The Supreme Court on Business Interruption Insurance and COVID-19: Financial Conduct Authority v Arch Insurance (UK) Ltd [2021] UKSC 1

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From the early days of the first national lockdown in England, widespread concerns over many different types of insurance claims had been raised. The business interruption losses that the small businesses and enterprises suffered received particular attention and were covered broadly by the national media channels. The policy wordings in question were so varied that it was not possible for any party to provide a clear outcome that will have a widespread effect on such insurance claims. Through the Financial Conduct Authority’s involvement, the UK Supreme Court delivered a much-awaited judgment in a test case on the twenty-one selected policy wordings, fourteen of which were held to respond to the Covid-19 related business interruption claims. The significant impact of the test case, which prevented an ongoing uncertainty and avoided protracted litigation for many, is that many thousands of policyholders should now have their claims for business interruption losses paid.

Introduction

The Covid-19 outbreak has led to widespread disruption and business closures resulting in substantial financial loss. Although seeking a compensation under the business interruption (BI) insurance policies appeared the obvious option, widespread concerns were raised over the lack of clarity and certainty over many of those policies. The Financial Conduct Authority (FCA), the conduct regulator of insurers in the UK, wrote to all chief executives of insurance firms to reiterate the need to assess and settle the BI claims quickly. The uncertainty was nevertheless ongoing. The range of wordings and types of coverage were too broad to determine at a general level the degree to which any one individual customer may be able to

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claim. The FCA took further actions, and worked closely with policyholders, insurance intermediaries and insurers, to identify the key issues in dispute. A framework agreement was reached between the FCA and eight leading BI insurance providers to enable the FCA to seek an authoritative declaratory judgment regarding the meaning and effect of their policy wordings.

The FCA’s strategic objectives include to ensure the relevant markets function well, and that appropriate protection for consumers and market integrity are provided. A test case scheme is available with respect to a Financial List claim ‘which raises issues of general importance in relation to which immediately relevant authoritative English law guidance is needed’. On 9 June 2020 the FCA submitted, for the benefit of the policyholders, a claim form to initiate Financial Conduct Authority v Arch Insurance (UK) Ltd, as the first case to be admitted to the test case scheme. Twenty-one different policy wordings were selected as representatives of all the most frequently used policy wordings that were giving rise to uncertainty. The High Court (HC) delivered preliminary rulings on the meaning of the selected policy wordings on 15 September 2020. A leapfrog appeal to the UK Supreme Court was concluded on 15 January 2021 with the judgment of their Lordships which both upheld and extended the decision of the HC. The significant outcome is that extension clauses conferring business interruption cover for losses caused by infectious disease and government action are applicable to the Covid-19 pandemic.

What is business interruption insurance?

Business interruption (BI) policies operate on the basis that the assured can recover financial losses caused by the relevant insured peril for an indemnity period as laid down by the policy. Typically, the insured peril is physical loss of or damage to property (damage clauses). If, for instance, the insured hotel is damaged as a result of a fire, the existence of the material damage confers the right to recover both repair costs and consequential BI losses. Further, insurance for lost revenue may be offered through an extension to the policy (non-damage clauses), so that, irrespective of any physical damage, cover for pure BI losses might still be available.

The insured perils here are typically concerned with local events, such as local outbreaks of disease and loss of access, or closure of premises by order of regulatory authorities following an incident in the locality (e.g. a burst water main). ‘Physical damage’

