Insurance revisited

Update from 15 January 2021

Latest update on FCA's 'business interruption insurance' test case.

The Supreme Court has today handed down judgment dismissing the insurers' appeals and substantially allowing the FCA's appeal which means that the principles as set out below remain unaffected (and for policies which include 'Access' wording, The Supreme Court approved a broader interpretation than the High Court had done previously).

For landlords and tenants, who may have put this issue on hold, they will want to review their policies in light of the Supreme Court's decision.

If you need any advice in relation to the judgment or your policy wording, please contact Mike Scott in the first instance (details below).

Update from 16 September 2020

The topic of insurance has once again stepped into the limelight with the handing down of the long-awaited judgment on the FCA's 'business interruption insurance' test case which was handed down yesterday.

The High Court made their decision in favour of the policyholders on nearly every count. This provides some much-needed clarity for businesses who had obtained a policy insuring against the risk of loss caused by the outbreak of pandemic disease only to be told by their insurers that the specific risk of Covid-19 fell outside the scope.

Further information about the case (and its ramifications for businesses generally) can be found in our article here.

This update considers how the case might impact on landlords and their tenants specifically. The key takeaway is that landlords (and their tenants) should look to their policies once again in light of this case.

Unfortunately, the judgment provides no clear formula that will enable policyholders to quickly determine whether their policy will pay out; it is more nuanced than that. It is a question of reviewing each policy against the detailed findings of the High Court in order to work out whether or not it is a policy that should be paying out.

In an ideal world, where claims have already been submitted, this exercise would be carried out by the insurance companies and many of them may do just that. However, whether or not claims have been

submitted, we would strongly recommend that every landlord and tenant review their policy against the findings of the High Court.

As summarised in our other articles, the court divided the policies into three main categories:

1. **'Disease**' wording (those policies that enabled claims to be made in the event of a notifiable disease occurring within the vicinity of the premises);
2. **'Access'** wording (where cover is provided if the premises has been rendered unusable following access being prevented as a result of the notifiable disease); and
3. **'Hybrid**' cases which contained a combination of both.

It is perhaps unsurprising that the court took a slightly more restrictive interpretation in relation to the 'Access' wording but it was comforting to policyholders generally that the court accepted that, in certain circumstances, claims should be successful in relation to all three categories.

Where access was prevented as a result of the outbreak of Covid-19, it would be necessary to consider the specific circumstances of each case (e.g. the type of business operating from the premises, whether the closure of the business was required in response to a public health emergency or whether the business could have continued to function in some reduced capacity) before deciding whether the policy will pay out.

The key action point for landlords is to review their policy wording once again to consider whether they have a policy that could fit into one of the three above categories.

If there is any doubt, it is worth seeking advice. Not only could the landlord have a claim against their policy but their tenants might also have a case for arguing that the rent suspension clause is triggered with the result that no rent has been payable since the outbreak/lockdown. In such situations, it will be worth identifying the precise date on which the lockdown (or closure of the premises) took place in relation to the relevant rent quarter day.

It is impossible in this note to deal with every possible permutation of possible wording of insurance policies and rent suspension clauses. However, suffice to say many rent suspension clauses are triggered by the premises being rendered inaccessible by an insured risk. In this case, the clause may well be triggered in the event that the landlord has a policy that falls within the second category ('Access') as identified by the High Court.

The Access category is likely to be the most common source of debate given that there are likely to be more instances of this type and therefore more resistances from the insurers in settling the claims. We foresee many lively arguments over whether a particular policy falls within the category as defined by the court.

Summary

The decision of the court is good news for policyholders generally and it is well worth dusting off the policies again for a quick review and, in the event that some of the relevant wording is present, it would also be worth reviewing the rent suspension clauses in any relevant leases. In the case of larger portfolios, this can be achieved by sampling or using AI search software to conduct such an exercise in a cost effective way.

This article follows on from our original 'COVID-19 Consequences for Landlords' article in April 2020.

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