WIDER CONSEQUENCES OF THE SUPREME COURT JUDGMENT IN THE FCA TEST CASE

On 15 January, the English Supreme Court handed down its final judgment in the COVID-19 Business Interruption test case commenced by the FCA. It is clear that the Supreme Court's judgment will have wider ramifications for English insurance law (beyond COVID-19 business interruption claims), particularly with regard to causation and quantum.

However, in brief summary, the Supreme Court ruled on the key categories of "non-damage" Business Interruption extension clauses in dispute as follows.

- Disease Clauses respond to business interruption losses resulting from cases of disease which occur within a specified local radius. Each individual case of COVID-19 amounts to an effective proximate cause of the Government's restrictions, the result being that disease clauses respond to a broader range of losses caused by the pandemic (including losses consequential upon national restrictions).
- Prevention of Access and "Hybrid" Clauses (which refer to both Prevention of Access and Disease) were construed broadly with the Supreme Court's interpretation allowing for expansive cover. For example, terms such as "restrictions imposed" included Government instructions regardless of whether they had been incorporated into an accompanying regulation. Additionally, a policyholder will have an "inability to use" premises where they are unable to use/access a discrete part of their premises (as opposed to complete prevention).
- The Supreme Court considered that the proper use of 'trends' clauses (which are designed to allow adjustment of losses to reflect what those losses would have been if the damage had not occurred) was not to alter the scope of cover, but rather to assist purely with the quantification of loss. When quantifying the loss, a trends adjustment cannot be applied to any circumstances having the same originating cause as the insured peril. As a result, no global effects of the pandemic can be factored into the machinery of quantification once cover has been triggered. This does not prevent insurers taking into account previous circumstances, that have a bearing on turnover, but which are unconnected with the insured peril and do not arise from the same underlying fortuity.

Whilst the Supreme Court's judgment has obvious and very significant implications for Covid BI claims, the focus of this article is on the wider impact of this judgment on English insurance law, specifically relating to property insurance. The most important review surrounds the analysis of causation principles, and the consequences of that will no doubt have a lasting impact on insurance claims where complex causation issues arise, including in cases of so called "wide area damage" arising in Business Interruption claims.

Widening the application of *Miss Jay Jay / Wayne Tank*

When discussing the applicability of the proximate cause test, the Supreme Court turned to issues surrounding concurrent causes of loss, namely:

- Where there are two proximate causes of loss, neither of which are subject to an exclusion, but only one of which is expressly insured, insurers shall be liable for the loss (*Miss Jay Jay* [1987] 1 Lloyd's Rep 32); and
- Where there are two proximate causes of loss and one of those is an insured peril but the other is expressly excluded, the exclusion will usually take precedence (*Wayne Tank* [1974] QB 57).

Whilst this view of concurrent proximate causes has usually been limited to circumstances where there are two competing interdependent causes of the loss (i.e. in circumstances where the losses would not have occurred had one of those causes not been present), the Supreme Court considered that there was no reason why such an analysis cannot be applied to multiple causes which act in combination to bring about a loss.

Applying this to the pandemic, the Supreme Court considered that whilst any individual case of illness resulting from COVID-19 could on its own have caused the Government to introduce restrictions, it was the case that the restrictions came about in response to information about all the cases of COVID-19 in the country as a whole. They agreed with the High Court in noting that *"it is realistic to analyse this situation as one in which all the cases were equal causes of the imposition of national measures"*. So each case of Covid (of which there were potentially hundreds of thousands in the UK) was a separate cause, subject to vicinity provisions.

The Supreme Court did, however, accept that questions around causation become more difficult when the number of separate events that combine to bring about loss is multiplied many times over. Notwithstanding this observation, the Supreme Court could find nothing in principle which precludes an insured peril, in combination with many other similar uninsured events, being seen to bring about a proximate cause of a loss, even where the insured peril is neither necessary nor sufficient to bring about the loss by itself. However, in making a final determination as to whether the required causal connection has been satisfied, the ultimate determination needs to be made by reference to the policy wording and what has been agreed by the parties (which shall be a matter of contractual interpretation).

Watering down of the 'but for' test

It was the insurers' positon that a policyholder was required to evidence that a loss would not have resulted but for the occurrence of the insured peril. Because the effects of the pandemic were so pervasive across society, insurers contended that policyholders would have suffered the same loss regardless of whether they could point to an occurrence of COVID-19 or not.

