

Report to:	EXECUTIVE CABINET
Date:	24 June 2020
Executive Member / Reporting Officer:	Cllr Allison Gwynne – Executive Member (Neighbourhoods, Community Safety and Environment) Jeanelle De Gruchy – Director of Population Health
Subject:	THE COUNCIL'S SPORT AND LEISURE FACILITIES – FINANCIAL SUSTAINABILITY DURING THE COVID-19 (CORONAVIRUS) PANDEMIC
Report Summary:	<p>This report confirms that the Council's stock of sports and leisure facilities will remain closed until restrictions controlling social contact are lifted. Once the restrictions are lifted then approval to reopen the centres will be sought from the Executive member for (Adult Social Care and Population Health) in consultation with the Director for Population Health.</p> <p>Approval is requested that a sum of £ 0.600 million is payable to Active Tameside on 1 July 2020 as an advance payment for services commissioned by the Council covering the period 1 April to 30 September 2020. The sum represents the balance due for this period excluding the value assumed in the Active Tameside cashflow to 30 June 2020. The advance payment would support the cashflow of Active Tameside until 31 August 2020, by which time it is expected there will be an update on the business interruption insurance issue.</p> <p>A further update report will be presented to Members in August 2020.</p>
Recommendations:	<p>That Executive Cabinet agreed that :</p> <ul style="list-style-type: none"> (i) The Council's stock of sports and leisure facilities will continue to remain closed until restrictions controlling social contact are lifted. (ii) Once restrictions on social contact are lifted the centres will be opened informed by a framework of financial sustainability and phased 'safety first' approach informed by public health advice from the Director of Population Health. (iii) A sum of £0.600 million be payable to Active Tameside on 1 July 2020 as an advance payment for services commissioned by the Council covering the period 1 April to 30 September 2020. The sum represents the balance due for this period excluding the value assumed in the Active Tameside cashflow to 30 June 2020. The advance payment would support the cashflow of Active Tameside until 31 August 2020, by which time it is expected there will be an update on the business interruption insurance issue when a further update report will be presented to Members in August 2020.
Corporate Plan:	Healthy Tameside
Policy Implications:	Local authorities have a central role to play when it comes to the provision of community sport and recreation facilities and are responsible for the health outcomes for their populations – specified in the as specified in the Public Health Outcomes

Framework.

As part of the health reforms brought in by the Health and Social Care Act 2012, local authorities have a duty to take such steps as they consider appropriate for improving the health of the people in their area. The steps listed in legislation include:

- Providing information and advice
- Providing services or facilities designed to promote healthy living
- Providing services or facilities for the prevention, diagnosis or treatment of illness
- Providing assistance to help individuals to minimise any risks to health arising from their accommodation or environment
- Making any other services or facilities available

Financial Implications:

**(Authorised by the statutory
Section 151 Officer & Chief
Finance Officer)**

In order to reduce the financial impact of the temporary closure Active Tameside has taken up the offer of financial support from central government and furloughed all staff not required to maintain/sustain the company during the period of facility closure. In addition, Active Tameside has business resilience insurance that may be used to fund the remaining costs that have been incurred over and above direct government financial support. At this stage Active Tameside are in regular dialogue and are awaiting further guidance from their insurer's and broker's on the additional costs and forgone revenue streams that could be claimable.

The Council continues to support Active Tameside's cash-flow position through this difficult period and paid the total value of the 2020/21 management fee of £1.077 million on 1 April 2020. Members should note that this sum, along with commissioned provision delivered within Adult Services and Children's Services directorates will currently only support Active Tameside's cash flow until the end of June 2020 (based on known revenue streams receivable at this stage). Active Tameside will also be recompensed for any related costs of existing furloughed employees who volunteer, and have the requisite skills to provide support to Council services where additional capacity is required as referenced in section 2.5 of this report.

