Article

Business Interruption Insurance claims: Will the Cayman Islands' Courts follow the English Court's Approach?

Authors: Alex Potts, Partner and Head of Litigation and Restructuring | **Erik Bodden,** Partner

The COVID-19 pandemic has triggered an increasing number of contested Business Interruption Insurance claims between Policyholders and Insurers worldwide.

In the USA alone, over 1,250 Court cases have been commenced since March 2020, with policyholders nation-wide claiming insurance coverage for Business Interruption losses, both as individual Plaintiffs and as part of larger class actions.

Many of these US claims have been filed by restaurants, bars, theatres, retailers, and casinos, with hospitality and retail being two of the business sectors most affected by the pandemic.

Most of the US Court decisions published to date have favoured Insurers, based on standard Policy definitions and exclusions, but a number of claims have survived summary motions to dismiss, and will therefore go to trial.

Insurance Policies governed by Cayman Islands law

As losses continue to mount locally for some Cayman Islands' businesses (including hotels, tour operators, dive operators, and restaurants that have been forced to close), policyholders and Insurers with policies governed by Cayman Islands law will want to review the wordings of their own Policies, with the benefit of expert legal advice.

Although Cayman Islands law on the interpretation and enforcement of insurance policies largely follows English law, there are certain local variations, taking into account:

- local Cayman Islands legislation,
- the local regulatory landscape for the conduct of insurance business,
- local case law[1],
- the Cayman Islands' Government's regulatory response to the COVID-19 pandemic; and
- the procedural mechanics for litigation, arbitration and mediation in the Cayman Islands.

There have been two recent judgments from the English Courts, which should be of particular interest to the local Cayman Islands' insurance market.

[1] See, for example, Cayman Islands cases such as *Toby v Allianz Global Risks US Insurance Co*, *Banks v Insurance Company of West Indies*, *Zeller v British Caymanian Insurance Company Ltd*, *McLaughlin v American Home Assurance Company*, and *Jackson v Cayman Insurance Company*.

The Financial Conduct Authority (FCA) v Arch Insurance (UK) Ltd & Ors [2020] EWHC 2448 (Comm) (15 September 2020)

The first judgment relates to the Business Interruption Insurance test case litigation commenced by the UK's Financial Conduct Authority in June 2020 on behalf of UK policyholders affected by the COVID-19 outbreak.

On 15 September 2020, the English High Court, made up of a specialist two-judge panel, Lord Justice Julian Flaux and Mr Justice Christopher Butcher, handed down its judgment: *The Financial Conduct Authority (FCA) v Arch Insurance (UK) Ltd & Ors* [2020] EWHC 2448 (Comm) (15 September 2020)

As part of the test case, the High Court was asked to decide the correct interpretation and scope of various Business Interruption Policy wordings, governed by English law, by reference to an agreed set of facts and assumptions.

The High Court had 21 lead policies to consider from eight different insurers: Arch, Argenta, Ecclesiastical, Hiscox, MS Amlin, QBE, Royal & Sun Alliance and Zurich.

The FCA estimated that in addition to the policies chosen for the test case, around 700 types of policies issued by over 60 different insurers, and 370,000 policyholders, could potentially be affected.

The High Court's judgment was, in large part, favourable to policyholders: but the Court made clear that each Policy turned on its own, particular wording, and not every Policy necessarily responded to COVID-19 related business interruption losses.

The High Court gave particular consideration to the following types of clauses:

- **'Disease' clause extensions**: these are provisions which provide coverage in respect of business interruption in consequence of, or following or arising from, the occurrence of a notifiable disease within a specified radius of the insured premises[2]. With respect to disease clauses, Insurers' main argument was that the Policy wording required the business interruption to be caused by the occurrence of COVID-19 within a specified radius, rather than by the wider effects of the pandemic. The Court rejected this interpretation, holding that a less restrictive test of causation should be applied. Causation could be established where there was a national lockdown, not just where business interruption had occurred due to the effects of a local occurrence of COVID-19.

- **'Prevention of Access' or 'Denial of Access' clauses**: these are provisions which provide coverage 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[3]. The Court found that these clauses were intended to provide narrow, localised cover. Coverage would depend on the detailed wording of each particular clause and how the business was affected by the government's response to the pandemic.