1 Practice Direction 51M [2.1].
2 [2020] EWHC 2448 (Comm); [2021] UKSC 1.
3 The full wording of all twenty-one selected clauses can be found at: https://www.fca.org.uk/publication/corporate/bi-insurance-test-case-representative-sample-of-policy-wordings-9-june.pdf.
4 The UKSC’s judgment was delivered mainly by Lords Hamblen and Leggat, with whom Lord Reed agreed. Lord Briggs, with whom Lord Hodge agreed, concurred but differed in some parts in the reasoning. The main judgment will be referred to here as that of the UKSC.
is found only through a tangible, material alteration to the insured property; nothing short of that will suffice for the policy to respond.\footnote{Merlin v. British Nuclear Fuels Plc. [1990] 2 Q.B. 557; Blue Circle Industries Plc. v Ministry of Defence [1999] Ch. 289; The Orjula [1995] 2 Lloyd’s Rep. 395; Kraal v The Earthquake Commission [2014] NZHC 919.} It was common ground that Covid-19 did not cause any physical damage to the insured properties.\footnote{In DAB Dental PLLC D/B/A Sunshine Dentistry v. Main Street Am. Protection Ins. Co., No. 20-CA-5504, (Hillsborough Cty, Fla. Nov. 10, 2020) the assured Dentistry argued that Covid-19 emergency orders prohibited access to its premises due to Covid-19 being present at other businesses and this constituted ‘direct physical loss of or damage to property’. The court held that mere presence of harmful substances which render property uninhabitable or unusable does not constitute direct physical loss or damage; instead, direct physical loss requires tangible or structural damage. Similar rulings were given in Gavrilides Management Co., LLCv. Michigan Ins. Co., Case No. 20-000258-CB, Mich., July 1, 2020); Social Life Magazine Inc. v. Sentinel Insurance Co. Ltd., case number 1:20-cv-03311.} As a result, damage clauses were left out of the scope of the test case but only those falling under the non-damage category were considered.

The method to calculate a BI loss is typically as follows: an earlier period of trading, generally the calendar year preceding the operation of the insured peril, is compared with the actual revenue during the indemnity period. Whilst the reduction in turnover calculates the recoverable loss, policies consider if there were specific reasons why the turnover during the indemnity prior year was depressed, such as a strike that affected the business. Hence, adjustments may be made to reflect ‘trends’ or ‘circumstances’ which were unrelated to the insured risk. Assume a railway operator was insured for interruption to business due to emergency speed restrictions (ESR). Following an accident, the operator had to apply ESR for a month which coincided with an industrial action that its employees took part in. The question imposed by the trends clause would be ‘what would have been the revenue if the ESR had not occurred?’ Due to the strike, the operator would in any event have run reduced services which would be caught by the trends clause.

Similarly, in the test case the court faced three main challenges. First, although some phrases were commonly used, each insuring clause varied from the others and the courts’ task was to find out whether each was to be read distinctly. Second, proof of the true cause of interruption to SMEs was critical. Some insuring clauses required a direct causal link between the local occurrences of Covid-19 and the interruption at the business premises. However, the combined effect of the local and national outbreaks of Covid-19 led to the interruptions. Further, did the trends clause defeat the SMEs insurance claims because irrespective of the local situation, the national lockdown would inevitably have interrupted the businesses?

In its analysis, the HC grouped, and the UKSC did not disturb, the selected twenty-one wordings under three different headings: disease, prevention of access/public authority and hybrid clauses.\footnote{One element of the peril insured against by these clauses is the occurrence of a notifiable disease. However, as distinct from the disease clauses, this element is combined with other elements, e.g. inability to use the premises, which narrow the consequences of disease covered by the clause.} Both the HC and the UKSC were guided through...
the ‘objectivity principle’ in contractual construction: the question is ‘what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean’?

Insured risk

All the selected wordings required interruption to business at the insured premises. Moreover, some were tied to, either something happening within a specified radius of the premises, or in the vicinity of the premises. It was significant to draw the following distinction for the purposes of the case:

(1) policies triggered by a generalised event, e.g. outbreak of an infectious disease, and
(2) policies triggered only because something specific has happened in the locality of the insured premises.

Both the HC and UKSC (more generously) concluded that most of the policies were triggered. The courts, however, differed greatly in the scope of some of the insuring clauses. Whether a local or a national outbreak of the disease was enough to trigger the relevant insuring clause became a critical distinction for the purposes of the causation problem. The HC decided that in category (2) above the interruption was required to be the result of the local outbreak. As discussed below, the UKSC disagreed.