In addition the repayment of the 2019/20 prudential borrowing sum of £0.788 million has been deferred until 2021/22 at the earliest. It is envisaged that the outstanding historical prudential borrowing debt balance (which excludes new borrowing relating to the recently opened Active Denton) that is due for repayment to the Council by the end of the 2023/24 lease term (including the 2019/20 and 2020/21 sums) will be re-profiled. The outstanding level of prudential borrowing owed to the Council as at 31 March 2020 is £3.8m, and was due to be all repaid by the end of the contract concession in March 2024. The borrowing all relates to previous years capital investment in the facilities operated by Active Tameside. In reality the Council currently pays Active Tameside an annual management fee, of which over 70% is returned to the Council to repay the borrowing.

Options will be considered that will support the ongoing financial sustainability of the organisation. The value of the annual management fee payable for the period 2021/22 to 2023/24 will include a repayment plan that will contribute towards the outstanding debt balance (including interest) of £3.8 million at 31 March 2020. This will reduce if a sum is repaid in 2020/21, which is currently unlikely.

Section 4.4, table 1 provides details of various scenario's of the estimated financial impact on the 2020/21 Active Tameside budget to ensure business continuity during COVID. The impact is estimated to be between £2.1 and £3.3 million. It is expected that the value of the impact would be reclaimable by Active Tameside via their business interruption insurance policy.

The report recommends that a sum of £ 0.600 million be payable to Active Tameside on 1 July 2020 as an advance payment for services commissioned by the Council covering the period 1 April to 30 September 2020. The sum represents the balance due for this period excluding the value assumed in the Active Tameside cashflow to 30 June 2020. The advance payment would support the cashflow of Active Tameside until 31 August 2020, by which time it is expected there will be an update on the business interruption insurance issue as referenced in section 4.12 of the report. A further update report will be presented to Members in August 2020.

Legal Implications:
(Authorised by the Borough Solicitor)

In recognition of the impact of COVID 19 on businesses, especially in the service sector a number national initiatives have been implemented such as the furloughing of staff to ease financial pressures.

In addition the Cabinet Office have issues an number of Procurement Policy Notes specifically addressing additional actions which Contracting Authorities, such as the Council, are encouraged to take in order to ease cash flow difficulties being experienced by suppliers as a direct result of the impact of the Covid 19 pandemic.

Active Tameside meets the criteria of an 'at risk supplier' for the purpose of the Procurement Policy Note. The Council is therefore expected to consider a range of measures, including advance payment for services to assist the supplier.

Such advance payments should be conditional upon the supplier agreeing to open book accounting arrangements to provide the Council with the assurances about the use of the funds and to ensure transparency.

The maximum advanced payment allowed without HMT permission is 25% of the total contract value and is currently permitted until 31st October 2020.

It is also advisable to formalise the advanced payment arrangement through a variation to the contract.

Members also need to be content from the financial analysis in this report that the advanced payment represents value for money for the council and is a benefit to residents of Tameside.

The Council should start working now with Active Tameside to develop a sustainable operating model going forward, as referred

to in The Recovery and Transition from COVID 19 Procurement Policy Note which can be undertaken in tandem with the open book arrangement to ensure that there is appropriate oversight and transparency.

It will be important given this is a discretionary power to fund sports facilities that the council looks at whether the current facilities can deliver our priorities and if both the council and the sports trust become financially squeezed that the partnership arrangement is best placed to review the arrangements to ensure sustainable and the open book arrangements should facilitate that.

Risk Management:

Active Tameside have risk management and business continuity plans in place.

Background Information:

Background papers relating to this report can be inspected by contacting: Debbie Watson, Assistant Director for Population Health



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1. BACKGROUND

- 1.1 This report is an update to the sport and leisure centre temporary closure report considered by the Executive Board on 8 April 2020 and 20 May 2020. In line with national guidance advising the UK public to avoid unnecessary social contact, all sport and leisure facilities owned by the Council and managed by Active Tameside closed at 10.30pm on Friday March 20 for an unspecified period. Active Medlock continues to provide a limited day care service to a vulnerable group of clients during the closure period. However, this continues to be subject to change based on further national and local guidance/restrictions received.
- 1.2 As previously approved, the Council's stock of sports and leisure facilities will remain closed until restrictions controlling social contact and closure of businesses are lifted. Once restrictions on social contact are lifted the centres will be opened informed by a framework of financial sustainability and phased 'safety first' approach informed by public health advice from the Director of Population Health.
- 1.3 This report provides details of an advance payment for services commissioned by the Council from Active Tameside during 2020/21. The advance payment relates to services commissioned from 1 April 2020 to 30 September 2020 excluding the sum assumed in the organisation's cashflow to 30 June 2020. The sum would be payable on 1 July 2020 and would support the cashflow of Active Tameside until 31 August 2020, by which time it is expected there will be an update on the business interruption insurance issue.
- 1.4 A further update report will be presented to Members in August 2020.

