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COVID-19: MUCH ANTICIPATED JUDGMENT ON "DISEASE AT THE PREMISES" POLICY WORDINGS HANDED DOWN

Mr Justice Jacobs has handed down his decision in *Excel* and other matters,[1] holding that insurance policies providing cover where disease occurs "at the premises", are capable of being triggered by the COVID-19 pandemic. The Judge rejected insurers' arguments that these sorts of localised covers should be distinguished from the radius policies which were considered by the Supreme Court in the FCA Test case. It was held that the same approach to concurrent causation that the Supreme Court set out in that case, would also apply to these policies.

Background

The Judge was considering preliminary issues in six expedited cases, with the lead case a claim by the London International Exhibition Centre. One of the other cases concerned companies in the PizzaExpress chain, and the others all involved small businesses. All of the policyholders held a form of "at the premises" or "ATP" cover within their business interruption policies, with some containing "hybrid" clauses and some "disease" clauses.[2] The main issue was whether the Supreme Court's reasoning in the FCA Test case[3] applied to these types of cover. ATP wordings were not considered by the Supreme Court at that time.

Policy wordings

The policy wordings varied but by way of example the Excel hybrid wording stated (our emphasis):

> *"The word Damage is extended to include closure of the Premises or part thereof on the order or advice of any local or governmental authority as a result of an outbreak or occurrence **at the Premises** of A) Any human contagious or infectious disease other than Acquired Immune Deficiency Syndrome (AIDS) or any AIDS related condition, an outbreak of which is required by law or stipulated by the governmental authority to be notified"*

The Pizza Express (disease) wording stated (our emphasis):

> *"The Incident for the purpose of all cover provided by Section 2 includes:*
>
> *a. Notifiable Human Disease and Other Health Risks*
>
> *i. any occurrence of a Notifiable Human Disease **at the Premises** or a Notifiable Human Disease attributable to food or drink supplied from the Premises.....*
>
> *Notifiable Human Disease means human disease, suspected human disease or contamination which must be notified to the local authority, excluding any occurrence, whether directly or indirectly, of a. any mutation of Avian Flu that manifests itself as a human infectious or human contagious disease b. Severe Acute Respiratory Syndrome (SARS)"*

Supreme Court decision in the FCA test case

In the Supreme Court FCA Test case the Court considered "disease" and "hybrid" covers that extended cover to occurrences of disease in a radius around the insureds' premises including within 1 mile and 25 miles. The Court held

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[1] The full list of matters heard are *London International Exhibition Centre PLC, Hairlab Ltd, Mayfair Banqueting Ltd, Kaizen Cuisine Ltd, Why Not Bar and Lounge Ltd and Pizza Express Group Ltd*

[2] As categorised in the FCA Test case

[3] FCA v Arch [2021] UKSC 1

that (contrary to the Divisional Court's analysis) these clauses only provided cover for any business interruption caused by cases of COVID-19 within the radius, not the effects of cases outside that geographical area.

However, the Supreme Court went on to find that the correct approach to causation was to apply a concurrent causation analysis. It held that each case of COVID-19 was a concurrent, equal cause of the government restrictions imposed and the public response. Therefore it was enough to show (in the case of a disease clause) that the interruption was a result of government action taken in response to cases of disease which included at least one case within the relevant radius.

Insurers' arguments in this case[4]

Insurers argued that the Supreme Court's reasoning on causation did not apply to these policies due to the "localised" nature of ATP covers, extending only to occurrences at the insured's premises and not to anything beyond. They were of a fundamentally different nature to radius covers, described by one insurer as "chalk and cheese".

Some insurers submitted (in the context of hybrid cover) that to trigger cover, the occurrence at the premises had to be a "distinct" cause of the closure. The insured's premises had to be the distinct and specific target of the restrictions imposed, although it was not necessary for the restrictions to be only in response to the particular occurrence at the premises. Others argued for the strict application of the "but for" test, in other words, the restrictions had to be as a sole result of an occurrence at the premises.

