SUPREME COURT'S APPLICATION OF CAUSATION PRINCIPLES HAS WIDE IMPLICATIONS

Covid-19 test case judgment brings clarity but policyholders and insurers will still have to grapple with many complexities.

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On January 15, 2021 the Supreme Court handed down its judgment in the appeal against the test case brought by the Financial Conduct Authority (FCA) about business interruption insurance coverage for insureds that have suffered loss because of the Covid-19 pandemic.

Last September the High Court ruled cover was available under most of the 21 sample business interruption policy wordings considered. This decision was appealed against by insurers and the FCA (along with the intervening Hiscox Action Group). Permission was granted for the appeal to "leapfrog" the Court of Appeal and be heard directly by the Supreme Court over the course of a four-day hearing in November 2020.

The Supreme Court has now substantially allowed the appeals of the FCA and interveners on certain grounds upon which they did not succeed at first instance, while unanimously dismissing the insurers' appeals.

The net result is that all of the insuring clauses in issue on appeal provide cover for business interruption caused by the Covid-19 pandemic and trends clauses do not operate to significantly reduce the indemnity available in the manner contended for by insurers.

Notwithstanding the similar overall outcome, the judges' reasoning diverges significantly from that of those in the court below - most notably, their application of causation principles will have wider implications for the market beyond the scope of business interruption insurance.

Key takeaways

- The Supreme Court adopted a narrower approach to when cover was triggered under various clauses, but found another route to cover via its application of causation principles. Its findings confirm in the insurance context, if a loss stems from multiple concurrent causes, satisfaction of the "but for" test is not essential before an event can be regarded as a proximate cause.

- When calculating loss, insurers cannot argue an insured's losses should be reduced because, but for the insured event, revenue would have been reduced by other (uninsured) perils, provided the insured and uninsured perils arise from the same underlying fortuity.

- Similarly, when considering pre-trigger losses, only circumstances that are wholly unrelated to Covid-19 should be reflected when adjusting for trends in the context of calculating an indemnity under an applicable business interruption policy.

- Where public authority intervention is a policy trigger, such intervention does not need to have the force of law. If a particular instruction was expressed in mandatory terms and in a sufficiently clear context such that it enabled a reasonable person to understand what compliance entailed and that said compliance was required without the need for legal powers, it may amount to a qualifying "restriction" or "action".

- There is an "inability to use" insured premises if: i) premises are unable to be used for a discrete part of a policyholder's business activities; or ii) a discrete part of the premises is unable to be used for business activities.

The judgment brings clarity for many critical coverage questions relating to business interruption insurance, but policyholders and insurers may still have to grapple with complexities relating to heads of cover and the application of retentions and limits to determine the quantum of recoverable loss.

Nevertheless, the FCA's Dear CEO letter of January 22, 2021 makes it clear the regulator expects insurers to proceed with making payments and it will be monitoring this.

Insurers should also be mindful that further delays may expose them to the risk of additional claims for damages from policyholders under the Enterprise Act 2016.

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