FORUM OF INSURANCE LAWYERS

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All you (now) need to know about Business Interruption insurance and Covid-19

This presentation was held on 24th May 2022 and was led by **Ian Stebbings** and **Robbie Parkin** of **1 Chancery Lane** Chambers.

Background in the light of the test cases – Ian Stebbings

Basic facts

The original action was brought by the Financial Conduct Authority (FCA) under its market test case scheme. The action was brought on behalf of and for the benefit of many policyholders, who were small/medium enterprise businesses. The defendants were eight leading providers of business interruption (BI) insurance, such as Arch and Hiscox.

There was a leap-frog appeal from the High Court to the Supreme Court and the Supreme Court, considered a representative sample of standard form BI policies, as many of the facts seemed to be agreed between the parties. (There were some 700 type policies over some 60 insurers, meaning that some 370,000 policyholders could potentially be affected by the outcome of the litigation).

The Supreme Court's approach

The appeal looked at the proper interpretation of four clauses and causation.

The four clauses looked at initially were the disease clause; the prevention of access clause; the hybrid clause; and the trend clause.

<u>The disease clause</u>

Broadly speaking these provided for BI losses arising from an occurrence of a notifiable disease, in this case Covid-19, at or within a specified distance of the business premises. (In some the distance was 25 miles, in others one mile).

Prevention of access clause

Cover for BI losses arising from a public authority intervention which prevents or hinders access to or the use of business premises.

Hybrid clause

A clause which combines the two previous elements.

The trend clause

A clause which provided for BI losses to be quantified by reference to what the performance of the business would have been, had the insured peril not occurred.

Causation was looked at, particularly in relation to the trend clause. The insurers argued that the policyholders would have suffered the same or similar BI losses, even if the insured peril had not occurred. They argued that the claims must fail, as it could not be proved that the losses arose as a result of the insured peril, because of the way in which trend clauses require the loss to be quantified.

The time-line

21st March 2020 – The Health Protection (Coronavirus Business Closure) (England) Regulations 2020. By reference to a schedule, this set out the businesses which were required to close. Part 1 of the schedule applied to restaurants, cafes and bars, etc. This allowed the sale of food only for consumption off the premises and not on them. Part 2 of the schedule applied to cinemas, night clubs, etc. The regulations provided for a breach to constitute a criminal offence.

23rd March 2020 – the government issued guidance in regard to the closure of businesses and working from home; the stopping of social events (including religious ceremonies and funerals). The guidance reiterated the potential penalties for operating a business in contravention of the 21st March regulations.

26th March 2020 – the 21st March regulations were revoked but replaced by even more restrictive regulations, requiring other types of businesses (such as nail bars) to close. Regulations were also introduced to prevent a person from leaving the place where they were living, without a reasonable excuse (again with criminal penalties for breaches).

4th July 2020 – the 26th March regulations were replaced with yet more restrictions, with businesses now being placed into one of seven categories of business.

In the High Court

The eight insurer parties agreed with the FCA and intervening parties that the High Court should consider 21 lead policies. Following a hearing and a lengthy reserved judgment, the court gave permission to all parties to appeal by way of leap-frog to the Supreme Court.

The issues on appeal

The FCA had been substantially successful in the High Court but all but two insurers appealed against the decisions below. In addition, the FCA appealed on issues on which it had failed.

What were the main points decided in the test case?

In basic terms, it was an interpretation of the clauses set out above. Each clause was given its proper and ordinary interpretation, with words given their ordinary meaning (i.e., how the ordinary person would interpret the wording and not pedantic lawyers).

E.g., in relation to 'interruption' in the Hiscox policy, the courts found that interference and interruption were the same thing, contrary to what the insurers had argued. Interruption, interference or disruption were the same.

Causation in the trend clauses

The insurers' argument was that the 'but for' test should apply. This was rejected out of hand by the courts. The speaker quoted from paragraph 168 of the Supreme Court judgment. The insurers' argument was that if there was a case of Covid-19 but not within the specified radius of the insured premises, then the policy did not apply, because the business would not have needed to close. The court rejected this approach in favour of a 'contribution' approach: the fact that there were many cases outside the radius of the policy, contributed to the government bringing in restrictions which did have an effect on the business.

In looking at 'inability to use' in some of the policies, that did not mean the whole premises. This was relevant where a business might have lost 80% of its trade through a loss of foot-fall but might still have 20% of the business through telephone or online sales. Hiscox argued that the policy should not respond, as the premises were being used. The court rejected this argument unless the wording in the policy was specific as to what was meant.

Hiscox also argued that the restrictions had to be mandatory and have the force of law behind them. The Supreme Court found that even before the criminal sanctions were introduced, the government guidance was sufficient to amount to a restriction on an individual and/or a business and therefore the clause applied.

The main points decided

Hiscox failed on a lot of issues, simply because of the wording of their policies. The court found that to have succeeded, the policy wording would have needed to be much tighter

The current position following the action by the FCA – Robbie Parkin

The Financial Ombudsman's (FO) position largely remains as set out in a news letter dated 29th July 2021 (#163).

The FO has seen an increase in complaints relating to how insurers and brokers have handled Covid-19 BI claims, mainly relating to denial of cover. There are also a small number of claims relating to how the policies were sold, delay in processing the claim, or the amount offered in settlement.

The reasons given for denying cover

These include:

- There was no BI term in the policy
- The policy provided BI cover where the loss caused by one of a list of specified diseases but Covid-19 was not included

- Cover was provided but only where there was a case of Covid-19 at the premises but there is insufficient evidence of this
- The policy only provided cover in the context of a public emergency in the local area (Covid-19 was national) (see *Corbin v Axa* below).

