Business Interruption

Are you covered?

By Damon Bossino

The UK Supreme Court delivered a highly significant judgment in a test case which analysed the business losses occasioned by the Covid-19 pandemic which can be recovered from insurance companies.

We provide what we hope will be a useful analysis of the headline issues which were covered.

BUSINESS INTERRUPTION: ANALYSIS OF UK SUPREME COURT JUDGMENT

The UK Supreme Court delivered a significant judgment on 15th January offering much needed clarity on whether claims can be made by businesses on their insurance as a result of loss suffered consequent upon the Covid-19 pandemic. The judgment is involved and extensive running into 326 paragraphs. This article provides a very high-level treatment of its conclusions. Legal advice is crucial and recommended.

Decision welcomed

The Supreme Court decision was welcomed not just by those who suffered significant financial loss as a result of lockdown after lockdown, but by the insurance industry in the UK and the Gibraltar Government itself. Huw Evans, the ABI director general welcomed the 'clarity that the judgment will bring to a number of complex issues' and that as a result 'all valid claims will be settled as soon as possible' – with the industry reportedly expected to pay out over £1.8 billion in Covid-19 related claims. The positive reaction was reflected in Gibraltar's Parliament which was coincidentally in session on the day that the decision was made, when in answer to questions the Chief Minister said that the whole structure of the BEAT payments had been designed 'because the business interruption claims were being denied'. If businesses, he continued, can make claims against those who have been taking their insurance premiums then that is something that 'we will want pursued…because those payments under the insurance policies are payments into Gibraltar'.

It's all in the wording

From a reading of the judgment, whilst providing very helpful authority, it is clear that much, if not all, will depend on the construction of the wording of each individual policy cover. In the context of the analysis on causation, the judges stated that 'all that

matters is what risks the insurers have agreed to cover'.

The judgment analyses, in considerable detail, the effects of the language of the relevant clauses in the various insurance policies that were put before the Court. The welcome effect of the judgment is that policyholders whose policies have identical or similar wording will have their position bolstered when making claims against their insurances.

Disease clauses

Many policies extend cover to encompass loss suffered as a result of occurrences of illnesses whether in the business' premises or within a certain radius (usually 25 miles of the premises), i.e., they are not limited to loss resulting from direct damage to premises. The Court decided that a disease which spreads cannot be seen as something which happens at a particular time and place, 'it occurs at a multiplicity of different times and places' whilst an 'occurrence' happens on a particular date and place so that each case of Covid-19 was a separate occurrence of the disease and not the general outbreak. Only those cases of Covid-19 within the defined area would be considered an insured peril. As the lead judgment put it: 'the interpretation which makes best sense of the clause, in our view, is to regard each case of illness sustained by an individual as a separate occurrence…it is not the outbreak nor the disease itself which constitutes a 'Notfiable Disease', but illness sustained by any person resulting from that disease.'

Much of the judgment focuses on the geographic extent of the cover and the consequences which arise from that but given Gibraltar's size it is not expected that that will be a live issue here. As Lords Hamblen and Leggatt put it in the lead judgment, 25 miles 'is bigger than any city in the UK, more than three times the size of Surrey, roughly the combined size of Oxfordshire, Berkshire and Buckinghamshire, and around a quarter of the area of Wales.'

Restrictions imposed

The Supreme Court opted for a wide definition of what amounts to 'restrictions imposed' by a public authority. It held that an instruction given by a public authority may amount to "a restriction imposed" if 'from the terms and context of the instruction, compliance with it is required, and would reasonably be understood to be required, without the need for recourse to legal powers'. It described the statement of the Prime Minister of 20th March 2020 as capable of being a 'restriction imposed' regardless of whether it was legally capable of being enforced.

Inability to use

Not all business interruption due to 'restrictions imposed' by a public authority following an occurrence of a notifiable disease will be covered. They will apply only where there has been an 'inability to use'. The Court found that 'inability to use' would be satisfied if the policyholder is unable 'to use either the whole or a discrete part of its premises for either the whole or a discrete part of its business activities'. However, it must be an inability of use 'rather than hindrance or disruption'. Those businesses which were allowed to remain open will find it difficult to demonstrate the requisite inability.

Prevention of access

The Supreme Court was of the view that whilst prevention meant stopping something from happening and is different from mere hindrance, a business could suffer prevention of access if 'access to a discrete part of the premises or access to the premises for a discrete purpose will have been completely stopped from happening'. It cited the example of a restaurant which continued to offer take-away services. In these circumstances, it held that there was a prevention of access to a discrete part of the premises, 'namely the dining area of the restaurant'.

Causation

The judgment provides very useful analysis of the correct test of causation and the application of the proximate cause test together with findings of trends clauses and pre-trigger losses.

It is not possible in an article of this nature to over the detailed and complex analysis set out in the judgment. By way of summary, it stated that all Covid-19 cases across the UK were equal causes of the imposition of national measures and that each occurrence of Covid-19 was a separate cause of the loss – they represented multiple causes of the restrictions imposed and consequential losses. A policyholder would need to show that the business was interrupted as a result of the Government's measures taken in response to all cases of the disease so long as there was evidence of at least one case within the geographical limit. The Court explains why the "but for" test of causation is sometimes inadequate and that there can be situations 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. The Court rejects the "weighing" approach as unworkable and unreasonable.

Trends clauses

These are clauses which provide a method for quantifying the policyholder's financial loss. The Court decided that any adjustment should reflect circumstances 'which are unconnected to the insured peril and not circumstances which are inextricably linked with the insured peril in the sense that they have the same underlying or originating cause'. With this approach what the Court was trying to achieve is that they do not result in the taking away of cover provided by the insuring clause.

Pre-trigger clauses

Here the Court rejected the High Court's approach provided that adjustments can only be made to reflect losses affecting the business which are unconnected with the cause of the insured peril.

The Orient Express

The Court held that *Orient-Express Hotels Ltd v Assicurazioni Generali SpA [2010] EWHC 1186* was wrongly decided. The case concerned a claim for business interruption loss arising from hurricane damage to a hotel in New Orleans. The effect of this is that when an insured and uninsured peril operate concurrently, in that case the hurricanes damaging the hotel (the insured peril) and New Orleans (the uninsured peril), so long as the damage was proximately caused by the uninsured peril (and so long as it is not excluded) it is covered.

CONTACTS

Damon Bossino
djb@tsnlaw.com