Branko Ltd FCA Test Case on Business Interruption Insurance

Friday 26th June 2020 and I have been watching a further procedural matters hearing at the High Court on the FCA's Test Case on Business Interruption Insurance.

Insurers have already, as part of their defence, argued as to whether it is the pandemic or government which has caused the problem, and because of the government's actions this has now caused 'frustration' to the contract of insurance (the Sweden defence). Clearly the concerns with insurers are that the flood gates will open if the case succeeds and clients are able to claim successfully for COVID-19 business interruption losses. For me I think the issues boil down to three KEY areas:-

1) How extensive is the policy and must the insured premises be actually damaged in order for a BI claim then to be made/considered?

2) Is coronavirus/COVID-19 per se covered and HAS it actually occurred?

Insurers define notifiable diseases and it may not have been possible to include the current one BUT it would appear that the list does include diseases that would operate on epidemic or pandemic proportions so is it covered as a listed disease or as a non-listed disease (i.e. all diseases)? We cannot assess intention (as this has been argued by virtually all the insurers) but we can read and determine what the policy wordings do actually say.

In addition, should it fall within the definition of what diseases are covered, then does this disease have to be found on the premises or within a defined area (say one mile or 25 miles) and what proof of this will be needed (which in itself is subject to massive insurer argument).

3) Is non-damage and non-disease denial of access (by civil or statutory authority or by order of the government) and the consequential financial loss covered?

So with (1) a lot of policies should not respond if written clearly, i.e. the insured premises have to be damaged (which will be defined) and for that claim to be made then in order for the BI section to apply. These may have been part of simpler/smaller commercial package policies. So, in this instance, no actual insured damage has been occasioned to the premises so this will mean that the BI section won't kick in.

I don't think, personally speaking, the court would be able to change this as the broker will have understood the client's demands and needs and have explained this clearly to them (have they?). If the business was small and not requiring any form of enhanced cover then the client should have had an 'OK' type of insurance (and that's what they were prepared to spend) and whilst upset, is unlikely to kick off. Bear in mind that a number of insurers are pointing out brokers ALSO have a duty in determining the suitability of a particular policy (and some larger brokers have written the wordings themselves).

With (2) this, I feel, will be the crux of the hearing that starts on 20th July and the judges will have to decide what each of the contested wordings mean in the cold light of day.

Let me look at some of the insurers' defences.

Arch argue that actions or advice on social distancing or working from home technically did not prevent access to insured premises, even if they resulted in less or no use being made of the properties. This depends on the type of premises so with an office it was possible if home-working was not possible, that you could go into work but if this was a leisure/tourist attraction clearly they would have closed and many won't have re-opened until 4th July (England only).

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Argenta state the policy does not include an exclusion for loss caused by a pandemic stating "Such an exclusion is unnecessary, because the policy wording provides cover only for specific insured perils – which do not include a global or national pandemic." In addition, there is an exclusion that excludes any loss arising from premises which have not been 'directly affected' by a local occurrence of an infectious disease.

They stress that the only insured peril within scope is a local occurrence of an infectious disease - that is, within 25 miles of the insured premises.

They also state that policyholders must establish that the loss claimed has been sustained as a result of the occurrence of COVID-19 within the relevant zone, a requirement that is not satisfied by showing that the loss is a result of any other cause such as the global or national pandemic and/or governmental/public responses to it.

Ecclesiastical and MS Amlin state that "It is irrelevant that insurers did not include an epidemic or pandemic exclusion clause if…the relevant policies did not extend to such perils in the first place" and add "Neither access to nor use of the premises is prevented unless it is rendered physically (in the case of access and use) or legally (in the case of use) impossible."

Hiscox begin by stating that there is a general presumption that there ought to be coverage and seek clarity as to whether there was in principle an insured peril and, secondly, whether that insured peril in principle caused the losses sustained.

Other interesting contributions include (from QBE) "the fact that something has not been excluded does not mean that it is covered in the first place."

RSA admit that the COVID-19 pandemic amounted to a public health emergency but state that a national public health emergency is not the same as an emergency in the vicinity of the premises and that the word 'vicinity' is to be given its natural meaning and denotes a requirement for a close spatial proximity to the premises.