- Disease clauses

Each wording discussed in the case was abbreviated. For instance, RSA 3 (much the same as MSA 1–2) insured:

interruption of or interference with the Business during the Indemnity Period following … any occurrence of a Notifiable Disease within a radius of 25 miles of the Premises …

In the view of the HC, the interruption was not tied to local events as the word ‘following’ did not require a close causal link between the local occurrence and the interruption with the business. A local outbreak encompassed in a national response triggered the insurers’ liability. It meant that if there was a general outbreak of the disease, as long as there was one instance of it in the locality then there was cover. The UKSC disagreed and drew attention to the word ‘occurrence’ as opposed to ‘outbreak’. A disease that spread could not qualify as an ‘occurrence’. Occurrence, interchangeably with ‘event’

8 Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896; Rainy Sky SA v Kookmin Bank [2012] 1 Lloyd’s Rep. 34; Arnold v Britton[2015] AC 1619; Wood v Capita Insurance Services Ltd [2017] AC 1173.
and ‘incident’, meant ‘something happening at a particular time at a particular place in a particular manner’\(^9\). It followed that the insured peril was an occurrence within the 25-mile radius only and not anything occurring elsewhere.

Although the clause was ‘something of an outlier’ because it referred to disease rather than an occurrence of illness, the UKSC read QBE 1 below in the same way that it insured disease occurring in or within 25 miles of the premises.

> Interruption of or interference with the business arising from … any human infectious … disease … an outbreak of which the local authority has stipulated shall be notified to them manifested by any person whilst in the premises or within a twenty five (25) mile radius of it …

The HC separated, and was not challenged on appeal, the word ‘manifest’ from ‘occurrence’. The former required a display of symptoms or a diagnosis; whereas the latter was to be found where a person had contracted Covid-19 such that it was diagnosable.

The HC held that QBE 2 and QBE 3 tied the interruption to diseases occurred in the locality only. QBE 2 insured

> Loss resulting from interruption of or interference with the business in consequence of … the following events

One of the events listed was ‘any occurrence of a notifiable disease within a radius of 25 miles of the premises … ’ It was added ‘insurer shall only be liable for loss arising at those premises which are directly subject to the incident.’

The words ‘following events’ and the addition of ‘incident’ to the clause were significant for the HC’s ruling. An incident was not the same as widespread danger. The clause was concerned with specific events, limited in time and place. Consequently, where there was an occurrence of Covid-19 within that radius limitation, it had to be shown that the interruption was the result of that occurrence. The UKSC found the HC’s reliance on the words ‘event’ and ‘incident’ unnecessary. RSA 3, QBE 2 and QBE 3 commonly included ‘any occurrence of a notifiable disease within’ the specified radius limitations. The meaning of event, occurrence and incident was the same and an occurrence of the disease within the specified area had to be the cause of the interruption.

- Hybrid clauses

The differences in the nuances were profound in hybrid clauses. Hiscox 1–3 were very similar. The Hiscox 1 extension was for:

> financial losses … 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

\(^9\) Axa Reinsurance (UK) plc v Field [1996] 2 Lloyd’s Rep 233.
human infectious or human contagious disease, an outbreak of which must be notified to the local authority.

Hiscox 4 provided similar cover but applied to:

… an occurrence of a notifiable human disease within one mile of the business premises.

Hiscox 4 contained a radius limitation but Hiscox 1–3 did not and was triggered if the occurrence of the disease wherever it occurred led to an inability to use the insured premises.

The Government’s advice on several different matters, including social distancing and avoiding large gatherings, pre-dated their enforcement through the relevant Regulations. Whether the word ‘imposed’ referred to only legally enforceable Regulations or also to the Government’s advice on social distancing prior to the Regulations was a critical point in the commencement date of the interruption. In view of the HC, ‘restrictions imposed by a public authority’ referred to something mandatory and not advisory. The UKSC disagreed and held that although the word ‘imposed’ connoted compulsion, it was unlikely that an ordinary person would look for a valid legal basis to be bound by the restrictions prior to the adoption of the Regulations.

