Summary of the Judgement of the FBD Business Interruption Test Case

Introduction

The Commercial Court delivered its much anticipated judgement on 5 February 2021 in the FBD business interruption test case. In a detailed judgement which ran to 212 pages the Commercial Court ruled in favour of the four pub owners (the "Plaintiffs") who claimed that FBD Insurance Limited (the "Defendant") was required to cover their losses for the enforced closure of business during the COVID-19 pandemic.

The principal question to be answered by the Commercial Court was whether the Defendant was obliged to cover the losses suffered by the Plaintiffs following the closure of pubs and restaurants on 15 March 2020 due to COVID-19.

The Risk Covered/The Composite Peril

Justice McDonald stated that the term "peril" is shorthand for the nature of the risk covered by the policy. In this case, the cover available under the extensions contained in s.3 of the policy was based on a list of named perils. In relation to extension 1 (d), there was a significant disagreement between the parties as to the nature of the insured's peril.

The Plaintiffs Argument

The Plaintiffs maintained that the relevant peril is a composite one involving all the elements of extension 1(d) of the policy namely that the business has been affected by:

*"**Imposed closure** of the premises by order of the Local or Government Authority **following**.....*

(d) Outbreaks of contagious or infectious diseases on the premises or within 25 miles of the same." (emphasis added)

The Defendant's Argument

The Defendant argued that the relevant peril for present purposes was the "imposed closure" **only**. This was an important aspect of the Defendant's case as if correct and in light of the position adopted by the Defendant's in relation to causation it would "substantially reduce the extent" of the recovery by the Plaintiffs as they would have

to show that the losses suffered stemmed from the closure as opposed to the outbreaks of COVID-19 giving rise to the closure.

If this argument succeeded, it could give rise to "significant difficulty" for the Plaintiffs as the Defendant's would be free to contend that the losses would have arisen even if the pubs were open during the period in question given the existence COVID-19 in the community and all of the restrictions (for example, social distancing and travel restrictions) which would continue to exist.

The Plaintiffs Argument

The Plaintiffs argument was that the insured peril was a composite peril of the "*imposed closure*" by "*order of the Local or Government Authority"* following the outbreak of COVID-19 on the premises or within 25 miles of it.

The Commercial Court's ruling

Justice McDonald rejected the Defendant's argument and held that rather than breaking up the clause in the manner suggested by the Defendant, the insured peril clause should read as a composite peril as argued by the Plaintiffs. Justice McDonald noted that this is how the clause would be read by a reasonable person standing in the shoes of the parties to these proceedings.

Cover in relation to localised outbreaks.

The Commercial Court had to consider whether the cover available is confined to imposed closures arising solely from localised outbreaks of contagious or infectious diseases. This issue arises in circumstances where the imposed closure ordered on 15 March 2020 arose in response to a national situation where cases of Covid-19 had arisen in many different areas around Ireland and where the government was concerned that the difficulty in maintaining social distance within pubs meant that pubs would have to be closed.

The Plaintiffs Argument

The Plaintiffs argued that in order for cover to be triggered all that was required was that there should be an occurrence of COVID-19 within the 25 mile radius as prescribed by the policy. It was their view that each occurrence was part of a wider picture which dictated the response of the government. The Plaintiffs also used the analysis carried out by the Divisional Court in the *Financial Conduct Authority v. Arch Insurance (UK) Ltd*[1] *(the "FCA case")* by arguing that each of the individual occurrences was a separate but effective cause.

The Defendant's Argument

The Defendant's argued that the interpretation of the Plaintiffs would involve the court giving no meaning to the clear geographical restrictions incorporated into the insuring clause. The Defendant maintained that a reasonable person in the position of the parties to the case would have understood the cover available to extend solely to closures following an outbreak of the disease in the specified local area and not beyond the area.

