

Business Interruption Insurance Covid-19

Implications of the FCA Test Case

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The case

- *The FCA v Arch Insurance (UK) Ltd & Others* [2020] EWHC 2448 (Comm) – 15 September 2020
- Judgment of Flaux LJ and Butcher J
- Declaration as to issues of principle in relation to policy coverage under various specimen wordings

The context

- Note [80] of judgment:

“The Court is asked to construe a number of wordings which contain non-damage “extensions” to the “standard” Business Interruption (“BI”) cover provided by the relevant insurers. That “standard” cover is contingent on the occurrence of physical or material damage to the insured premises. There is no dispute before the Court about whether there is cover under such “standard” BI cover...”

- Therefore did not consider any argument as to wider view of meaning of damage (cf *MDS Inc v Factory Mutual*, Ontario Superior Court of Justice, 30 March 2020 and webinar on 29 April 2020) or application of standard cover – this is extensions territory...

The context (cntd)

- A trial but involving no expert evidence or decisions made in relation to disputes of fact
- The policies of 8 insurers and 21 specimen wordings
- Effectively a decision of a Divisional Court with likely route to appeal to Supreme Court
- As confirmed at hearing on 2 October 2020

Three parts

- Part 1: coverage issues
- Part 2: causation & trends clause issues
- Part 3: prevalence & proof issues

Judgment structure

- Section A: Introduction: [1]-[8]
- Section B: Factual background: [9] – [60]
- Section C: Principles of construction: [61] – [79]
- Section D: Disease clauses: [80]- [241]
- Section E: Hybrid clauses: [242] – [305]
- Section F: Prevention of access: [306]-[502]
- Section G: Causation: [503]-[535]
- Section H: Prevalence: [536]- [579]

Key timeline

- 12 Jan 2020: WHO novel coronavirus – SARS-CoV-2 [10]
- 5 & 6 March 2020: Covid-19 made “a notifiable disease” in England and then next day in Wales [20]-[21]
- 16 March 2020: advice against holding of large gatherings & PM announcement [25-26]
- 20 March 2020: PM – cafes, pubs etc to close [32]
- 21 March 2020: Regs under the 1984 Act; closure of certain businesses; equiv. provisions in Wales [34]
- 23 March 2020: Further PM announcement [40] & guidance followed (eg holiday accm on 24 March at [42])
- 26 March 2020: 26 March Regs: closure of most businesses and facilities offered goods and services to public [44]

Part 1

- Section C: Principles of construction: [61] – [79]
- The short route...[61], last sentence
- Or, slightly longer route:
- Wood v Capita [63]: objective test
- Plus a shower of Rainy Sky [64]
- Insurance exclusions not necessarily = contra proferentem [74]; Crowden v QBE [2017] EWHC 2597 (Comm) at [65]

Part 1: coverage (cntd)

- Section D: Disease clauses: [80]- [241]
- 4 different specimens
- Eg RSA 3 extension – [85] – indemnity “following” the “occurrence of a Notifiable Disease within a radius of 25 miles of the Premises”
- “occurrence” – [93] – one infection not diagnosis
- “following” – [94] – not proximate merely temporal [95]
- And satisfied even if part of wider outbreak: [111], cf..
- General exclusion L: [86], [115] – [117] short shrift

Part 1: coverage (cntd)

- Section D: Disease clauses: [80]- [241]...[cntd]
- RSA 4: ...within the “vicinity” [126]-[127], [137]
- Argenta: as above: [149] et seq
- MS-Amlin 1-2: similar approach to RSA 3 [175], [191], though note “within” [196] required diagnosed
- QBE 1: note use of word “manifested” [204], [224]
- QBE 2: use of word “consequence of the following events” and “occurrence of a notifiable disease within a radius of 25 miles of the premises” [208]; “event” must have caused BI [231]; coupled with use of word “incident” [232] (QBE 3 followed; [238])

Part 1: coverage (cntd)