In an important part of the ruling, the Supreme Court rejected the insurers' argument and explained why the but for test of causation is sometimes inadequate and noted, in summary, that there can be situations (such as the current pandemic) *"where a series of events all cause a result although none of them was individually either necessary or sufficient to cause the result by itself"*. Upon reaching this conclusion, the Supreme Court proceeded to disapply the 'but for' test in relation to the clauses in dispute and instead reiterated the importance of the principle of proximate causation, which they noted was the general approach to the question of causation in both marine and non-

marine insurance alike. Importantly, the Supreme Court acknowledged that the presumption of proximate causation can be expressly displaced by policy language, but it is rare for the test for causation *"to turn on such nuances"*. Previously the position was that the 'but for' standard could be relaxed where that was required by "fairness and reasonableness" but this ruling now goes a step further.

Overturning of *Orient Express*

A natural consequence of the Supreme Court's analysis of causation principles, and possibly the biggest news for the property insurance world which comes out of the judgment, is the overturning of the *Orient Express Hotels* decision, which has long since been criticised by policyholders as leading to absurd results.

Insurers' case around causation during these proceedings was partly premised on the decision in *Orient-Express Hotels Ltd v Assicurazioni General SpA* [2010] EWHC 1186 (Comm). In summary, the claim in *Orient Express* arose from business interruption losses, sustained by a hotel in New Orleans, following Hurricanes Katrina and Rita. A claim was made on an all risks policy incorporating a trends clause. It was insurers' position that the policy did not respond to business interruption losses because, applying the 'but for' test of causation, but for the damage to the hotel, it would still have incurred the consequential business interruption losses due to lost bookings in wake of the total devastation to its surrounding area. Hamblen J, as he then was, held that this position was correct. This was an appeal of an arbitration award made by a tribunal including Mr. George Leggatt QC (now Lord Leggatt).

The Supreme Court, now consisting inter alia of Lord Hamblen and Lord Leggatt, overruled the Orient Express decision for the following two main reasons:

- Where a loss is caused concurrently by both an insured and uninsured peril, arising from the same underlying circumstance (i.e. the hurricanes), so long as the uninsured peril is not expressly excluded, the loss resulting from both concurrent causes shall be covered. (This applies *Miss Jay Jay / Wayne Tank* to the wide area damage scenario).
- Having regard to their analysis of the trends clauses, the correct approach to the adjustment of claims in *Orient Express* would have been to exclude the circumstances that had the same underlying cause as the relevant damage i.e. the hurricanes.

It is fair to say that not many people expected this outcome because Lords Hamblen and Leggatt had not been expected to admit an error and overrule themselves, but this is exactly what they have done, *"gracefully and good naturedly surrendering former views to a better considered position"* borrowing the words (as they do) of a US Chief Justice, although they have had to look back to 1847 to find such a precedent, and it is indeed as rare an event as it is magnanimous of them.

The overturning of *Orient Express* is significantly good news for policyholders as it will now be difficult for insurers to deny cover or reduce an indemnity on grounds that the relevant losses would also have resulted from uninsured perils which share the same underlying fortuity as the triggered insured peril.

Applying this to the current pandemic, insurers will be unable to exclude losses caused concurrently by both an insured and uninsured peril, where both perils can be said to have arisen from the outbreak of COVID-19. *Orient Express* has always been much criticised by policyholders on the grounds of iniquity – the bigger the loss, the less cover is available. It could also lead to absurd windfall results on certain scenarios, for example in the hurricanes context if a hotel had been notionally the only one standing within a flattened wider area. This aspect of the Supreme Court's decision will therefore be a big relief to policyholders, but also brings clarity and common sense to this area of the law. It will be welcome news, as an example, for hotel groups now considering whether to launch Covid BI claims.

Conclusion

The Supreme Court's judgment will have far reaching consequences which go way beyond Business Interruption non-damage extensions triggered by COVID-19 losses. The substance of the ruling will have a significant bearing on how both insurers and policyholders interpret the causal link stipulated in the policy language. How English insurance law addresses concurrent causes of loss has also moved into "new territory" (as noted by Lord Briggs) and close attention must be paid as to how a broader application of the *Miss Jay Jay* and *Wayne Tank* principles will now shape the response of policy language. Finally, in circumstances where trends clauses form part of a policy's quantification machinery, the overturning of the *Orient Express* has removed a significant hurdle for policyholders in establishing cover for losses arising from a fortuity giving rise to both insured and uninsured perils, including in cases of so called wide area damage.

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