FCA's BII Judgment Summary

Impact

The judgment – 160 odd pages – deals with 21 lead policies and 8 insurers but there 700 types of BII issued by more 60 different insurers to 370,000 policy holders, so it is going to be a big piece of business over the coming years.

Ultimately one must read the judgment in light of the specific policy being analysed, but there are some general issues: (a) disease clauses (b) denial of access; (c) causation/trends; (d) prevalence; (e) appeals

Disease Policies

Many BII policies provide cover in respect of notifiable diseases. A typical (RSA) policy says it shall indemnify against "*interruption of or interference with the Business during the Indemnity Period following any occurrence of a Notifiable Disease within a radius of 25 miles of the Premises*"

So how does that apply?

A few simple points, first an occurrence simply means an infection, it does not mean diagnosis. Second, following does not equate to proximate cause. So it is not necessary to show that the interruption or interference was proximately caused by the particular local occurrence; some indirect causation would suffice.

But there is a bigger related point, do these policies apply to worldwide pandemics such as Covid?

The gist of point made by all insurers, beyond the precise contractual wording, was that pandemic cover was expensive and separate and what was instead offered was cover for local outbreaks for local infectious diseases, not a global emergency. They generally said this meant the cover was only available in respect of those consequences which could be specifically attributed to the local occurrence and not to the occurrences outside of the zone.

The Court was not persuaded by this. Notifiable diseases include things like the plague and SARS. These are highly infectious diseases which can be transmitted in all sorts of directions and will often require more than a local response and to limit the recoverable losses to only the locally caused losses was just unrealistic. The only requirement was to have a local occurrence. The Court took the view that really what insurers were saying was that the insurance **only** applied if the disease **only** occurred in the relevant locality. But the policies did not say that.

So, looking at the QBE wording: "*interruption or interference with the business arising from: (a) any notifiable human infectious or contagious disease manifested by any person whilst in the premises or within a 25-mile radius of it…*"

- This does not mean interruption has to result from the particular manifestation within 25 miles
- It means the interruption has to result from the disease, so long as a person with the disease is within 25 miles

But it is not all one way.

QBE had issued a separate policy for nightclubs – it insured against loss resulting from a list of **events** including an occurrence within a radius and expressly said it was only liable for loss directly subject to the incident:

> "*loss resulting from interruption of or interference with the business in consequence of any of the following events:…(c) any occurrence of a notifiable disease with a radius of 25 miles of the premises…provided that that the (h) insurer shall only be liable for loss arising at the premises which are directly subject to the incident"*

On this policy the Court held that the nature of the list and the reference to events means something which is occurring at a particular place and in a particular way. So here the policy required the loss to have been caused by the particular occurrences within the radius and the insured needs to show that the cases within the radius, as opposed to elsewhere, were the cause of the interruption. It is difficult to see how insureds could prove that during the national lock down, but it might be available where there are local lockdowns.

So, for disease policies generally bad news for insurers, but if particular wording is akin to QBE2 there might not be cover.

Denial of Access

Denial of access policies insure against losses arising from denial of access because use of the premises was prevented. The paradigm example might be a serious crime and the police close the high street for a week. Here it is important to look at the precise wording, but it's fair to say insurers did reasonably well.

The Court held that prevention means it is impossible to carry on the existing business because of some lawful requirement or government advice. This means businesses which entirely changed their nature: a theatre moving online or pubs starting up a takeaway business might be ok, but otherwise prevention is required. An example in the hearing was fish and chip shops with some sit-down trade but largely takeaway. These were not prevented from operating and so would not be covered if prevention was required.

Similarly, government warnings against or prohibitions of non-essential journeys, using public transport and low footfall, all of which may have induced closure of premises was all insufficient. Nurseries which could have kept going with children of key workers or a bookshop with a small online service to general retail (which many of them have) or law firms who shut down and moved to zoom would all not be covered under these policies.

These policies also tend to require "action" by an "authority" preventing access. The Court held that firm advice or instructions by the PM were not this. It was only when legally enforceable regulations came in that there was a trigger.

So where a policy requires denial of access, if a business is not actually closed down there will probably not be cover.

Trends Clauses

The biggest point was perhaps how to measure the loss against which an indemnity was available.

What – using the dreaded phrase - is the counter-factual?

The Court said that the answer was in properly understanding the peril which was insured and that had to be stripped out. Usually the peril would be Covid and consequential issues such as changes in the law, govt advice etc. It agreed with the FCA that leaving in the pandemic and its economic and social effects but excluding the legal restrictions was artificial. The Court disapproved of the *Orient Express* case of 2010 which took a very restrictive view of what was take out for the purposes of the counter factual.

But a downward trend prior to the first local occurrence (in disease claims) or the law being changed preventing access (in denial of access claims) was to be left in and it was only the further deterioration for which an indemnity was available.

Other Points

On the question of proving prevalence: i.e. when Covid occurred or manifested in a particular place it will depend on the facts. The Court did not want to get drawn into general findings. But NHS Deaths Data, ONS Deaths data and reported cases are in principle capable of proving this. A distribution-based analysis or an undercounting analysis could also be enough to discharge the burden. Absolute precision was not required. This might be territory for further disputes if the amount involved warrants it.

Appeals

Not been announced, but rumour is the Supreme Court has allocated time in December and some insurers have indicated an appetite to take it further.

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