BRIEFING NOTE

COVID-19 - Extensions, Exclusions and The Fist Fight to Follow

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Introduction

Since the outbreak of COVID-19, law firms across the world have burst into print, keen to share their views as to whether construction or operational all risks policies will respond to the financial loss incurred by cover holders as a result of the interruption resulting from the virus. Many of these articles focus on the meaning of damage and, in triggering cover, whether damage has occurred. But do these articles miss the point? We say they do. But the Insurers have not. And in this article, we explain why.

The Meaning of Damage

The insurance industry accepts that damage is an adverse change in the physical condition of the insured property. And it has relied on this definition for donkey's years to exclude claims for the repair of defects (see *Promet Engineering (Singapore) Pte. Ltd. v Sturge (The Nukila) [1997] 2 Lloyd's Rep 146*), which claims the industry says should be made against the supplier or manufacturer. The law reports are littered with examples of property that is damaged by reason of a change in its physical condition at a microscopic level, from fine art (*Quorum A/S vs Schramm [2002] 2 All E.R. 147*) to frozen seafood (*Ranicar vs Frigmobile Pty. Ltd. [1983] Tas. R. 113*), as distinct from property that is defective, the condition of which has been discovered, but not adversely changed, during the term of the policy.

The difficulty is that the reported cases, and the determination as to whether or not the condition of insured property has adversely changed such that it is damaged, is fact sensitive. In other words, it turns on the particular facts of each case and particularly the expert evidence adduced before the Court. And that's the difficulty that, at the time of writing this article, the whole world faces. We simple do not know enough about the COVID-19 virus. The world's resources are aimed at finding a vaccine to the virus. Whether or not that virus causes a physical change to property is of far less consequence.

The Factual Matrix

If we do not know enough about the virus, what do we know to make an informed choice as to whether or not an insurance policy responds to the financial loss resulting from that virus? In the Singapore context, we know three things. First, that from 28 February 2020, COVID-19 was an infectious disease that had to be notified to the Director of Medical Services. Second, as at 7 April 2020 there were 1481 notifications of COVID-19. Third, on 8 April 2019 the Minister of Health issued a Control Order closing premises to entry. What we do not know is when that Control Order can or will be lifted. It is against this factual matrix that we need to consider the extensions to the policy and the application of established law that acts as a tie breaker if a number of causes are in play.

Infectious Disease Extension

If a cover holder is faced with a financial loss resulting from the closure of its premises as a result of the Control Order then the first place it should look are the extensions to its policy, and particularly whether it has paid for a Notifiable Infectious/Contagious Diseases extension. This extension provides an indemnity for financial loss resulting from the outbreak of a notifiable infectious disease. Over the years, and particularly since the SARS outbreak, the ambit of this cover has been narrowed by reducing the geographical scope: from an outbreak within 25 kms of the insured property to an outbreak within 2.5 kms or to manifestation within a person at the insured property. To benefit from this extension, the cover holder does not have to establish damage. Instead, it must establish that a notifiable disease has occurred at or within the geographical limits and that, as a result, it has incurred financial loss.

Public Authorities Extension

The second place a cover holder should look is to the public or civil authority extension. This extension provides an indemnity for financial loss resulting from the actions of a public, civil or government authority. For example, when the City or New Orleans imposed a curfew following the devastating impact of Hurricanes Rita and Katrina in 2005 (as reported in *Orient-Express Hotels Ltd. vs Assicurazioni General SpA (UK) [2010] EWHC 1186*). Alternatively, the red zone in post-earthquake Christchurch or what we are witnessing in Singapore as premises are closed to entry pursuant to the Control Order.

The Causation Defence

But what of the cover holder who has an infectious disease extension or a public authorities extension but not both? And who is faced with the Insurer, hiding behind the Reinsurer, the loss adjuster, and the insurance market panel law firm, that raises the causation defence that goes along the following lines: You may have an infectious disease extension but the cause of the loss was closure by a public authority. Or you may have a public authority extension but the cause of the loss was manifestation of an infectious disease. The answer lies in the legal doctrine of concurrent causes of loss.

Concurrent Causes of Loss

The legal doctrine of concurrent causes of loss runs along the following lines. Two perils, that acting individually would not result in a loss, combine to cause the loss. It is not possible to identify the dominant peril such that the two perils are characterized as concurrent causes. For example, in *JJ Lloyd Instruments Ltd. vs. Northern Star Insurance Co. Ltd. (The Miss Jay Jay) [1987] 1 Lloyd's Rep. 32* defects in design combined with rough seas resulted in the loss of the vessel in circumstances in which the defective design or the weather conditions alone would not, absent the other, have caused the loss.

The issue then is whether Insurers are obliged to indemnify the loss resulting from those concurrent causes. That issue is determined by reference to whether the concurrent causes are insured, excluded or simply uninsured (in other words, not mentioned in the policy). And the answer is as follows:

If one concurrent cause is insured and the other is uninsured then cover is triggered and Insurers are obliged to indemnify the loss: see *Seashore Marine S.A. vs. Phoenix Assurance Plc [2002] Lloyd's Rep. I.R. 51* and *Bovis Construction Ltd. vs. Commercial Union Assurance [2001] Lloyd's Rep. I.R. 321*.

But if one concurrent cause is insured and the other is expressly excluded then cover is not triggered: see *Siang Hoa Goldsmith Pte. Ltd. vs. Wing On Fire and Marine Insurance Co. Ltd. [1998] 2 SLR(R) 408* and *Pacific Chemicals Pte. Ltd. vs. MSIG Insurance (Singapore) Pte. Ltd. [2012] SGHC 198*.

Perhaps the most relevant precedent is *If P&C Insurance Ltd. v Silversea Cruises Ltd. [2004] Lloyd's Rep. I.R. 217.* Following the terrorist attack on the World Trade Centre, the U.S. Government warned its nationals not to travel. Terrorism was an insured peril. Government action was an uninsured (rather than excluded) peril. The Court held that the (insured) act of terrorism and the (uninsured) Government warnings were concurrent causes. Proceeding on the basis that one of those concurrent causes was insured and the other was not excluded, the Insurers were obliged to indemnify the loss.

Closing the Stable Door

Insurers will argue that the COVID-19 virus does not cause an adverse change to the physical condition of the property. But even if that is correct, they still face a significant exposure to the financial loss resulting from the COVID-19 outbreak, particularly if contagious disease is not expressly excluded as a peril or cause of loss. In response, conditions are now being introduced to exclude financial loss resulting from infectious disease from cover. But the horse has bolted. And the law is clear.

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