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Last Orders: Will the FBD 'test cases' be the last word on business interruption claims?

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The decision of the High Court in *Hyper Trust Limited t/a The Leopardstown Inn & Others – v – FBD Insurance plc*[1] may have drawn a line under the impacted pubs' disputes but questions remain as to the wider effect of the judgment, to include the criteria to be applied in the assessment of losses for business interruption claims arising from Covid-19.

Introduction

On 5 February, Mr Justice McDonald of the High Court handed down not only one of the most highly anticipated judgments in recent years but also one of the most comprehensive decisions relating to policy coverage ever delivered in this jurisdiction. McDonald J. decided in favour of all four of the plaintiffs[2] who had challenged FBD's refusal to provide indemnity in respect of their Covid-19 related business interruption claims. The decision – whilst confined to the terms of the relevant FBD policy – provides some guidance for policyholders generally as to how the business interruption section of their Commercial Combined Policies may respond as a result of their businesses being *affected by* any period(s) of Government-ordered imposed closure as a result of (or 'following', as was the case here) the outbreak of Covid-19 and the rolling restrictions which have been in place since March 2020. Whilst many policyholders will likely find solace as well as hope in the decision and look to apply some of the findings on a market-wide basis, it remains clear from the judgment that there is no 'one size fits all' answer to issues of policy interpretation. It will continue to be necessary in respect of each claim to review the specific applicable policy wording in considering if cover has been 'triggered' in the first instance, and thereafter the scope and extent of any such cover[3]. It is, however, undoubtedly the case that insurers will have to consider their respective positions in light of the decision and, potentially – where appropriate – re-evaluate any previous decisions to decline indemnity. This article will examine the key aspects of the Judgment.

Background

After the Government ordered closure of all non-essential businesses on 15 March 2020, a number of pubs with the standard form FBD public house insurance policy sought to rely on the terms of the consequential loss/business interruption section, and in particular the 'disease/murder/suicide' extension[4]. Under this extension[5] FBD had provided at 1(d) that it would indemnify policyholders in respect of losses incurred "… *as a result of the business being affected by … Imposed closure of the premises by order of the Local or Government Authority following … Outbreaks of contagious or infectious diseases on the premises or within 25 miles*

[1] [2021] IEHC 78
[2] The Leopardstown Inn, Sinnotts, Lemon & Duke & Seán's Bar
[3] It is, for example, explicitly noted in the decision at para 82 that *not all of the policies of insurance available on the Irish market require both an imposed closure and an outbreak of disease.*
[4] As per the description in the IPID.
[5] *The Company will also indemnify the Insured in respect of (A), (B) or (C) above as a result of the business being affected by:*

(1) Imposed closure of the premises by order of the Local or Government Authority following:
(a) Murder or suicide on the premises
(b) Food or drink poisoning on the premises
(c) Defective sanitary arrangements, vermin or pests on the premises
(d) Outbreaks of contagious or infectious diseases on the premises or within 25 miles of same.

of same" (the "Disease Extension"). FBD, however, declined cover on the basis that the pubs were closed as a result of a pandemic and not as a result of a local outbreak or a manifestation of Covid-19 on the premises.

The 'Insured Peril'

While FBD accepted that the forced closures caused significant damage to the plaintiffs, they argued that there was no causal link between the damage caused by the pandemic and the outbreak of Covid-19 on the premises or within 25 miles of the premises. Rather, it maintained that the insured peril (i.e. the event that caused damage to its policyholder) was the imposed closure only and that the imposed closure arose not as a consequence of a local outbreak of the disease but as a consequence of the countrywide presence of the disease. To that, McDonald J. commented:

"If FBD is correct in that contention, it would substantially reduce the extent of any recovery to which the plaintiffs might be entitled under the policy (in the event that they establish that there is cover under it)."

In contrast, the plaintiffs argued that the insured peril was "a composite one" which involved (1) an imposed closure (2) by order of a local or government authority *following* (3) an outbreak of a contagious or infectious disease either on the premises itself or within a radius of 25 miles (emphasis added).

