

Irish Commercial Court rules on COVID-19 business interruption insurance claims

The Commercial Court delivered its judgment on Friday 5 February 2021 on insurance claims by various publicans against FBD Insurance for business interruption losses due to COVID-19 and resulting business closures. It ruled against FBD on the four core issues.

In this article we summarise the core issues and the related outcomes. We also touch on other interesting aspects of the judgment.

Backdrop

The judgment followed the recent UK Supreme Court decision in the Financial Conduct Authority (FCA) test case. In delivering his judgment last week, the judge confirmed that he had received and considered submissions on the FCA decision but had not substantially altered his judgment as a result.

The FBD Policy

The case turned on the interpretation of a section of the relevant policy and in particular, the meaning and import of the wording which dealt with when business interruption cover was provided in the event of infectious disease. Such cover was provided in respect of losses resulting from the:

“...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 of same”

The four core issues:

1. Causation

The question arose as to whether the government imposed closure “followed” the outbreaks of

COVID-19 within 25 miles of the insured premises. One of the plaintiffs argued for a temporal interpretation which would be triggered provided the government imposed closure occurred after outbreaks within 25 miles of the premises. The rest of the plaintiffs accepted that this required causation, however argued that this was “looser” than proximate causation. FBD had argued that the closure had to be caused by the outbreak within 25 miles of the insured premises, “the proximate cause” of the closure. This distinction was potentially important because FBD was arguing that the “proximate cause” of the business closures was the nationwide spread of the disease rather than the occurrence of individual cases within 25 miles of the insured's premises – the closure would have occurred irrespective of any local outbreaks. The Court did not accept that the term ‘following’ had a purely temporal meaning, but nor did it accept that it required proximate causation as FBD had contended. It held that the term did envisage a degree of causation but at a ‘lesser standard’ than proximate cause. For the FBD policy, it held that ‘following’ meant that disease ‘should be a cause, but not necessarily the dominant cause, of the imposed closure’. Cover was triggered ‘so long as the outbreak was a cause’. The Court’s conclusion on this point is similar to the conclusions reached on similar wording by the English High Court and Supreme Court in the FCA proceedings.

The Court went on to add that if the word “following” had in fact required a proximate cause (as FBD argued) then it would have concluded in any event that any cases of COVID-19 within the 25 mile limit would have constituted such a proximate cause of the closure, meaning that the business interruption cover was triggered even if cases outside of that area were also proximate causes which would have required the closure in any event. The Court cited other insurance cases as authority for the proposition that cover could be triggered where there were multiple “proximate causes” only some of which were insured against, unless the uninsured cause was excluded from cover.

The Court commented that while the policy clearly requires an outbreak within the 25 mile area, there was no suggestion in the policy that outbreaks simultaneously occurring outside the area would deprive an insured of cover.

The Court concluded that *‘each outbreak of the disease in the State was instrumental in the government decision to close down all public houses wherever they were in the State. In circumstances where FBD accepts... that there were outbreaks within 25 miles of each of the plaintiffs’ premises, those outbreaks were, at minimum, a cause of the decision to close each of the public houses the subject matter of these proceedings.’*

The Court dismissed FBD’s attempt to argue for a restrictive interpretation of the particular cover (which it described as a free ‘add on’) noting that the insurer’s characterisation of it in that manner did not lessen its importance for policyholders. The Court also noted that FBD could have excluded cover for COVID-19, stating that *‘It would equally have been a straightforward matter for FBD to expressly exclude cover where there was a nationwide outbreak or to exclude cover for pandemics’*.

2. Insured Peril

FBD had interpreted the business interruption policy as only insuring against the peril of an imposed closure, whereas the claimants argued for a “composite peril”. This was triggered by an imposed closure and an outbreak of the disease within 25 miles of the premises and covered losses flowing from both. The Court concluded that the insured peril was a composite peril, encompassing both closure and disease within

the 25 mile area (i.e. neither would suffice on its own). This was consistent with the majority’s finding in the UK Supreme Court’s decision in the FCA case. The Court has not yet ruled on a separate submission by one of the plaintiffs as to whether a partial closure engages the cover. The judgment directs that that issue should be the subject of a separate application to the court.

3. “Counterfactual and Disaggregation”

In the context of a business interruption claim, the insured’s losses depend on ascertaining the impact of the business interruption on the business’s profitability for the relevant period, which generally involves comparing the actual results following the business interruption to the results which the policyholder would have achieved in the absence of the business interruption. This is referred to as the “counterfactual”. FBD argued that even if the business interruption cover was triggered by a local outbreak, the pandemic would have impacted its profits/led to the closure of the premises in any event. Accordingly, the adoption of such a counterfactual could have reduced or eliminated the loss which was recoverable under the policy.

