COVID-19 AND BUSINESS INTERRUPTION INSURANCE: *CORBIN & KING LTD AND OTHERS V AXA INSURANCE UK PLC* [2022] EWHC 409 (COMM)

A Case Note from the 2TG Insurance Team **March 2022**

To borrow from the late AA Gill, 'Breakfast At The Wolseley', *Analysis is everything. The beginning, the first thing … and the end of things.*

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Introduction

1. On 25 February 2022, Mrs Justice Cockerill handed down Judgment in *Corbin & King Ltd and Others v AXA Insurance UK plc* [2022] EWHC 409 (Comm)

2. As the learned Judge said: "*This case concerns the scope of cover provided by a Denial of Access (Non Damage) ("NDDA") clause to a combined business insurance policy issued by the Defendant …*" [J1]. "*The Policy was issued to the Claimants, the owners and operators of a number of well-known restaurants, cafés and other establishments in and around London*" [J2]

The Coverage Issue

3. The coverage issue in the case was:-

> "*Whether the NDDA clause provided effective cover for loss resulting from restrictions on access to the Claimants' premises under government regulations passed in response to the COVID-19 pandemic in the course of 2020*" [J3]

The Facts

4. The relevant insuring clause was in the following terms:-

> "***Denial of access (non-damage) cover***

We will cover you for any loss insured by this section resulting from interruption or interference with the business where access to your premises is restricted or hindered for more than the franchise period shown in your schedule arising directly from:

1 the actions taken by the police or any other statutory body in response to a danger or disturbance at your premises or within a 1 mile radius of your premises.

2 unlawful occupation of your premises by third parties

Provided that

1 the insurance provided by this cover shall only apply for the period starting with the restriction or hindrance and ending after 12 weeks during which time the results of the business are affected

2 our liability for any one claim will not exceed the limit shown in your schedule.

We will not cover you where access to your premises is restricted or hindered as a result of

1. physical damage to property at your premises or elsewhere

2. strikes, picketing, labour disturbances or trade disputes

3. the condition of or the business conducted within your premises, or any other premises owned or occupied by you

4. notifiable diseases as detailed in the Murder, suicide or disease cover

5. actions where you have been given prior notice."

5. As is well known, Government COVID-19 regulations required cafés, pubs, bars and restaurants to close, apart from takeaway services. The parties agreed:-

   (i) the Claimants' premises were forced to close from 20 March 2020 until 4 July 2020;

   (ii) an enforced closing time of 10.00 pm was introduced from 4 September 2020;

   (iii) the Claimants' premises were forced to close again from 5 November 2020 to 2 December 2020.

6. The Claimants' business interruption claim under the Policy was rejected by AXA.

The Law

7. The Judge carried out a characteristically thorough and perceptive analysis of:-

   (i) *FCA v Arch*:-

   (a) in the Divisional Court [2020] EWHC 2448:
   (b) in the Supreme Court [2021] UKSC 1; and

   (ii) The Irish High Court decision in *Brushfield Limited (t/a the Clarence Hotel) v AXA Insurance Designated Activity Company & Anr* [2021] IEHC 263

(iii) Lord Mance's Award in the *China Taiping Arbitration*. [J46] - [J124].

8. In the light of that analysis the Judge identified the two central issues as being: first, the proper construction of the insuring clause; and, second, (having regard to the answer to the first question) the correct approach to causation.

The Coverage Issue

9. The Claimants contended that they were entitled to an indemnity under the NDDA clause provided they could demonstrate:-

(i) that there were cases or the threat of cases of COVID-19 at or within a one-mile radius of each of the Claimants' premises; and

(ii) such cases or threatened cases, combined with actual or threatened cases, elsewhere in the UK, were an effective cause of the passing of the Regulations which led to restriction of access to each of the Claimants' premises [J133(i)].

10. AXA, on the other hand, contended that:-

(i) the NDDA clause only provides a narrow, localised form of cover in respect of a "danger or disturbance" specific to the locality of the Claimants' premises, occurring at the Claimants' premises or within a one-mile radius as opposed to a nationwide state of affairs; and

(ii) the Claimants are only entitled to an indemnity under the NDDA clause if they can demonstrate that it was the presence or the risk of COVID-19 at the Claimants' premises, or within a one-mile radius, as opposed to the country as a whole, which led to the Regulations. [J133(ii)]

11. Central to the Claimants' submissions was the contention that the Divisional Court's judgment in *FCA v Arch*, that NDDA clauses (such as the present) do not provide an indemnity, cannot stand in light of the Supreme Court's analysis of the doctrine of causation in *FCA v Arch*. [J136]

The Decision

12. After a close and careful analysis of the arguments and decisions in the Divisional Court and the Supreme Court in *FCA v Arch*, the learned Judge concluded that she was not bound by the decision of the Divisional Court in *FCA v Arch* because:

