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Locke Lord QuickStudy: UK High Court Rules on Business Interruption Insurance Test Case

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On September 15, 2020, the UK's High Court issued its highly-anticipated ruling on the "test case" for COVID-19 business interruption insurance coverage. The case was brought by the UK Financial Conduct Authority (FCA) on behalf of several policyholders – many small and medium sized enterprises (SMEs) – to determine how the Court would rule on several different policy wordings for business interruption insurance in relation to losses arising out of the COVID-19 pandemic. The High Court was presented with 21 different "lead" policy wordings and asked to rule on whether each provided coverage under the facts of the COVID-19 pandemic. The case was defended by eight insurers whose policies contained one or more of the representative wordings: Arch Insurance (UK) Limited, Argenta Syndicate Management Limited, Ecclesiastical Insurance Office plc, Hiscox Insurance Company Limited, MS Amlin Underwriting Limited, QBE UK Limited, Royal & Sun Alliance Insurance plc, and Zurich Insurance plc.

In its complex and highly-technical 162-page opinion, the Court, for the most part, ruled in favor of the policyholders. The Court bundled the representative policy wordings into three main categories, all of which had some sort of "non-damage" extensions to the "standard" business interruption clauses:

1. "disease clauses" which cover, for example, business interruption "following any occurrence of a notifiable disease within a radius of 25 miles of the premises";
2. "hybrid clauses" which cover, for example, "both [] restrictions imposed on premises and to the occurrence of manifestation of a notifiable disease"; and
3. "denial of access clauses" which cover, for example, "where there has been a prevention or hindrance of access to or use of the premises as a consequence of government or local authority action or restriction."

For the "disease" and "hybrid" clauses, the Court largely ruled in favor of the policyholders and held that those clauses generally provide cover for COVID-19 business interruption claims (subject to additional language that provided limited cover for disease occurring at a particular time, in a particular place, or in a particular way). For the "denial of access" clauses, the insurers were largely, but not completely, successful. The Court noted that the typical language provided coverage for a localized event such as an explosion or a bomb scare, but not for a national emergency such as COVID-19. However, the Court did not make any blanket rulings on the "denial of access" clauses, noting that the outcome would depend on the specific policy language and the facts of each case.

For UK insurers and policyholders, this is a significant ruling, likely impacting tens of thousands of policyholders and potentially resulting in billions in liability to the insurers. The Court will hear applications to appeal the decision

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on October 2. If the judgment is appealed, there is a possibility the case could jump straight to the Supreme Court for an expedited ruling. Regardless of whether the ruling stands on appeal, it is not binding on insurers or policyholders with U.S. policies and it is unlikely to have much persuasive value on the cases pending in the U.S. The Court in the FCA test case analyzed “non-damage” extensions to typical business interruption policies that are not prevalent in the U.S. In contrast, the vast majority of business interruption policies issued in the U.S. require “physical loss of or damage” to property. Indeed, the FCA stipulated at the outset of the test case that the “standard” business interruption coverage for SMEs issued in the UK (which is similar to the language in the U.S.) covers business interruption claims only when there is property damage; thus, losses arising out of COVID-19 would not be covered. The UK ruling may, however, boost enthusiasm to pursue cases against insurers in the U.S. and would be persuasive authority for any policyholder that is covered by a policy with similar “non-damage” language.

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