The FCA Test Case examples

The FCA has provided a number of case studies to demonstrate its approach to cases. These flow from the fact that Covid-19 is a notifiable disease under The Public Health (Control of Disease) Act 1984 and the Health Protection (Notification) Regulations 2020 (as of 6th March 2020).

Example 1

A repair shop had to close from March 2020 and remained closed throughout lockdown.

The policy provided cover 'where the interruption to business was caused by an occurrence of a notifiable disease on the premises.'

The business initially closed because one of the business's members of staff did feel unwell in March 2020, before the lockdown, Covid-19 was suspected, but there had been no positive test and no later evidence of Covid-19 on the premises.

Finding

The policy applied only where there was an occurrence pf Covid-19 on the premises.

There was no sufficient evidence that the illness in March 2020 was caused by Covid-19 and there was no later evidence of such infections.

The business was not required to close as a result and so the insurer had applied the policy wording fairly and its decision was upheld.

Example 2

A nail salon had been forced to close as a result of the lockdown restrictions.

The policy only provided cover where the business was interrupted by a government response to a specified list of illnesses, but Covid-19 was not on the list.

Covid-19 did not exist at the date of the policy.

Finding

Covid-19 was not on the list, so cover was not provided.

Whilst recognising the unfairness to the business, the FO considered that it was unable unilaterally to extend the policy in this way.

The insurer's refusal of cover was upheld.

Example 3

A restaurant had been forced to close due to Covid-19 restrictions.

The policy provided cover where it was in response to an occurrence of a notifiable disease within 25 miles of the premises.

The insurer held that the closure had not been caused by a case of Covid-19 within that radius.

Finding

It was clear that in the light of the Supreme Court ruling in the test cases (*FCA v Arch)* that the causation argument failed.

The insurer was required to reconsider the claim, i.e., with a view to granting cover.

Corbin & King Ltd and others v Axa Insurance UK Plc (Rev 1) (2022) EWHC 409 – the only major determination reported since the test case.

In summary:

1. The specific terms of the policy in question determined whether or not cover would be provided.

2. Understanding these was a matter for ordinary contractual construction.

Background

The claimant companies (a group with a consolidated insurance policy) operated a total of eight restaurants which were required to close three times each during the period of the lockdowns: in March, September and November 2020.

The policy

This covered BI loss where 'access to your premises is restricted or hindered arising directly from actions taken by the police or other statutory bode in response to a danger or disturbance at your premises or within a 1-mile radius of your premises'.

But also: 'We will not cover you where access to your premises is restricted or hindered as a result of notifiable diseases as detailed in the Murder, suicide or disease cover'. Covid-19 was not on that list.

Cover was limited to '100% of the sum insured or £250,000 whichever is less'.

The claimants' position

They sought indemnity under the policy of £250,000 for each of the eight restaurants for each of the three lockdowns.

The defendant's case

It declined cover, arguing that:

- The policy did not cover the Covid-19 pandemic, in that it was not a transient, or locality specific 'danger or disturbance' of the kind specified in the policy, but a lasting, national emergency;
- The disease exclusion clause applied;
- The presence of Covid-19 in the locality did not cause the closures;

- The £250,000 was an aggregate total: not one per site.

The issues

Whether or not the policy provided cover;

Which party was correct in respect of the £250,000 limit?

Findings

- A disease such as Covid-19 qualified as a 'danger'.
- There was no qualification by locality save that it should occur within a 1-mile radius.
- The 'danger' did not have to be temporary or transient.
- The disease exclusion clause applied only to diseases listed in the schedule, not all notifiable diseases, so did not apply to Covid-19.
- The BI was caused directly by the presence of Covid-19 in the radius (and more generally in the UK).

Quantum

The claimants' arguments on quantum were preferred because although it is not beyond the bounds of possibility that there could be a composite policy with a single limit which applies to all of the premises and all of the claims, that would certainly not be the expectation in the context of a composite policy.

Watch this space

Smart Medical Clinics Ltd v Chubb European Group – forthcoming trial on liability (extent of restriction of access; whether Covid-19 was a relevant disease; whether a case at the premises was required).

Simpsons (Preston) Ltd v MS Amlin – concerns cover under a Motor Trade policy. This will be managed in a dedicated BI list in Manchester.

World Challenge Expeditions v Zurich – pending claim relating to the interruption to travel services. (This could be a growth area, given the obvious impact of the pandemic on the travel industry).

Summary

- It's all about the wording
- The courts and the FO are adopting an 'exact words' (though not over-legalistic) approach
- This can produce harsh results for certain insurers and insureds
- There remain plenty of potential get-out clauses in a well drafted policy

Further questions

Q: Does the presence of so many policy wordings mean that there are still unresolved issues out there?

A: The simple answer is 'yes', as highlighted by the three cases referred to above. There are going to be more and there will be different issues. For example, **Ian Stebbings** has a case relating to

disability discrimination where a retail store required someone entering their premises to wear a mask. However, Ian believes that many disputes can be resolved by reference to the Supreme Court judgment and how it dealt with the four clauses: look at the wording and how it should reasonably be understood.

Q: What is the bigger picture/wider points that can be learned from the test case?

A: The better and tighter drafting of both inclusionary and exclusionary clauses is a must.

Q: In the light of the Supreme Court judgment, is it not the case that most of these policies are required to respond?

A: While **Robbie Parkin** agreed with this in principle he referred back to what happened in *Corbin*. Some of the general findings in the UKSC judgment can be distinguished in specific circumstances. The position may not be quite as settled as it may at first seem. Also, there is still quite a lot to be done in terms of quantum.