(i) there was a sufficient difference between the terms of the present NDDA clause and those under consideration in *FCA v Arch* to distinguish them [J158]; and

(ii) in any event, the argument advanced by the Claimants in the present case was not squarely raised and decided in the *FCA v Arch* case. Fundamentally, this was because the FCA's argument (in *FCA v Arch*) had been that the relevant 'danger' was the pandemic as a whole which was nonetheless to be regarded as within the vicinity of the premises for the purposes of the relevant NDDA clauses. In contrast, it was the Claimants' argument in this case that the relevant 'danger' was

to be regarded as a single case (or cases) of COVID within the specified radius [J163]. As the Judge observed, the decision of the Supreme Court had "*moved the goalposts*" and the legal argument had inevitably developed "*like water, to find its way around an obstacle*". [J169 and 172]

13. The starting point for the construction of the Policy was:-

    (i) paragraph [77] of the Supreme Court's judgment in *FCA v Arch* :-

    "*[77] ...the overriding question is how the words of the contract would be understood by a reasonable person. In the case of an insurance policy of the present kind, sold principally to SMEs, the person to whom the document should be taken to be addressed is not a pedantic lawyer who will subject the entire policy wording to a minute textual analysis (cf Jumbo King Ltd v Faithful Properties Ltd (1999) 2 HKCFAR 279, para 59). It is an ordinary policyholder who, on entering into the contract, is taken to have read through the policy conscientiously in order to understand what cover they were getting.*"; and

    (ii) what was described as "*the Mance variation*" at [18] of the *China Taiping* Award.

    "*The latter passage does not address all the conundra raised in an insurance context by the law's familiar invocation of the "reasonable person". The pedantic lawyer is easily and uncontroversially despatched. The insurer and any broker through whom the policy may have been placed are not mentioned. The reasonable person is identified with the ordinary policyholder. That is an assimilation by which I am probably bound, but with which I can also have sympathy, since insurance policies, and especially standard wording, should be readily digestible by the users to whom they are sold, even though they may in some cases have brokers who can sometimes advise them.*"

14. On its proper construction, the learned Judge held:-

    (i) the NDDA clause was linguistically apt to cover disease as one of the "dangers" covered; [J181–182]

    (ii) there was no locality limitation other than by radius. In particular "danger" was not paired with "local" and the relevant intervention was by 'any statutory body' which would include central government;

    (iii) the "danger" in the context of the clause did not have to be transient;

    (iv) the "disease" exclusion explicitly excluded cover for NDDA caused by those diseases covered by the MSDE[1] exclusion ("*We will not*

[1] Murder, Suicide, Disease

cover you when access to your premises is restricted or hindered as a result of . . . notifiable diseases as detailed in the Murder, suicide or disease cover"). So, "*the clause says that some diseases are excluded with the logical correlate that not all are. The natural reading is that diseases not on the excluded list can be covered – if the other conditions are met . . . Given the different limits and structure of the MSDE cover and the NDDA cover there is no reason why the two should be mutually exclusive.*"

15. The learned Judge declined to follow *Bushfield v. AXA*, and concluded that "*… an orthodox approach to construction points to the conclusion that this clause provides a localised cover, but one which is capable of extending to disease . . . it is consistent with the conclusion reached on disease clauses that there is no reason why that danger cannot be one or more cases of COVID-19 within the radius.*" [J205]

Causation

16. Having concluded that the word '*danger*' could encompass "*one or more cases of COVID-19 within the radius*", the question here was whether the Supreme Court's approach to causation in *FCA v Arch* (i.e. the 'but for' test of causation is displaced) applied to the NDDA clause.

17. The learned Judge held:-

    (i) the Supreme Court did not envisaged that its approach to causation was confined to disease clauses and/or the hybrid/NDDA clauses with which it was directly concerned but was of wider application. [J209]–[220]

    (ii) "[T]*he better argument is that in this context the Supreme Court's approach to causation should be adopted. I conclude that COVID-19 is capable of being a danger within one mile of the insured premises, which, coupled with other uninsured but not excluded dangers outside, led to the regulations which caused the closure of the businesses and caused the business interruption loss.*" [J220]

Conclusion

18. This thoroughly reasoned and compelling Judgment is essential reading for those considering COVID-19 business interruption claims. It has substantially resolved the question of the extent to which the Supreme Court judgment in *FCA v Arch* applies to NDDA clauses.

19. It has been argued, following the decision of the Divisional Court in *FCA v Arch*, that NDDA clause are to be viewed as providing a qualitatively different form of cover. That is, cover which is in essence only local in its reach and/or in relation to which the 'but for' test of causation is preserved.

20. That argument has been repudiated. Where, on its proper construction, the NDDA clause responds to a case or cases of COVID within a specified radius of the insured premises then the court will adopt the same approach to causation as was applied by the Supreme Court in *FCA v Arch*. This approach is likely to be of wider application.

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