Clifford Chance

BRIEFING

Bath Racecourse: Supreme Court decision

Furlough payments and benefits received from third parties

13 May 2026

The Supreme Court has confirmed in *Bath Racecourse Company Limited v Liberty Mutual Insurance Europe SE* [2026] UKSC 14 that furlough payments are to be deducted from insurance recoveries for Covid-19 business interruption losses. In doing so, the Supreme Court addressed a point of wider relevance: the circumstances in which a benefit received from a third party should be taken into account when quantifying an insurance claim.

The takeaway for policyholders is that where a third party provides a benefit which could be said to eliminate or reduce a loss against which there is insurance, it should be recorded clearly that the third party intends the benefit to be solely for the recipient and not insurers, if that is the case.

Key issues

1. The Supreme Court confirmed that furlough payments are to be deducted from Covid-19 business interruption insurance recoveries by operation of standard "savings" clauses.
2. Furlough payments did reduce the policyholders' charges or expenses within the scope of standard "savings" clauses.
3. The Supreme Court rejected the argument that furlough payments were collateral or gratuitous benefits that should be left out of account when calculating insured loss.
4. The judgment clarifies the general rule that third-party payments will reduce insured loss, even if made voluntarily or gratuitously, except where there is a clear intention (express or inferred) that the payment is solely for the insured's benefit.

5 Applying that test, the Supreme Court found no evidence that the Government intended furlough payments to be solely for the recipients' benefit, so the exception did not apply.

6 The decision underlines that if a third party intends a benefit to be solely for the insured and not insurers, that should be documented clearly.

Background and the issues

The case concerned insurance claims in respect of the financial impact of the Covid-19 pandemic on certain businesses. The appeal focused on whether furlough payments received under the UK Government's Coronavirus Job Retention Scheme were to be deducted from business interruption insurance payouts. The central question was whether the payments constituted "savings" under standard policy clauses, e.g.:

"*If any of the charges or expenses of The Business payable cease or reduce in consequence of the Damage such savings during the Indemnity Period shall be deducted from the amount payable.*"

The High Court and Court of Appeal had both upheld the insurers' position that furlough payments should be deducted from business interruption claims as they were savings within the scope of savings clauses. The policyholders' appeal to the Supreme Court challenged this on two main grounds:

- the payments did not actually "reduce" employee costs as contemplated by the clause (the "**construction issue**"); and
- the payments were not legally caused by the insured peril because an entitlement to them did not depend on proof of the peril, and/or they should be regarded as collateral, gratuitous benefits not intended to benefit insurers (the "**causation issue**").

The construction issue

On the construction issue, the Supreme Court held that, on the proper construction of the savings clauses, furlough payments had "reduced" the charges or expenses of the policyholder's business as contemplated by the clauses.

The Supreme Court rejected the appellants' various arguments which included that employee costs had to be paid by the insured business and were simply reimbursed by the furlough scheme, which meant that the charge or expense that the insured had to bear was not lowered, diminished or lessened. The Supreme Court noted that no reason had been put forward to explain why a reasonable person in the position of the parties would choose to differentiate, as the appellants sought to do, between (i) the incurring of a charge or expense and (ii) ultimately bearing a charge or expense. That was a matter of mechanics which did not alter the economic outcome.

The causation issue

On the causation issue, the policyholders made two main arguments, as follows:

1. the existence of the insured peril was irrelevant to the entitlement to the payments. This meant the furlough payments were not proximately caused by the insured peril as required by the savings clause. The Supreme Court rejected this on the basis that the relevant point of principle had been addressed in the *FCA Test Case*,[1] where the Supreme Court had held that the losses were proximately caused by the insured peril even though they would have been suffered in the absence of the insured peril. The Supreme Court said the same test of causation must also apply between the insured peril and any savings.
2. the payments were gratuitous, benevolent or voluntary conferral of a benefit by a third party so were not to benefit insurers. The Supreme Court rejected this on the basis there had been no express stipulation or other clear indication that the Government intended the furlough payments to be solely for the benefit of the insured and not the insurers.

Wider relevance: benefits from third parties

In considering point 2 above, the Supreme Court set out how English insurance law treats a benefit conferred on the insured by a third party.

The Court started by noting that "*the general rule is that loss which has been avoided is not recoverable as damages … To this there is an exception for collateral payments (res inter alios acta), which the law treats as not making good the claimant's loss…*"[2]

The appellants' position was that what determines whether a benefit conferred by a third party diminishes the loss is whether the benefit is to be regarded as caused by the event insured against; and a payment made by a third party voluntarily or gratuitously or benevolently is collateral (i.e. the gain is not legally caused by the insured peril) and is to be left out of account. The appellants said that a number of cases (referred to, loosely, as the "subrogation" cases) were to be explained by this principle.

To illustrate their position, the appellants put forward a hypothetical case of a racing enthusiast who made a philanthropic donation to an insured who operated a racing arena for the specific purpose of helping the insured maintain the workforce at their racecourses during the pandemic lockdowns. They said that such a donation, although it reduced the wage bill, did not reduce it "*in consequence of the incident*" as the proximate cause of the reduction was an independent act of generosity by the donor. On this basis, they said, the payment would not fall within the savings clause.

The Supreme Court disagreed with this analysis and held that the principle illustrated by the cases was (as recently summarised by Butcher J in *Stonegate*[3]) that any payment made by a third party to the insured in respect of the subject matter of the insured loss, even if made voluntarily

[1] [2021] UKSC 1
[2] *Swynson Ltd v Lowick Rose LL*P [2017] UKSC 32; [2018] AC 313, para 11
[3] [2022] EWHC 2548 (Comm), at [284]

or gratuitously, will diminish the loss and be solely for the benefit of the insurer except where the intention of the third party in making the payment, expressly stated or inferred from the circumstances, was to benefit only the insured to the exclusion of the insurer.

Applying that test, the Supreme Court held that furlough payments made to policyholders, even if they could be characterised as voluntary, fell within the rule and not the exception. The payments reduced costs of employing staff which the policyholder would otherwise have borne as a result of continuing to employ those staff during the indemnity period.

The Supreme Court also did not accept that the furlough payments could properly be characterised as gratuitous, voluntary or benevolent in nature. The payments flowed as a matter of legal obligation from the circumstances arising from the Covid-19 pandemic which entitled the employer to claim furlough payments.

Consequences

The Court was told that the insurance market has deducted over £1bn from claims to reflect furlough payments- so the result that they do not need to revisit those claims is significant.

More broadly, the case is a reminder of the need for insureds to take care when receiving a benefit from a third party which eliminates or reduces a loss against which there is insurance of any type. If the third party intends the benefit to be solely for the recipient and not insurers, that should be made clear and ideally recorded in writing.

It is not uncommon for indemnities to be provided which protect companies or individuals for the consequences of events which are also insured, and indeed for indemnity arrangements to be put in place after the event to bridge the gap in time between an insured incurring a liability and the determination of its insurance claim. Where this is being done, the Supreme Court has affirmed that it will respect the intention of the parties that such a payment will not reduce the insurance payout- if that intention can be ascertained.

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