



**CILA ANNUAL CONFERENCE 2020**  
**FCA- TEST CASE (COVID-19 BI CLAIMS)**  
**8 OCTOBER 2020**

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**Kennedys**

# Agenda

OVERVIEW

DISEASE CLAUSES

HYBRID CLAUSES

PREVENTION OF ACCESS CLAUSES

CAUSATION AND ORIENT EXPRESS

WHAT LIES AHEAD...

Q&A SESSION



# OVERVIEW

Purpose and background to the Test Case

# What is the Test Case?

- Significant impact from COVID-19 on various businesses leading to a large number of Business Interruption (BI) Claims.
- UK Insurers felt that their policies did not cover a global pandemic. Thus many disputes between policyholders and insurers on the interpretation of certain clauses.
- In May 2020, the FCA announced its intention to bring a test case, acting on behalf of “all policyholders”, in the High Court, to seek legal clarity on the meaning / effect of selected BI policy wordings.
- Eight defendant insurers who are party to proceedings and 21 representative sample wordings including various non-damage “Disease”, “Hybrid”, and “Prevention of Access” clauses were considered.



# The Judgment...



Neutral Citation Number: [2020] EWHC 2448 (Comm)

IN THE HIGH COURT OF JUSTICE  
BUSINESS AND PROPERTY COURTS  
QUEEN'S BENCH DIVISION  
FINANCIAL LIST

Case No: FL-2020-000018

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 15/09/2020

Before:

LORD JUSTICE FLAUX  
MR JUSTICE BUTCHER

Between:

THE FINANCIAL CONDUCT AUTHORITY

- and -

- (1) ARCH INSURANCE (UK) LIMITED
- (2) ARGENTA SYNDICATE MANAGEMENT LIMITED
- (3) ECCLESIASTICAL INSURANCE OFFICE PLC
- (4) HISCOX INSURANCE COMPANY LIMITED
- (5) MS AMLIN UNDERWRITING LIMITED
- (6) QBE LIMITED
- (7) ROYAL & SUN ALLIANCE INSURANCE PLC
- (8) ZURICH INSURANCE PLC