RSA 4 was different. It insured:

any other enforced closure of an Insured Location by any governmental authority or agency or a competent local authority for health reasons or concerns

The courts agreed that the words ‘enforced closure’ was narrower that did not include ‘advice or exhortations, or social distancing and stay at home instructions’. The courts also agreed that the word ‘interruption’ did not require a complete closure of the business. However, they differed on the meaning of ‘Inability to use’. Whilst the HC found it meant something more than an inability to use part of the premises, the UKSC held ‘inability to use’ did not have to be interpreted as narrowly as that. An inability to use any part of the premises for any business purpose sufficed. A department store which had to close all parts of the store except its pharmacy would potentially be an example of a case of inability to use a discrete part of its business premises.

- Prevention of access / public authority clauses

The HC found the word ‘vicinity’ referred to the locality of the cover in respect of the following wordings:

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10 The first of those was on 21 March 2020, the Health Protection (Coronavirus, Business Closure) (England) Regulations 2020 (SI 2020/327).

11 The cover, obviously, would only be for that part of the business for which the premises could not be used.
MSA 1:

loss resulting from interruption or interference with the business following action by the
police or other competent local, civil or military authority following a danger or disturb-
ance in the vicinity of the premises where access will be prevented.

Zurich:

Action by the police or other competent local, civil or military authority following a danger
or disturbance in the vicinity of the premises whereby access thereto will be prevented … .

RSA 2.1

the actions or advice of a competent Public Authority due to an emergency likely to
endanger life or property in the vicinity of the Premises which prevents or hinders
the use or access to the Premises.

The HC ruled that there had to be an emergency in the vicinity of the premises, e.g. a
police cordon following a bomb threat. The entire country could not be the vicinity for
this purpose. The meaning and scope of the word ‘vicinity’, however, lost its signifi-
cance in the light of the causation analysis of the UKSC.12

Further, the word ‘prevention’, in the view of the HC, meant a complete ban on
access. A mere restriction was not a prevention but a ‘hindrance’ to access. Sub-
sequently, if a business was not required to close, there was no question of access
being prevented. The fact that the ability of individuals to visit premises had been
restricted was a hindrance only. For instance, a restaurant that had provided, prior
to the Covid-19 outbreak, both a take-away and dine-in services, and after the outbreak
carried on with its take-away business, would not be covered under the Arch wording
which insured:

reduction in Turnover and increase in cost of working … 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.

The Supreme Court disagreed. The phrases ‘inability to use’ and ‘prevention of access’
should be construed in the same way, and that if either the premises or the business was
divisible, prevention of access to one part of the business or the premises was sufficient
to trigger coverage. Under the UKSC’s ruling, the restaurant would be covered under
the Arch wording.

12 RSA 4 also included the word ‘vicinity’: ‘interruption or interference to the Insured’s Business as a result of… Notifiable Diseases … occurring within the Vicinity of an Insured Location, during the Period of Insurance …’ The HC’s read it more broadly and held where a disease was of such a nature that any occurrence in England and Wales would reasonably be expected to have an impact on assureds and their businesses, all occurrences of Covid-19 were within the relevant ‘Vicinity’. This was not challenged on appeal but in any event the UKSC’s ruling on ‘causation’ rendered he point irrelevant.
Causation

The division between the HC and the UKSC on the stipulation of the insured peril made a great difference in their application of the principles of causation. In the HC’s view for the wordings which tied the interruption to locality, the local event and the interruption had to be causally linked. The HC did not come to a firm conclusion with respect to how such burden of proof would be satisfied, but the matter in any event became irrelevant considering the UKSC’s analysis. For those that did not impose such a tie, the insured peril was the outbreak of disease, so that Covid-19 was enough to satisfy the insuring clauses if there was one outbreak within the geographical limits laid down by the relevant clause. The UKSC explained that the question of whether loss has been caused by an insured peril was a matter of interpretation of the policy. This involved assessing the legal effect of the insurance contract as applied to a factual situation.

