## The FCA test case – the background, scope and reach (in a nutshell):

- Expedited proceedings brought by the FCA to clarify the operation of cover under certain non-damage business interruption insurance extensions.
- Eight named insurers with two action groups permitted to intervene in the case.
- 21 sample policy wordings considered in the test case with the Judgment deciding on whether, as a matter of principle these policies respond to losses arising from the action taken to reduce the spread of the virus.
- However, it is anticipated that the impact of the decision will have wider consequences: for an estimated 700 policy wordings, across around 60 different insurers and around 370,000 policyholders overall.

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## Categories of representative sample policy wordings

- (1) Disease clauses – **interruption** or interference with the business following the occurrence of a **notifiable disease with a defined radius** of the insured premises.

- (2) Prevention of access clauses – **prevention or hindrance of access or use** of the insured premises caused **by action of the relevant authority** due to an **emergency/incident/ event** that could endanger human life or property.

- (3) Hybrid clauses – **an inability to use** the insured premises due to **restrictions imposed by a public authority** following an **occurrence of a human infectious or contagious or notifiable disease**. A combination of disease and prevention of access clauses.

## Disease sample policy wordings: the first instance decision

"The Insurer shall indemnify the Insured for interruption or interference with the Insured's Business **following / in consequence of / as a result of** any **occurrence of a Notifiable Disease within a radius** of 25 miles / one mile / the vicinity of the Premises."

- A composite insured peril: interruption; following the national occurrence of, and response to, COVID-19; with a local incidence of the disease within the defined radius of the insured premises.
- The Insuring Clause is triggered from the point in time where there were cases of COVID-19 in the relevant policy area.
- Cover not limited to circumstances where an outbreak only occurs within the relevant policy area.
- Note the more narrow construction given to some wordings based on the meaning attributed to "event" or "incident".

## Prevention of access sample policy wordings: the first instance decision

**"Prevention or hindrance of access or use** of the insured premises caused **by action of the relevant authority** due to an **emergency/incident/ event** that could endanger human life or property."

- A close review of the wording is required. A slight variation of terms may have a significant impact on cover. Prevention of access is not the same as hindrance of access. Inability to use is not the same as hindrance of use.

- "Action" by the relevant authority must have the force of law.

- "Advice" from the relevant authority need not have the force of law.

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## Timeline

- **5 March 2020**: COVID-19 becomes a notifiable disease in England/Wales
- **16 March 2020**: Prime Minister makes statement urging people to stay at home, stop non-essential contact and unnecessary travel, work from home where possible, and avoid social venues
- **20 March 2020**: The Prime Minister makes statement directing various categories of business to close, e.g. hospitality venues and gyms (given legal effect by Regulations coming into force on **21 March**)
- **23 March 2020**: The Prime Minister announces first lockdown including closure of further businesses including all non-essential shops and restrictions on individual movement (given legal effect by Regulations coming into force on **26 March**).

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## Prevention of Access – the first instance decision

| Category | Prevention of access? |
|---|---|
| 1. Restaurants, cafes, bars, pubs etc. | Qualifying prevention of access from the moment of closure in response to the advice given by the Prime Minister on 20 March or the 21 March Regulations. |
| 2. Cinemas, theatres, nightclubs, salons | Qualifying prevention of access from the moment of closure in response to the advice given by the Prime Minister on 20 March or the 21 March Regulations. |
| 3. Essential shops | No qualifying prevention of access as regulations did not require closure |
| 4. Non-essential shops and businesses | Qualifying prevention of access from the moment of complete closure in response to the 26 March Regulations. |

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## Prevention of Access – the first instance decision (2)

| Category | Prevention of access? |
|---|---|
| 5. Other businesses including construction and professional firms | Category 5 businesses were not required to close by the 21 or 26 March Regulations and were permitted to remain open. There is therefore no qualifying prevention of access. |
| 6. Holiday accommodation | 16 March advice was capable of causing an interruption to businesses operating holiday accommodation in the UK. 21 March Regulations qualified as interruption of business if the accommodation operated a bar or restaurant. Whether there was an interruption was a matter of fact to be determined in each case. |
| 7. Places of worship, schools and nurseries | Qualifying prevention of access if and when premises were required to close. There would be no prevention of access for schools or nurseries which were permitted to remain open for use by key worker children. |

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## Hybrid sample policy wordings: the first instance decision

"**An inability to use** the insured premises due to **restrictions imposed by a public authority** following an **occurrence of a human infectious or contagious or notifiable disease**."

- A blend of the decisions regarding disease and prevention of access clauses. For the Insuring Clause to be triggered the relevant authority action must be in response to a local occurrence of the disease. Action in response to the national outbreak will not be enough.

- Starting point for review – assessment of the insured peril.

- The devil is in the detail – again slightly different wordings can have a significant impact on cover.

