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Business Interruption Insurance: The Latest from the UK

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15th January 2021 | by Shane Neville, Ian Lavelle

The UK Supreme Court judgment in the UK Financial Conduct Authority's test cases raises Irish businesses' hopes of making successful business interruption claims in this jurisdiction.

Back in September 2020, we commented on the outcome of test cases heard by the High Court in England and the implications that judgment might have for Irish businesses looking to make successful claims on their business interruption policies (click here to access our September 2020 update).

The UK Supreme Court today handed down its judgment in the appeals of those High Court test cases.

Facts

In the UK, the Financial Conduct Authority (FCA), the insurance regulator in that jurisdiction, initiated test cases on 9 June 2020 to determine issues of principle in relation to policy coverage under various specimen wordings underwritten by eight different insurers. Many of those insurers had refused to provide cover to businesses under business interruption policy clauses for losses arising from the current COVID-19 pandemic, having taken the view that the true causes of the businesses' declines in activity related to broader, nationwide factors rather than specific outbreaks or cases of COVID-19 in their localities. It was agreed between the FCA and the insurers that the High Court (Commercial) in London would consider a representative sample of standard-form business interruption policies issued by the eight insurers. The court was asked to consider 21 "lead" policy wordings.

Lord Justice Flaux and Mr Justice Butcher, sitting together in the High Court in England, heard the test case in an expedited manner, with judgment handed down on 15 September 2020, only approximately three months after the proceedings were initiated. In what was considered by many to be a pro-policyholder judgment, the High Court raised the hopes of many Irish businesses which are in similar dispute with their own business interruption insurers.

Six of the insurers appealed the High Court decision and the FCA also appealed certain elements of it. The appeals were heard by the Supreme Court under a "leapfrog" procedure which allows an appeal to bypass the Court of Appeal in exceptional circumstances.

UK Supreme Court

The UK Supreme Court addressed six issues, which it summarised succinctly in its press summary:

1. the interpretation of "disease clauses" (which cover business interruption losses resulting from any occurrence of a notifiable disease within a specified distance of insured premises);
2. the interpretation of "prevention of access" clauses (which cover business interruption losses resulting from public authority intervention preventing access to, or the use of, business premises) and "hybrid clauses" (which contain both disease and prevention of access elements);
3. the question of what causal link must be shown between business interruption losses and the occurrence of a notifiable disease (or other insured peril specified in the relevant policy wording);
4. the effect of "trends clauses" (which prescribe a standard method of quantifying business interruption

losses by comparing the performance of a business to an earlier period of trading);
5. the significance in quantifying business interruption losses of effects of the pandemic on the business which occurred before the cover was triggered; and
6. in relation to causation and the interpretation of trends clauses, the status of the decision of the Commercial Court in Orient-Express Hotels Ltd v Assicurazioni Generali SpA (trading as Generali Global Risk) [2010] EWHC 1186 (Comm).

Disease Clauses

The court examined the scope of the peril insured against by a sample business interruption clause which covered loss arising from "any … occurrence of a Notifiable Disease within a radius of 25 miles of the Premises".

The insurers contended that the clause only covered the business interruption consequences of any cases of a Notifiable Disease which occurred within a radius of 25 miles of the premises insured under the policy, and that any cases of disease which occurred outside that area should not form part of the insured peril. The FCA's position, on the other hand, was that the clause should be read as covering the business interruption consequences of a Notifiable Disease wherever the disease occurred, provided it occurred (meaning that there was at least one case of illness caused by the disease) within the 25-mile radius.

The UK Supreme Court accepted the insurers' argument that the disease clause in question was properly interpreted as providing cover for business interruption caused by any cases of illness resulting from COVID-19 that occurred within a radius of 25 miles of the premises from which the business was carried on. However, as a result of its analysis of causation (see below), the Supreme Court ultimately reached a similar conclusion to the High Court regarding the scope of cover available under the policy.

Prevention of Access and Hybrid Clauses

Some prevention of access and hybrid clauses apply only where there are "restrictions imposed" by a public authority following an occurrence of a notifiable disease. The High Court had held that this requirement was satisfied only by a measure expressed in mandatory terms which had the force of law. The Supreme Court rejected this interpretation and held that an instruction given by a public authority may amount to a "restriction imposed" if it carried the imminent threat of legal compulsion or was in mandatory and clear terms and indicated that compliance was required without recourse to legal powers.