- **'Hybrid' clauses**: these are policy terms which refer both to restrictions imposed on the premises and to the occurrence or manifestation of a notifiable disease[4]. The Court approached the disease and prevention of access parts of these clauses in a similar way to the above. It was necessary to consider the terms of individual clauses in each Policy in order to determine policy coverage.

On the issue of causation, the Court considered the earlier case of *Orient Express Hotels Ltd v Assicurazioni Generali SpA* [2010] EWHC 1186 (Comm), a claim for business interruption losses caused by Hurricanes Katrina and Rita. The Court distinguished *Orient Express* on the facts, but also held that it had been wrongly decided.

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[2] One Policy wording example is as follows: "*We shall indemnify You in respect of interruption or interference with the Business during the Indemnity Period following: … iii. occurrence of a Notifiable Disease within a radius of 25 miles of the Premises".*

[3] One Policy wording example is as follows: "*We will also indemnify You in respect of reduction in Turnover and increase in cost of working as insured under this Section resulting from… prevention of access to the Premises due to the actions or advice of a government or local authority due to an emergency which is likely to endanger life or property".*

[4] One Policy wording example is as follows: "*We will insure you for your financial losses and other items specified in the schedule, resulting solely and directly from an interruption to your activities caused by… your inability to use the insured premises due to restrictions imposed by a public authority during the period of insurance following… an occurrence of any human infectious or human contagious disease, an outbreak of which must be notified to the local authority".*

The High Court granted permission to Arch, Argenta, MS Amlin, Hiscox, QBE and RSA to pursue a 'leapfrog' appeal to the Supreme Court.

The Insurers' appeal to the Supreme Court took place by video-link between 16 and 19 November 2020 (although some of the Insurers did not pursue an appeal with respect to the High Court's findings on some of their Policy wordings), and the Supreme Court's judgment is now awaited.

***TKC London Ltd v Allianz Insurance PLC* [2020] EWHC 2710 (Comm) (15 October 2020)**

In a second development, the English High Court has now delivered a separate judgment on a Business Interruption Insurance claim, in the case of *TKC London Ltd v Allianz Insurance PLC* [2020] EWHC 2710 (Comm) (15 October 2020).

TKC operated a restaurant, The Kensington Crêperie in London. From 21 March 2020, it was required by the UK's Health Protection (Coronavirus, Business Closure) (England) Regulations 2020 to close, and to cease any sale of food and drink that was to be consumed on the premises. TKC closed The Kensington Crêperie from 21 March 2020 to 4 July 2020, and the forced closure resulted in significant Business Interruption losses for TKC.

TKC's claim for coverage involved Allianz's standard form of Policy wording, which did not, however, contain a Disease Clause extension.

Allianz rejected the claim, based on the Business Interruption section of the Policy, which only provided cover for "*Business Interruption by any Event*". Under the Policy, Business Interruption was defined as: *"Loss resulting from interruption or interference with the business carried on by the Insured at the Premises in consequence of an event to property used by the Insured."* Event was defined as: *"Accidental loss or destruction of or damage to property used by the Insured at the Premises for the purpose of the Business."*

The Court held that Allianz was entitled to reject the Insured's Business Interruption Claim. The Policy only responded to Business Interruption caused by a relevant Event to Property: but "*The deterioration of TKC's stock during the period of closure did not cause TKC's business to be interrupted or interfered with, because (as is common ground) it occurred at a point at which that business was already closed as a result of the Coronavirus Regulations. It was a consequence of the interruption or interference, not its cause*".

It remains to be seen whether this judgment will be appealed.

Conclusion

These two English Court judgments are not binding as a matter of Cayman Islands law, and the decisions, in each case, have turned on the Policy wordings in question.

Once the United Kingdom Supreme Court gives its judgment in the pending appeal in the FCA case, however, these English Court judgments are likely to be of persuasive value for Cayman Islands' Courts and arbitration tribunals, when adjudicating claims governed by Cayman Islands law, and subject to standard forms of policy wording.

Whether or not coverage is established to be available for COVID-19 related losses that have been incurred to date, Cayman Islands' Policyholders will want to review the appropriate scope of Business Interruption Insurance cover for their businesses in the future, even if pandemic-related insurance is likely to become prohibitively expensive, in the absence of Governmental and reinsurance industry support.

Author:

Alex Potts
Partner
alex.potts@conyers.com
+1 345 814 7394

Other Contact:

Erik Bodden
Partner
erik.bodden@conyers.com
+1 345 814 7754

For further information please contact: media@conyers.com