2. ONGOING REVIEW / ACTION

- 2.1 Regular weekly updates continue to be held between Active Tameside's management team and the Council in order to react to changing circumstances. These regular updates are used to plan for recovery together with supporting the timely and efficient reopening of the facilities and associated services.
- 2.2 Members are reminded that during the COVID-19 pandemic facility closure period, Active Tameside are providing alternative leisure, health and wellbeing services to keep the general public active, healthy and entertained from home. Community support includes;
 - Sharing health, wellbeing and nutrition resources on social media, website blogs, email newsletters and a mobile phone app, supported by local media press releases and information.
 - Online fitness instructor videos and live-streaming of classes including full-body workouts, high-intensity interval training (HIIT), legs, bum and tum routines and Pilates.
 - Creating a dedicated website section with regular coronavirus updates and advice - <https://www.activetameside.com/coronavirus-update/>
 - Providing much-needed fun and social activities such as the 'Saturday Night Quiz' on social media, which offer motivation and encouragement along with opportunities join online conversations.
 - A dedicated website page for people managing health conditions. This includes advice and home exercises created by the Live Active team, which runs a patient referral scheme with local GPs' surgeries. Useful help includes resources for back pain, chair-based exercises, strength and balance. There are also links to other support organisations.
 - Printed help guides are being posted to those who may have difficulty accessing online information.
 - Active Tameside's Everybody Can service team is helping with hot meals for residents at Beatrix House Care Home in Dukinfield.
 - Delivering meals to residents' doors while ensuring safe social distancing.

- Working with children and adult social care services to highlight the most vulnerable residents for support assessment and to prevent family crisis.
- Giving remote support for every person who attends adult social care provision. Each participant receives at least two phone calls a week.
- Learners on supported internship courses are being contacted and urged to regularly access their work modules from home, to progress. In addition, Active Tameside staff is using video chats to stay in touch with learners alongside Tameside Hospital and Jigsaw.
- Homework packs have been provided and delivered to the homes of every young person supported by Active Tameside's special education programme. Parents and carers are also receiving weekly phone calls.
- Active Tameside is continuing to help two Tameside special schools which support children of key workers.
- Some staff are working with The Samaritans who are currently taking a lot of calls from families under pressure and suffering due to issues arising from increased domestic abuse. This is often a result of excessive drinking during the enforced restrictions to stay at home.

All these services are being done under a campaign and social media hashtag called #TamesideTogether. This encourages the community to come together, support each other and join in conversations during this period of self-isolating.

- 2.3 Active Medlock continues to operate providing essential health and social care services to vulnerable groups and individuals identified in consultation with Children's and Adult services. Contact restrictions and social distancing measures are in place and will continue to be updated in line with current guidelines.
- 2.4 Active Tameside continues to provide sports coaches to primary schools in order to support activity provision for the children of key workers. Contact Restrictions and social distancing measures have been put in place.
- 2.5 In addition, Active Tameside are committed to working in partnership with the Council and provide essential support to services where additional capacity is required due to the impact of COVID 19 across the borough. Existing furloughed employees who volunteer, and have the requisite skills to provide such support, will be made available to the Council at short notice. As previously advised, it is proposed to recompense Active Tameside for any related costs under such arrangement.

