COVID-19 AND FCA BUSINESS INTERRUPTION COVER TEST CASE – SUPREME COURT APPEAL (JUDGMENT)

You may be aware from recent media coverage that on 15 January 2021 the Supreme Court handed down its ruling on the formal test case brought by the Financial Conduct Authority (FCA).

The case was brought to provide clarity as to whether and the extent to which insurers were obliged to indemnify relevant business interruption policyholders for financial losses incurred following interruption to their businesses resulting from the Covid-19 pandemic and the lockdown measures imposed by the UK Government.

The ruling, which is the final step in the test case process, is binding on the eight insurers involved in the test case but will also influence the way in which insurers not involved but who sell similar policies assess claims for these types of losses.

The test case considered a number of sample insurance policy wordings, comprising business interruption insurances containing what became known as "non damage" policy extensions which, in certain specified circumstances, provide cover for losses resulting from an interruption to a policyholder's business following:

- public authority intervention preventing access to, or use of, their business premises (Prevention of Access/Hybrid clauses); and/or
- the occurrence of a notifiable disease (Covid-19) within the vicinity or within a certain radius of their business premises (Disease clauses).

It is important to note that not all business interruption insurance policies will provide cover in respect of the Covid-19 pandemic. Most notably the majority of business insurance policies, which ordinarily require an element of "physical" damage before cover will apply, do not.

The complex judgment ran to 112 pages. In very broad summary, the Supreme Court ruling confirmed:

- **Disease Clauses** - the business interruption losses claimed must have been caused by the case or cases of Covid occurring within the prescribed radius, e.g. 25 miles of the insured premises (however see the finding on causation below). Additionally, each case of illness sustained by a person as a result of COVID-19 is a separate "occurrence".
- **Prevention of Access/Hybrid Clauses**
  - the relevant restrictions imposed did not have to have the force of law, it was enough for them to be clear instructions given by a competent authority, with the imminent threat of legal compulsion. While the ruling does not elaborate specifically on what would satisfy that test, instructions given by, for example, the Prime Minister would likely do so. This will have the effect of bringing the relevant policy trigger forwards earlier than the formal Regulations issued on 21 and 26 March and potentially also of bringing within scope businesses not expressly required to close by those Regulations.
  - an inability to use/prevention of access/interruption could equally apply to a discrete part of a business, e.g. a restaurant able to continue to provide a takeaway service had an "inability to use", "prevention of access to" or "interruption of" its discrete dine-in business.

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- **Causation** - all instances of Covid were an "equally effective" proximate and therefore "legal" cause of the Government measures (and public response), which had been the alternate finding of the High Court. For the purposes of the disease clauses therefore, it is sufficient to show that at the time of any relevant Government measure/restriction, there was at least one case of Covid within the relevant radius specified by the policy.

- **Trends clauses / Pre-Trigger Losses**
  - only truly extraneous circumstances can be considered for the purposes of trends clauses, i.e. only non-Covid related circumstances.
  - further, any Covid related downturn in business prior to the triggering of the insured peril, e.g. a downturn in business prior to the imposition of the relevant restrictions, should also be disregarded for the purposes of the trends analysis : "adjustments should only be made to reflect circumstances affecting the business which are unconnected with COVID-19".

WHAT DOES THIS MEAN FOR YOU?

If you have made a claim under your business interruption policy and this has not been accepted or settled, the FCA's expectation is that your insurer will assess your claim, or re-assess your claim if it was declined, in light of the ruling, and contact you directly.

If you have not made a claim under your policy, but believe you may be entitled to and/or are not sure if your circumstances or policy is affected by the outcome of the test case, or if you would otherwise like to discuss your claim, then please get in touch with us to discuss next steps.

We would also remind you that your policy will contain obligations for you to give prompt notice to insurers of anything which may give rise to a claim on your policy, and to cooperate in the provision of information to insurers regarding your claim, and if you fail to do so any claim may be declined. Accordingly, if you do feel that you have cause to submit a claim, we would recommend that you do so as soon as possible.

Please feel free to contact us should you have any immediate concerns or wish to discuss your individual circumstances.

The information contained in this bulletin is based on sources that we believe are reliable and should be understood as general risk management and insurance information only. It is not, and is not intended to be taken as, legal advice and/or advice with respect to any specific or individual situation and cannot be relied upon as such.

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