Browne Jacobson

COVID-19 BI Claims rumble on

09 May 2023

Previous
The risk of encroachment is not a nuisance: Davies v Bridgend County Council

Next
The perfect financial storm: top 5 trends making a mischief with BI adjustments

2022 continued to be affected by further COVID-19 BI claims, (albeit not to the same extent as we had in 2020 and 2021 with the **FCA v Arch** test case).

The recent judgments of Mr Justice Butcher in the Commercial Court actions involving **Stonegate Pub Company v MS Amlin**, **Greggs v Zurich**, and **Various Eateries Trading Ltd v Allianz** largely went in favour of insurers but are subject to appeal towards the end of 2023 to the Court of Appeal and possibly even beyond that to the Supreme Court. They involve issues of market importance involving the treatment of furlough payments, causation and aggregation.

In addition, Mr Justice Jacobs ordered the consolidation of several actions involving '*human notifiable infectious/contagious disease ... at the premises'* type wordings to be taken forward to preliminary issues hearing which was heard week of 24 April 2023. The consolidated proceedings involve: **Pizza Express v Liberty/AXA**; **Kaizen Cuisine v HDI Global**; **London International Exhibition Centre (ExCel) v Allianz & Others**; and **Mayfair Banqueting v AXA.** Again, the outcome is likely to be of significance for those insurers with similar wordings.

Mr Justice Jacobs has also ordered the consolidation of claims concerning the Liberty NDDA wording: "..***loss following interference with the Business carried out by the Insured in consequence of action by the Police or other Statutory Authority following danger or disturbance within 1 mile of the premises which shall prevent or hinder use of the Premises or access thereto or interference with the Business..***" to be heard over starting 24 October 2023. That consolidated preliminary issues hearing involves the following actions: **Gatwick Investment Limited & Ors v Liberty Mutual; Liberty Retail & Ors v Liberty Mutual & Ors; Hollywood Bowl Group PLC v Liberty Mutual; Pizza Express Group & Ors v Liberty Mutual & Ors; Fuller, Smith & Turner v Liberty Mutual & Ors.** It has been reported that the claim of **Bath Racecourse & Ors v Liberty Mutual Insurance**, and **Starboard Hotels Ltd v Liberty Mutual**, may also be included in the above. It has also been reported that the **International Entertainment Holdings Ltd v Allianz** action may be heard soon after the October hearing in the above, by the same judge.

Across the pond, a decision in Canada, **SIR Corp v Aviva** confirmed that a restaurant chain's BI losses arising from COVID-19 were not covered under its All Risks policy because they did not satisfy the '*direct physical…damage'* requirement. There was no such physical damage to the insured property, so the BI cover, which was a bolt on to the property damage cover, did not engage. The dispute between the parties focussed on whether the loss engaged cover. The Court agreed with insurers that in the absence of any property damage, COVID-19 was not an insured peril.

Additionally, in considering the arguments over policy construction, the Court gave a helpful reiteration that policies should be read as a whole. In this case SIR Corp sought to argue the interpretation of an endorsement (which was unconnected to the peril in question) was evidence of Aviva's intention regarding the scope of the BI cover. That argument failed. The Court held the application of an endorsement did not impliedly extend the scope of covered perils – to do so the clause would have had to explicitly state this intention.

Through **SIR Corp**, Canadian Courts have adopted a similar approach to COVID-19 related losses as the Courts in Australia and the U.S.

Contents

Key contact

Colin Peck

Partner

colin.peck@brownejacobson.com

+44 (0)20 7337 1016

Related expertise

Coverage disputes and policy interpretation

Property damage and business interruption