The Court rejected FBD’s counterfactual argument. Following on from its conclusion on cases where there are other concurrent causes in addition to the insured peril, the Court ruled that such concurrent causes (unless excluded from cover) must also be stripped out of the counterfactual. This meant that the publicans’ losses must be ascertained by comparison to a world not only without any local outbreak but also without any nationwide cases or closures.

FBD also sought to invoke the insurance principle of “disaggregation” to argue that that losses due to specific cases of Covid-19 within the 25 mile area (which were covered by the insurance) should be “disaggregated” from losses caused by COVID-19’s general societal effects. Reiterating its conclusions on the legal principles dealing with concurrent causes, the Court generally found against FBD’s argument on disaggregation but noted that a final conclusion on this point could only be reached at a quantum hearing, and that there may be specific heads of loss which were not proximately and solely caused by the insured peril.

4. Trends

Many business interruption policies contain “trends” clauses, providing that in assessing the impact of a closure regard should be had to “trends” which were already affecting the business and which would have affected revenue and profits in any event. FBD argued that a decline in business in the days leading to the imposed closure (as COVID-19 concerns affected trading even before the mandatory shut-down) constituted such a trend. Such an argument would have reduced the amount recoverable due to the closure as profits were declining due to the pandemic even before the closure. The Court found against FBD holding that ‘one must exclude the effects of the insured peril from the calculation’ of the trend. While such slow days could form part of the comparator period for the purpose of quantum calculations, they could not be carried forward as a trend for the duration of the insured peril.

Other issues of note

Indemnity period

The Court rejected a contention by the plaintiffs that a claim could be maintained for COVID-19 related losses even after the premises reopened. The indemnity period ran until losses caused by the insured peril ceased or the indemnity period ended, whichever came first. Therefore, as the insured peril was a composite peril, including both disease and imposed closure, a claim could only be maintained for continuing losses caused by the composite peril after reopening (i.e. continued losses due to the closure and COVID-19 would be recoverable, but not ongoing losses which were solely due to the lasting effects of COVID-19). Once the closure ceased, the composite peril ended and continuing losses were only recoverable to the extent that they still flowed from the closure.

Regulatory context

The plaintiffs supported their arguments as to interpretation by reference to other documents published by FBD, namely its IPID and Features and Benefit documents. The Court accepted that while FBD’s documents were not intended to comprehensively summarise the policy, they nonetheless were required to be accurate and

not misleading. Therefore, cover as described in those documents formed part of the ‘broader context’ in which to interpret the policy and while ‘not determinative’, the fact that cover as described was for ‘disease’ and not ‘imposed closure’ supported the Court’s finding on construction of the insured peril. These findings underscore the importance of careful drafting of such documentation and of ensuring that it is consistent with, and does not inadvertently extend, the policy.

Misrepresentation

The Court found that a specific representation had been made to one plaintiff. The representation was that FBD’s policy ‘is covering Coronavirus and...the pub must be forcibly shut down and cannot be voluntary’. The Court found that the effect of this representation was to disapply the need for an outbreak within the geographical limit provided for in the policy, which applied in respect of the other plaintiffs. The Court however, rejected that plaintiff’s application for aggravated damages.

Conclusion

This judgment is being closely analysed by insurers, their reinsurers and by insured businesses across Ireland. The Central Bank has [welcomed the judgment](#) and commented that it will be closely examining its potential impact for customers in the context of its sustained and ongoing engagement with insurers.

In the meantime, insurers should consider not only the implications of the judgment on considerations of coverage and causation, but also the [Central Bank’s expectations](#) regarding engagements with customers, handling and analysing claims or complaints or patterns arising from those engagements, and overall governance in handling these issues.

The decision highlights the importance of regularly reviewing and updating policy wordings and related documents (regulatory or marketing) such as IPIDs or communications with brokers or customers and of ensuring that all representatives of an insurer are well briefed as to the terms and intended coverage of the policy.

For further information please contact [James Grennan](#), [Laura Mulleady](#), Insurance and Reinsurance Partners, [Liam Kennedy](#), Litigation and Dispute Resolution Partner, [Dario Dagostino](#), Financial Regulation and Investigations Partner and [Sinéad Prunty](#), Financial Regulation and Investigations Knowledge Lawyer or your usual partner contact.

Key contacts



James Grennan
Partner
+353 1 649 2318
jgrennan@algoodbody.com



Laura Mulleady
Partner
+353 1 649 2609
lmulleady@algoodbody.com



Liam Kennedy
Partner
+353 1 649 2501
lkennedy@algoodbody.com



Dario Dagostino
Partner
+353 1 649 2308
ddagostino@algoodbody.com



Sinead Prunty
Knowledge Lawyer
+353 1 649 2054
sprunty@algoodbody.com

Disclaimer: A&L Goodbody 2021. The contents of this document are limited to general information and not detailed analysis of law or legal advice and are not intended to address specific legal queries arising in any particular set of circumstances.