- Standard of burden of proof

As the UKSC reiterated, in an insurance contract the parties may choose a formulation to express how close the link should be between the loss and the insured risk. The HC relied on the nuances of the phrases ‘following’, ‘as a result of’, ‘arising from’, and ‘in consequence of.’ The UKSC however said ‘... it is rare for the test of causation to turn on such nuances.’ For the UKSC it was not profitable to ‘search for shades of semantic difference between these phrases’.

The main principle of causation is found under the Marine Insurance Act 1906 (MIA 1906) section 55(1) which provides:

unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against.\(^\text{13}\)

According to the UKSC, the word ‘proximate’ is somewhat misleading. It originally had been used to express the opposite of ‘remote’ causes. However, as the common law evolved, the word proximate was described as referring to ‘efficiency’, namely, the real or the immediate cause of the loss. Assume a ship that was hit by a torpedo, subsequently met a heavy gale, and sank thereafter. The most proximate event in time was the gale. However, the court held in *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd*,\(^\text{14}\) that the cause of the loss was the torpedo as it maintained its efficiency until the ship sank. Here, there were two causes, each was independently capable of making the loss inevitable. The Court of Appeal answered, as a matter of common sense, which one was more likely than not to bring about the loss?

\(^{13}\) The section does not confine to marine insurance.
\(^{14}\) [1918] AC 350.
In some circumstances, however, two different causes might be interdependent to bring about the loss, so that neither would have caused the loss without the other. In other words, they occurred concurrently, none of them were on their own capable of making the loss inevitable, but their interaction did. The common law’s solution to determine this matter is as follows:

- If one of the risks was insured and the other was uninsured (not expressly mentioned in the contract), the insurer is liable.\(^\text{15}\)
- Where one was insured but the other was excluded, the latter prevails, the insurer is not liable.\(^\text{16}\)

In the Covid-19 pandemic, multiple illnesses occurred in numerous different places in different numbers. On the other hand, irrespective of the number of illnesses in different localities, the businesses were affected by the Government actions which was a nationwide response to a nationwide outbreak.\(^\text{17}\) Measuring the local efficiency of the illnesses that occurred within the specified areas on the businesses in those areas became irrelevant. All the cases were equal causes of the imposition of national measures which was a response to the national outbreak altogether. Two alternative solutions could be considered for the insuring clauses that required localised occurrences of a disease for interruption to businesses:

1. The insurance cover is not triggered because the efficient cause to interruption was not the illnesses occurred in the specified radius, but the national outbreak; or
2. The cover is triggered so long as at least one disease occurred in the specified radius, that is sufficient to satisfy the proximate cause test because all of the diseases occurred nationwide equally contributed to each interruption.

- Orient Express

For this purpose, a comparison with *Orient-Express Hotels Ltd v Assicurazioni Generali SpA (trading as Generali Global Risk)*\(^\text{18}\) (*Orient Express*) was critical. In this case the insured hotel, located in New Orleans, was physically damaged by Hurricanes Katrina and Rita. BI was included in the insurance cover if it directly arose from damage. The hotel was closed for several weeks, not only because the repair of the damage required it but also New Orleans had to be evacuated. An arbitral tribunal decided and Hamblen J (as he then was) upheld, that an undamaged hotel in a damaged city would inevitably have suffered a loss of profit. Application of the concurrent causes test as laid down

\(^{15}\) *JJ Lloyd Instruments Ltd v Northern Star Insurance Co Ltd (The Miss Jay Jay)* [1987] 1 Lloyd’s Rep 32.

\(^{16}\) *Wayne Tank and Pump Co Ltd v Employers Liability Assurance Corp Ltd* [1974] QB 57.

\(^{17}\) The test case was concerned with the situation prior to the Tier system introduced after the first national lockdown.

\(^{18}\) [2010] EWHC 1186 (Comm).
above (insured v. uninsured risk), would have concluded the ‘damage to the hotel’ to be the proximate cause. However, the obstacle was each peril was capable of bringing about the loss independently. Finding further support from the trends clause, the tribunal and the court applied the ‘but for’ causation test which concluded that the interruption was caused by the ‘damage to the city’.