3. FINANCIAL IMPACT

- 3.1 In the final week of trading prior to closure, Active Tameside casual revenues were down 70% year on year reflecting increasing levels of public anxiety. Nevertheless, draft accounts for 19/20 indicate that Active Tameside achieved its budgeted year end trading surplus – a manifestation of the business resilience model developed by the trust over the previous eighteen months. However, in order to reduce the financial impact of the temporary closure following the COVID pandemic, Active Tameside has taken up the offer of financial support from central government and furloughed all staff not required to maintain/sustain the company during the period of facility closure. In addition, Active Tameside has business resilience insurance that may be used to fund the remaining 20% of employee costs over and above direct government financial support. At this stage Active Tameside are in regular dialogue and are awaiting further guidance from their insurer's and broker's on the additional costs and forgone revenue streams that could be claimable.
- 3.2 The Council has supported Active Tameside's cash-flow position through this difficult period and paid the total value of the 2020/21 management fee of £1.077 million on 1 April 2020. Members are reminded that this sum, along with commissioned provision delivered within

Adult Services and Children's Services directorates will only support Active Tameside's cash flow until June / July 2020 (based on known revenue streams receivable at this stage).

- 3.3 In addition the repayment of the 2019/20 prudential borrowing sum of £0.788 million has been deferred until 2021/22 at the earliest. It is envisaged that the outstanding historical prudential borrowing debt balance (which excludes new borrowing relating to the recently opened Active Denton) that is due for repayment to the Council by the end of the 2023/24 lease term (including the 2019/20 and 2020/21 values) will be re-profiled. Options will be considered that will ensure the ongoing financial sustainability of the organisation. The value of the annual management fee payable for the period 2021/22 to 2023/24 will include a repayment plan that will contribute towards the outstanding debt balance (including interest) of £ 3.8 million at 31 March 2020. This will reduce if a sum is repaid in 2020/21 which is currently unlikely. The outstanding debt relates to borrowing from the Council by Active Tameside for investment in the infrastructure and equipment across the leisure estate in prior years. An option could be to remove the obligation for Active Tameside to repay the borrowing in exchange for a reduced management fee. This would then make the management fee a better reflection of the costs of operating the service on behalf of the Council.
- 3.4 The Council commissions services from Active Tameside via Adult Services and Children's Services equating to a value of £ 1.8 million in 2020/21. The latest Government COVID procurement guidance enables local authorities to provide supplier relief under PPN 04/20 'if appropriate' to maintain delivery of 'critical services'. This also includes advance payment for services. The guidance covers the period to 31 October 2020.
- 3.5 The existing cashflow of Active Tameside to 30 June 2020 includes a value of commissioned services of £ 0.270 million. The value of these services for the period 1 April 2020 to 31 October 2020 equates to a sum of £ 0.870 million. The Council therefore can consider an advance payment of £ 0.600 million which is the difference of the sum already included in the cashflow to 30 June 2020.
- 3.6 Payment of £ 0.600 million in advance on 1 July 2020 would support the cashflow of Active Tameside to 31 August 2020. At this point it is expected there will be an update on the business interruption insurance issue referenced in section 4.12 of the report.
- 3.7 Members are reminded that Active Tameside are in regular dialogue with Council finance officers during this period and are operating on a transparent and open book policy in respect of their financial position.

4. BUSINESS UPDATE

Commercial Revenue

- 4.1 Active Tameside's commercial rehabilitation has been underpinned by a relentless focus on three key revenue streams:
- Health and Fitness memberships (gym/swim/group exercise)
 - Swimming lessons
 - Gymnastics lessons
- 4.2 Early modelling suggests that the combination of capacity reductions via social distancing measures and customer anxiety could reduce these revenue streams by up to 50% for the foreseeable future.
- 4.3 Even before the pandemic, concerns were growing with regard to sector capacity and latent demand, notwithstanding affordability for those services procured outside Active Tameside

in particular. As a consequence of the pandemic, the imbalance between demand and capacity is likely to increase, in part because of the fragility of many current providers.

- 4.4 Current estimates suggest that the impact of falling commercial revenues during the course of the financial year 2020/21 will be a funding shortfall of between £2.1 million and £ 3.3 million on top of the agreed management fee and it is highly likely that the trading position of Active Tameside will be adversely affected during the remainder of the existing contract to 2023/24. A summary of the estimated funding shortfall in 2020/21 is provided in table 1 via a number of scenarios for reference.

Table 1 also includes the value of the existing outstanding prudential borrowing debt liability to the Council as referenced in section 3.3. It is expected that the 2020/21 adverse financial impact value would be reclaimable via business interruption insurance that Active Tameside have in place.

