Browne Jacobson

Covid-19 – business interruption claims (Summer 2023)

07 August 2023

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Notwithstanding the Supreme Court's decision in January 2021 in the test case *FCA v Arch Insurance (UK) Ltd & Others*, business interruption claims arising out of Covid-19 have not gone away with new cases continuing to be issued and heard in the Commercial Court.

A series of recent Preliminary Issues hearings are providing further clarity on some of the issues and wordings that were not dealt with during the Supreme Court decision in the test case of **FCA v Arch.**

Preliminary issues hearings

'Disease at the Premises'

In the first of two consolidated sets of proceedings, Mr Justice Jacobs was asked to consider certain Preliminary Issues in six expedited test cases involving various forms of 'at the premises' or 'ATP' disease wordings in the case of **London International Exhibition Centre & Others v RSA & Others**. The matter was heard in April 2023 and judgment handed down in June 2023.

Although Insurers were successful on some points, the judgment represented a considerable victory for policyholders with the Commercial Court concluding that the Supreme Court test on causation in respect of 'radius' or 'in the vicinity' disease wordings also applied to 'at the premises' disease cover.

In doing so, Mr Justice Jacobs rejected Insurers' argument that there was a fundamental distinction between a 'radius clause' and an 'at the premises' clause, or that the latter was supposed to provide more limited localised cover. In his view, it was not an omission in the Supreme Court's judgment in ***FCA v Arch*** that there was no substantial discussion on why the same causation approach could not be applied whatever the size of the radius.

Mr Justice Jacobs agreed with Insurers that cases of Covid-19 occurring before it became 'a notifiable disease' were not capable of falling within the wording but agreed with the claimants that a 'Public Authority' was not confined to a local authority and would extend to the UK government and its senior medical advisors.

Other than RSA, all other insurers in the case and those insurers in each of the consolidated claims have been granted permission to appeal to the Court of Appeal.

'Prevention of Access'

The second set of consolidated proceedings is **Gatwick Investment Limited and Others v Liberty Mutual** which concerns the Liberty Mutual 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...".*

These claims are due to be heard in a 9-day hearing starting 24 October 2023.

The case of **International Entertainment Holdings Limited and Others v Allianz** involving a similar wording is listed for 1 and 2 November 2023 to follow directly after the ***Gatwick*** case.

Sub-limits

In the matter of **Pizza Express & Others v Liberty & Others**, Mr Justice Jacobs was asked to consider the sub-limits contained in the AON Trio Property and BI wording.

The Pizza Express Claimants had argued that there was a distinction between 'Limits of liability' and 'Sub-Limits' such that the 'Sub-Limits' were not intended to be subject to the aggregation of '*any one Occurrence*'. If successful, this would bring the Claimants' overall claim to around £260m.

Insurers argued that the 'Sub-Limit' in both applicable sections of the policy applied to '*any one Occurrence'* which gave rise to a maximum indemnity of £250,000 (for one occurrence) or, at most, £750,000 (for three occurrences) depending upon Mr Justice Jacobs' ultimate decision on whether the policy responds to non-localised (nationwide) restrictions and if so the relevant number of UK Governmental actions.

Mr Justice Jacobs agreed with insurers that a sub-limit was as much 'a limit' as an aggregate or overall limit, which applied '*any one Occurrence'*.

Permission to appeal was refused.

Stonegate

Also coming up at the end of this year are the appeals arising out of the **Stonegate v MS Amlin and Others**, **Greggs v Zurich** and **Various Eateries v Allianz**. **Greggs v Zurich** cases in which judgment was handed down in October 2022.

Since then, **Greggs v Zurich** has settled whilst the other two cases have been granted permission to appeal on the issues of aggregation, furlough payments and whether Stonegate's AICW clause provides cover for economic losses. It is anticipated that the appeals will be heard in back-to-back hearings in late November this year.

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