Policyholder Outlook Following UK Biz Interruption Test Case

By **Peter Sharp and Paul Mesquitta** (September 22, 2021)

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The U.K. Supreme Court issued a policyholder-friendly decision earlier this year in the COVID-19 business interruption insurance test case, Financial Conduct Authority v. Arch Insurance (UK) Ltd. The judgment will apply to policyholders' claims on a case-by-case basis.

On Jan. 15, the U.K. Supreme Court handed down its judgment in the test case for the benefit of policyholders.[1] The FCA has said that, in the period between the Supreme Court decision and June 14, insurers have paid out £757 million to policyholders in respect of claims related to COVID-19 under their business interruption insurance policies.

However, in the wake of the landmark ruling, the English courts have in recent months seen a number of business interruption claims brought by policyholders against their insurers. Despite the likelihood that the FCA judgment has resulted in claims reaching settlement, it is evident from the cases going through the English courts that there are points of dispute between insurers and policyholders.

Practical Effect of the FCA Test Case for Policyholders

Shortly after the Supreme Court decision, the FCA issued a "Dear CEO" letter to those insurers affected by the business interruption test case.[2] It is clear from this communication that the FCA is keen that all businesses with valid business interruption claims receive payments due to them from insurers as soon as possible.

In its letter, the FCA explained its intention to request and publish data on business interruption policies that respond to COVID-19, along with information from affected insurers on the progress of their nondamage business interruption claims by policyholders.

The FCA published data on business interruption claims for the first time on March 22, and it continues to do so on a monthly basis. The FCA reported that, as of Sept. 5:

- 27,248 of 42,308 business interruption policyholders whose claims have been accepted by their insurer have received at least an interim payment;
- The proportion of policyholders who have received payments in respect of accepted claims, 64%, has increased from 63%, as reported to the FCA in August, and 59%, as reported to the FCA in July;
- Insurers have paid out an aggregate value of £328,908,143 in interim and initial payments for 4,568 unsettled claims; and
- An aggregate value of £696,244,085 has been made in full and final settlement of 22,680 claims.

Based on these figures, insurers have not yet made any payments to 15,060 business

interruption policyholders whose claims have been accepted. Accordingly, the FCA has advised that "[a]ny [business interruption] policyholders who believe they may have a claim but have not yet submitted this to their insurer should do so as soon as possible in accordance with the policy document."

Business Interruption Cases in the English Courts

Although the Supreme Court judgment is very policyholder friendly and the FCA envisages a swift recovery process, such a positive outcome for policyholders is not guaranteed. In some circumstances, some policyholders have had no option but to seek recourse via the English courts. We have provided a summary of some of these cases below.

World Challenge Expeditions

In World Challenge Expeditions Ltd. v. Zurich Insurance PLC, travel company World Challenge Expeditions canceled a number of student trips throughout 2020 as a result of COVID-19 and had to refund a total sum of £10 million.[3] It now seeks that amount from Zurich in a claim filed in the Commercial Court of the High Court of Justice of England and Wales on May 24.

World Challenge contends that the policy contains cancellation clauses that cover events beyond its control, such as global pandemics. World Challenge submitted that Zurich had previously provided cover in respect of business interruption losses for medical events outside its control and for cancellation losses unrelated to COVID-19. As a result, World Challenge's position is that its policy covers cancellations due to COVID-19.

Furthermore, "World Challenger sought express confirmation from the defendant that the defendant would continue to indemnify the claimant for the amount of the deposit which the claimant was obliged, upon cancellation, to refund to challengers."[4]

Despite Zurich's prior assurances that it would cover losses relating to COVID-19, it subsequently changed its position.

Parkdean Resorts

In Parkdean Resorts U.K. Limited and Others v. Axis Managing Agency Ltd., U.K. holiday park operator Parkdean filed a claim in the Commercial Court on July 27, 2020, for £71 million stemming from losses suffered due to the closure of 67 caravan, camping and chalet sites following the outbreak of COVID-19.[5] Parkdean's policy provides cover for premises forced to close because of an outbreak of an infectious disease. Parkdean's position is that the government's lockdown restrictions prevented access to the insured premises, within the wording of the policy.

Parkdean also claims for tail losses after the lockdown ended because "given the length of time the parks were required to be closed, such a ramp-up period necessarily took some weeks" and its adjustment period continued until July 24 of this year.

Axis' position is that Parkdean needs to prove the losses were suffered because of the lockdown and not by a general economic downturn. Further, Axis denies that COVID-19 prevented access to the sites and argues that COVID-19 was present prior to the imposition of the lockdown restrictions.

Corbin & King

On April 22, Corbin & King Ltd., the owner of a number of other upmarket London restaurants, commenced a claim, Corbin & King Ltd. and another v. AXA Insurance U.K. PLC, in the Commercial Court against AXA for £6 million in lost sales when the company's venues were obliged to close in both March and November 2020, and were placed under restrictions in September 2020.[6]

Corbin & King contends that each of these instances constitutes a separate restriction of access under its business interruption policy. Each individual venue ought to have received up to £250,000 each time the venues, which were separately insured, were closed or adapted in compliance with government regulations.

AXA's position is:

> Any restriction on, or hindrance to, access to the premises must arise directly from actions taken by police or any statutory authority in response to the danger or disturbance at the premises or within a one-mile radius of the premises [rather than] actions taken at a national level, in response to a national emergency.[7]

In other words, cover was not available because the government did not impose lockdowns or restrictions in response to a localized danger or disturbance specifically at any of Corbin & King's restaurants, or within a one-mile radius of the premises. Furthermore, AXA considered that the maximum sum recoverable under the policy would be £250,000 for all the restaurants together for each set of government restrictions, totaling £750,000.

