FCA v Arch Insurance (UK) Ltd and others [2021] UKSC 1 – the Supreme Court's view

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In the last edition of this newsletter, I discussed the High Court's judgment in the business interruption insurance test case brought by the FCA on behalf of policyholders affected by the COVID-19 outbreak. The judgment was broadly favourable to the FCA (and therefore policyholders) although it did not find that the defendant insurers were liable across all of the sample policy wording.

Both sides appealed parts of the judgment using the "leapfrog" procedure and the Supreme Court heard the appeals from 16-19 November 2020 by video link. The Court handed down its judgment on 15 January 2021. The judgment substantially allowed the FCA's appeal and dismissed the insurers' appeals. A short summary of the judgment and next steps for policyholders are discussed below.

The judgment of the Supreme Court

Lords Hamblen and Leggatt gave the main judgment, with which Lord Reed agreed. Lord Briggs gave a separate but concurring judgment, with which Lord Hodge agreed.

Disease clauses

As discussed in my previous article, disease clauses were defined by the High Court as *"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".

The Supreme Court took a narrower approach than the High Court to the disease clauses, finding that it is only an occurrence of the disease within a specified area that is an insured peril. However, it also held that such individual occurrences could as a matter of law satisfy the relevant test of causation (as to which see further below).

Prevention of access/hybrid clauses

Prevention of access clauses were defined by the High Court as *"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 were defined as *"certain policy*

terms which refer both to restrictions imposed on the premises and to the occurrence or manifestation of a notifiable disease".

With respect to these clauses, the Supreme Court held that the High Court's interpretation of these clauses was too narrow, stating that there was no requirement for a legislative step ordering closure, and that cover may be available for partial as well as full closure of premises.

Causation and Orient Express

With respect to causation, the insurers argued that it was necessary to show that the loss would not have been sustained but for the occurrence of the insured peril. They argued that, because the pandemic was so widespread, policyholders would have suffered the same or similar business interruption losses even if the insured risk or peril had not occurred.

The Supreme Court rejected the insurers' argument, holding that the "but for" test was not determinative in ascertaining whether the test for causation has been satisfied. The causal connection required had to take account of the nature of the cover provided in the particular policies and it may be satisfied where the insured peril, in combination with many other similar uninsured events, brings about a loss with a sufficient degree of inevitability, even if the occurrence of the insured peril is neither necessary nor sufficient to bring about the loss by itself.

The Supreme Court went on to determine that *Orient Express Hotels Ltd v Assicurazioni Generali SpA* [2010] EWHC 1186 (Comm), a claim for business interruption losses caused by Hurricanes Katrina and Rita was wrongly decided and that it should be overruled.

"Dear CEO"

On 22 January 2021, the FCA issued a "Dear CEO" letter outlining its expectations of insurers following the judgment. With respect to claims handling, this letter directed insurers to *"promptly reassess all BI claims affected by the test case in light of the Supreme Court's judgment, including those previously rejected or not fully paid".* With respect to complaints, the FCA made it clear that all potentially affected complaints should be reassessed unless properly settled on a full and final basis.

Next steps for policyholders

The FCA has published a useful table setting out the outcome of the test case and key paragraphs of the judgments according to policy type. It has also published policy checker and FAQs to help policyholders find out if their insurance policy may cover business interruption losses and what they can do next.

Insurers should be notified as soon as possible of claims in line with the relevant policy wording although they should not include the period between 17 June 2020 and the final resolution of the test case when relying on any time limits in cases potentially affected by the FCA's test case.

If a policyholder disagrees with an insurer's final decision on the claim or believes they have been unfairly treated, they can make a claim through negotiated settlement, arbitration, court proceedings, or by taking eligible complaints to the Financial Ombudsman Service.

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