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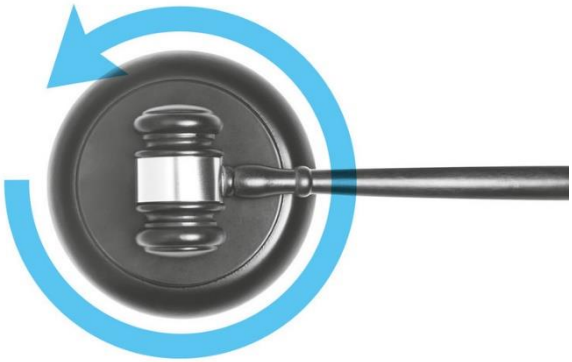

Covid-19 Business interruption insurance

Takeaways from the FBD insurance decision

Mr Justice McDonald delivered a landmark decision in favour of policyholders on 5 February 2021, in four test cases brought by publicans against FBD Insurance plc ("**FBD**") that will afford clarity and set a benchmark to those seeking indemnity for business interruption as a result of the Covid-19 pandemic and also to insurers and reinsurers.

With an appeal having already been ruled out by FBD, stated legal principles of the Irish High Court on interpretation of contracts, causation and proximate cause will form the basis of likely resolution of future disputes for the 1,300 publicans throughout Ireland that have similar FBD policies of insurance and the Court's interpretation will also provide clear guidance in relation to other comparable policies issued by insurers operating in the Irish market. The next steps of the Central Bank of Ireland (the "**CBI**") will bring further clarity to affected insurers to assess any proposed remedial action to ensure that the beneficial impact of the decision is applied to similar groups of customers.

While the Financial Conduct Authority (the "**FCA**") has previously been down this road[1] benefitting consumers from its much publicised test case on business interruption, the CBI has not. Instead, perhaps as a consequence of both statutory restrictions (we have no equivalent of the UK's financial market test case scheme In Ireland) and a certain pragmatism, the CBI elected to let the market litigate the issue. It has now done so and the CBI appears to have been vindicated in its multi-pronged perspective, by way of supervision and direct engagement with insurers, via its Supervisory Framework issued last August, outlining its expectations that insurers should accept that certain issues are established for responsive policies where issues of cover and causation are clear. The current monitoring approach of the CBI may, as a result of the clarity afforded by the FBD judgment, likely lead to further actions by affected insurers to now assess whether the final outcome has a wider beneficial impact for similar groups of customers and if proposed remedial action to ensure that the beneficial impact of the final outcome/s is applied to similar groups of customers and/or reasons why such remedial action may not be carried out. The approach of the CBI coupled with Mr Justice McDonald's opening statement that "*It is hoped that the ultimate outcome of these cases will assist in the resolution of a large number of similar claims…"* will likely ensure that suitable business interruption claims are resolved without recourse to litigation, however, not all policies of insurance are the same so what will be the key factors to assess?

Background

The cases were brought by three pubs based in Dublin; Hyper Trust Ltd t/a The Leopardstown Inn, Aberken Ltd t/a Sinnotts Bar and Inn on Hibernian Way Ltd t/a Lemon & Duke, as well as one pub based in Athlone; Leinster Overview Concepts Ltd t/a Séan's Bar.

Each of the plaintiffs held policies of insurance issued by FBD. The principal question arising in each of the four test cases was whether FBD was contractually obliged to cover the losses suffered by the publicans following the Government imposed closure of public houses on 15 March 2020, due to the Covid-19 pandemic.

[1] *Financial Conduct Authority v. Arch Insurance (UK) Ltd* [2020] EWHC 2448 (Comm) (the "**FCA Case**"). Our colleagues in the United Kingdom recently considered the FCA Case here.[1]

Section 3 of the FBD policy provided cover in respect of losses arising from the imposed closure of a premises by order of a government or local authority following the occurrence of a number of specified circumstances, including *"outbreaks of contagious or infectious diseases on the premises or within 25 miles of same"*. In the cases of the Leopardstown Inn, Sinnotts Bar and Séan's Bar, there had been no negotiation on the policy terms relating to business interruption and FBD's policy was presented as a standard-form policy. The only negotiation related to the extent of cover required under each section and the extent of the indemnity period required in relation to section 3.

The Lemon & Duke policy can be distinguished from the other three policies, as that policy was issued following a specific representation made by FBD to the insured effectively stating:- *"As outlined, our VFI/DPU policy which our policy will be written under is covering Coronavirus and it is the amount specified on the policy, the pub must be forcibly shut down and cannot be voluntary."*

FBD declined cover on the grounds that the imposed closure did not arise in consequence of an outbreak of Covid-19 on any of the publican's premises or within a 25-mile radius of their premises and submitted that the imposed closure could not be said to have been causatively linked to an outbreak of Covid-19 which occurred within the 25-mile radius surrounding the publican's respective premises. Lemon & Duke submitted that an enforced closure was a trigger giving rise to cover, however, once that trigger occurred, all losses arising from Covid-19 thereafter were covered under the policy, including losses sustained after the enforced closure came to an end. Mr Justice McDonald did not agree with this interpretation of the language used by FBD. However, the Court concluded that the terms of this representation applied in place of the provision of the policy that cover for business interruption is confined to cases where the imposed closure arises in respect of outbreaks within 25 miles of the premises.

