



Business Interruption Insurance



The Supreme Court's ruling that insurers are liable under business interruption policies may mean that your business can recover losses caused by Covid-19.



March 2020 saw the UK Government introduce a series of measures to prevent the spread of Covid-19, including a national lockdown announced on 23rd March 2020. Covid-19 and these measures have had a catastrophic impact on the profits of so many businesses.

For many they would have expected to be able to recover these losses through their business interruption insurance.

However, many insurers refused to meet claims, leading to the Financial Conduct Authority (“FCA”) instituting proceedings.

On 15th January 2021, the UK Supreme Court handed down its decision in *Financial Conduct Authority v Arch Insurance (UK) Ltd and Others* [2021] UKSC 1, which considered the impact of the Government’s actions and measures on claims that could be made under a variety of insurance policies covering business interruption.

In principle and, so long as the terms of the policy are consistent with the policies analysed by the Supreme Court, the ruling means that policy holders who experienced business disruption due to the pandemic should be entitled to compensation from insurers.

Key Points

Some of the key points in the Supreme Court Judgment are as follows:

1. Most insurance policies contain a “disease” clause which provides insurance cover for business interruption loss caused by the occurrence of a “Notifiable Disease” at or within a specified geographical distance of the insured business premises (typically 25 miles radius).

The Supreme Court considered the “disease” clauses and the meaning of a “Notifiable Disease” in the insurance policies before it. An example of these are set out at the end of this Quick Guide. It held that the “disease” clauses which it considered provided cover for business interruption caused by any cases of illness resulting from Covid-19 that occur **within** a 25 miles radius of the insured business premises. It does **not** cover interruption caused by cases of illness resulting from Covid-19 that occur **outside** that area.

2. It is sufficient for any policy holder to show that, at the time of any relevant Government measure, there was at least one case of Covid-19 within the geographical area covered.

3. An instruction given by a public authority such as “to close tonight”, may amount to a “restriction imposed” if it carried an imminent threat of legal compulsion or is in mandatory and clear terms and indicates the compliance is required without recourse to legal powers. In such circumstances the insurer may be liable to indemnify.

4. Any indemnity should be calculated by reference to what would have been earned by business had there been no Covid-19 (therefore disregarding any decrease in revenue prior to the insurance policy being triggered).

5. *Orient Express** was wrongly decided and should be overruled. In *Orient Express*, the insurers would successfully argue that the cover did not extend to losses which would have been sustained in any event as a result of damage to New Orleans caused by Hurricane Katrina.

The ruling is potentially very favourable for businesses. However there will be a need for specific advice on any individual policy to ensure that it can be brought within the terms of the Supreme Court ruling.

Example of Clauses

Example of a ‘disease’ clause considered by the Supreme Court in *Financial Conduct Authority v Arch Insurance (UK) Ltd and Ors* [2021] UKSC 1

“We shall indemnify You in respect of interruption or interference with the Business during the Indemnity Period following:

a. any

i. occurrence of a Notifiable Disease (as defined below) at the Premises

or attributable to food or drink supplied from the Premises;

ii. discovery of an organism at the Premises likely to result in the occurrence of a Notifiable Disease;

iii. occurrence of a Notifiable Disease within a radius of 25 miles of the Premises;

b. the discovery of vermin or pests at the Premises which causes restrictions on the use of the Premises on the order or advice of the competent local authority;

c. any accident causing defects in the drains or other sanitary arrangements at the Premises which causes restrictions on the use of the Premises on the order or advice of the competent local authority; or

d. any occurrence of murder or suicide at the Premises.”

Example of a definition of a ‘Notifiable Disease’ considered by the Supreme Court in *Financial Conduct Authority v Arch Insurance (UK) Ltd and Ors* [2021] UKSC 1

“Notifiable Disease shall mean illness sustained by any person resulting from:

i. food or drink poisoning; or

ii. any human infectious or human contagious disease excluding Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition **an outbreak of which the competent local authority has stipulated shall be notified to them.”**

* *Orient-Express Hotels Ltd v Assicurazioni Generali SpA (trading as Generali Global Risk)* [2010] EWHC 1186 (Comm)

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