Supreme Court Dismisses Insurers' Appeals in Business Interruption Insurance Dispute

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Friday's Supreme Court ruling will require insurers to pay out on disputed business interruption insurance claims impacted by the test case ruling. Those claims are thought to be worth more than £1.2 billion in England and Wales and will be a lifeline for thousands of small businesses.

Court proceedings were originally brought by the Financial Conduct Authority ("FCA") last year under the Financial Markets Test Case Scheme in agreement with insurers. That scheme enables a claim raising issues of general importance to financial markets to be determined in a test case without the need for a specific dispute between the parties.

The FCA's test case sought to clarify whether certain policy wordings relating to 'disease' and 'prevention of access' clauses provided cover for business interruption losses arising from the Covid-19 pandemic. The defendants to the test case were eight insures who are leading providers of business interruption insurance.

As part of the test case, the FCA selected a representative sample of 21 types of policy issued by the eight insurers. It was estimated that in addition to the particular policies chosen around 370,000 policyholders holding 700 types of policies from 60 different insurers were likely to be affected by the outcome of the test case.

The trial took place remotely over eight days between 20 and 30 July 2020. Judgment in excess of 150 pages was given on 15 September 2020. At trial, the FCA was substantially successful in its claim with the Court generally favouring the FCA's broader interpretation of the relevant policy wordings. In particular, the Court found that most, but not all, of the relevant disease clauses, which broadly cover business interruption in consequence of or following or arising from the occurrence of a notifiable disease within a specified radius of the insured premises, provided cover.

Permission to appeal the decision was given on 2 October 2020. The Court also decided that the appeals were suitable for the "leapfrog" procedure which allows an appeal to bypass the Court of Appeal and proceed directly to the Supreme Court. The Supreme Court gave permission to appeal and appeals from the insurers and the

FCA were heard over four days between 16 and 19 November 2020.

The main appeal was that of the insurers relating to 11 of the policy types. However, the FCA also appealed on four issues on which it did not succeed at trial. The issues raised on the appeals were dealt with under the following headings:

1. The disease clauses;
2. The prevention of access and hybrid clauses;
3. Causation;
4. The trends clauses;
5. Pre-trigger losses;
6. The *Orient-Express Hotels*

The Supreme Court's judgment (found here) is complex and deals with the above issues in detail.

In relation to 'disease clauses,' the Supreme Court adopted a narrower approach than the High Court finding that cover should only be provided for BI caused by any cases of illness resulting from COVID-19 that occur within a specified radius. It does not cover interruption caused by cases of illness resulting from Covid-19 that occur outside that area.

An important point was that the Supreme Court agreed with the High Court that (i) the wording of the clause did not limit cover to business interruption resulting only from cases of a notifiable disease within the specified radius, and (ii) that in interpreting the policy wording importance should be attached to the potential for a notifiable disease to affect a wide area. While neither of those points supported the conclusion that cases of disease outside the specified area were included, they were important to the Supreme Court's approach to causation.

As for 'prevention of access' and 'hybrid clauses', the Supreme Court found that those clauses might be extended to provide cover where business interruption loss was caused by the policyholder's inability to use the insured premises for a discrete business activity or was unable to use a discrete part of the premises for its business activities. That contradicted the High Court's decision that there was no cover under certain prevention of access clauses and that these clauses should be construed more narrowly to relate to specific localised events rather than being UK wide

The Supreme Court found that in terms of causation (i) local cases of Covid-19; (ii) the worldwide pandemic; (iii)

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the actions, measures and advice of the Government; and (iv) the public's reaction in response to Covid-19, could all be treated for the purposes of insurance cover as one cause resulting in BI.

What the above means is that businesses with disease, denial of access and hybrid clauses may all be entitled to cover for loss caused by the national consequences of the Covid-19 pandemic.

Responding to Friday's judgment, Sheldon Mills, Executive Director, Consumers and Competition for the FCA, commented: "*Our aim throughout this test case has been to get clarity for as wide a range of parties as possible, as quickly as possible, and today's judgment decisively removes many of the roadblocks to claims by policyholders. We will be working with insurers to ensure that they now move quickly to pay claims that the judgment says should be paid, making interim payments wherever possible. Insurers should also communicate directly and quickly with policyholders who have made claims affected by the judgment to explain the next steps.*"

A link to the FCA's dedicated webpage for policyholders can be found here.

If you have any questions, please contact our specialist Dispute Resolution Solicitors by emailing online.enquiries@la-law.com or calling 01202 786226

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