

LITIGATION AND
DISPUTE RESOLUTION

Comparison between AXA and FBD COVID-19 cases

Mr Justice McDonald has recently presided over two cases involving plaintiffs' claims that they were entitled to compensation under their respective insurance policies for losses incurred due to the closure of their premises as a result of the COVID-19 pandemic.

In the FBD case, the plaintiffs successfully argued that the closure of their premises as a result of the fallout caused by contagious or infectious diseases, which was not further defined, entitled them to compensation for losses incurred.

In the AXA case, the relevant clause had been narrowly drafted and, importantly, diseases which would trigger cover under the insurance policy were specifically listed, to the exclusion of COVID-19. As a result, the plaintiff in this case was not successful.

MIN READ

01

Brushfield Limited t/a The Clarence Hotel -v- Arachas Corporate Brokers Limited and AXA Insurance DAC [2021] IEHC 263 (AXA)

This case involved a claim by the operators of the Clarence Hotel, Dublin, who claimed that they were entitled to compensation for losses incurred as a result of government mandated closures of their premises due to the COVID-19 pandemic.

The AXA insurance policy contained two relevant clauses regarding business interruption coverage. The first of these was the “murder, suicide or disease clause” (the “**MSDE clause**”), which contained a list of specified human diseases that were covered under the policy. Notably, COVID-19 was not contained in the list of diseases and the diseases had to occur at or within 25 miles of the premises and cause a disruption to the business. In this regard, the Court determined that coverage was limited to business interruption caused by one of the listed diseases and, as COVID-19 was not listed, it was not covered by the policy.

A specific condition known as acute encephalitis was, however, listed in the MSDE clause and the plaintiff provided expert evidence, which claimed that acute encephalitis was caused by COVID-19. However, the Court held that there was no

reported link between COVID-19 and acute encephalitis within the 25 mile radius of the premises (notably there had been no case of acute encephalitis induced by COVID-19 in Ireland) and that the plaintiff had failed to show that the closure was proximately caused by an outbreak of acute encephalitis.

The MSDE clause also contained a provision covering the plaintiff for closures due to “defects in the drains or other sanitary arrangements at the premises”. The plaintiff argued that the inability to facilitate social distancing constituted a “sanitary arrangement” under the insurance policy. The Court determined that this clause only applied where there was a specific order from a public authority requiring closure due to a defect in the drains or sanitary arrangements, which was not the case here, where there was a general direction from the government mandating closures.

The second relevant clause related to a denial of access (non-damage) clause, which provided up to €50,000 of cover for losses sustained arising from the following:

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

The Court held that this clause was intended to respond to localised dangers or disturbances, which occur within a one-mile radius of the hotel, rather than a disease such as COVID-19, which had a large geographical spread.

02

Hyper Trust Limited t/a the Leopardstown Inn and Inn on Hibernian Way Limited t/a Lemon and Duke and Leinster Overview Concepts Limited t/a Sean's Bar -v- FBD Insurance plc [2021] IEHC 78 (FBD)

In FBD, which preceded AXA, a number of publicans similarly argued that they were entitled to compensation under their insurance policies for losses incurred due to the closure of their premises as a result of the COVID-19 pandemic. The pertinent clause in the FBD insurance policy provided cover for losses incurred:

“as a result of the business being affected by imposed closure of the premises by order of the local or government authority following outbreaks of contagious or infectious diseases on the premises or within 25 miles”.

It was not disputed that the statement issued from the Department of the Taoiseach on 15 March 2020, that “all pubs [are] asked to close from tonight”, satisfied the requirement that the business is affected by an “imposed closure of the premises by order of the local or government authority”. It therefore fell for the Court to consider whether the closure followed an outbreak of contagious or infectious disease on the premises or within 25 miles of the premises.

Unlike in AXA, the above clause in the FBD insurance policy did not further define or itemise those “contagious or infectious diseases”, which would trigger cover under the policy. McDonald J, therefore, was satisfied that COVID-19 did fall within the remit of the clause.

Further, McDonald J found that cover was not lost where the closure was prompted by nationwide outbreaks of disease, provided that there was an outbreak within a 25-mile radius and provided that the outbreak was a cause of the closure. He found that the outbreak of COVID-19, which was shown to have occurred within 25 miles of each of the plaintiffs' premises, was a proximate cause of the imposed closure of pubs announced by the government.

03 Conclusion

Both cases were presided over by McDonald J and the outcome of each case centred on the specific wording of the relevant clauses in the respective insurance policies. In AXA, as Covid-19 was not one of the specified diseases within the relevant clause, there could be no cover, despite the plaintiff's attempt to tie COVID-19 to other diseases which were listed. The insinuation (and McDonald J suggested as such at paras. 114 - 115 of the AXA judgment) is that if one of the listed diseases had occurred, or indeed if COVID-19 had been listed, then the plaintiff would have succeeded. Further, McDonald J (at para. 115 of the AXA judgment) highlighted the distinction between the AXA insurance policy and other policies which were available at the time that the AXA policy was entered into (with specific reference to the FBD case) which were not "prescriptive as to specific diseases which were covered".

It is suggested that where the clauses are drafted broadly, as was the case in FBD, they will be interpreted as such and, conversely, where the clauses are more narrowly and specifically drafted, as in AXA, a more restrictive interpretation will be adopted by the Court.

It therefore appears likely that the success of any future claims for losses incurred due to the COVID-19 pandemic will depend on the specific wording of the insurance policy held by any potential claimant. Moreover, the above decisions highlight that whether an insurance policy covers business interruption losses arising from COVID-19 restrictions will be considered on a case-by-case basis.



Key contacts



Enda Hurley
Partner
+353 1 649 2930
ehurley@algoodbody.com



Catherine Hayden
Associate
+353 1 649 2622
chayden@algoodbody.com



Rebecca Martin
Solicitor
+353 1 649 2167
rmartin@algoodbody.com