks should be worn by anyone working in enclosed spaces or with others they do not normally meet, if Respiratory Protective Equipment is not worn for the tasks undertaken. The number of workers in shared company vehicles should be restricted.[22]

Whilst operating best practice in such risk management scenarios would typically assist with keeping insurance premiums in check and even lowering them, during times of a softer insurance market, the rewards are not to be found at present. The insurance market hardened considerably, even pre-pandemic, with this reflected in higher premiums and more exclusions – or 'deductibles' within cover.

Insurers have not only become nervous about cladding and fire-related risks, but also about the possibility of water damage within projects. Policy terms and conditions are regularly changing and premiums for some liability covers have increased by 100% or more. Quotes are often honoured for just 30 days, before the premium is reconsidered. Often, insurers are nervous about being first to quote, with a reluctance to provide other insurers with a baseline from which to provide their own offers.[23]

Obtaining broad-based coverage is undoubtedly very difficult to do at present but it is not impossible. What we are finding is that insurers will respond far more favourably to those clients who have a broker presenting their risk in as good a light as possible. Thorough, well-researched presentations to insurers are proving their worth.

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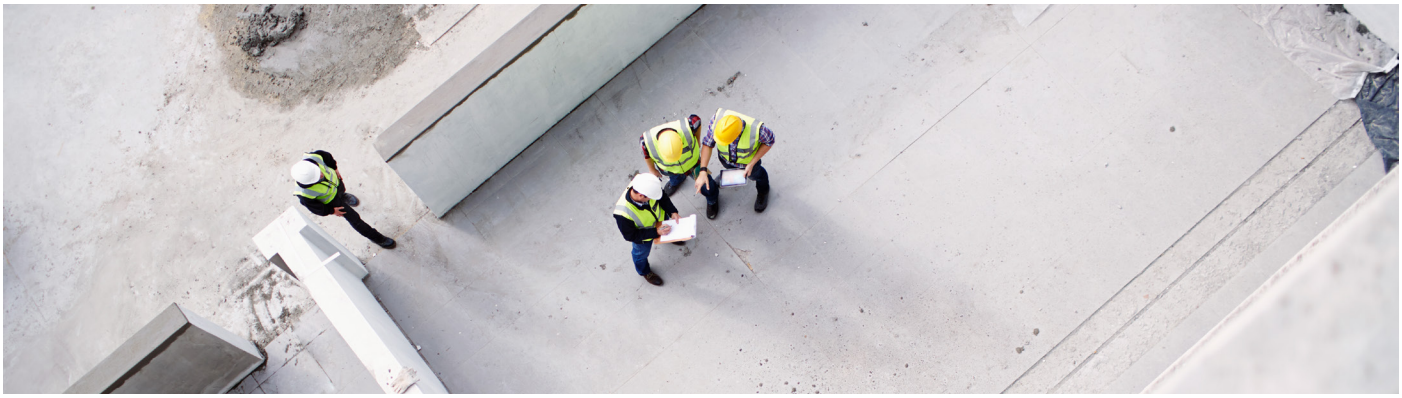
[20] https://www.gov.uk/government/news/dont-rely-on-temperature-screening-products-for-detection-of-coronavirus-covid-19-says-mhra
[21] https://www.gov.uk/guidance/if-you-need-to-self-isolate-or-cannot-attend-work-due-to-coronavirus
[22] https://www.chubb.com/uk-en/business/health-safety-elearning.html
[23] https://www.willistowerswatson.com/en-GB/Insights/2020/06/construction-insurance-market-update-the-reaction-to-covid-19

Whilst this has been true previously, insurers are asking for extremely in-depth information now, which requires tenacity and a willingness for hard work on the broker's part. Insurers are also taking considerably longer to review risks and reach decisions. Whilst less senior underwriters had an autonomy and authority to offer terms in the past, they are now often having to refer their suggested offer to the highest tier of the underwriting department, so as to gain the necessary permission to quote.

The whole process can require several months, so leaving things until the last minute can result in a construction company having nowhere to go in the short-term, other than perhaps towards acceptance of an extraordinarily high quote or a policy with crippling restrictions.

Despite other pressures imposed by the pandemic, it is vital for construction sector companies to get expert insurance brokers on board swiftly, as premium rises are likely to continue for both single project placements and annual construction programme insurances.

To sum up, without such dedicated and in-depth support, construction firms may find that their insurer refuses to quote. Without insurance in place, no construction work can continue and no tender pitches, to secure future projects for the order book, will be possible.



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