[1] [2020] EWHC 2448 (Comm)

The Defendant's contended that that their viewpoint is consistent with "*fundamental principles of insurance*" and their Counsel stated that*:*

"It is one thing to price risk and insure an imposed closure due to an outbreak of disease within a particular locality. It is quite another to price risk and insure imposed closures due to nationwide outbreaks of disease which, by definition, are outbreaks likely to result in closure simultaneously of all premises within the State at a nationwide level."

The Commercial Court's ruling

Justice McDonald rejected the Defendant's argument, he found while it is clear that in order for cover to be available there must be an outbreak of the disease at least within 25 miles of the premises and once that element of the peril is satisfied, the fact that there are also outbreaks outside that radius does not deprive the Plaintiffs of cover.

Justice McDonald noted that it would have been a *"simple and straightforward matter for FBD to so provide in its policy"* and the Defendant chose not to use wording that referred to an outbreak of a disease *"on the premises or* ***wholly*** *within 25 miles of same".*

However, Justice McDonald did also note that simultaneously occurring outbreaks outside that area may make it more difficult to demonstrate causative connection between the imposed closure and the localised outbreaks.

Meaning of the word "following"

The question which arises in this context is whether the use of the word "*following"* means that an *"imposed closure of the premises by order of a government or local authority"* must have been **proximately caused** by *"an outbreak of contagious or infectious disease on the premises or within 25 miles"* or whether the word should be interpreted as imposing some lesser standard of causation.

The Plaintiffs Argument

The Plaintiffs maintained *"following"* is unambiguous in its terms and even in the event the Court finds that it has more than one meaning, the Plaintiffs will rely on the contra proferentem principle which provides the most favourable meaning to the Plaintiffs should be adopted (as they were not the drafters of the policy).

The Defendant's Argument

The Defendant argued that the word ''*following"* should be interpreted in the same way as the words ''*as a result of"* and if the Plaintiffs were to recover under the policy it must be shown that the "*outbreak of infectious disease on the premises or within a 25 mile radius*" were the direct or dominant cause of the order to close by the government on 15 March 2020.

The Commercial Court's ruling

Justice McDonald noting the unique nature of this case said other than the *FCA case*, none of the parties were in a position to identify any authority on the meaning of the word *"following"*. Justice McDonald when ruling on this point of the case referred to a decision of the New South Wales Supreme Court which addressed the meaning of the word ''*following"* and also referred to the definition of the word under the Oxford English dictionary. Justice McDonald ultimately (and unsurprisingly) relied on the FCA judgement by ruling that the word *"following"* meant that the outbreak had to be a cause, but did not need to be the proximate cause, of the enforced closures and thus rejecting the Defendant's argument.

Causation – "But For" Test & Proximate Cause

Under the application of the "but for" test an Insured is entitled to be indemnified by the Insurer in respect of those losses which the Insured can prove would not have arisen *but for* the insured peril.

The Defendant's Argument

The Defendant's argued that insured peril was narrow and restricted to the imposed closure of the pubs (and did not include the wider effects of COVID-19). Accordingly, they said but for the imposed closure of the pubs the business interruption loss would always have been suffered essentially due to the wider effects of COVID-19 (for example social distancing and travel restrictions). In other words, it was said even if the pubs had not been required to shut and remained open, they would have suffered the same loss owing to the wider effects of the COVID-19 pandemic.

The Plaintiffs Argument

Simply, the Plaintiffs argued that the insured peril included the imposed closure and **also** the outbreaks of COVID-19. As mentioned above, their arguments on what amounted to the insured peril was successful. Therefore, the effects of COVID-19 could not be treated as part of the counterfactual to argue that but for the insured peril the same business interruption loss would always have been suffered.

The Commercial Court's ruling

Justice McDonald explained that the "but for" test was not always adequate and if taken to its extremes could give rise to anomalous results.

For instance, where a loss arises due to two concurrent causes operating together to give rise to a loss – one of which is an insured peril and one which is not an insured peril (but not excluded under the policy) - a strict interpretation of the "but for" test would mean that the policy would not respond.