In concluding that the insured peril was a composite one the Court – by reference in part to the judgment of the UK Divisional Court[6] in the influential *FCA case*[7] – rejected FBD's position that the circumstances described in each of the separate sub-paragraphs of the 'disease / murder / suicide' extension' should be read as restrictions or limitations on the cover available, but rather held that:

" … the more natural and obvious way to describe the matters set out at sub-paras. (a) to (d) is that they constitute words of definition of the relevant risk or peril which is covered […] When read in that way, it seems to me that one does not pause at the reference to imposed closure and regard everything which follows as a limitation or restriction on those words. One would read the clause as a whole in order to understand the precise perils which are covered by the extension."

'Proximate Cause'

Having established the nature of the insured peril in broad terms McDonald J. (over the course of 21 pages) considered the meaning of the word *'following'* as it pertained to the question of causation and specifically whether or not the word *'following'* (in the context of the Disease Extension) meant that an imposed closure by order of government must have been proximately caused by an outbreak of Covid-19 on the premises (or within 25 miles) or whether the word should be interpreted as imposing some lesser standard of causation. The plaintiffs' argument that *'following'* should have a purely temporal meaning was rejected.

However, having considered the use of the word *'following'* by comparison with more commonly used words/phrases such as 'in consequence of', the Court reached the important conclusion (in terms of the present case) that the word in context did not denote a requirement for proximate cause, but rather *should be construed as requiring that … the outbreak of disease within a 25 mile radius of the insured premises should be a cause, but not necessarily the dominant cause, of the imposed closure.* (our emphasis)

Causation (and the counterfactual)

The next issues addressed by the Court were whether (1) the government imposed closure followed the (admitted) outbreaks of Covid-19 within 25 miles of the plaintiffs' premises and, if so, whether (2) the plaintiffs could show that their businesses suffered losses as a result of the closure which followed (in the causative sense) the outbreaks (i.e. was the composite peril the proximate cause of the plaintiffs' losses?).

[6] The UK Supreme Court decision in the FCA case was delivered on 15 January 2020, which was in fact the originally scheduled date for delivery of the FBD test case decision. Although the FBD decision was subsequently delayed by 2 weeks to allow for submissions arising from the UK SC decision, it is the Divisional Court's decision which is most significantly referenced in Justice McDonald's decision.

[7] The Financial Conduct Authority – v – Arch Insurance (UK) Limited & Ors [2020] EWHC 2448 (Comm)

To (1), it was McDonald J.'s view (by reference to the rationale for the measures recommended by NPHET at the outset of the pandemic) that it was *clear that each outbreak of the disease in the State was instrumental in the government decision to close down all public houses wherever they were in the State* … and that … *thus, in circumstances where the word "following" means that an outbreak of disease must be a cause (but not necessarily the proximate cause) of a government imposed closure, that test is plainly satisfied on the facts.*[8]

As for (2) it was the Court's conclusion – pending the anticipated quantum hearing – that whilst *it is not possible to make any definitive finding as to whether all of the plaintiffs' losses were proximately caused by the composite peril … it is improbable that the closure following the outbreaks in question is not, at least, an effective (i.e. proximate) cause of some of the claimed losses.* Noting FBD's argument that the effective cause of any losses is/was the public reaction to Covid-19, Justice McDonald stated that *it may be that the closure following the outbreaks in issue is not the only effective cause of loss but … that will not necessarily mean that the plaintiffs are unable to recover under the FBD policy at least in those cases where the effective causes overlap and where it is not possible to distinguish between the effects of one from the effects of the other*.

To that end, McDonald J. stated that *so long as the plaintiffs can establish that the closure following the outbreaks within the 25 mile radius was a proximate cause of their loss, their recovery under the policy will not be reduced just because the change in societal behaviour (whether within or outside that radius) as a result of the pandemic was also a proximate cause. In such event, the attitude of the general public will be stripped out of the counterfactual along with the specific elements of the composite peril.*

Trends and Circumstances

In perhaps the least ambiguous section of the judgment, the Court emphatically rejected the argument put forward by FBD (in relation to the question of the assessment of the loss of gross profit in the indemnity period) that any trends and circumstances affecting the business prior to the occurrence of the insured peril on 15 March 2020 are to be taken into account in adjusting the amount to be paid, even if they are ultimately part of the composite insured peril.