Table 1

Scenario	Estimated Re-open Date	Narrative	Estimated Financial Impact	Outstanding Borrowing Debt To The Council – 31 March 2024	Total
			£' m	£' m	£' m
1	1 July 2020	No social distancing customers NOT worried about perceived health risk	2.106	3.800	5.906
2	1 July 2020	No social distancing customers ARE worried about perceived health risk	2.521	3.800	6.321
3	1 July 2020	Re-open under social distancing then social distancing removed 1 Sept 2020	2.985	3.800	6.785
4	1 Sept 2020	No social distancing customers NOT worried about perceived health risk	2.352	3.800	6.152
5	1 Sept 2020	No social distancing customers ARE worried about perceived health risk	2.294	3.800	6.094
6	1 Sept 2020	Re-open under social distancing then social distancing removed 1 Dec 2020	3.291	3.800	7.091

- 4.5 It remains the case that a significant proportion of the trading deficit is prudential borrowing which is currently deferred.
- 4.6 It is clear that an empirical review of the commissioning intentions of the Council is necessary in order to ensure that the focus remains on the delivery of health and social

outcomes and reducing health inequalities. These priorities will need to be deliverable but sustainable in revenue terms and realistic in terms of capital investment. A review of profits and losses of each facility will be undertaken, identifying future sustainability, and any opportunities and proposals for redesign. A visioning session is planned with the Council and Active Tameside on 15th July to begin to plan for recovery. Any future investment will need to align to the Council's medium term financial plan and Strategic Asset Management Plan as part of the COVID recovery approach.

Current cost savings

- 4.7 Currently Active Tameside has 83% of its employees on Furlough saving £ 0.250 million per month. In addition they have also successfully applied for Business Support grant and rate relief. They are also negotiating with suppliers for any support they can give either as reduced rates, contract suspensions or payment holidays.

Business Loans

- 4.8 In order to qualify for any of the Government backed business loans, a business had to be solvent and be able to repay any loan. As Active Tameside has a pension deficit, they are (and have always been) technically insolvent. Their balance sheet has a £ 1.4 m deficit (at 31 March 2019 – latest audited accounts). Even if they were solvent, they would be unable to repay any meaningful loan due to affordability compounded by the contract expiring with the Council on 31 March 2024. The pension deficit/balance sheet insolvency is a common position for those leisure trusts that maintained a Local Government Pension Scheme. Having discussed with their bank, they are unable to borrow anything under the Government loans scheme as they do not meet the criteria.

Business Viability - Going Concern

- 4.9 In order to trade legally, any business has to have a reasonable expectation that over a 12 month period its income will exceed its liabilities. If not and it keeps trading, that is classed as “wrongful trading” and trustees become personally liable for company debts. Currently the Government has temporarily suspended that piece of legislation due to COVID but at some point it will need to be addressed. As part of the normal audit process the Trustees/Directors of a Company have to make a legally binding statement that they believe they will be a going concern for a minimum of 12 months from the date at which the accounts are signed.

- 4.10 Active Tameside's financial year end was 31 March 2020 and the Audit is due to take place this summer with the final accounts presented to Board members in December 2020. At that point the Trustees would look to assure their auditors that over the next 12 months they would have sufficient funds to meet liabilities. This is onerous enough in normal circumstances and is very unlikely that any responsible Governing body (based on what we know) would be able to provide that assurance to December 2021. In the past, the Council has provided a “letter of comfort” to Active Tameside to support this requirement. It is only fair to point out that whereas in the past it was unlikely that this letter would have been activated, under the current circumstances it is highly likely that Active Tameside will need additional financial support to keep trading until “normal” revenues can be re-established.

Solvency

- 4.11 All Companies have a legal duty to cease trading (become insolvent) when they become aware that they can no longer pay their bills and have no prospect of recovering. Under COVID 19, the Government temporarily relaxed that duty. This expired on 1 June and we await an update on the Government's position. Clearly without either continued Council financial support or Insurance, Active Tameside would cease to trade and become insolvent.