From an Irish perspective, this conclusion is important, as many businesses closed voluntarily in the early part of the pandemic knowing that they would compulsorily be closed by the Government of Ireland if they did not do so.

Other sample policy wordings in the FCA test cases provided cover only where business interruption loss was caused by the policyholder's "inability to use" the insured premises. The High Court had held that this meant complete and not merely partial inability to use the premises. The Supreme Court agreed that inability, rather than hindrance of use, must be established but held that this requirement may be satisfied where a policyholder is unable to use the premises for a discrete business activity or is unable to use a discrete part of the premises for its business activities.

Causation

The UK Supreme Court rejected insurers' arguments: (i) that one event cannot in law be a cause of another unless it can be said that the second event would not have occurred in the absence of ("but for") the first; and (ii) that cases of disease occurring inside and outside the specified radius should be viewed in aggregate, so that the overwhelmingly dominant cause of any Government measure will inevitably have been cases of COVID-19 occurring outside the geographical area covered by the clause. It is therefore sufficient for a policyholder to show that, at the time of any relevant Government measure, there was at least one case of COVID-19 within the geographical area covered by the clause.

Trends Clauses

Many of the policy wordings in question contained “trends clauses” which provide for business interruption losses to be calculated by adjusting the results of the business in the previous year to take account of trends or other circumstances affecting the business in order to estimate what results would have been achieved if the insured peril had not occurred. The Supreme Court held that these clauses should not be construed so as to take away cover provided by the insuring clauses and that the trends and circumstances (for which the clauses require adjustments to be made) do not include circumstances arising out of the same underlying or originating cause as the insured peril. In other words, one could discount the overall effects of the COVID-19 pandemic when considering the “trends” to be applied.

Pre-Trigger Losses

The High Court, in broad terms, permitted adjustments to be made under the trends clauses to reflect a measurable downturn in the turnover of a business due to COVID-19 before the insured peril was triggered. The Supreme Court rejected this approach. In accordance with its above-mentioned interpretation of the “trends clauses”, it held that adjustments should only be made to reflect circumstances, affecting the business, which are unconnected with COVID-19. This may be particularly relevant to businesses which were in “COVID-free” zones in February/March 2020 but had begun to suffer from the effects of the developing global emergency.

Status of Orient-Express

In the Orient-Express case, the English Commercial Court held that the relevant trends clause did not extend to business interruption losses which would have been sustained anyway as a result of hurricane damage to the city of New Orleans, even if the hotel in question had not been damaged. The insurers relied on that decision to support their arguments on causation of loss and the effect of the trends clauses in the present case. The Supreme Court concluded that the Orient-Express case was wrongly decided and should be overruled. The Supreme Court considered that the Orient-Express case should have been decided by construing the trends clause so as to exclude, from the assessment of what would have happened if the damage had not occurred, circumstances which had the same underlying or originating cause as the damage, namely the hurricanes. Therefore, while the matter is complex, the fact that COVID-19 would ultimately have led to interruption for businesses, even if there were no outbreaks in the locality or specified radius, does not exclude a business from successfully claiming for losses arising from outbreaks in the locality or specified radius.

Conclusion

The decision means that many thousands of policyholders in the UK, some of which have been struggling to stay afloat, will now have their claims for COVID-19 related business interruption losses paid out. The FCA has said that it will work with insurers “to ensure that they now move quickly to pay claims” and it encourages interim payments to be made wherever possible.

Meanwhile, on this side of the Irish Sea, the UK Supreme Court’s decision will undoubtedly raise Irish businesses’ hopes of making successful business interruption claims in this jurisdiction. The High Court was due to deliver judgment today in the four test cases brought by pub owners against the insurer, FBD, following its refusal to pay out on business interruption policies. Earlier this week, the court acceded to a request from FBD’s lawyers to defer judgment until after the UK Supreme Court’s decision was handed down. Although the cases will turn on the specific wording of the policies before the Irish court, this related decision of a 5-judge UK Supreme Court is likely to be a particularly persuasive authority.

The contents of the above article are for general information purposes only and do not constitute legal advice. If you have any queries regarding business interruption insurance, please contact Shane Neville (sneville@lkshields.ie) or Ian Lavelle (ilavelle@lkshields.ie).

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