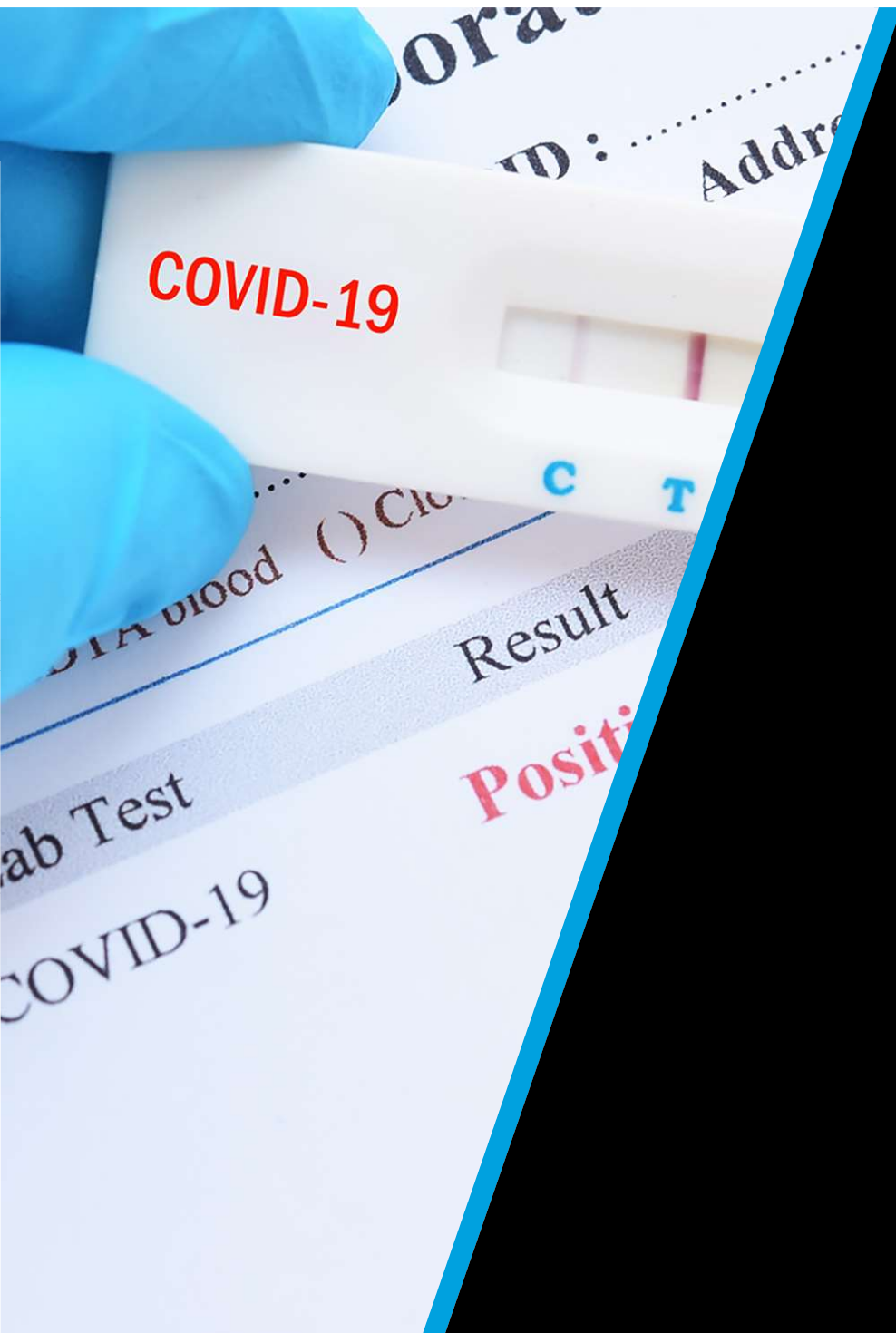
- (1) HOSPITALITY INSURANCE GROUP ACTION
- (2) HISCOX ACTION GROUP

Claimant

Defendants

Interveners

- The case was heard before trial judges Lord Justice Flaux and Mr Justice Butcher in the High Court at an eight day trial between 23 and 30 July 2020.
- The full written (162 page!) judgment was handed down on 15 September 2020.
- The judgment is only binding on those insurers who were party to the proceedings.



# DISEASE CLAUSES

# Typical Disease Clause

Clauses providing cover for BI consequent on an occurrence / outbreak / manifestation of a notifiable disease within a specific radius.

Example - RSA 3 wording:

*“We shall indemnify You in respect of interruption or interference with the Business during the Indemnity Period following:*

*a) any*

*i. occurrence of a Notifiable Disease (as defined below) at the Premises or attributable to food or drink supplied from the Premises;*

*ii. ...*

*iii. occurrence of a Notifiable Disease within a radius of 25 miles of the Premises;*

# Conclusions on Cover

- For most policies, the court found cover for any business interruption which a policyholder can show resulted from COVID-19 (including the actions, measures and advice of the government and public reaction) from the date when the disease occurred in the relevant radius.
- The exception is in respect of one policy which contained the words “event” and “incident” and the court considered that those words were sufficient to connote a local / limited cover which responds only to effects of cases within the specified radius.



# Occurrence and Radius

- Cover would be triggered from the time of the occurrence/manifestation within the radius i.e. from when the disease spreads within it.
- An “occurrence” of the disease was interpreted to mean at least one case of COVID-19 in the defined radius. The test generally being whether the case of COVID-19 was “diagnosable”, regardless of whether it was diagnosed or even symptomatic.
- Manifestation is different to occurrence. There is no manifestation of the disease by someone who was asymptomatic and undiagnosed.
- For most clauses, cover was available for the effects of both cases inside and outside of the radius.
- Either the occurrence of the disease within the radius was part of an indivisible cause - namely COVID-19 and the governmental and public reaction thereto - or was one of many equally effective causes (the latter being less satisfactory).

