



Business Interruption Case: Supreme Court Judgement

As previously advised, in September 2020 a test case was brought by the Financial Conduct Authority (FCA) against a number of insurers on behalf of policyholders whose businesses were affected by the coronavirus pandemic in support of their claims for business interruption under their insurance policies.

The aim of the FCA in bringing the test case was to urgently clarify certain key issues of contractual uncertainty. They did this by selecting a representative sample of 21 types of policy issued by eight insurers. The role of the FCA was to put forward policyholders' arguments to their best advantage in the public interest.

Most insurance policies held by small and medium-sized enterprises (SMEs) are focused on property damage and only have basic cover for business interruption as a consequence of property damage. However, some policies also cover business interruption from other causes, in particular infectious or notifiable diseases ('disease clauses') and prevention of access and public authority closures or restrictions ('prevention of access clauses'). In some cases, insurers have accepted liability under these policies. In other cases, insurers have disputed liability while policyholders considered that they had cover.

The High Court's judgement in September 2020 resolved most of the key issues but, because they were unable to reach agreement, insurers and the FCA made 'leapfrog' appeals to the Supreme Court (without going to the Court of Appeal first).

The appeals to the Supreme Court related to six main areas of dispute as follows:

1. The interpretation of "disease clauses"
2. The interpretation of "prevention of access" clauses
3. The question of what causal link must be shown between business interruption losses and the occurrence of a notifiable disease
4. The effect of "trends clauses"
5. The significance in quantifying business interruption losses of effects of the pandemic on the business which occurred before the cover was triggered
6. In relation to causation and the interpretation of trends clauses, the status of the decision of the Commercial Court in *Orient-Express Hotels Ltd v Assicurazioni Generali SpA* (trading as Generali Global Risk)



On January 15th 2021 the UK Supreme Court handed down judgement in the test case brought by the Financial Conduct Authority (FCA) on behalf of UK based small and medium enterprises (SMEs).

The Supreme Court unanimously dismissed the insurers' appeals, which serves as positive news for many policyholders looking to advance claims for business interruption losses suffered as a result of the COVID-19 pandemic.

The previous High Court ruling in September 2020 stated that cover for losses was limited to those caused by mandatory public shutdowns. The Supreme Court's decision stated that that scope was too narrow. As such, losses resulting from any instructions from public authorities can now qualify as having constituted prevention of access.

A fuller explanation can be found on the FCA web-site here <https://www.fca.org.uk/news/press-releases/supreme-court-judgment-business-interruption-insurance-test-case>

What does this mean for our clients?

Undoubtedly the main thrust of this action by the FCA was to protect those businesses effectively shut down by Government such as hospitality, non-essential retail trades and the like. There is likely to be continued points of debate and we continue to look at whether these new rulings will affect any of the policies we have arranged on behalf of our clients.

While the Supreme Court judgement is positive for those policyholders whose policies are directly in scope, it remains the case that not all policies will respond to COVID-19 business interruption losses. The cover provided under a policy is linked to the type of business, trade or profession being insured and the reality is that the coronavirus pandemic has not impacted all businesses, trades and professions in the same way.

Following the Supreme Court judgement, we anticipate that some insurers may have already written or will shortly write to inform you that there is potential to make a claim under your policy. If you feel you have a valid claim with quantifiable losses, as your broker we will support you in submitting that claim to insurers as required.

If you have any further queries please do not hesitate to communicate these to your usual contact at Reason Global.