Insurance Update

- 4.12 Unlike most Companies in the UK, Active Tameside will submit a claim for business interruption under a special “resilience clause” via their business insurance policy. Most

insurance policies state a disease had to have been on a specified list before the policy was taken out (impossible for COVID 19). The resilience clause allows a new disease to be backdated to the point it became notified. This provides a very strong case. Active Tameside's insurance brokers, Marsh, have this clause in only 700 policies nationally but these companies include FTSE 100 companies and nationally recognised charities. Marsh are commissioning expert legal opinion to support the claim of Active Tameside. Whilst this does not guarantee success, in Marsh's opinion they remain "cautiously optimistic."

- 4.13 There is, however a good chance that this might go to litigation as a "class action" because all the policies are worded the same and the cause (COVID-19) is common. If it does go down this route, it is likely to take years.
- 4.14 Insurance acceptance is the best outcome for both Active Tameside and the Council and this option is being pursued vigorously. This would ensure that any temporary financial support provided by the Council would be repaid.
- 4.15 **Appendix 1** provides an update from the Financial Conduct Authority of test cases that will be brought to court relating to business interruption insurance policies to provide clarity and certainty for everyone involved in business interruption policy disputes i.e. policyholder's and insurers. The court hearing is expected to take place in the later part of July 2020, the outcome of which will be reported once available.

5 PROPOSALS FOR PHASED REOPENING TO THE PUBLIC

- 5.1 Given that the 'leisure sector' features in Phase 3 of the Government's recovery plan, at the time of writing, Active Tameside's physical estate must remain closed to the general public until 4th July at the earliest with a formal announcement not expected from Government until 26th June. However, throughout the leisure sector, preparations are now underway to reopen within the context of a 'new normal'.
- 5.2 Any proposals for re-opening will be carefully risk assessed (both operationally and financially), in line with local advice and agreed with public health to ensure we remain vigilant against the spread of COVID-19, reduce inequalities and work together to protect our communities. Any proposals will need to be considered carefully:
 - Anticipating the Government's requirements for continued social distancing once reopening commences, extensive risk assessments have been developed to cover the safe operation of facilities for staff and customers:
 - Financial sustainability
 - Control of COVID-19 risk via social distancing and infection control
 - An ongoing commitment to support the most vulnerable residents within the borough and continued support to schools.
- 5.3 Any phased opening cannot commence until the point at which all requisite processes, protocols and associated training are demonstrably in place following permission to reopen by Government. At this juncture, it is not possible to predetermine the chronology of subsequent phases which will be informed by national guidelines, the emerging review and local Population Health advice and guidance.
- 5.4 In the first instance Active Tameside propose a 'safety first' approach focused on swim, gym and classes, all bookable and payable in advance. To ensure that 2m social distancing can be maintained and increased cleaning and infection control measures adhered to, services will be operating at significantly reduced capacity. Many centres will continue to be closed to the public.

- 5.5 During the course of the lockdown, Active Medlock has remained open supporting the Council to continue to provide services to adults and children with complex needs. Initially, 18 places per week were provided for both Adult and Children's social care and these places were taken up by 6 individuals. During the course of lockdown, demand has increased and 19 individuals now occupy 28 places. Remote support has continued for all Everybody Can clients in the form of a minimum of two phone calls per week, insights from which have been fed into the social care framework.
- 5.6 However, risk assessments clearly indicate that reopening some buildings including Active Medlock to the general public whilst managing the COVID-19 risk to vulnerable populations is impractical. The maintenance of social distancing requirements necessitates the donning of PPE in many circumstances. Further, challenges including enhanced staffing ratios, cohort 'bubbles' and building 'flow' and adequate space necessitate a different approach to the delivery of commissioned services. To this end, opening hours will reflect these challenges at both Active Medlock and other centres within the estate as below. This approach will enable Active Tameside to meet not only pre COVID- 19 levels of provision within the borough but also to meet increased post COVID-19 demand both safely and efficiently.
- 5.7 In the first quarter of 2020 (to lockdown), the Live Active referral scheme for those residents with long term conditions had 412 actively participating members and 422 'completed' members still on the 12-month pathway. During lockdown, the non-furloughed Live Active officers have continued to support those on the scheme, by phone, through social media and via hard copy. In recent times, the Active Streets trial has taken Live Active 'to the people' providing a lifeline to those suffering with both mental and physical health issues as a consequence of isolation, whilst supported health walks have been reintroduced. Active Tameside will continue to promote and deliver on the Tameside 'Active Neighbourhood' model within neighbourhoods, supporting the increased demand for outdoor exercise.
- 5.8 Current phase 1 proposals are to open only if safe to do so and in line with other Council services (all facilities on a reduced timetable):
- Active Medlock - Exclusive use for Supported Services (Everybody Can/Live Active)
 - Active Oxford Park - Exclusive use for Supported Services
 - Active Ken Ward - Exclusive use for Live Active clients
 - Adventure Longdendale - Exclusive use for Supported Services
 - Etherow Centre - Exclusive use for Supported Services
 - Active Copley – to public pre-bookable
 - Active Hyde – to public, Leisure Pool to remain closed, gym and studio pre-bookable
 - Active Ashton – to public, pre-bookable
 - Tameside Wellness Centre – to public pre-bookable
 - Active iTrain – to public prebookable

