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The FCA business interruption test case – one year on

In association with Weightmans LLP

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Learning objectives:

- The background to, and the key issues determined, in the FCA Test Case and the Supreme Court's judgment

- The progress made in handling and concluding Covid-related business interruption claims and how the Test Case has enabled the insurance sector to investigate such claims

- The impact of the Supreme Court judgment and key developments and themes one year on from both the FOS and the courts

Timeline for the FCA Test Case

- In June 2020, the FCA commenced expedited proceedings to clarify the cover provided by certain non-damage business interruption insurance extensions.

- In July 2020, the trial took place over eight days in the High Court in front of Lord Justice Flaux and Mr Justice Butcher. 162-page judgment was handed down on 15 September 2020. The Declarations followed on 2 October 2020.

- The FCA, one intervener, and six insurers were granted permission to appeal straight to the Supreme Court.

- The appeal was heard by the Supreme Court over four days in November 2020. The decision was handed down on 15 January 2021. The Declarations followed on 14 July 2021.

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.

The Supreme Court decision – Disease clauses

"*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*."

- Cover was 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.

The Supreme Court decision – 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."

- 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 definitions of "restrictions imposed" or "orders" were widened: such wordings did not strictly require action of the government to have legal force.
- "Restrictions imposed" did not necessarily have to be specific to the premises or directed at the policyholder to trigger cover.

The Supreme Court decision – 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."

- Drawing on 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.

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The Supreme Court decision – causation

- 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's reaction to the virus.

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The Supreme Court's decision – trends clauses

- Trends clauses should not be applied to delineate the scope of cover. 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.

- Orient Express Hotels Ltd v Assicurazioni Generali SpA [2010] EWHC 1186 (Comm) was wrongly decided.

The FCA and claims progression

- Declarations published July 2021
- FCA toolkit for BI claims available on the website – https://www.fca.org.uk/firms/business-interruption-insurance
- Includes policy checker, FAQ's, list of affected policies, table of relevant paragraphs in the Supreme Court judgment and declarations for each sample policy wording
- Guidance issued on how to prove prevalence of COVID-19 within a certain area at a specific time

Claims data published by the FCA

- FCA confirmed its intention to gather claims information from insurers and to publish data on its website.

- Data was first published in March 2021 and is updated on a monthly basis.

- Data confirms the number of claims accepted, the number of claims pending a coverage decision, the number and value of interim payments and the number and value of final payments.

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Claims data

Month	Total number of accepted BI claims	Total value of interim payments made for ongoing claims (£)	Total number of claims pending final coverage decision	Total number of claims where a final settlement has been offered, accepted and paid	Total value of payments made for final settlements (£)
March 2021	21,140	192,084,302	18,387	8,177	279,823,468
April 2021	35,438	247,689,535	12,217	10,772	352,101,391
May 2021	36,414	268,248,492	9,912	13,895	433,125,666
June 2021	37,702	289,595,404	9,152	16,159	467,251,258
July 2021	40,531	308,885,284	6,900	18,958	566,604,710
August 2021	41,666	331,285,812	6,073	21,198	636,799,954
September 2021	42,308	328,908,143	5,204	22,680	696,244,085
October 2021	42,234	329,368,933	4,615	24,466	766,598,035
November 2021	42,616	312,215,762	3,821	25,898	871,573,228
December 2021	42,724	308,400,593	3,188	27,678	916,662,633

Decisions made by the Financial Ombudsman Service ("the FOS") (1)

- The FOS has jurisdiction to deal with complaints from consumers and from businesses that employ fewer than ten people and with a turnover or annual balance sheet not exceeding €2m, as well as certain charities and trustees.

- The FOS confirmed that it would consider complaints by reference to the outcome of the Test Case but that "*insurers should not only consider a strict interpretation of the policy terms but what is fair and reasonable in the circumstances – taking into account the particular unprecedented situation that the response to the virus has created*".

Decisions made by the Financial Ombudsman Service ("the FOS") (2)

Some reoccurring themes from published final decisions from the FOS:

- COVID-19, or the measures introduced to reduce its spread do not amount to "physical damage".
- Cover is not available under disease clauses which include a specified, closed list of diseases (if that list does not include COVID-19).
- Cover is generally not available for policies which provide cover for losses resulting from the occurrence of, or the manifestation of an infectious disease "at the premises". However note Decision ref: **DRN-3026033**

Decisions made by the Financial Ombudsman Service ("the FOS") (3)

- There are examples of the FOS referring to and directly applying parts of the Judgment from the High Court Decision – for example when assessing the meaning of "vicinity" "incident" and "inability to use".

- There are also examples of the FOS comparing wordings under consideration with the representative sample policy wordings from the FCA Test Case.

- The FOS has also been creative – such as using authorities from another jurisdiction to assist with its review of a complaint.

COVID-19 BI decisions

Hyper Trust Limited t/a The Leopardstown Inn & Others – v – FBD Insurance plc [2021] IEHC 78

- "as a result of the business being affected by…imposed closure of the premises by order of the Local or Government Authority following…Outbreaks of contagious or infectious diseases on the premises or within 25 miles of the same".
- Largely followed the FCA Test Case decision.
- The court however concluded that indemnity only afforded until the order to close – and therefore the composite peril – ceased.

COVID-19 BI decisions (2)

Rockliffe Hall Ltd v Travelers Insurance Co Ltd [2021] EWHC 412 (Comm)

- Closed list of 34 specified illnesses and conditions.
- Policyholder claimed that "plague" (one of the specified conditions) included COVID-19.
- This interpretation was rejected by the court.

COVID-19 BI decisions (3)

Brushfield v Arachas [2021] IEHC 263

- Irish High Court decision.
- Policy provided cover for closure due to defects in drains or other sanitary arrangements at the premises.
- Policyholder argued that an inability to maintain social distancing amounted to defective sanitary arrangements.
- This argument was rejected.

The Taiping Arbitration (the Mance Award)

- Denial of Access wording which provided cover for:
  - Closure due to the instructions of a competent local authority; and
  - Actions or advice of a competent local authority due to an emergency threatening life or property in the vicinity.

- The fact the policy included a Notifiable Disease clause which did not cover COVID-19 did not preclude the Denial of Access clause from responding to a closure due to COVID-19.

- The UK Government did not fall within the definition of a competent local authority.

- The wording "emergency in the vicinity" did not provide only narrow, local cover as had been decided in the High Court.

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On the horizon

- *Parkdean Resorts v Axis* – settled

- *Corbin & King v AXA*
  - Trial 24 January 2022
  - Denial of Access – danger or disturbance within one mile of the Premises.

- *Stonegate Pub Company v MS Amlin*
  - Trial June 2022
  - Aggregation
  - Post-policy period loses/cover period

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If you should have any questions, or if you would like to discuss any aspect of this presentation further, please do not hesitate to contact us.

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