Zurich have stated that "The UK government is not a 'civil authority' (and, accordingly, it did not 'follow') a specific and localised danger, in the vicinity of any particular premises, but rather was a response to a nationwide pandemic …irrespective of whether there was a danger in any particular vicinity and irrespective of the number of cases of COVID-19 which might actually have occurred there.

The FCA, in a 35-page response (published 3rd July), refute these defences most strongly.

So, as you can see, the court will initially have to give regard as to whether it is the pandemic or the government response that has caused the action. Following this it will be very stretched as it will then need to take on board every wording under test and interpret whether what has happened falls to be covered by the policy as written adopting a common-sense approach but bearing in mind any clear ambiguity in the wording will go against the insurer (again regardless of any unknown originally intended insurer intentions which they have failed to adequately articulate in their wording). For me, if insurers specified particular diseases that could become epidemic or pandemic in proportion then surely this one would be in the same boat so would that be splitting hairs? Do customers have to establish that COVID-19 actually was present in the given insured area? Is this a step too far?

With (3) I feel this is very difficult for insurers to argue. They have stated what classes of body can deny access to the premises and are they really saying whilst a local authority can, the government can't? How they define "incident" will be crucial but if you look at Hiscox in one of their wordings, they

state that cover is provided if an "incident…occurs within a one mile radius of the insured premises which results in a denial of access or hindrance in access to the insured premises, imposed by any civil or statutory authority or by order of the government…for more than 24 consecutive hours."

Many would struggle to see cover not operating in this instance, but that's for the judges.

This is a difficult time for customers and brokers and insurers alike and the action is estimated to cover some 8,500 disputed claims. Over 10,000 businesses have gone into liquidation from March to mid-June and they may have been able to survive had their policy paid out. Some 100,000 restaurants, cafes and pubs have not been able to open until 4th July (in England). None of the businesses that have ceased to trade now need insurance and clients have been lost. What do those people now think about the insurance industry collectively?

Wordings are key and not all claims can be covered despite what insurers may have said in the past re standing together with the insured and not existing solely to generate profit (i.e. pay valid claims as that is what we are here to do). Whilst many will consider it in the "spirit of the policy" to pay it is very difficult to explain to a customer what the implications are for all insurers and all its policyholders would be if a general "honouring the spirit" approach were to be adopted but I don't feel insurers should be splitting hairs where, based on the wording as written, and a common-sense interpretation of it, they should indeed be paying.

Will this case present a clear and present danger to brokers? Possibly. However, with only 15 pandemics in the last 2,000 years and terrorism and cyber (the risk of which is somewhat more prevalent) cover being only bought by 10% of clients, is it reasonable to have been expected to give advice on this??!! Some may allege that brokers have failed to misunderstand the client's requirements (the need for wider cover assuming this was available) or have failed to provide adequate advice re the appropriateness of the particular wording which was then advised as being suitable to the client. Please do now take this opportunity to check the robustness of your advice process under ICOBS and the competence of your staff over these critical issues.

What shocks me is that professional indemnity insurers are seeking to exclude advice (or lack of advice) given to clients over COVID-19 and where cover is available that premiums are shooting through the roof with much larger excesses that could affect the financial viability of brokers.

I do not envy the work of the judges in this case. The FCA's motives are decent enough in bringing the action to try to get clarity around the myriad of different wordings and hopefully avoid endless litigation on the subject as the arguments over 9/11 wording interpretation went on for over 10 years in the US courts and we don't need that but I fear they may be trying to simplify what is, in fact, a hugely complex issue.

Every claim for each client has to be decided on its individual merits in its unique circumstances so whilst having guidance on the interpretation of a particular wording may be helpful it won't guarantee cover in all and every circumstance. Whilst we can talk about this for decades to come, and no doubt it will enter CII study texts and provide me with a lecture income for years to come, will the insurance buying public understand that? I am sure insurers will appeal the judgement of the High Court to the Supreme Court if they are not entirely happy and this will then take even more time and so many more businesses will by then have ceased to trade - was that ever the intention?

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