The UKSC overruled Orient Express for it was wrongly decided. The UKSC took the matter beyond insurance, and in its more general sense of causation, found some conspicuous weaknesses in the ‘but for’ test. In most cases in any field of law or ordinary life, if event Y would still have occurred irrespective of the occurrence of a prior event X, then X cannot be said to have caused Y. However, the UKSC found this test over-inclusive because it fails to exclude a great many cases in which X would not be regarded as an effective or proximate cause of Y. Assume a ship, while in an unseaworthy state, sinks under exceptionally severe weather conditions. Whilst either her unseaworthiness or the weather conditions could be the cause of the sinking, it might equally be said that the loss would not have occurred but for the decision to manufacture the ship. Inadequacy of the test was also to be found where one event could or would be regarded as a cause of another event. Take as an example where two hunters simultaneously shoot a hiker who is behind some bushes. Medical evidence shows that either bullet would have killed the hiker instantly even if the other bullet had not been fired. The outcome of ‘neither hunter’s shot caused the hiker’s death’ was, in the view of the UKSC, manifestly inconsistent with common-sense principles.

It would be difficult, if not impossible, for a policyholder to prove that, but for the cases of Covid-19 within the specified areas, the interruption to its business would have been less. None of the Covid-19 illnesses on its own could bring about the loss, but their combination did. Significantly, however, in this combination, although all the cases were equal causes of the imposition of national measures, they were not interdependent in bringing about the interruption to businesses. The lockdown would have been imposed in all the areas irrespective of the number of the cases that occurred there. Hence, each of the illnesses were not sufficient, but, importantly, were necessary to bring about the interruption. The UKSC’s analysis concluded that an insured peril which acts in combination with other causes of equal efficacy to bring about loss is capable of being regarded as a proximate cause.

- The UKSC’s Response

In answering the dilemma presented by the clauses which seemingly provided a localised covered, the UKSC refused to tie interruption to locality. Their Lordships held that the relevant wordings did not confine cover to a situation where the interruption of the business has resulted only from cases of a notifiable disease within the radius, as opposed to other cases elsewhere. The MIA 1906, s.55 provides a rule which is flexible. The words ‘unless otherwise agreed’ indicates in the section a presumption that can be rebutted by the parties to an insurance contract. Businesses and insurers were presumed to have known that
Some infectious diseases can spread rapidly, widely and unpredictably so that an infectious disease would comprise cases both inside and outside the radius.

Measures taken by a public authority which affected the business would be taken in response to the outbreak.

The above reasoning was held to apply to the disease clauses as well as hybrid clauses which contain, as one element, an occurrence of an infectious disease within a specified distance of the insured premises. For example, the RSA 1 mentioned above was triggered where the interruption was a result of closure or restrictions placed on the premises in response to cases of Covid-19 which included at least one case manifesting itself within a radius of 25 miles of the premises.

Unlike the disease clauses, the hybrid and prevention of access clauses specify more than one condition which must be satisfied in order to establish that business interruption loss has been caused by an insured peril. With regards to Hiscox 1–4 (mentioned above) the insurer argued that the insured risk was composite in the sense it comprised elements required to occur in a reversed causal sequence: illnesses must cause restrictions on the premises, that must cause inability to use the premises, that must cause the financial losses. Relying on the words ‘solely and directly caused by’, Hiscox asserted that the extent of the indemnity provided was only in respect of losses proximately caused by the insured peril alone and nothing else. For the UKSC this was a misplaced argument. All the illnesses and their effects arose from the same original fortuity: the global Covid-19 pandemic.

The concurrent effects of the pandemic was not excluded from the cover. Contrary, they would naturally expect to such effects to occur concurrently with the insured peril. The public authority clause in the Hiscox policies indemnified the policyholder against the risk of all the elements of the insured peril acting in causal combination to cause business interruption loss. However, the cover was triggered regardless of whether the loss was concurrently caused by other (uninsured but non-excluded) consequences of the underlying or originating cause of the insured peril. Therefore, the fact that even without the lockdown customers would have stopped coming was not something that broke the chain of causation. As illustrated by a teaspoon of water added to a flooding river it may not be appropriate to recognise trivial contributions as causes. The UKSC dismissed to include such an appropriateness test in its analysis as in the present case’s context what mattered was ‘what risks the insurers had agreed to cover’?

