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Supreme Court decision on business interruption

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The 15th January is historically an interesting date: in 1535 King Henry VIII declared himself the Head of the Church of England and in 1559 Elizabeth I was crowned. More recently, in 2001 Wikipedia was created.

Adding to that list will be 15 January 2021 when the Supreme Court delivered its highly anticipated judgment in *FCA v Arch Insurance and Others* on the extent to which business interruption insurance covers losses arising from the Covid pandemic.

By way of quick recap, the FCA and eight defendant insurers brought a test case in September 2020 to construe the terms of 21 different types of business interruption cover. The implications of the case were in fact thought to affect 700 types of policies, held by 370,000 policyholders across 60 different insurers. Ana Klein's commentary on the High Court's decision, *A glimmer of hope for some business interruption policyholders?* made the point that while the decision was broadly good news for policy holders, there was still some uncertainty, which is why the FCA and the insurers pursued an appeal.

Given the importance of the case, the appeal went straight to the Supreme Court and an expedited remote hearing took place in October 2020. In short, the Supreme Court upheld some of the High Court's conclusions, although in part adopted different reasoning, and also expanded the interpretation of the policies, in favour of policyholders. The grounds of appeal raised by the insurers were dismissed.

Both courts looked primarily at disease clauses and prevention of access or use of premises, together with how the causal link with Covid 19 and adjustments for trends and other circumstances should be applied.

Disease clauses

This type of clause commonly covers losses arising where there is an occurrence of a notifiable disease within a limited distance (typically a 25 mile radius) from the insured's business premises. The Supreme Court interpreted this more restrictively than the High Court had done, holding that it would apply to business losses only where a particular person had suffered from Covid at the relevant time and within the 25 mile radius. That means it would not cover business interruption caused solely by cases outside that radius. However, once there is such a notifiable case, cover is not limited to business interruption arising only from that case but extends to losses resulting from a combination of cases in the area and the wider pandemic.

This applies even if the cases in the insured area would not themselves have been enough to cause the loss. This means that cover applies to losses caused by government action taken in response to nationwide concerns about the spread of the disease, provided at the time of government action there was a case of Covid within a 25 mile radius of the business premises.

Prevention of access/inability to use premises

This type of clause provides cover for losses arising from a public authority intervention which prevents access or use of the insured's business premises. The Supreme Court went further than the High Court, holding that a restriction imposed by a public authority did not have to have the force of law before triggering cover. It would also include an instruction in anticipation of subsequent legally binding measures being put in place, provided that the instruction was mandatory and in clear enough terms that the reasonable recipient would understand this and know what was required to comply. For example, the Supreme Court considered that the Prime Minister's statement on 20 March that specific businesses should close was capable of imposing a restriction despite not having the force of law.

The Supreme Court also interpreted "prevention of use of premises" more widely. It held that it was not limited to cases where the entire premises were incapable of use but would also cover a situation where one of a number of uses was prevented; and where a discrete part of the premises could not be used at all. Therefore, where dine-in restaurants ran a takeaway service, cover would extend to losses arising from their inability to provide a dining-in experience for customers.

The Supreme Court also determined that business was interrupted not just where it had to stop altogether but also where there was interference or disruption to the running of the business.

Hybrid clauses

This type of clause combines both disease and prevention of access. The Supreme Court applied its findings above in the same way for these clauses. As with a disease clause, cover would extend to losses resulting from a combination of causes giving rise to the public authority intervention, even if the cases in the area themselves would not have been enough to trigger the intervention.

Adjustment clauses for trends

This type of clause is part of the machinery for quantifying loss under a policy, designed to stop claimed losses being increased or reduced by unrelated matters. The Supreme Court was clear that these should be interpreted in the same way as the principal clauses and should not be used as a second way for insurers to exclude cover. Unless there is wording to the contrary, this clause should put the policyholder in the position they would have been in had the insured peril, and any other circumstances arising out of the same cause, not happened. Here that would mean any other consequences of Covid. Therefore, adjustments should be limited to trends and circumstances wholly unrelated to Covid.

Pre-Trigger Losses

Insurers had argued that losses sustained in the lead up to government interventions by reason of, for example, the public's reticence to visit business premises due to concerns about catching Covid, should be taken into account, reducing the pre-trigger income levels a business enjoyed. In line with its determination on trends and circumstances, the Supreme Court disagreed and held that losses like this should be ignored.

What is the impact of this decision on the property industry?

Clearly, the Supreme Court's decision has likely widened the pool of policyholders who can claim on their insurance policies and increased the levels of claim that they can make. However, a note of caution is that each case will depend on the wording of individual policies: one shoe does not fit all.

However, the decision does not impact on policies which are dependent on damage to premises, which many landlord's rent cesser insurances require. That may be the next area that needs clarification. The issue of business interruption is not over yet, by any stretch.