- Section E: Hybrid clauses: [242] – [305]
- Hiscox 1-4
- 1-3: “financial losses...resulting...from an interruption...caused by...your inability to use the [premises] due to restrictions imposed by a public authority...following...an occurrence of any hum infectious disease...
- Mandatory v advisory – the former [267]
- Inability to use – beyond simply impairment of normal uses [268]
- 4: “within 1 mile” – national impact – “followed” as per Disease clauses
- RSA 1 (holiday cottages)
- Mandatory closure or restrictions [294]

Part 1: coverage (cntd)

- Section F: Prevention of access: [306]-[502]
- Arch [307], [308]
- “Prevention of access to The Premises due to the actions or advice of a government or local authority due to an emergency which is likely to endanger life or property”
- Insured peril is not simply the emergency but interruption resulting from the composite peril [309]
- Prevention v hindrance: former = closure [330]
- Restaurants v takeaways – context specific [331]
- EIO: snakes & ladders [352], [354], [373]-[377]
- Hiscox NDDA [390]; note “incident” [403], [404]



Part 1: coverage (cntd)

- Section F: Prevention of access: [306]-[502] [cntd]
- So Hiscox NDDA – narrow, localised
- MSA [419]
- MSA 1:

*loss resulting from interruption or interference with the **business** following action by the police or other competent local, civil or military authority following a danger or disturbance in the vicinity of the **premises***

- Vicinity local [430]; localised cover only [436]..cf [111]
- MSA2 – use of word “incident”; same as Hiscox NDDA; not same as “danger”

Part 1: coverage (cntd)

- Section F: Prevention of access: [306]-[502] [cntd]
- MSA 3 – “action” – incl. advice [443]
- RSA 2.1 & 2.2 [445]
- Like MSA covers not just prevention of access but also hindrance of access & use [464]
- Note use of word “in vicinity” however [466] – narrow cover
- Zurich AOCA clause [479] – similar to MSA 1
- “danger or disturbance” – transient incident [491], [500]

Part 2: causation & trends

- “*in consequence of*”; “*caused by*”; “*as a result of*”
- ‘But for’ causation and the identification of the **proximate cause**

It is a fundamental rule of insurance law that the insurer is only liable for losses proximately caused by the peril covered by the policy. This rule is easily stated in general terms, but its application to particular facts has been hotly disputed...A proximate cause is not the first, the last or the sole cause of the loss; it is the dominant, effective or operative cause. The insurer is liable if such a cause is within the risks covered by the policy and is not liable if it is within the perils excepted.

MacGillivray

Part 2: causation & trends (cntd)

- Difficulties emerge where there is chain of events - two or more concurrent proximate causes
- Concurrent and interdependent causes – provided one is insured peril and the other is not an excluded peril, loss is in principle recoverable (Miss Jay Jay) – interdependent means loss would not have happened if only one of the causes had been operative – satisfies ‘but for’ causation
- Concurrent and independent causes – if one is insured peril and the other is not (or is excluded), ‘but for’ causation not met in respect of either cause

Part 2: causation & trends (cntd)

- **Orient-Express** (Hamblen J)
- Appeal against arbitration award
- A owned hotel in New Orleans damaged by Hurricanes Katrina & Rita – surrounding area devastated
- All risks policy with BI cover – policy also covered PoA and LoA
- Trends clause in policy – similar wording to most BI policies
- Indemnity provided under lower PoA and LoA cover but not higher BI cover



Part 2: causation & trends (cntd)

- Tribunal and Hamblen J determined that appropriate 'but for' counterfactual was undamaged hotel surrounded by devastated city
- Highly questionable and meant that insured would have suffered BI loss in any event
- Meant that insured would have recovered BI loss from less damaging peril but recovered nothing from larger event
- NB insurer accepted that causes were independent when arguably interdependent
- Hamblen J accepted that it might be appropriate to depart from 'but for' causation where **fairness and reasonableness** require it – but was of the view that this was not that case!
- Hamblen J also held that trends clause would have reduced loss to nil – clause concerned only with damage not with causes of damage so insurer entitled to take into account impact on wider area