Other questions

- Exclusions

RSA 3 contained an express clause excluding from the insurance ‘any loss or Damage due to contamination pollution … epidemic and disease …’. RSA therefore asserted that any loss caused by an occurrence of a notifiable disease is excluded from cover if
the disease amounts to an epidemic. The HC and the UKSC both agreed that no reason-able person would have intended the policy, whilst on the one hand insuring a notifiable disease, on the other hand, taking away the cover for an epidemic. The exclusion of epidemic was therefore to be disregarded. On the other hand, the exclusion clause in the Ecclesiastical wording was given effect. The wording was clear and there was no cover in respect of the closure or of the restriction of use. The clause provided:

\[ \text{closure or restriction in the use of the premises due to the order or advice of the competent local authority as a result of an occurrence of an infectious disease.} \]

- Trends clauses

A version of ‘trends clause’ appeared in each of the policies selected for the test case. The UKSC reiterated that trends clauses did not define the insured peril. They should not be allowed to obliterate the insurance cover but were to be considered only to quantify the indemnifiable loss. It was necessary to compare the actual performance of the business with that which the business would have achieved in the absence of the Covid-19 outbreak. In overruling Orient Express the UKSC identified the correct question there as ‘what would have been the profit but for the hurricanes?’ In the present case it was ‘what would have been the profit but for Covid-19?’ This outcome rendered the issue of ‘whether the effects of the pandemic could be taken into account in assessing the revenue of the assured before the occurrence of the insuring clauses were triggered’ irrelevant. The relevant comparator was the Covid-19 pandemic. For the purposes of the trends clause the matters external to the pandemic were taken into account. For instance, adjustments would be made under the trends clause for a Michelin restaurant that lost its famous chef just before the outbreak.

Conclusion

The UKSC decision has prevented an ongoing uncertainty for a lengthy period and offers a solution to the complex nature of different policy wordings involved in the discussion. The ruling is likely to be persuasive authority for the interpretation of similar policy wordings and claims elsewhere in the world. South African courts at least on two occasions found the HC’s ruling, whilst the UKSC’s judgment was still awaited, as a persuasive authority.\(^{20}\)

\(^{19}\) This was not challenged on appeal.

\(^{20}\) Ma-Afrika Hotels (Pty) Ltd and Another v Santam Limited (6499/2020) [2020] ZAWCHC 160; (17 November 2020); Guardrisk Insurance Company Limited v Cafe Chameleon CC (632/20) [2020] ZASCA 173 (17 December 2020).
In the construction of contractual terms context is everything. Insurance contracts attempt to predict at the outset, whether or not, and in what form, an insured risk will take place in the future. The insurers had refused to indemnify many BI policyholders by arguing that at the time those policies were agreed, none of the parties contemplated, and therefore agreed to insure, the Covid-19 pandemic. The UKSC recognised the need for innovative approaches necessitated by the novel outbreak of the disease. The analysis of the ‘but for’ causation test and the application of the concurrent causes rule to independent causes will open new directions for the principles of insurance. Moreover, a big question mark now appears for those who will be analysing the effectiveness of express exclusion clauses in commercial contracts.

The FCA estimated that the test case covered some 700 policies issued by over 60 different insurers, affecting up to 370,000 policyholders. Although no actual claims were dealt with in the judgment, it will provide the basis for the claims for SMEs concerned, including cafes, restaurants, cinemas, theatres, gyms, leisure centres and businesses providing holiday accommodation. The FCA published a policy checker to help policyholders find out if their insurance policy may cover BI losses caused by Covid-19 and what they can do next. Individuals may still pursue issues through the courts, or the Financial Ombudsman and the declaratory judgment will be taken into account in considering their claims.

Disclosure statement

No potential conflict of interest was reported by the authors.