Restatement of key principles on contractual interpretation

In any comparable litigation involving a contractual dispute where interpretation of a written contract is at issue, the wording of the executed contract itself is of primary importance. The subjective intention of the parties in entering into the contract or their subjective understanding of the meaning of its terms is irrelevant. As restated by Mr Justice McDonald, the Court will instead put itself in the position of the parties and assess, on an objective basis, the meaning of the disputed terms by looking at the relevant wording, the context of the contract as a whole and also in the context of the relevant factual and legal background. In doing so, the Court puts itself in the position of the parties at the time the contract was made and interprets the contract by reference to the meaning it would convey to reasonable persons having the background knowledge that would have been reasonably available to the parties at the time. Further, if certain relevant material was available to only one party to the contract, given the bilateral nature of a contract that material could not be considered with a view to establishing the commercial purpose of the contract unless the material was reasonably available to both parties[2].

In interpreting the terms of the policy, Mr Justice McDonald stated[3] that:

"The meaning of a contractual document is what the parties using those words, construed against the relevant background, would reasonably have been understood to mean. While words should be given their natural and ordinary meaning, it is possible that the parties may sometimes have used the wrong language in which case, the law does not require judges to attribute to the parties an intention which they plainly could not have had."

In interpreting a contract, the Court must read it as a whole and must not focus solely on the terms in dispute. This is an entirely objective process. However, in the case of a standard-form policy, where other rules of interpretation fail, the Court will apply the *contra proferentem* rule. In essence, this rule means that ambiguity in language will be construed against the insurer.

In assessing what the relevant factual background was at the time the contract was made the Court relied on the Supreme Court's decision in *Law Society of Ireland v Motor Insurer's Bureau of Ireland* [2017] IESC 31 (the "**MIBI Case**") in finding that, with the exception of the Lemon & Duke policy, the Covid-19 pandemic could not be said to form part of the factual background, as the existence of Covid-19 was not known prior to the issuing of the policies to the three remaining plaintiffs.

In respect to the relevant legal background, the Court considered relevant regulatory obligations in the European Union (Insurance Distribution) Regulations 2018 (S.I. No. 229 of 2018) (the "**Regulations**"). The Regulations require insurers to provide customers with objective information about an insurance product in a comprehensible form, to allow them to make an informed decision[4]. FBD addressed this requirement in the form of a "Features & Benefits" document. Additionally, prior to the conclusion of a contract information should be provided to customers by way of an insurance product information document ("**IPID**") on paper or other durable

[2] Citing *Lehman Bros International (Europe) v Exotix Partners LLP* [2020] BUS LR 67.

[3] At paragraph 113 of the judgment

[4] Regulation 34(1), 2018 Regulations

medium[5]. Mr Justice McDonald found that the standard form Features & Benefits document and IPID used by FBD should be regarded as forming part of the transaction and the relevant context against which the terms of the policy should be construed.

Cover available

Mr Justice McDonald rejected FBD's suggestion that the cover available to the plaintiffs extended solely to closures following an outbreak of disease in the specified localised area and not beyond that area. Significantly, following days of legal debate on the issue, he found that while it is clear that there must be an outbreak of disease at least within 25 miles of the premises, there is no suggestion that simultaneously occurring outbreaks outside that area would deprive the insured of cover noting that it would have been a *"simple and straightforward matter for FBD to so provide in its policy"*[6]. In other words FBD could have included the phrase '*on the premises or wholly within 25 miles of same'* but they had not. However, common sense would also dictate that simultaneously occurring outbreaks outside that area may make it more difficult to demonstrate causative connection between the imposed closure and the localised outbreaks.

Meaning of *"following"*

In addition to the requirement that there must be an outbreak or outbreaks within 25 miles of the insured premises, there were also a number of other elements to the insured peril which must exist for indemnity cover to have been provided. In this context, the next issue of interpretation that arose related to whether the use of the word *"following"* means that an imposed closure of the premises by order of a government or local authority must have been proximately caused by an outbreak of contagious or infectious disease on the premises or within 25 miles of the premises or whether the word should be interpreted as imposing some lesser standard of causation.

The meaning of the word *"following"* was also the subject of discussion in the judgment of the Divisional Court in the FCA Case and Mr Justice McDonald outlined the approach taken in that case as the publicans sought to rely on the FCA approach. However, he held that it was not intended to have a purely temporal meaning, concluding that the word *"following"* as used in the FBD policy should be construed as requiring that the outbreak of disease within a 25 mile radius of the insured premises should be a cause, but not necessarily the dominant cause, of the imposed closure.