However, Justice McDonald explained that in that type of case a test of proximate causation would result in their being cover. A cause has been said to be a proximate cause if it is the efficient cause of the loss or made the loss sufficiently inevitable. A proximate cause does not have to give rise to the loss of itself.

So, in this case Justice McDonald explained to the extent there are overlapping proximate causes of the plaintiffs losses – one of which was the composite insured peril (of imposed closure of premises following an outbreak of COVID-19 within the 25-mile radius) and the other being society's response to COVIV-19 / cases of COVID-19 outside the 25-radius (which were not insured perils but not excluded) – then the policies would respond. It would seem that the position may have been different had the policies included an exclusion for business interruption caused or contributed by, say, disease occurring outside the 25-mile radius referred to in the policy.

Trends Clause

The purpose of a trends clause is to limit the liability of an Insurer to the losses which would have been sustained had the insured peril not occurred. There was a dispute as to whether the reduction in sales suffered by the Plaintiffs in the days preceding the imposed closure on 15 March 2020 constituted a trend and should be carried forward into the period of closure.

The Plaintiffs Argument

The Plaintiffs accepted that their peril did not occur until 15th March 2020 however the reduction in sales prior to this period ought to be considered when assessing the value of their loss. The Plaintiffs argued that it would be contrary to principle if any element of the insured peril was to be considered in adjusting the amount of the payment to be made by the Defendant's under the insurance policy.

The Defendant's Argument

The Defendant maintained that, under the "*trends and circumstances*" provisions of the policy, any trends and circumstances affecting the business prior to the occurrence of the insured peril on 15th March 2020 are to be taken into account in adjusting the amount to be paid. Naturally, this would result in reduced sums being paid to the Plaintiffs.

The Commercial Court's ruling

Justice McDonald rejected the Defendant's approach and held that in applying the "*trends and circumstances*" clause one must exclude the effects of the insured peril from the calculation.

Justice McDonald further stated it would oppose the nature of an insurance policy as a contract of indemnity, to allow the effects of the insured peril to reduce the payment to be made to an insured who has the benefit of cover for that peril.

The Indemnity Period

The purpose of the indemnity period is to deal with the ongoing effects on the business of the insured after a loss covered by the policy.

The Plaintiffs Argument

The Plaintiffs argued that they may claim for whatever loss of business they have suffered in the period after the pubs reopened where they continue to suffer loss of business as a consequence of the continued impact of the disease.

The Defendant's Argument

The Defendant's argued that the interpretation put forward by the Plaintiffs would involve recovering losses which arise not as a consequence of the insured peril but as a consequence of the existence of the disease after the closure has come to an end.

The Commercial Court's ruling

Interestingly this was the only aspect of the case where Justice McDonald found in favour of the Defendant. Justice McDonald held that Plaintiffs were mistaken in relation to this aspect of their case and rejected the claim that they are entitled, post the period of closure, to recover for ongoing losses in respect of the continuing effects of Covid-19. However, Justice McDonald did caveat this by saying that to the extent that the Plaintiffs can show their businesses continue to be affected by the composite peril after the period of imposed closure comes to an end, they are entitled to be indemnified for those losses until the losses cease or the indemnity period comes to an end (whichever is the earlier).

Conclusion

The decision of the Commercial Court is a red letter day for many in the hospitality industry and a much needed tonic for those who will be seeking to rely on similar business interruption policies with other insurers. Noel Anderson Managing Director of Lemon & Duke released a statement on Friday afternoon expressing his delight with the outcome of this case. However. Mr Anderson unsurprisingly was quite forthright in his statement and stated that "*it should never have come to this*" and that he *"specifically had taken out a business interruption policy to protect us against COVID-19."*

The Defendant has confirmed that they will not be appealing the outcome of this case and will begin to make interim payments to Policyholders despite the question of quantum be deferred to a further hearing.

Further Information

Caytons
Changing Perceptions

John Sparks
Solicitor
sparks@caytonslaw.com