# Causation - Trends Clauses

- The “peril insured against” is the composite peril of interruption or interference with the Business during the Indemnity Period following on the occurrence of the disease including via the authorities’ or public’s response.
- The word “*following*” is a looser causal relation than proximate cause, satisfied by the occurrence of a case of the disease within the radius where occurrence was part of a wider picture.
- The correct counterfactual, an alternative to reality, is a hypothetical situation where everything other than the insured peril occurred. That is, a world without COVID-19 and the public and governmental response to it.

# Exclusions

- No microorganism exclusions were considered.
- Only one pollution and contamination exclusion was considered - Exclusion L of RSA 3.
- Court found that despite the reference to “epidemic” the exclusion did not bite:

“We have no doubt that a reasonable person would not understand the insurance to be expressly giving cover with one hand and taking it away by the other in the form of the list of matters referred to in General Exclusion L...”



# HYBRID CLAUSES

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# Typical Hybrid Clause

Clauses providing cover for BI consequent on restrictions imposed on the premises following an occurrence of a notifiable disease (sometimes within a specific radius).

Example - Hiscox 1 wording:

*“We will insure you for your financial losses ... caused by:*

*...*

*Public authority*

*13. your inability to use the insured premises due to restrictions imposed by a public authority during the period of insurance following:*

*a. a murder or suicide;*

*b. an occurrence of any human infectious or human contagious disease, an outbreak of which must be notified to the local authority...”*

# Conclusions on Cover

- Similar to the stand-alone disease clauses, cover was not restricted to outbreaks only.
- However, the Court also considered that the words “*restrictions imposed*” meant a mandatory requirement generally with the force of law, i.e. the Government regulations as opposed to “stay at home” advice.
- “*Inability to use*” generally meant an impairment of normal use but not every departure from normal use constitutes an inability to use and so it will be a question of fact as to the application of any restrictions imposed on the policyholder’s specific business.
- Interruption can in some cases require complete cessation of business, however in some cases “business interruption” could be more general so as to include disruption and interference.



# Causation - Trends Clauses

- In general terms the insured peril is a composite one, involving three interconnected elements:
  - i) inability to use the insured premises;
  - (ii) due to restrictions imposed;
  - (iii) following [or other linking term(s)] an occurrence of an infectious or contagious disease.
- The correct counterfactual is a hypothetical situation in which one strips out all three interconnected elements, including the national outbreak of COVID-19. However cover is only available from the date of the relevant restrictions.



## PREVENTION OF ACCESS CLAUSES

# Typical PoA Clause

Clauses providing cover for BI consequent a prevention or hindrance of access to or use of the premises as a consequence of government or local authority action or restriction.

Example - MSA 2 wording:

***“Prevention of access - non damage***

***your financial losses and other items specified in the schedule, resulting solely and directly from an interruption to your business caused by an incident within a one mile radius of your premises which results in a denial of access or hindrance in access to your premises during the period of insurance, imposed by any civil or statutory authority or by order of the government or any public authority, for more than 24 hours....”***

# Conclusions on Cover

- Generally, the Court concluded that PoA clauses were to be construed more restrictively than the Disease Clauses. However, cover was held to be extremely fact dependent and it may be that two businesses with the same policy would have different cover afforded to them.
- Apart from in one instance, the Court considered that “interruption” did not require complete cessation of the business.
- Where policies included the wording “*emergency*”, “*danger or disturbance*”, or “*injury*” in the “vicinity” or “*1 mile*”, were considered to be requirements that meant something specific, which happened at a particular time, in the local area and therefore were intended to provide narrow localised cover. Cover would therefore only apply where the action of the relevant authority was in response to the localised occurrence and not a response to the pandemic generally.

# Prevention/Hindrance of Access

- Many policies required “prevention” as opposed to “hindrance of access/use”.
- Where “prevention” was required this meant impossibility i.e. a closure of the premises for the purpose of carrying on the business, rather than a difficulty (“hindrance”), although “prevention” did not necessarily need to be physical.
- A distinction was made between businesses already offering services not requiring use of the premises (E.g. takeaways) and those who adapted after the government orders:
  - Existing services = no “prevention” but probably hindrance subject to the facts.
  - New services = “prevention” - because the nature of the business has changed and/or new services added.

