

BRIEFING NOTE

Final Words on COVID-19 Business Interruption Insurance – Welcome News for both Policyholders and Insurers

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Introduction

In our earlier briefing note ([COVID-19 Business Interruption Insurance – Welcome News for Policyholders, and Something for the Insurers](#)), we shared the judgment handed down by the UK Commercial Court in the test case of *The Financial Conduct Authority v Arch & Others* [2020] EWHC 2448 (Comm).

Parties appealed and the matter was brought before the UK Supreme Court. In what is the final word on this test case, the judgment [\[2021\] UKSC 1](#) provides welcome news to both policyholders and insurers.

The Disease, Prevention of Access and Hybrid Extensions

Disease / Hybrid Extensions. These policy wordings require an occurrence or manifestation of the disease within the insured premises or defined radius (the “**Relevant Policy Area**” or “**RPA**”). For policyholders, the Court confirmed that each occurrence or manifestation is satisfied by one symptomatic or asymptomatic (but diagnosed) person attending the RPA.

Prevention of Access / Hybrid Extensions. These policy wordings require a restriction of access or closure of the RPA.

- The Court disagreed (with the lower court) that imposition of restrictions must always have the force of law. That is, be in the form of legislation. An element of compulsion may suffice. However, government advisories or exhortations are not sufficient.
- For policyholders, the Court clarified that restriction or closure is satisfied when a discrete part of the business activities or business premises is restricted or closed. For insurers, the Court indicated that coverage extends only to those activities or premises affected by the restriction or closure. Those unaffected are not covered (even if those suffered from the depressive effects of the pandemic or restriction / closure).

Causation

Taking a different approach (from the lower court), the Court considered that questions of causation are of crucial importance.

- Whilst there needs to be proximate causation, this need not satisfy the ‘but for’ test. It is unrealistic to say that ‘but for’ each occurrence or manifestation, the government would not have introduced the measures leading to business interruption.
- It is more realistic to say that each occurrence or manifestation was an equal cause of the national measures. For policyholders, the Court determined that where there are multiple causes (some being insured perils and some being uninsured but not excluded perils), the insured peril may be said to be a proximate cause of the loss. For insurers, the Court indicated that if the factual circumstances were such that the sole proximate cause was an uninsured peril (for e.g., a travel agency whose business was affected by travel restrictions), then even though elements of the insured peril were present (i.e., restriction or closure of travel agency office), these were insufficient to secure policy coverage.

To establish causal link, it is worth remembering that like all other contracts, insurance policies are to be interpreted objectively (not subjectively). The Court indicated that parties may be presumed to have known that some infectious diseases can spread widely beyond the RPA. Insofar as Disease / Hybrid Extensions were concerned, so long as there was at least one occurrence or manifestation within the RPA, it was unlikely that the commercial intent of the policy was to treat occurrences or manifestations outside the RPA (if these were uninsured but not excluded perils) as depriving the policyholder of coverage.

Trends Clause

Previously, in *Orient Express Hotels Ltd. v Assicurazioni Generali SpA* [2010] EWHC 1186 (Comm) (“**Orient-Express**”), it was held that in applying the trends clause to the (hypothetical) standard revenue, one should ignore only the damage to the insured property. In *Orient-Express*, that was to imagine the revenue of an undamaged hotel in a hurricane battered city.

The Court, which comprised Lord Hamblen (who presided over *Orient-Express*) and Lord Leggatt (who was a member of the arbitral tribunal that made the underlying arbitral award in *Orient-Express*), decided otherwise. In handing down the majority decision, Lord Hamblen and Lord Leggatt expressly overruled the decision in *Orient-Express*.

For policyholders, the Court explained that when applying the trends clause, one should exclude only those circumstances unrelated to the insured peril and not those that are inextricably related to the insured peril (i.e., having the same underlying or originating cause). Otherwise, the trends clause – as part of the quantification machinery – would operate as a form of exclusion. For insurers, the Court clarified that the adjustments pursuant to the trends clause would apply only to the discrete part of the business that was interrupted or interfered by the insured peril (for e.g., for a restaurant that operated dine-in and takeaway operations, only the dine-in revenue (not the whole restaurant’s revenue) may be adjusted).

Summary

The judgment is welcome news for policyholders who purchased the relevant extensions. For those with the Disease / Hybrid Extensions, provided there was at least one occurrence or manifestation of COVID-19 within the RPA. For those with the Prevention of Access / Hybrid Extensions, provided a discrete part of the business was restricted or closed pursuant to measures compelled by the government. For all extensions, the amount of indemnity is calculated with respect to the expected revenues if the pandemic had not occurred.

At the same time, the judgment should be welcomed by insurers. Especially for the Prevention of Access / Hybrid Extensions, the extent of coverage relates to only those discrete parts of the business that were interrupted or interfered by the government measures. Insofar as there were parts of the business that were not (or not proximately) interrupted or interfered by the government measures, these would be excluded from the indemnity calculation.

How We May Assist

Since the declaration of a pandemic, our lawyers have been assisting all stakeholders in the insurance industry, insurers, brokers and policyholders, with business interruption insurance claims arising from the pandemic. To date, we have assisted commercial, hospitality and retail property owners, as well as international construction companies, with advancing and supporting COVID-19 related claims and negotiating renewal premiums for insurance policies.

We would be delighted to assist you or your company in considering its insurance coverage.

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