Business, Interrupted

Clare Baker, Outer Temple Chambers

On 15 September 2020, the High Court (Lord Justice Flaux and Mr Justice Butcher) handed down its judgment in the business interruption insurance test case brought by the FCA on behalf of policyholders affected by the COVID-19 outbreak.

As part of the case, the Court was asked to determine the correct construction of certain business interruption policy terms by reference to a set of agreed facts.

The Court had 21 lead policies to consider from eight insurers (Arch, Argenta, Ecclesiastical, Hiscox, MS Amlin, QBE, Royal & Sun Alliance and Zurich). The FCA estimated that in addition to the particular policies chosen for the test case, around 700 types of policies across over 60 different insurers and 370,000 policyholders could potentially be affected.

Although the judgment was broadly favourable to the FCA (and therefore policyholders), the Court did not find that the defendant insurers were liable across all of the sample policy wording. Insurers and policyholders must now carefully assess affected policies against the judgment.

However, on 2 October, the Court granted "leapfrog" certificates to appeal to the Supreme Court. Accordingly, some issues may not be finally resolved until they have been decided by the Supreme Court.

FCA v Arch

The court considered the following clauses

- **Disease clauses** - *"provisions which, in broad terms, provide coverage in respect of business interruption in consequence of or following or arising from the occurrence of a notifiable disease within a specified radius of the insured premises"*
- **Prevention of access clauses** - *"cover where there has been a prevention or hindrance of access to or use of the premises as a consequence of government or local authority action or restriction"*
- **Hybrid clauses** - *"certain policy terms which refer both to restrictions imposed on the premises and to the occurrence or manifestation of a notifiable disease".*

Disease clauses

With respect to disease clauses, the core argument advanced by the insurers (RSA, Argenta, MS Amlin and QBE) was that the policy wordings required the business interruption to be caused by the occurrence of

COVID-19 within a specified radius, rather than by the wider effects of the pandemic. The Court rejected this interpretation, holding that a less restrictive test of causation should be applied. Causation could be established where there was a national lockdown, not just where business interruption had occurred due to the effects of a local occurrence of COVID-19.

Prevention of access clauses

With respect to prevention of access clauses found in policies written by Arch, Ecclesiastical, Hiscox, MS Amlin, RSA and Zurich, the Court found that these clauses were intended to provide narrow, localised cover. Coverage would depend on the detailed wording of each particular clause and how the business was affected by the government's response to the pandemic.

Hybrid clauses

Hybrid clauses appeared in policies written by Hiscox and RSA. The Court approached the disease and prevention of access parts of these clauses in a similar way to the above. It was therefore necessary to consider the terms of individual clauses in order to determine policy coverage.

Causation and Orient Express

Finally, the Court went on to consider the issue of causation. It noted that it was apparent that the issues of causation resolved themselves as a part of the process of construction of the various policy wordings. However, the Court went on to consider *Orient Express Hotels Ltd v Assicurazioni Generali SpA* [2010] EWHC 1186 (Comm), a claim for business interruption losses caused by Hurricanes Katrina and Rita. The Court distinguished *Orient Express* on the facts but went on to note that there were several problems with the reasoning in that case and that if the decision had been applicable, it would have reached the conclusion that it was wrongly decided and declined to follow it.

Consequentials hearing

A consequentials hearing took place on Friday 2 October 2020.

In terms of the appeal applications, the Court granted "leapfrog" certificates to appeal to the Supreme Court to all parties that sought one.

The draft transcript of the consequentials hearing has now been published on the FCA's website (see https://www.fca.org.uk/firms/business-interruption-insurance).

Future resolution

Insurers and insurance intermediaries are required to satisfy obligations under the FCA Rules including Principles for Businesses (PRIN), the Insurance Conduct of Business Sourcebook (ICOBS) and Dispute Resolution: Complaints (DISP) when dealing with business interruption claim and complaints. In June 2020, the FCA published *"Business interruption insurance test case: Finalised guidance for firms"* which set out its expectation that, following final resolution of the test case (including any appeals), insurers should apply the judgment in the assessment of all outstanding or rejected claims and complaints which may be affected (except complaints that had been referred to the Financial Ombudsman Service).

After the judgment was handed down, the FCA issued a *"Dear CEO"* letter to insurers encouraging them to settle claims where the judgment had given the clarity needed. The letter also set out the FCA's expectation that insurers should write to policyholders with clear details of next steps. The letter emphasises that insurers should *"take all reasonable steps to ensure that all [affected] claims are ready to be paid and settled at the earliest possible opportunity after any relevant appeals".*

In the meantime, policyholders should carefully consider communications from insurers and make their own assessment of their business interruption policy wording against the judgment. Policyholders may be able to proceed with claims against their insurers where coverage has been wrongly denied.

CLARE BAKER

Outer Temple Chambers

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