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COURT OF APPEAL CONSIDERS COVID-19 AGGREGATION - *VARIOUS EATERIES*

The Court of Appeal has handed down the latest judgment in the ongoing litigation concerning Covid-19 business interruption losses. The focus in this case was whether and how COVID-19 losses should be aggregated under the policy wording, and therefore whether the insured was entitled to one or more policy limits.

The policy in question aggregated losses by reference to a single "*occurrence*". Mr Justice Butcher found at first instance that the decision of COBR on 16 March 2020 and the imposition of restrictions on 20 March 2020 were the relevant aggregating occurrences. Both parties appealed in relation to different aspects of his decision. None of the appeals were successful.

Background

Various Eateries[1] was one of three matters heard in a sequential hearing by Mr Justice Butcher[2], concerning the Marsh resilience wording. The other two matters, *Stonegate* and *Greggs* were settled in advance of the appeal hearing.

Various Eateries (VE) is a company that operates several restaurants in London, which suffered loss from reduced footfall, social distancing measures, and the effect of government restrictions during the pandemic.

Its property damage and business interruption insurance policy was written on the Marsh Resilience policy wording. That wording was considered as part of the FCA Test Case, in which it was referred to as RSA 4, and there was no dispute between the parties to this case that it responded to Covid-19 losses in principle.

Aggregation issues

By the time of the appeal, the main issue between the parties was the application of the Single Business Interruption Loss (SBIL) provision in the policy that provided for aggregation of losses "*that arise from, are attributable to or are in connection with a single occurrence*"

At first instance, Butcher J held that the UK Government decision on 16 March 2020 to instruct people to avoid social venues was the aggregating occurrence. The enforced closures by government restriction from 20 March 2020 was another occurrence as were the restrictions of 24 September 2020 placed on restaurants. Butcher J rejected other candidates put forward by insurers as potential occurrences, including in particular the initial human infection in Wuhan (on the basis that, while it could be an "*occurrence*" it was too remote from the losses suffered by VE) and the introduction of COVID-19 into England or the UK.

Insurers challenged these findings. In relation to the Wuhan transmission, it said that the judge had failed to stand back and look for the most meaningful explanation for the losses. Instead, he had placed too much weight on the remoteness test.

Court of Appeal findings on aggregation

The Court of Appeal considered the case law on remoteness in the context of aggregation, including the well-known cases of *Caudle v Sharp* and *Scott v Copenhagen Re*. Lord Justice Males LJ, giving the judgment (with which the other judges agreed), held that:

- Whether and the extent to which the remoteness principle applies depends on the construction of the aggregation clause in question, and specifically the use of causal linking language in an aggregation clause such as "*arising out of*".

[1] [2024] EWCA Civ 10

[2] *Various Eateries v Allianz* [2022] EWHC 2549 (Comm), *Stonegate v MS Amlin* [2022] EWHC 2548 (Comm), *Greggs v Zurich* [2022] EWHC 2545 (Comm)

- How the test is to be applied depends on the nature and strength (or weakness) of the causal link that the aggregation clause requires. In this case the inclusion of the linking words "*in connection with*" in this context meant that only a weak or loose causal link was required.
- Remoteness is a legal tool to aid the search for a significant or relevant event, or an event that provides a meaningful explanation for the loss, and these are synonyms for the same concept. This is not to be equated with proximate cause, particularly where the clause requires only a weak causal link.
- The analysis to be carried out is as per *Scott v Copenhagen Re*. There are no firm rules, and the process calls for an exercise of judgment that is to some degree intuitive but also requires analysis of all the relevant circumstances of the case, including the nature of the causal link required by the aggregation clause. Relevantly to this case, an event far from the loss in time or place is more likely to be remote than one that is contemporaneous or geographically closer to the loss. An event is likely to be remote where the occurrence of a loss depends on a series of intervening steps that may or may not happen after the event, such as the spread of a disease or the introduction of government restrictions.
- The nature of the exercise – an evaluation of the facts – means that an appeal court should not interfere with a trial judge' s conclusion unless it is plainly wrong (meaning that the decision reached was not reasonably open to the judge or there has been an error of principle).

Applying these principles to the facts, Males LJ held that the Judge had been entitled to reach the conclusion that the meaningful explanation for VE's losses was the Government response to COVID-19 on 16 March 2020.

Although not necessary, Males LJ also agreed with the conclusion that the loss suffered by the closure of VE's restaurants was too remote in time and place from the initial animal to human infection in Wuhan to be the relevant occurrence. There were various intermediate steps that were not inevitable such as: the disease taking hold in humans, proving serious or fatal, spreading to the UK, and the government taking action. If an informed observer had asked why VE was suffering losses at any material time after 16 March 2020, the answer would have been the government had required its restaurants to close, not because of animal to human transmission of the covid virus in late 2019.

Males LJ held that position was broadly the same with regard to insurer's secondary case that the introduction of COVID-19 into the UK was the relevant occurrence. Males LJ disagreed with Butcher J's conclusion that this could not be a single occurrence, as the arrival of COVID-19 was something that happened at a particular place at a particular time, even if it was not possible to give the precise date or place. However, although geographically more proximate than the Wuhan outbreak it was still too temporally remote from the loss.

Males LJ therefore dismissed the appeal on this issue.

It was also noted that neither the parties nor Butcher J had drawn any distinction between loss suffered by VE before and loss suffered after the Government intervention on 16 March. Males LJ noted that it might be argued in another matter, if relevant, that the pre-16 March losses should be aggregated by reference to the initial infection in Wuhan or introduction to the UK (although the comment was not intended to determine how that should be decided.)

Per premises aggregation

Males LJ dismissed VE's appeal seeking to argue that aggregation should be per insured location (i.e., the limit of £2.5 million should be applied to each restaurant). Males LJ held that there was nothing in the SBIL language to suggest that this was the case. The policy in this case was different to that in *Corbin & King* where the court was considering a composite policy insuring the business of multiple insureds and which did not contain "per occurrence" type language.

Renewals and relaxations

The court rejected VE's application for permission to appeal on the findings that there were separate occurrences for the purposes of the SBIL when government measures were renewed or relaxed. Males LJ said Butcher J was clearly right on that point.

Scope of cover

Insurers challenged the decision on the scope of cover under the Prevention of Access and enforced closure clauses in the policy. The clauses provided cover for loss caused by notifiable diseases and by prevention of access "*during the period of insurance"*.

Insurers argued that cover only extended to losses suffered during the period of insurance, that is to say that cover ended when the policy ended, even if a closure implemented during that time continued. Males LJ rejected this argument. VE could recover for business interruption loss proximately caused by a covered event, ie an enforced closure or prevention of access during the period of insurance, even if it extended beyond the period of insurance subject to the maximum indemnity period.

Furlough

One issue that did not arise on appeal – it was not in issue in the Various Eateries claim – was how furlough payments should be dealt with. In *Stonegate*, Butcher J decided that insurers should be given credit for furlough payments. Stonegate were given permission to appeal that point but ultimately settled before the appeal was heard. This issue remains in issue on other cases and may reach the Court of Appeal in due course.

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