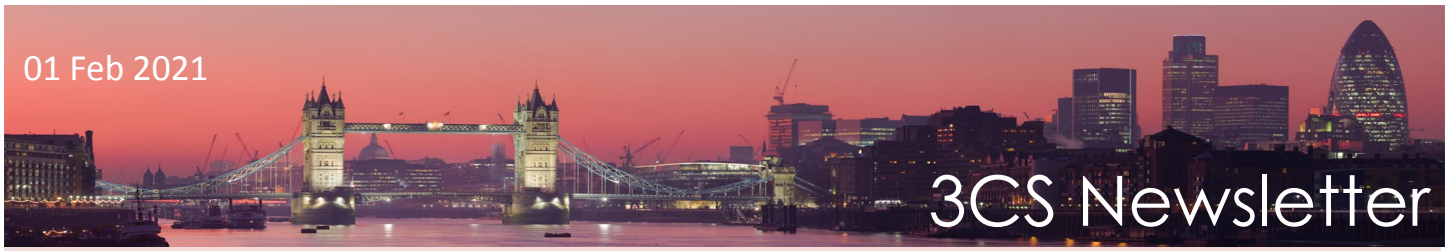

Litigation

Covid-19 Business Interruption Test Case - Supreme Court hands down Judgment in FCA's Appeal

On 15th January 2021, the Supreme Court handed down its judgment on the appeals heard in the business interruption (BI) insurance test case, The Financial Conduct Authority v Arch and Others [2020] EWHC 2448 (Comm). The appeals were brought by the Financial Conduct Authority (FCA), Hiscox Action Group and six of the eight insurers involved in the test case, following the High Court judgment recently made on 15th September 2020.

The Supreme Court found in favour of all four of the FCA's appeals bringing positive news to policyholders throughout the country that have suffered (BI) losses as a result of the Covid-19 pandemic. The Supreme Court summarised its judgment and we set out the key points below:

1. Disease Clauses - A disease clause in the insurance policy wording usually provides cover for (BI) following the occurrence of a notifiable disease at or within a specified distance of the insured's business premises.

The Court held that if there is a disease clause in a policy that is drafted using the words like "the occurrence of, a notifiable disease, within a specified distance of the insured's premises [usually 25-mile radius]", it will provide cover for (BI) caused by any cases of illness resulting from Covid-19 that occur within that radius. It does not cover interruption caused by cases of illness caused by Covid-19 that occur outside that area.

2. The Prevention of Access and Hybrid Clauses - A prevention of access clause generally provides insurance cover for business interruption losses resulting from public authority intervention preventing access to, or use of, the insured premises. A hybrid clause is a combination of disease and prevention of access wordings, which provide cover when restrictions existed on the premises as a result of a notifiable disease.

The Supreme Court ruled that "restrictions imposed" by a public authority (for example, the Government) would be understood as meaning mandatory measures "imposed" by the authority pursuant to its statutory or other legal powers. However, the Court did not accept that a restriction must always be legally binding before it can fall within the description.

The following guidance should be used:-

a). "Restriction imposed" may include a mandatory instruction given by a public authority in anticipation that legally binding measures will follow shortly afterwards, or will do so if compliance by the public is not achieved.

b). The Supreme Court didn't rule on whether all of the Covid-19 government announcements and regulations were "restrictions imposed". However, it commented that the argument is "clearly stronger" in relation to the following specific instructions to close business and other premises: -

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i) the instructions to schools to close given by the Prime Minister on 18 March 2020;
ii) the instruction to certain businesses to close given by the Prime Minister on 20 March 2020; and
iii) the instruction to certain businesses on 24 March that they should take steps to close for commercial use, as contrasted to the government's more general instructions to stay at home, stop all unnecessary travel and social contact, and work from home where possible.

c). "Inability to use" premises: The Court held that the requirement is satisfied if either the policyholder is unable to use the premises for a discrete part of its business or if it is unable to use a discrete part of its premises for its business activities. Although in both scenarios there is a complete inability of use, there would only be cover for the part of the business for which the premises cannot be used.

d). An example which might satisfy both of these situations is a golf course which is able to remain open but with its clubhouse closed so that there is an inability to use a discrete part of the golf club for a discrete but important part of its business - serving food and drink and the hosting of functions. And a restaurant or shop that stayed open for take-away or mail order business, may now advance a claim for the loss of in-person business provided their policy wording covers this.

3. Causation - When interpreting disease clauses, in order to show that loss from interruption of the insured business was proximately caused by one or more occurrences of Covid-19, it is sufficient to prove that the interruption to business was as a result of Government action taken in response to cases of disease which included at least one case of Covid-19 within the geographical area covered by the clause.

The Court also concluded that the 'prevention of access/hybrid wordings' cover the policyholder against the risk of all the elements of the insured peril caused by the BI loss.

What does the Supreme Court's Judgment mean for those businesses with BI insurance?

The judgment is very positive news for many, but not all businesses. This latest judgment significantly increases the prospects of a successful claim, and goes much further than the previous High Court judgment in September 2020. Although the Supreme Court interpreted the disease clauses more narrowly than the High Court, it gave a broader interpretation to the prevention of access/hybrid wordings. And its findings on causation mean that it will be more difficult for insurers to refuse coverage, or reduce an indemnity otherwise due to an insured. However, it should be stressed that insurance companies did not all use the same policy wording. Some were more relaxed than others.

Contact Us

If you require assistance with reviewing your business interruption policy in light of the Covid-19 pandemic to see if you may have coverage in light of the Supreme Court's recent decision, please contact the 3CS Dispute Resolution team or our Commercial team, who can advise accordingly, using the details provided below.

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