Accordingly, it was not necessary for the insured to establish that the outbreak was the proximate cause of the imposed closure, so long as the outbreak was a cause.

Meaning of *"outbreak"*

Mr Justice McDonald referred to the Health Protection Surveillance Centre's definition of *"outbreak"*, as follows:

"An outbreak of infection or foodborne illness may be defined as two or more linked cases of the same illness or the situation where the observed number of cases exceeds the expected number, or a single case of disease caused by a significant pathogen (e.g. diphtheria or viral haemorrhagic fever). Outbreaks may be confined to some of the members of one family or may be more widespread and involve cases either locally, nationally or internationally."

The Court found that it is clear from the above definition that a single instance of a serious disease such as Covid-19 within the 25-mile radius would be sufficient, so long as it can be shown to have been the cause of the closure.

"But for" causation – what if more than one event causes loss?

The decision on causation is perhaps the most significant part of the judgment in terms of impact on future comparable insurance claims. Under an insurance contract the usual rule is that an insured is entitled to be indemnified by the insurer in respect of those losses which the insured can prove would not have arisen but for the occurrence of the insured peril. This decision clarifies that, in order to determine whether a loss has been caused by an insured risk, the courts are not beholden to a mechanical application of the *"but for"* test as was suggested by counsel for the insurer.

In recognising the difficulty that would be posed if publicans had to show that all of their losses arose but for the imposed closure arising from the outbreaks within 25 miles of their premises, as many losses could have arisen due to the public not wishing to go to a pub or restaurant for reasons more loosely connected to the pandemic, Mr Justice McDonald ruled that there were overlapping proximate causes of the plaintiffs' losses, i.e. the composite peril and the alteration of societal behaviour as a response to Covid-19. In so doing, the Court modified the *"but for"* test and treated each interrelated event as causing loss, rather than neither on the basis that fairness and reasonableness required a tailored approach.

This issue arose in the FCA Case, wherein the UK Supreme Court overruled the decision not to modify or relax the *"but for"* approach in the Orient-Express Case[7]. Though Mr Justice

[5] Regulation 34(5), 2018 Regulations
[6] Paragraph 146 of the judgment

[7] *Orient-Express Hotels Ltd v Assicurazioni General SpA* (UK) [2010] EWHC 1186 (the "**Orient-Express Case**")

McDonald ultimately reached a comparable conclusion he did so in a way that recognises that the Irish legal system's interpretation of the *"but for"* test *"is not taken to extremes and applied in an unduly mechanical way which could give rise to manifest injustice"*[8].

The appropriate counterfactual

The counterfactual is the position the plaintiffs would have been in but for the occurrence of the insured peril. In the case of all four plaintiffs, the Court noted that further arguments as to the geographic extent of the counterfactual world are necessary and the Court will explore this further later this month.

Trends clauses

The purpose of a trends and circumstances clause is to ensure, in so far as reasonably practicable, that the adjusted figures reflect the financial results which, but for the occurrence of the peril, would have been achieved by an insured during the insured peril. FBD unsuccessfully argued that, under the "trends and circumstances" provisions of section 3 of the policy, any trends and circumstances affecting the business prior to the occurrence of the insured peril on 15 March, 2020 ought to be taken into account in adjusting the amount to be paid, even if they are ultimately part of the composite insured peril. Instead, Mr Justice McDonald concluded that the trends and circumstances provisions of the policy cannot be used to cut down the indemnity in that way in light of the clear promise made by the terms providing business interruption cover in respect of business interruption arising as a result of a closure of the premises by government authority following outbreaks of a contagious or infectious disease within 25 miles of the premises.

The indemnity period

The plaintiffs contended that they were entitled to be indemnified under the policy for the continuing effects of the Covid-19 pandemic, even in the period after the imposed closure came to an end. Significantly, McDonald J rejected this claim and saw no basis to suggest that the intention of the policy was to indemnify the plaintiffs in respect of the *"post-closure effects"* of the disease as that would in fact comprise re-writing of the policy. However, to the extent that the plaintiffs can show that their businesses continue to be affected by the insured peril after the period of imposed closure comes to an end, they are entitled to be indemnified for those losses until the earlier of the point at which the losses cease, or, the indemnity period comes to an end.

Conclusion

FBD has said it will arrange interim payments to affected policyholders while awaiting final clarity on quantum. The next potential battleground will be how to assess quantum of losses. There is still plenty of mileage in this one yet, however, the clarity and practical reasoning of Mr Justice McDonald will benefit not only the plaintiffs in this case, it will, in time, benefit the sector generally and will shine a light on insurers and their reinsurers regarding whether or not they can make a recovery for these claims under reinsurance provisions. The decision may prompt insurers to redraft policies so that they only cover business interruption from property damage, or also include cover for the underlying cause of the property damage at a higher price. No matter what occurs the decision will make the buying process clearer.

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[8] At paragraph 211 of the judgment