6. RECOMMENDATIONS

- 6.1 As set out on the front of the report.

Statement from the Financial Conduct Authority (FCA)

The Financial Conduct Authority (FCA) is today providing an update on progress on its court action on business interruption (BI) insurance policies.

Since the FCA made its last announcement on 1 May, the FCA has approached 56 insurers and reviewed over 500 relevant policies from 40 insurers. We have identified a sample of 17 policy wordings that capture the majority of the key issues that could be in dispute.

This update gives further detail on the proposed court action, including identifying the representative sample of policy wordings to be examined in the test case, insurers that use those wordings, and which of those insurers we have invited, and have agreed, to participate in the proceedings.

This **initial list of insurers** and the policy wordings they use is not exhaustive, and we are also now publishing a short consultation on draft guidance asking all insurers to check their policy wordings against those we intend to test to see if theirs will be impacted by the outcome of the case. The FCA expects to publish a list of all the relevant insurers and policies that may have impacted wordings in early July.

The consultation on draft guidance also sets out the FCA's expectations of all firms handling BI claims and any related complaints between now and the court decision.

Christopher Woolard, Interim Chief Executive at the FCA said:

'The court action we are taking is aimed at providing clarity and certainty for everyone involved in these BI disputes, policyholder and insurer alike. We feel it is also the quickest route to this clarity and by covering multiple policies and insurers, it will also be of most use across the market. The identification of a representative sample of policies and the agreement of insurers who underwrite them to participate in these proceedings is a major step forward in progressing the matter to court.'

The outcome we are seeking

We want to achieve clarity for all concerned in an unprecedented situation. To do this, we are taking a representative sample of cases to court. The FCA will put forward policyholders' arguments to their best advantage in the public interest. The FCA has retained the services of Colin Edelman QC, Leigh-Ann Mulcahy QC, Richard Coleman QC and Herbert Smith Freehills to assist it in the case.

As stated in our Dear CEO letter of 15 April, our view remains that most SME insurance policies are focused on property damage (and only have basic cover for BI as a consequence of property damage) so, at least in the majority of cases, insurers are not obliged to pay out in relation to the coronavirus pandemic. This case is focused on the remainder of policies that could be argued to include cover.

Policyholders should not assume that simple inclusion of their policy wording in this case will mean their policies are responsive. We are seeking a judgment that will help policyholders and insurers have a much clearer view of which business interruption policies respond to the pandemic, and those that don't. Therefore, the court may well decide a number of these policies respond to the pandemic and others do not.

How we have chosen the representative sample of policy wordings

On 1 May 2020, our **statement** set out our intention to seek a court declaration to resolve the contractual uncertainty around the validity of many BI claims.

Also, on 1 May 2020, we asked 56 relevant insurance companies to provide us with information on their BI policies with more than 500 policyholders, and how they intended to handle claims on these policies by 15 May 2020. A number of the relevant insurers decided to accept claims from policyholders with certain policies which included particular wordings which had previously been in dispute.