# “Action” means...

- Generally connotes steps taken by the relevant authority which have the force of law.
- The government advice (on 16 March and the days following) did not have the force of law and therefore not “action”. Only the 21 March Regulations and more wide-ranging 26 March Regulations were “action”.
- However where there is reference to “advice”, may include other steps taken by the government without force of law.



# Causation- Trends Clauses

- In general terms the insured peril is a composite one, involving three interconnected elements:
  - i) Prevention / Hindrance of access
  - (ii) due to government action / advice
  - (iii) in response to an emergency (including COVID-19)
- The correct counterfactual is a hypothetical situation in which one strips out all the prevention/hindrance and all the actions/advice and assume there had been no COVID-19. However cover is only available from the date of the relevant restrictions.



# CAUSATION AND ORIENT EXPRESS

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# ‘Proximate Cause’ v ‘But For Test’

- The application of the “But for” test in an insurance context was questioned. The Proximate Cause is the usual causation test.
- Regardless, the same answer is reached because the correct counterfactual requires asking the question of what would happen “but for” the insured peril, which in many cases is a composite one.

# Generali v Orient Express

- Concerned a Trends clause in a wide area damage context.
- The Insured's hotel was damaged by hurricanes and the Tribunal found that the correct counterfactual was a hypothetical situation in which the hurricanes occurred in the same way but where the hotel was not damaged, which was upheld on appeal.
- Insurers in the *Test Case* argued for a narrow definition of the insured peril in the policy wordings e.g. the local occurrence of disease only in a disease clause wording, in order to effect the same result as in *Orient Express*.
- The Court distinguished *Orient Express* on the basis of construction of the wordings and that the *Test Case* was not concerned with the type of insured perils considered in *Orient Express*. In particular, *Orient Express* applied in a physical damage context and the “composite or compound perils” being featured in the wordings before the Court contrasted with the “all risks” nature of the cover in *Orient Express*.

# Orient Express cont

- However it considered that there were several problems with the reasoning in *Orient Express*.
  - Misidentification of the insured peril by treating the “Damage” as the insured peril, rather than Damage caused by a covered fortuity-hurricanes and the proximate cause of the loss was not “Damage” but “Damage caused by hurricanes”
  - The notion that the more serious the fortuity, the less cover the policy provides for the consequences of damage to the insured property e.g. if the hurricanes had only damaged the hotel, there would have been full recovery.
  - If it had been necessary for determining the Test Case it would be likely that the Court would have concluded that it was wrongly decided and declined to follow it.

# Conclusions

- The Court held that the usual rules of construction applied in interpreting policy wordings.
- Therefore, it is necessary to look at each policy as a whole and the specific wording to assess the application of the Test Case decision.
- The Court was very much against the idea of illusory cover, which also requires a decision on cover to be based on the policy as a whole including restrictions and exclusions.
- Whilst there is some guidance in terms of interpreting policies, ultimately whether there is cover should be reviewed on a case by case basis and will be extremely factual dependent.
- It is very possible, particularly in the case of PoA clauses, that two businesses may have the same policy but with very different results in terms of cover on application of the Test Case findings.
- Unless policy wordings are square-on to the sample wordings in the Test Case, it will be difficult to apply the conclusions of the Court.



# What lies ahead...

- On 2 October 2020 the High Court agreed to fast-track an appeal.
- The appeal will leapfrog straight to the Supreme Court and is expected to be heard before the year-end.
- Aside from the FCA and the Hiscox Action Group (HAG), those who received leapfrog certificates were Arch, Argenta, MS Amlin, Hiscox, QBE, and RSA.
- Ecclesiastical and Zurich have decided not to appeal September's ruling.
- Qatar Insurance Company has been denied the right to intervene.
- HAG will still pursue claims through an expedited arbitration.
- The parties to the Test Case proceedings have agreed that they will seek to have any appeal heard on an expedited basis.
- The appeal may mean a delay on pay-outs on disputed claims.



**ANY QUESTIONS?**

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