Court of Appeal Hands Down Judgment in COVID-19 Business Interruption Aggregation Dispute: *Various Eateries Trading Ltd v Allianz Insurance PLC*

On 16th January 2024, the Court of Appeal handed down judgment in *Various Eateries Trading Ltd v Allianz Insurance Plc* [2024] EWCA Civ 10. The appeal and cross-appeal was from one of three cases (the other two being *Greggs v Zurich* and *Stonegate v MS Amlin*) which were heard sequentially by Mr Justice Butcher in June and July 2022, with judgments in all three handed down together in October 2022. The trio of cases addressed issues of causation, limits and aggregation as they related to the widely-used "Marsh Resilience" wording (or "RSA 4 wording" as it was referred to in the *FCA* test case).

The proceedings being appealed concerned Various Eateries' claim for an indemnity under their policy (underwritten by Allianz) in respect of significant trading losses said to have been caused as a result of the COVID-19 pandemic.

The aggregating language in the policy provided that all business interruption ("**BI**") loss was to be aggregated where the amounts payable "arise from, are attributable to or are in connection with a single occurrence". Language such as this, which combined wide linking language ("in connection with") with the requirement for a "single occurrence" (as opposed to an "originating cause" or the like) had not previously been considered by the Courts.

Various Eateries claimed that there was no aggregation under the policy because there was/were no "single occurrence(s)" with which the loss claimed was connected. Various Eateries' ran an alternative case that, to the extent there was aggregation, it applied to each of its insured locations separately (as opposed to across all of its businesses as a whole).

Allianz's primary case on aggregation was that all of Various Eateries' BI loss suffered as a result of the COVID-19 pandemic were to be aggregated as a single limit, either with reference to an event concerning the emergence of the SARS-CoV-2 virus in Wuhan, or its arrival in the United Kingdom. Allianz's alternative case was that aggregation was to be applied with reference to Government action. Various Eateries also ran an alternative Government-action aggregation case, but argued for a greater number of limits based on reviews and renewals of certain action.

At first instance, Butcher J rejected Various Eateries' primary case that there was no aggregation. He also rejected Allianz's primary case that there was a "single occurrence" with which all of Various Eateries' loss was connected, finding essentially that whilst the initial transmission(s) of the disease from animals to humans in Wuhan, China did amount to a single occurrence with which all of Various Eateries' loss was connected, it was too remote to be an aggregating event. The judge also dismissed Allianz's case that the first introduction of the virus to the United Kingdom was a relevant aggregating single occurrence, on grounds that there was no single introduction of COVID-19 to the UK, and that the epidemic within the UK could not be said to be "connected with" any one such introduction (and that this too would in any event have been too remote).

The judge instead found that Various Eateries' losses aggregated with reference to various pieces of Government action (and in doing so, rejected Various Eateries' case on this that each time Government action was reviewed or relaxed, there was a new aggregating single occurrence). The judge also rejected Various Eateries' case that aggregation was to be applied to each premises separately, on grounds that the aggregating language did not support an application on a per premises basis.

With the permission of the judge, Allianz appealed on the basis of its primary aggregation case, and Various Eateries appealed the dismissal of its "per premises" aggregation case. Allianz also appealed (again, with the permission of the judge) the interpretation of the Prevention of Access and enforced closure covers concerning the period for which such cover was granted. Various Eateries sought from the Court of Appeal permission to appeal on its case that renewals and relaxations amounted to separate aggregating events, and also on the question of whether in each case where there was a loss there would always be a "single occurrence". Permission to appeal was also granted in the *Greggs* and *Stonegate* actions, but both matters settled before reaching the Court of Appeal.

The Court of Appeal (The Chancellor of the High Court, Sir Julian Flaux, and Newey and Males LJJ) heard the appeal over two days in November 2023. Males LJ gave a judgment, with which the rest of the Court agreed. In short, the Court dismissed both parties' appeals, and refused Various Eateries' applications for permission to appeal. In doing so, however, Males LJ partly departed from the findings which Butcher J made at first instance on aggregation and indicated that, whilst the judge at first instance was entitled to reach the conclusions which he did, he would have found that the introduction of COVID-19 to the UK *was* a single occurrence with which all of Various Eateries' loss was "connected". He would, however, have still considered that this single occurrence was "too remote" to operate as an aggregating single occurrence.

In reaching this conclusion, and in finding also that the initial human infection(s) in Wuhan were too remote to be an aggregating single occurrence, Males LJ gave specific and extensive consideration to the role which remoteness plays in the context of aggregation. In short, he held that:

First, whether and to what extent remoteness applies depends upon the true construction of the aggregation clause in question. It is an aspect of causation which needs to be considered as a result of the connecting or causation language in each case.

Second, the application of the remoteness principle therefore depends on the nature and strength (or weakness) of the causal link which the aggregation clause requires.

Third, remoteness is ultimately a legal tool which may be employed in a variety of circumstances, including where there is only one candidate unifying event, and where there are several. In each case, the search is for the (or a) significant or relevant event, or for an event which provides a meaningful explanation for the loss.

Fourth, the analysis has to be carried out as an exercise of judgment, which is to some extent intuitive, but which also requires analysis of all of the relevant circumstances of the case.

Fifth, the nature of the exercise required is such that an appellate court should not interfere with the trial judge's evaluation of the circumstances unless the conclusion reached is plainly wrong, in the sense that it was not reasonably open to the trial judge or that the judgment discloses some error of principle.

The judgment provides the most comprehensive consideration by the Courts to date of the role of remoteness in aggregation, and it is therefore essential reading for insurance and reinsurance practitioners. The judgment is also likely to be of great interest to those working on cases concerning COVID-19 business interruption loss.

Charles Dougherty KC and Timothy Killen acted for the insurer, Allianz Insurance PLC, instructed by a team from DAC Beachcroft LLP (James Deacon, Matthew Dalley and Hannah Stanford)

The Judgment of the Court of Appeal can be found here:

The Judgment of Butcher J can be found here:

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