Article

To BII or not to BII – a Cayman Islands perspective

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On 15 January 2021, the United Kingdom Supreme Court delivered its judgment on the appeals in the Business Interruption Insurance (BII) test cases between the UK's Financial Conduct Authority and eight UK insurance companies.

The Supreme Court's judgment is reported as *Financial Conduct Authority v Arch Insurance (UK) Ltd and Ors [2021] UKSC 1*, and it has been widely reported in the media, and in insurance industry publications.

The Supreme Court's judgment has clarified, under English law, whether or not a variety of insurance policy wordings cover BII losses resulting from the COVID-19 pandemic, and from the public health measures taken by UK authorities in response to the pandemic from March 2020.

The Supreme Court has largely found in favour of the Financial Conduct Authority, offering some degree of comfort to the 370,000 UK policyholders said to be affected.

The ruling means that insurers will find it harder to deny BII claims, and it should help UK businesses to get their BII claims settled promptly.

Although the wording of any particular insurance policy will need to be considered in any given case, the Supreme Court has provided definitive guidance under English law on the meaning and effect of 28 specimen clauses in 21 lead policy wordings.

The Supreme Court's judgment, which bears careful reading and analysis, addressed the following issues arising on the appeals:

(i) the interpretation of "**disease clauses**" (which cover business interruption losses resulting from any occurrence of a notifiable disease within a specified distance of insured premises);

(ii) the interpretation of "**prevention of access**" clauses (which cover business interruption losses resulting from public authority intervention preventing access to, or the use of, business premises) and "**hybrid clauses**" (which contain both disease and prevention of access elements);

(iii) the question of what causal link must be shown between business interruption losses and the occurrence of a notifiable disease (or other insured peril specified in the relevant policy wording);

(iv) the effect of "**trends clauses**" (which prescribe a standard method of quantifying business interruption losses by comparing the performance of a business to an earlier period of trading);

(v) the significance in quantifying business interruption losses of effects of the pandemic on the business which occurred before the cover was triggered ("**Pre-Trigger Losses**"); and

(vi) in relation to causation and the interpretation of trends clauses, the status of the decision of the English Commercial Court in *Orient-Express Hotels Ltd v Assicurazioni Generali SpA (trading as Generali Global Risk)* [2010] EWHC 1186 (Comm) ("Orient-Express").

From a legal perspective, the Supreme Court's judgment is of particular interest because of its policyholder-friendly approach to the issue of causation, as well as its conclusion that Orient-Express had been wrongly decided.

The Supreme Court's decision has already influenced judicial thinking in other common law jurisdictions.

On 5 February 2021, for example, the Irish High Court handed down a judgment, relying on the UK Supreme Court's decision, finding in favour of four pub owners on BII claims against Irish insurer, FBD Insurance plc.

The case is reported as *Hyper Trust Limited et al v FBD Insurance plc [2021] IEHC 78.*

As we discussed in our November 2020 article on this topic, these English and Irish judgments are not binding as a matter of Cayman Islands law, and every decision will turn, eventually, on the facts and Policy wordings in any given case. The English and Irish judgments are likely to be treated as highly persuasive in the Cayman Islands, however, when Cayman Courts or Cayman arbitration tribunals have to adjudicate local claims for Business Interruption losses under policies governed by Cayman Islands or English law.

Cayman Islands' policyholders and Insurers will also want to review their BII policy wordings and BII coverage requirements going forwards, with the benefit of the Supreme Court's analysis.

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