## Causation, trends and counterfactuals

- The battle ground during submissions:
  - *Orient-Express Hotels Limited v Assicurazioni Generali Spa (UK) (t/a Generali Global Risk).* [2010] EWHC 1186 (Comm).

- Versus the basis upon which findings were made in the first instance decison:
  - Orient Express need not be considered because the issues in the test case were to be resolved based on the proper construction of the policy wordings and particularly the definition of the composite insured peril.

- The correct counterfactual at first instance strips out all aspects of the insured peril, including the presence of COVID-19 in the UK.

## Supreme Court decision – Disease clauses

- Cover was again confirmed in principle, but primarily due to issues of causation.

- The Supreme Court's analysis was that each occurrence of Covid-19 was a separate event but that each occurrence was an equal and effective cause of the Government and public reaction to Covid-19.

- Due to the Court's interpretation, the Supreme Court disagreed with the High Court's distinction between "occurrence" and "event" – policy wordings using both terms would in principle provide cover for Covid-19 losses.

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## Supreme Court decision – Prevention of Access

- The FCA's appeals were successful to a limited extent.
- The Supreme Court held that "inability to use" or "total closure" could be satisfied if the policyholder was unable to use a discrete part of the business.
- The Supreme Court also widened the definition of "restrictions imposed" or "orders" and found that such wordings did not strictly require action of the government to have legal force. It could be enough in principle to show that the order was reasonably believed to be mandatory, e.g. the Prime Minister's 23 March speech.
- "Restrictions imposed" did not have to be specific to the premises or directed at the policyholder to trigger cover.
- The Supreme Court left open the issue of what amounts to a "restriction" for the purposes of the wordings, and whether this could include general measures such as social distancing measures and the 'stay at home' order.

## Supreme Court decision – Hybrid

- The hybrid clauses again drew conclusions from both the disease clauses and prevention of access clauses.

- Whilst some policies would respond in principle, there would be limitations on cover based on the need for closure and/or an inability to use the insured premises, depending on the wording.

- Where a business was ordered only to close one part of its premises, cover would only be triggered in relation to those losses, and not the losses of the business as a whole.

## Supreme Court decision – Causation

- The Supreme Court rejected insurers' arguments that the insured peril could not be said to be a proximate cause of the loss if it did not satisfy the 'but for' test.

- Whilst the 'but for' test is almost always the correct test of causation, it would be inadequate in some circumstances where there are multiple concurrent causes of equal efficacy.

- It would be enough for a policyholder with a disease clause to show that its business interruption was a result of government action taken in response to the Covid-19 pandemic as a whole, provided they could evidence at least one case of Covid-19 prior to such action within the geographical limit.

- Under prevention of access/hybrid clauses, it would not be correct to reject cover because loss would have been suffered anyway due to other consequences of Covid-19 such as the general public reaction.

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## Supreme Court decision – Trends

- Trends clauses should not be applied to delineate the scope of cover and are solely part of the quantification machinery. The Supreme Court therefore held that trends clauses should be construed consistently with the insuring clauses and should not be treated as a form of exclusion.

- The purpose of a trends clause is to "arrive at the results that would have been achieved but for the insured peril and circumstances arising out of the same underlying or originating cause".

- Therefore, trends clauses should not be interpreted to reduce the level of cover on the basis that the business would have suffered a reduction in turnover anyway due to uninsured losses which were "inextricably linked" to the insured peril, i.e. uninsured losses which had the same underlying or originating cause.

## Supreme Court decision – pre-trigger losses and Orient Express

- Whilst the High Court had determined that insurers could account for a downturn in trade due to the effects of COVID-19 prior to cover being triggered, the Supreme Court did not agree with this approach.

- Where an insured peril and uninsured peril arise from the same underlying cause, i.e. the hurricane in *Orient Express,* and operate concurrently, loss resulting from both causes would be covered (unless such uninsured peril was expressly excluded).

- Lords Hamblen and Leggatt recognised the role they played in the decision in *Orient Express*, commenting that they *"invoke whatever ways by which we may "gracefully and good naturedly" surrender "former views to a better considered position.""*

## Where are we now? (1)

- Declarations awaited after written submissions were filed in February

- Some wordings remain contested between the parties:

  - Limitations on the trigger of the relevant policy radius in Disease clauses;
  - Application of the counterfactual;
  - The application of 'restrictions imposed' to the 'General Measures';
  - The application of the 'enforced closure' test to various Government instructions in March 2020.

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## Where are we now? (2)

- Claims being processed by the Financial Ombudsman Service (FOS). Can we draw any firm conclusions on the approach taken by the FOS when assessing complaints relating to BI coverage?
- FCA releases data on claims processed to date.
- Application of late payment damages under the Enterprise Act 2016.
- FCA has released guidance on evidence which can be used to prove the prevalence of Covid-19 in a given area.

# Questions / thoughts?

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