Good news for businesses claiming under a Business Interruption Insurance policy - Final decision by the Supreme Court.

The Supreme Court has provided much needed certainty for business owners when claiming under a business interruption insurance ("**BII**") policy and grounds for many insureds to challenge their insurer's rejections of claims relating to the COVID-19 pandemic ("**Pandemic**").

By way of brief reminder, thousands of claims have been brought under BII policies as a result of the Pandemic and many have been refused by insurers on the basis that they say that the policy wording does not cover effects (or certain effects) of the Pandemic. The Financial Conduct Authority ("**FCA**") issued proceedings against eight insurers on behalf of policyholders in a test case to obtain clarity about the meaning and effect of examples of BII policies in the context of Pandemic-related claims.

We previously provided an update on the High Court decision. As we mentioned in that blog, the FCA filed a 'leap-frog' application to appeal the High Court decision in the Supreme Court, for final determination. On 15 January 2021, the Supreme Court issued its judgment (which is available here) on that appeal and it brings good news for businesses. Whilst the judgment deals directly with the policies of the eight insurer defendants, the Supreme Court's decision will be applied to other similarly worded policies.

The Supreme Court decision contained detailed analyses of different policy wordings. The devil is in the detail. As we conclude below, if your BII insurer has declined cover previously or you have not yet made a claim, you should contact your insurer to confirm whether they will now provide cover. If, following that response, you believe you may have been wrongly refused cover, you should discuss this with your broker and or seek legal advice on your specific claim and circumstances.

The Supreme Court's decision

Disease clauses and the link between losses and the notifiable disease

Some policies specify that the notifiable disease must have occurred within a specified distance (usually 25 miles) of the insured premises. The Supreme Court held that, contrary to the High Court's decision, this should be interpreted such that there must have been a case of COVID-19/the notifiable disease within the specified distance when the loss arose.

On the issue of causation, the Supreme Court rejected the insurers' submission that losses caused by the Pandemic are as a result of the government imposing lockdowns, not the COVID-19 disease itself, so they would not have to pay out on the wording. The Supreme Court regarded the distinction as artificial and incorrect. It referred to the analogy of "*20 individuals who all combine to push a bus over a cliff. Assume it is shown that only, say, 13 or 14 people would have been needed to bring about that result. It could not then be said that the participation of any given individual was either necessary or sufficient to cause the destruction of the bus. Yet it seems appropriate to describe each person's involvement as a cause of the loss*".

In summary, so long as there was a single case of COVID-19 within the specified distance of the insurer's premises when the restriction was imposed/the loss arose, the insurer should provide cover.

Clauses requiring "restrictions" to be "imposed" or for there to be "prevention of access"

Timing of "restrictions"

Insurers had argued that the requirement under some policies for "restrictions" to be "imposed" was not met until laws were formally enacted on 26 March 2020 and that the government's earlier instructions merely amounted to guidance. The High Court had held that where policies required "restrictions" to be "imposed", cover need only be provided once a legally binding restriction took effect on a business.

The Supreme Court disagreed and held that a restriction is imposed at the point at which the government gives a clear instruction (i.e. when Boris Johnson as PM instructed the country to "stay at home" and instructed categories of businesses to close "tonight" on 20 March 2020) and not the later date of it being enacted in law. Laws take time to be enacted whereas a government restriction can be practically imposed almost immediately. Businesses are expected to comply in such cases, not to refuse to do so until legislation has been enacted.

The practical implication of this is that insureds should be provided cover for losses incurred after Boris Johnson issued the government's instruction (so far as it applies to the insured's business) on 20 March 2020, rather than when it was enshrined in law almost a week later.

Partial closure – "inability to use" and "prevention of access"

The Supreme Court held that the High Court was incorrect to decide that a policy provided cover only where the insured had an "inability to use" all its premises. The High Court's interpretation could mean that businesses which were prevented from operating in some way, but could continue to function in part or in a modified way e.g. dine-in restaurants converting to takeaway, or a traditional book shop operating online from its physical premises, may not be provided with any cover. The Supreme Court stated that if a business was:

- "unable to use the premises for a discrete part of its business activities"; or
- "unable to use a discrete part of its premises for its business activities"

"In both those situations there is a complete inability of use."

As such, applying the Supreme Court's reasoning, if an insured has been unable to carry on a certain part of its business (such as serving food and drink to walk-in customers) or unable to carry on its business from a certain part of its premises, cover should be provided.

Similarly, the Supreme Court considered the High Court's decision that "anything short of complete closure would not constitute "prevention of access" to the premises". The Supreme Court agreed with the High Court that prevention is different from mere hindrance and so cover may not be provided if the restrictions simply made the business more difficult to operate. However, as above, where a part of the business or premises (such as a dining area in a restaurant) has been mandatorily closed, there has been a prevention of access to that part of the business and so an insured may claim losses caused by being unable to access it.

The Supreme Court further disagreed with the High Court's decision that if a dine-in restaurant had also provided takeaways prior to restrictions being imposed, an insurer may decline cover. The Supreme Court held that cover should be provided, regardless of whether the insured had already operated a takeaway service prior to the restrictions but that clearly, cover should only be provided for the lack of dine-in business.

Trends clause

Insurers trends clauses provide for calculating losses by comparing financial performance against an earlier trading period. The Supreme Court agreed with the High Court's decision (albeit via a different route) in relation to these clauses.

In some cases, businesses suffered a significant downturn shortly before restrictions were imposed. The Supreme Court held that insurers cannot reduce the amount of compensation because the same underlying peril/event that is the subject of the claim caused a downturn in turnover before the peril was triggered for the insured. The aim of trend clauses 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".

As a result of this decision, the Supreme Court held that the decision in *Orient-Express Hotels Ltd v Assicurazioni General SpA* [2010] EWHC 1186 (Comm), a decision made by some of the same judges sitting in this very case, was wrong.

Practical implications of the judgment

As with the previous High Court judgment, the Supreme Court's judgment is technically only binding on the parties to that case. However, the Supreme Court decision will be followed by all courts when deciding similar claims involving similar policy wording. Insurers are expected to settle and not litigate claims if the outcome is clear from the Supreme Court's decision.

If your BII insurer has declined cover previously or you have not yet made a claim, you should contact your insurer to confirm whether they will now provide cover. If, following that response, you believe you may have been wrongly refused cover, you should discuss this with your broker and or seek legal advice on your specific claim and circumstances. Similarly, if you are currently negotiating a settlement of a BII claim, you may be in a stronger position as a result of the Supreme Court's decision. The FCA has also issued draft guidance to insurers, intermediaries and policyholders here about evidencing the presence of COVID-19 at the time of the losses.

If you have any queries or would like to discuss any of the points raised in this blog, please contact Kayleigh Fantoni in our Commercial Dispute Resolution team.

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