FORUM OF INSURANCE LAWYERS

Informing Progress - Shaping the Future

FOIL UPDATE 10 November 2020

Update – FOIL Roundtable on Business Interruption (BI) and Covid-19

This roundtable event was held virtually on 9 November and was led by **Sarah Prager** and **Richard Collier** of **1 Chancery Lane** chambers.

Context

Sarah opened with a reminder that when looking at insurance contracts, what has to be borne in mind is what the parties intended at the time the contract was entered into, and the temptation must be resisted to apply hindsight. Mindsets have undoubtedly changed since March 2020, when the pandemic started.

The key dates were:

5 March – Covid made a notifiable disease in England & Wales

11 March – WHO declared a pandemic

16 March – UK Government (UKG) advised/asked people to stay at home wherever possible

21 March – UKG introduced regulations for the closure of restaurants, bars and pubs

26 March – Closure of all retail outlets.

These measures reflect the fact that Covid had initially appeared as if it might be localised, as with the SARS epidemic but it had soon become apparent that it was more serious and widespread than that. By mid-March the UKG strategy was that a lockdown would probably go a long way to resolving the problem.

However, as the early moves were not obligatory, it was only on 26 March that the steps taken began to impact on BI policies. During the period between March and May, a number of insured businesses had

IN BRIEF

This roundtable event considered:

1. The context in which the Business Interruption test cases were brought to court by the FCA;

2. The High Court's ruling on the key issues;

3. What the UKSC has been asked to consider in the imminent, fast-tracked appeal.

made claims. Some insurers had paid out but others had declined cover. This prompted the FCA to take urgent action.

1 June – Framework Agreement between the FCA and eight insurers, reflecting the fact that the FCA had realised that there was a problem.

9 July – Proceedings issued in the Commercial Court. The FCA identified 700 policies from 60 different insurers and affecting at least 370,000 policyholders. The test case examined 28 clauses from 21 policies written by eight different insurers.

15 September – Following a trial in July, the High Court judgment was handed down

16 – 19 November – UK Supreme Court to hear the appeal. The court will comprise not only senior members of the UKSC but a number who have experience in dealing with similar issues.

The speed at which these issues are being addressed clearly reflects underlying policy issues and the concern that an increasing number of businesses will fail if payments are not received. At the same time, it is accepted that insurers cannot reasonably be required to make payments in all cases. Speed is clearly of the essence. Further claims will arise during additional periods of lockdown, or as a result of local tiering.

The test cases

Richard Collier presented this section of the talk.

The test cases were brought under the expedited Financial Market Test Case Scheme (CPR PD 51M).

The FCA was broadly the winner in the High Court. It won on most disease and hybrid clauses and some denial of access, causation and trends clauses.

The insurers won on some denial of access claims but the court distinguished and (obiter) doubted the *Orient Express Hotels (2010)* causation/counterfactual point, which would have assisted the insurers.

Diseases clauses were, broadly speaking, triggered by the occurrence of a notifiable disease, typically within a certain distance of the insured premises. The key wording included:

Loss resulting from:

i) interruption or interference with the business;

ii) following/arising from/as a result of;

iii) any notifiable disease/arising from any human infectious or human contagious disease manifested by any person;

iv) within 25 miles/1 mile/ the 'vicinity' of the premises.

Within these cases, the central issue was what was the insured peril in question? The insurers argued that these clauses related to local issues, i.e. an occurrence within the vicinity, not a national lockdown. This argument was rejected, with the court introducing the concept of a 'composite peril', within the required radius. There was no requirement for the insured to prove a specific incident within the radius, nor any divisibility between a local incident and the declaration of a

national lockdown. This avoided the potentially absurd situation that would arise if the larger the outbreak, the lesser the cover.

The policy was triggered by the first occurrence of a notifiable disease within the specified radius, which was relevant also to business trend clauses.

'Vicinity' was viewed as the area within which an occurrence was likely to affect the insured business. So, with the Covid outbreak, it must be nationwide.

Denial of access clauses differed because they were not triggered by the occurrence of some notifiable disease but by a public authority preventing or hindering access to or the use of the premises. These clauses were interpreted far more restrictively than the disease clauses but with the court emphasising that the specific wording was of greater importance. It is therefore important to look carefully at the wording of an individual policy and not *necessarily* be influenced by any of the policies considered by the court, while at the same time noting similarities.

Unlike with disease clauses, what was done locally in response to the disease is far more relevant to interpreting these clauses. The national lockdown may not therefore apply, but what had been done by way of local lockdowns may be far more relevant.

There is also a distinction to be drawn between business 'interruption' and prevention of access, with the business needing to fall within the 26th March regulations. Where, for example, a restaurant already had a significant take-away service (which could continue), the clause would not be satisfied.

A number of 'hybrid clauses' were considered by the court, concerning restrictions imposed in relation to a notifiable disease. 'Restrictions imposed' required something mandatory. Here the inability to use the premises required not necessarily complete restriction of use but more than impairment of normal use.

Finally, the court considered a number of trends clauses, issues of causation and counterfactuals, which were relevant to quantification of the insured loss. The question raised was whether the counterfactual (the situation but for the insured's peril materialisation) included consideration of what was occurring nationally, limiting the extent of the loss due to local events. The High Court said not.

In distinguishing *Orient Express*, the court found that the correct application of the counterfactual was to compare the actual performance of the business with that which the business would have achieved in the absence of the Covid outbreak. This is an important issue for the appeal to the UKSC, as the High Court view strongly disagreed with the ruling in which two of the members of the UKSC panel were involved.

As to the trends clauses, the court found that where a business had been adversely affected by Covid, prior to the point at which a claim was triggered, that would be relevant to the computation of loss.

As to proving prevalence, the court considered various forms of evidence demonstrating the presence of the virus, but made no findings of fact. The insurers did, however, make a number of concessions as to the type of evidence that would be acceptable to them, including NHS deaths data; ONS data; and reported cases available publicly online.

On a general point, the consensus was that while the *contra preferentum* rule was in the court's contemplation, its relevance was limited, as the rulings were based more on what the appropriate commercial interpretation of the various clauses should be.

A case reported since the judgment in the test cases

Sarah Prager referred to the case of *TKC Limited v Allianz Insurance Plc (2020) WLUK 137,* which related to a business forced to close between 21 March and 4 July because of the Covid restrictions. The problem for the insured was that the policy related to 'accidental' damage, with the gradual deterioration of stock excluded.

The claim was struck out, because the cause of the business interruption was not an accidental event, nor was the loss a permanent one.

The appeal to the UKSC

Most (but not all) of the parties are appealing and the main issues will be:

- What is the correct approach to insured peril(s), including the legitimacy of 'composite perils' and the counterfactual?

- The correct approach to proximate cause;

- Trends clauses and whether revenue drops should be included which were referable to Covid-19 but prior to the policy being triggered;

- Whether *Orient Express* is distinguishable and wrong in law;

- Wordings requiring mandatory legal force and not merely instructions or advice from the Government;

- Wordings requiring complete closure of the business;

- The divide between parts of the business which could continue and which were/were not pre-existing.

Closing remarks

Subsequent lockdowns will probably be seen as further triggers for claims, rather than as a continuation of any earlier claims, but ultimately that will depend on the wording of the policy. However, the appeal to the UKSC is relevant primarily to the first lockdown.

In the meantime, it is advisable not to proceed with any existing claims until the UKSC judgment is available, seeking a stay if necessary.

The recording of this event can be viewed at https://www.foil.org.uk/members/streamed-events/