Part 2: causation & trends (cntd)

- **Orient-Express** heavily criticised by editors of leading textbooks...criticism warranted
- HC critical of judgment but unnecessary to determine that it had been wrongly decided
- Fallacy 1 = Misidentification of insured peril – Hamblen J conflated insured peril with damage – hurricanes were integral part of insured peril (all risks policy and not excepted) and not separate from it
- Fallacy 2 = absurdity – the more serious the fortuity, the less cover provided – BI cover for hurricane damage rendered illusory
- Fallacy 3 = Infected construction of trends clause because appropriate counterfactual was one where both damage to hotel and wider area stripped out

Part 2: causation & trends (cntd)

- Did not need to hold that **Orient-Express** wrongly decided (but would have) because distinguishable based on wording in issue where responsive cover – **composite or compound perils** – primacy given to construction
- (1) PoA composite = (a) prevention or hindrance of access (b) by government action (c) due to emergency – counterfactual requires all 3 to be stripped out
- (2) Public authorities hybrid = (a) inability to use (b) due to restrictions imposed (c) following occurrence of...disease – strip out all 3 from counterfactual
- (3) Disease clauses – disease within and outside of relevant area needs to be stripped out

Part 2: causation & trends (cntd)



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Part 3: prevalence and proof



- Some policies require proof of Covid within a certain radius of the insured's premises.
- Two issues: (i) geography; and (ii) date
- FCA wanted decisions on two issues: (i) type of proof; (ii) sufficient in principle

Part 3: prevalence and proof

“567. It is not possible for us to provide any generally applicable guidance as to what evidence may prove actual prevalence in varying factual contexts and for the purposes of different policies. ... The relevant evidence as to prevalence will also vary according to the particular timing and location of the claim. And different inferences might be drawn from a combination of underlying data in different contexts.”

Part 3: prevalence & proof

Types of evidence:

- Specific evidence
- NHS Deaths Data
- ONS Deaths Data
- Reported Cases

https://coronavirus.data.gov.uk/?_ga=2.40923681.2072597972.1601997047-786197426.1585243112



Part 3: prevalence & proof

Plugging the gaps:

(1) Averaging methodology

(2) Undercounting

- (a) Imperial College London: Flaxman, S. et al, *Report 13: Estimating the number of infections and the impact of nonpharmaceutical interventions on COVID-19 in 11 European countries*
- (b) University of Cambridge: Birrell, P. et al, *COVID-19: Nowcast and Forecast*

(3) Rebuttable presumptions

Part 3: prevalence & proof

Equitas Limited v R&Q Reinsurance Company (UK) Limited [2009] EWHC 2787 (Comm)

- Case concerning retrocessional excess of loss reinsurance and the 'LMX Spiral'
- E used actuarial model to show the minimum level of loss suffered. R said not good enough.

“Equitas is entitled to seek to discharge the legal burden resting upon it ... by the use of the best evidence it has available; should such evidence prima facie suffice to discharge that legal burden, Equitas does not need to undertake a process of regression; it would be for R&Q to mount a sufficient response which necessitates Equitas doing so.” Gross J

Part 3: prevalence & proof

Conclusions?

- NHS Deaths Data: can't say what conclusions should draw about prevalence of disease without further evidence.
- ONS Data: deaths in that week evidence of prevalence at start of week.
- Reported Cases: cases 2-3 days either side evidence of occurrence on particular day.
- Can't say anything about averaging methodologies absent evidence ... this is the real issue

Part 3: prevalence & proof

- Critical of FCA's approach. Per [576]:

“The provenance of a particular report, or the fact that it has been relied on by the Government, may assist in the assessment of whether it is reliable, and whether it is indeed the best available evidence, but it does not add much to the question of whether it could discharge the burden of proof once we assume it is the best available evidence. The quality of “relevance” is more helpful, because an insured will be more likely to satisfy the burden of proof if it relies on evidence which is relevant in the sense that it deals with the particular geographical area, and the particular timing, in question.”