Various Eateries Trading

In Various Eateries Trading Ltd. v. Allianz Insurance PLC, filed in the Commercial Court on June 30, another restaurant company is seeking to recover almost £16.4 million from Allianz for losses suffered during the COVID-19 lockdowns, specifically £15.8 million for decreased turnover, £520,000 for increased working costs and £30,000 in costs for the claim.[8]

Various Eateries' claim for losses falls under different categories in its policy, namely the prevention of access clause, the enforced closure clause, and the disease clause. Relying on the FCA test case, Various Eateries' position is that each lockdown and each set of restrictions constitutes distinct events under the policy.

Everatt's

Following the imposition of the first national lockdown in England, the staff of the law firm Everatt's LLP could not work from its main office. Their inability to access the premises allegedly caused the firm to suffer a loss of income.

Everatt's LLP v. Aviva Insurance Ltd., filed in the Commercial Court on May 11, is based on the prevention of access clause in Everatt's business interruption policy, which was triggered by government action.[9] Everatt's contends that its policy covers loss of income up to a total of £478,000, in addition to increased office expenses of approximately £150,000.

Aviva, Everatt's insurer, states that the majority of the losses claimed by Everatt's were "attributable only to the wider effects of the Covid-19 pandemic and not to the hindrance or prevention of access to or use of the premises," and as such are not covered by the policy.

Rather, Aviva must only indemnify Everatt's for lost income directly linked to the inability of lawyers to attend the office during the lockdown. Aviva therefore maintains that any payout to Everatt's should be subject to a cap of £50,000.

Further Guidance for Policyholders

The FCA test case produced a resoundingly policyholder-friendly result. However, the U.K. Supreme Court considered only the policy wordings that were at issue in the test case, as opposed to the wording of every business interruption insurance policy, and related policyholder claims.

In order to establish the implications of the judgment in the FCA test case for their own claims, policyholders must therefore consider the specific wording of their individual policies against wording of the policies considered by the Supreme Court.

The cases currently before the English courts can provide policyholders with an indication of the types of arguments the courts are hearing from policyholders and insurers regarding coverage for business interruption losses. Should these cases reach trial, policyholders will benefit from the analysis of policy wording in the context of the relevant facts — against the backdrop of the FCA test case — which will be set out in the courts' judgments.

Policyholders can also look to the FCA for further guidance on their business interruption claims. The FCA has published a business interruption insurance policy checker[10] and general policyholder FAQs[11] designed to enable policyholders to investigate whether their policy will cover business interruption losses due to COVID-19. It does so by checking whether the wording in the relevant policy is the same as, or very similar to, the 21 policies in the representative sample considered in the FCA test case.

However, the FCA stressed that each claim will need to be considered on an individual basis to determine whether the policy in question provides cover for losses suffered as a result of COVID-19, reminding policyholders to check in particular (1) the extent of their coverage, including the length of their indemnity period, and (2) the losses included under the cover.

The FCA has also produced a list of business interruption policies that insurers have assessed as being, in principle, capable of responding to COVID-19 following the FCA test case.[12] Such policies cover over 200,000 policyholders. Policyholders may also refer to a table which highlights the most relevant declarations in the FCA test case by policy type for policyholders.[13]

Finally, when seeking to establish a claim against their insurers for business interruption losses, policyholders may rely on the guidance published by the FCA on proving the presence of COVID-19,[14] as well as the calculator that was similarly launched to help policyholders prove the presence of COVID-19 in their policy area.[15]

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as legal advice.

[1] To see our review of the judgment visit: https://www.morganlewis.com/pubs/2021/01/uk-supreme-court-provides-policyholders-an-antidote-to-business-interruption-losses-cv19-lf.

[2] https://www.fca.org.uk/publication/correspondence/dear-ceo-letter-business-interruption-insurance-january-2021.pdf.

[3] World Challenge Expeditions Limited v. Zurich Insurance PLC, case number CL-2021-000322 in the Commercial Court of the High Court of Justice of England and Wales.

[4] Id.

[5] Parkdean Resorts U.K. Limited and others v. Axis Managing Agency Ltd (a managing agent at Lloyd's sued on its own behalf and on behalf of all other members of Lloyd's Syndicate 1686 (the Axis Syndicate)), case number CL-2020-000469 in the Commercial Court of the High Court of Justice of England and Wales.

[6] Corbin & King Limited and another v. AXA Insurance U.K. PLC, case number CL-2021-000235 in the Commercial Court of the High Court of Justice of England and Wales.

[7] Id.

[8] Various Eateries Trading Limited v. Allianz Insurance PLC, case number CL-2021-000396 in the Commercial Court of the High Court of Justice of England and Wales.

[9] Everatt's LLP v. Aviva Insurance Limited, case number CL-2021-000275 in the Commercial Court of the High Court of Justice of England and Wales.

[10] https://www.fca.org.uk/firms/business-interruption-insurance/policy-checker.

[11] https://www.fca.org.uk/firms/business-interruption-insurance-policy-checker/general-faqs-policyholders.

[12] https://www.fca.org.uk/publication/corporate/bi-insurance-test-case-list-policies-capable-responding-covid-19.pdf.

[13] https://www.fca.org.uk/publication/corporate/bi-insurance-test-case-table-high-court-supreme-court-declarations.pdf.

[14] https://www.fca.org.uk/publication/finalised-guidance/final-guidance-bi-insurance-test-case-proving-presence-covid-19.pdf.

[15] https://covidcalculator.fca.org.uk/.