Business Interruption Insurance FCA Test Case:
the Supreme Court rejects insurers' appeals

The Supreme Court, has this morning 15 January 2021, handed down its judgment in the much-awaited FCA Test Case and the seven appeals in the 'Non-Damage Business Interruption Cover' cases, which 'leap-frogged' the Court of Appeal to be heard before a five-justice Supreme Court on 16 to 19 November 2020.

The Supreme Court considered six issues such as to which the FCA sought clarity and which are likely to be pertinent to many, if not all potential claims by some 400,000 BI policy holders across the UK, of a value said to be up to £1.8bn:

(a) the interpretation of "disease clauses";
(b) the interpretation of "prevention of access" clauses;
(c) the question of what causation must be established between the BI losses and the occurrence of a notifiable disease or other insured peril;
(d) the effect of "trends clauses" as to quantification of loss;
(e) the significance of "pre-trigger losses"; and
(f) the status of the Commercial Court's 2010 decision in the *Orient-Express* case.

In a judgment which can only be seen as an emphatic victory for the BI policy holders and FCA rather than for the insurers, whose appeals were rejected, Lords Hamblen and Leggatt gave the main judgment, with which Lord Reed agreed; with Lord Briggs delivering a separate judgment with which Lord Hodge agreed.

A. **"Disease" Clauses**: it was held by the majority that these clauses should be interpreted as covering business losses resulting from the Covid-19 pandemic, as long as there had been an occurrence of at least one case within the geographical radius of the clause (as applicable).

B. **"Prevention of Access" Clauses**: it was held that the interpretation of the court below, in relation to such clauses, such as that they only apply where there are restrictions imposed by a public authority following the occurrence of a notifiable disease, was too narrow. It was held that such a condition should be interpreted as having been met if the restriction imposed carried the impending threat of legal compulsion or was in mandatory and clear terms and indicated that compliance is required without recourse to legal powers. The Court did not rule on specific restrictions, mandatory guidance or general restrictions imposed, but considered that the test should be one of 'inability' to use premises for a discrete business activity rather than 'hindrance'.

C. **Causation**: the Supreme Court considered that the public health measures taken in response to the Covid-19 pandemic in the country as a whole, and individual cases of the disease by the date of the measures, were proximate causes of that measure. It was thus held, contrary to the arguments advanced by the insurers, that it was sufficient for a policy holder 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. In so rejecting the insurers' argument that there was no 'but for' causation in every such case, the Supreme Court moved away from this test in this situation on the basis that causation should be construed here as having been met where a series of events all cause a result, although none of them was individually necessary or sufficient by itself. In relation to 'hybrid' losses, it was held that these were not excluded from cover under such clauses if they were also caused by other (uninsured) effects of the pandemic.

D. **"Trends" Clauses**: most BI policies provided for the calculation of loss by adjustment of the results of the business in the previous year, to account for trends or other circumstances affecting it, so as to estimate results which would have been achieved absent the realisation of the insured peril. It was held these should not be interpreted as effectively denying cover and should not include circumstances arising out of the underlying clause, i.e., the effects of the pandemic itself.

E. **"Pre-trigger Losses"**: it was held that the Court below was wrong to permit adjustments under the "trends" clauses, to reflect a measurable downturn in a business due to the pandemic itself before the insured peril was triggered. It was held that adjustment should only be made to reflect circumstances affecting the business unconnected with Covid-19.

F. **The *Orient-Express* Case**: this case concerned a claim for BI losses arising from hurricane damage to a hotel in New Orleans. Here, the insurers' argument that cover did not extend to BI losses which would have been sustained anyway due to damage to the City of New Orleans even if the hotel itself had not been damaged, was accepted by Hamblen J (as he then was) hearing the Commercial Court's appeal from the decision of arbitrators which included Mr George Leggatt QC (as he then was). The Supreme Court considered the case was wrongly decided and should be overruled.

It seems likely that whilst opportunities exist for insurers to seek to avoid cover on the grounds that particular restrictions did not prevent access to premises in every case where a potential BI loss was suffered, the tide is very much against insurers. They are likely to experience judges regarding the Supreme Court's judgment as mandating a liberal as opposed to a restrictive approach to policy interpretation. For some insurers and some legal commentators, this judgment may even be seen as the development of

a new line of reasoning to obtain the result the Court wanted to reach, which may have longer-term consequences for the drafting of insurance contracts.

Whether the judgment will see a flood of additional claims under BI policies, only time will tell. This seems likely given the clarity provided by the Supreme Court as to the correct interpretation which should be applied to existing policies. Insurers are likely to have to consider whether they can rely upon aggregation clauses in certain relevant cases, such as in the case of larger business with multiple business outlets. in historic cases (such as which were not subject to the Supreme Court's judgment), and certainly will have to consider the re-drafting of BI policies in future cases where it is not intended to insure against losses caused by such a broad concatenation of circumstances.

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