Judgment

The Judge did not accept insurers' arguments and held that the Supreme Court's causation reasoning applied to ATP clauses in the same way as radius clauses. Thus, provided a policyholder can prove an occurrence of Covid-19 at its premises during the relevant period, there is cover in principle.

His reasoning included the following points.

- It was held that the localised wording did not affect the approach to causation, and the Judge was unpersuaded that ATP cover was something fundamentally different to cover extending to a radius. This was particularly so given that a clause which covered a given radius would also apply to occurrences within the premises themselves, i.e. the radius would spread out from the centre. The Judge also noted that whilst some of the radius clauses considered in the FCA Test case covered a very wide area, others concerned a very small area with a very close geographical connection to the premises and it was accepted that the size of the radius did not matter for the purposes of applying the analysis.
- The Judge referred to clauses that provide cover for occurrences in the "vicinity" of the premises, and expressed the opinion that the decision of Cockerill J in *Corbin & King*[5], that the Supreme Court's concurrent causation analysis applies to "vicinity" wordings, is correct, and would be followed. This issue will be given further consideration in a number of separate cases, also due for a conjoined hearing of preliminary issues in October.
- As in the FCA Test case, it was held that the nature of the notifiable diseases being covered was relevant, and the potential for those diseases to be widespread and call for a national response would have been known to the parties entering into the cover. The Judge did not accept that there was a fundamental distinction between a clause providing cover outside the premises but which may still impact them, and an ATP clause. In each case the nature of the diseases that were being covered remained the same.
- One objection to the application of the "but for" test in the FCA Test case was that it meant cases of COVID outside the territorial scope of cover would be set up in competition with those within it, and this objection remained the same for ATP cover.

The Judge considered that his conclusions were the appropriate result in view of the fact that, in his view, a different conclusion would give rise to surprising anomalies, from the point of view of a reasonable SME policyholder. A policyholder with a 1 mile or vicinity radius policy would receive cover for a local case of COVID whereas a policyholder next door with an ATP policy would not. He also referred to a decision of the Financial Services Ombudsman which applied similar reasoning.

[4] There were of course some nuances between the cases put for the different insurers, and the cases involved different wording.

[5] [2022] EWHC 409 (Comm).

Occurrences of COVID-19 prior to it becoming notifiable

The Judge held that cases of COVID-19 that occurred before it was made a notifiable disease were not capable of falling within these covers.

Taking the Excel clause, the correct causal sequence was: (A) an occurrence of notifiable disease at the premises, which causes (B) the closure of the premises on the order or advice of a governmental authority which causes (C) interruption of or interference with the policyholder's business at the premises. All of these elements are required for there to be a right to recover and the first is only satisfied if the occurrence is of a notifiable disease[6]. This conclusion was supported by the decision in Hong Kong in *New World Harbourview Hotel v Ace Insurance Ltd*[7].

The same analysis applied to the disease clauses being considered.

Meaning of "Medical Officer of Health of/for Public Authority"

Two of the policies required that the restrictions or closure must be placed on the premises on the advice or with the approval of the "Medical Officer of Health for/of the Public Authority". The insurers submitted that this referred exclusively to officers carrying out functions and duties on behalf of local government.

The Judge rejected the insurers' arguments. An ordinary reader of the type of policy issued in this case would understand "Public Authority" to extend to national governments, and the Supreme Court's declarations in the Test case supported this. There was nothing in the policy wordings to suggest a different conclusion. Therefore, the expression Medical Officer of Health extended to senior national government medical advisers.

Meaning of "suffered by any visitor or employee"

One of the policies referred to COVID "suffered by any visitor or employee". The Judge accepted that in the context of the particular policy wording "suffer" could be equated with "occur" or "sustain".

For more information, please contact the author of this alert

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[6] The judgment notes that in England COVID-19 became a notifiable disease at 6.15pm on 5 March.

[7] [2012] HKCFA 21