Insurance against coronavirus (COVID-19)? (Financial Conduct Authority v Arch Insurance)

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Insurance & Reinsurance analysis: Paul Wright of Brick Court Chambers provides a post-hearing overview of the issues before the Supreme Court in *Financial Conduct Authority v Arch Insurance*, and highlights what will likely be the most interesting aspects of its judgment.

What are the key issues in this dispute?

Coronavirus and the responsive measures taken by the governments of the various nations of the UK have caused enormous economic damage to a large number of businesses. Unsurprisingly, this has given rise to disputes about whether the businesses can recoup their losses under various business interruption insurance policies.

In June 2020, the Financial Conduct Authority brought a test case involving 21 different policies issued by eight insurers. In September 2020, the Commercial Court (*The Financial Conduct Authority v Arch Insurance (UK) Ltd and others (Hospitality Insurance Group Action and another intervening)* [2020] EWHC 2448 (Comm), Lord Justice Flaux and Mr Justice Butcher) gave judgment on various issues of principle in which (broadly stated) they adopted constructions of the policies and conclusions on causation which were, in respect of many of the policies, favourable to the assureds. In November 2020, the Supreme Court heard argument over four days in leapfrog appeals, mostly brought by the insurers.

The central issue in the case concerns the scope of the insurance coverage, and in particular the scope of the peril insured under the policies. In most of the cases the Commercial Court took a broad view of the peril. Its approach can best be illustrated by the so-called ‘disease clauses’. A number of these disease clauses provided cover for losses following the occurrence of a notifiable disease within a radius of 25 miles of the premises of the business (eg the bookshop that had to close because it was deemed to be selling non-essential items). It was accepted that coronavirus was a notifiable disease. However, the insurers disputed liability on the basis that the losses arose not from the occurrence of the disease within the radius of 25 miles (which was covered) but the occurrence of the notifiable disease in the UK as a whole and the various governments’ responsive measures to that nationwide outbreak (which was not covered). The Commercial Court disagreed. It held that provided at least one instance of coronavirus had occurred within the 25-mile radius, the insurers were liable for the consequences of the nationwide pandemic, including the national lockdown. This meant that the insured could still recover even if it could be shown that it would have suffered the loss anyway (eg because its premises were shut down as part of the national lockdown), even if (as the counterfactual) there had been no local outbreak within the 25-mile radius.

It will be seen that the Commercial Court took a broad view of the scope of this type of clause. It seems likely that the judges were heavily influenced by their view of the commercial merits of the dispute: shortly stated, that where possible businesses should be able to recover the large, and in many cases existence-threatening losses, they have suffered.

What are your views regarding the hearing?

This writer thinks that in construing a number of the disease clauses, the Commercial Court impermissibly departed from the plain meaning of the clauses in its (entirely understandable) desire to provide broad coverage. It will be interesting to see whether the Supreme Court continues the recent trend of its decisions, which has been to focus more on the meaning of the words of contracts rather than more nebulous, and often disputable, commercial considerations, or whether it will also be persuaded by the fairness argument.

The Supreme Court also heard interesting arguments on causation and the correct application of the 'but-for' test to cases of insurance where there are two or more causes of the loss, not all of which are covered by the policy. However, it seems unlikely that the Supreme Court will take this opportunity to make any significant changes to the law, not least because time constraints meant that fuller argument on the sometimes-difficult questions of causation was not possible.

Finally, this case demonstrates how well the English courts have adapted to having to conduct remote hearings. In fact, remote video hearings on points of law seem to work at least as well as physical hearings. They seem to encourage the advocates to make concise submissions, focusing on the most important points, which, as we are often told, is the key to success in appellate hearings!

Case details:

- Court: UK Supreme Court
- Judge: Lord Reed, Lord Hodge, Lord Briggs, Lord Hamblen and Lord Leggatt
- Date of hearing: 16–19 November 2020

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