On 15 May 2020, we also invited holders of BI insurance policies who remained in dispute with their insurers over the terms of their policies to send us their arguments, related policies and relevant facts by 20 May 2020. We received over 1,200 submissions from policyholders and brokers.

Over the last 3 weeks we, supported by external counsel, have thoroughly considered the information we received to enable us to decide which selection of policy wordings would be representative of the key issues in dispute between policyholders and insurers. This process led to us deciding which insurers we should invite to participate in the High Court test case.

The representative sample of policy wordings

From all the policies we reviewed, we have selected a representative sample of 17 policy wordings to give as much clarity as possible to both insurers and policyholders alike. Rather than select firms by market share, we have identified policies which are representative of the key arguable issues and invited insurers to participate on the basis of securing the maximum relevant coverage for relevant policies whilst minimising the number of parties engaged before the court in order to make the process as swift as possible for the court.

The insurers who use the representative sample of policy wordings

The following 16 insurers use at least one of the policy wordings in our representative sample which will be examined in the test case:

- Allianz Insurance plc (part of Allianz SE)
- American International Group UK Limited (part of American International Group, Inc.)
- Arch Insurance (UK) Limited (part of Arch Capital Group Limited)
- Argenta Syndicate Management Limited (part of Hannover Re)
- Aspen Insurance UK Limited (part of Aspen Insurance Holdings Limited)
- Aviva Insurance Limited (part of Aviva plc)
- Axa Insurance UK plc (part of AXA SA)
- Chubb European Group SE (part of Chubb Limited)
- Ecclesiastical Insurance Office plc
- Hiscox Insurance Company Limited (part of Hiscox Limited)
- Liberty Mutual Insurance Europe SE (part of Liberty Mutual Group)
- MS Amlin Underwriting Limited (part of MS&AD Insurance Group Holdings, Inc.)
- Protector Insurance UK (part of Protector Forsikring ASA)
- QBE UK Ltd (part of QBE Insurance Group Limited)
- Royal & Sun Alliance Insurance plc (part of RSA Insurance Group plc)
- Zurich Insurance plc (part of Zurich Insurance Group Limited)

The wordings that they use are set out in [this list](#).

Following the process described above, we have asked the following insurers, who underwrite policies in the representative sample, to assist us by participating in the High Court test case:

- Arch Insurance (UK) Limited
- Argenta Syndicate Management Limited
- Ecclesiastical Insurance Office plc
- Hiscox Insurance Company Limited
- MS Amlin Underwriting Limited
- QBE UK Ltd
- Royal & Sun Alliance Insurance plc
- Zurich Insurance plc

These insurers have entered into a framework agreement with us governing the process and timetable for the test case.

How this will affect insurers who are not participating directly in the test case

Given the representative nature of the policies and wordings we have selected, we expect the test case to provide guidance for the interpretation of many other BI policies that are not in the representative sample.

This means that other insurers will also be affected by the test case and its conclusions. In early July, we expect to publish a comprehensive list of other insurers and many other BI policies in the market that we expect the test case to affect, based on firm submissions.

Other documents we have published today

In addition to the FCA's proposed representative sample of terms, we have also published proposed assumed facts (for example, the types of business and how they responded to the pandemic), a proposed issues matrix and proposed questions for determination by the court. We invite comments from other insurers, policyholders and other stakeholders on these documents by 3pm on Friday 5 June.

We have also issued today a consultation on draft guidance to set out our expectations of all firms handling BI claims and any related complaints during this period, including an expectation that they identify those policies where their decision to deny claims may be affected by the test case.

For all interested parties our legal team at Herbert Smith Freehills will be available on 3 and 4 June to speak directly with as many policyholders and intermediaries as possible. Further information is on our business interruption webpage.

Next steps

We give the principal next steps and timelines for how we envisage the test case to proceed below. There remain a number of uncertainties to the timeline including the consent of the court:

- 9 June - FCA files claim form and particulars
- c.11 June - Case management conference, at which the court will be invited to fix the timetable for the case
- 23 June - Insurers file Defences
- c.26 June - Further case management conference
- 3 July - FCA files Reply
- First half July - Skeleton arguments and replies served
- Second half July - 5 to 10 day court hearing