Although it was accepted by the plaintiffs that any fall-off in sales in the days immediately prior to 15 March 2020 must be taken into account in calculating the takings during the 12 months immediately before the date of damage, the Court held that to the extent any such fall-off might be considered a 'trend' – and in the absence of what the Court suggested would have to be an extremely clearly worded provision in the policy to that effect – it would *be contrary to principle that an insured's right of indemnity under the policy should be reduced by a trend based on losses which have been caused by that peril.*[9]

Indemnity Period

In what might be considered the only 'victory' for FBD in the decision (aside from the rejection of a claim for aggravated damages on behalf of Lemon & Duke) the Court rejected the plaintiffs' contention that they could maintain a claim against FBD for the continuing effects of Covid-19 on their business even *after* any period(s) of imposed closure came to an end. The Court agreed with FBD's contention that this was beyond the scope of the indemnity available under the policy which states that *"the*

[8] It is of potentially significant note in the context of the potential interpretation of different policy wordings that Justice McDonald engaged in a detailed consideration of the question as to whether or not the result would be any different if *'following'* is to be interpreted as requiring proximate cause. It was his view – by reference to an established line of jurisprudence (including *Ashworth v. General Accident Fire and Life Assurance Corporation* [1955] I.R. 268, *Gray v. Barr* [1971] 2 QB 554, *Leyland Shipping Co. v. Norwich Union Fire Insurance Society Ltd* [1918] AC 350 and *Miss Jay Jay (i.e. J.J. Lloyd Instruments Ltd v. Northern Star Insurance Co. Ltd* [1987] 1 Lloyd's Rep. 32)) that the result would not be any different as *proximate cause is not the first or the last or the sole cause of a loss; it is the dominant or effective or operative cause.*

[9] The Court went on to state that *Similarly, in the case of a composite peril, it seems to me to be equally contrary to principle that an insured's claim should be reduced to take account of a trend proximately caused by any element of that composite peril once that composite peril has eventuated.*

company shall indemnify the Insured in respect of … the loss of gross profit during the indemnity period…". To that end McDonald J. held that:

"*Once the closure ceases, the composite peril comes to an end and while, I accept that the plaintiffs are entitled to claim for the continuing effects of that composite peril for as long as the effects of that peril persist, I can see no basis to suggest that, once the closure comes to an end, the intention of the policy is to indemnify the plaintiff in respect of the effects of the post closure effects of the disease. To my mind, that would involve a re-writing of the policy."*

Conclusions

FBD has confirmed that it will not appeal the High Court decision. In the circumstances, subject to the resolution of the very important questions which remain outstanding in relation to the assessment of the extent of the covered losses (which is to be the subject of a separate quantum hearing), the decision will likely stand as a precedent for some time in respect of identically or very similarly worded policies.

As for its wider application, however, the devil is in the detail. Although the decision of the Court references general principles of policy interpretation, the application of those principles in the present case (in marked contrast to the scope of the UK FCA case) was to a specific section of the effected FBD policy. As McDonald J. stated himself, it struck him *quite forcefully, that many parties who take out insurance policies are likely never to have considered … that so much time and effort would be spent in debating the meaning of words in the policy such as "by" or "following" or "as a result of" or "event" or "occurrence" or arguments in relation to the concept of "proximate cause" … .*

That is often, however, the level of detail and consideration required in the context of any disputed policy wording before a firm view can be reached as to the correct interpretation, which interpretation in turn will be informed not only by the specific wording of the challenged provision but also in the context of the policy as a whole. There is no 'cookie-cutter' approach.

As with the fallout from the UK FCA decisions, among the likely consequences of the FBD test cases will be a market-wide review of policy wordings by underwriters and a tightening of the conditions / criteria required before the triggering of such 'disease' clauses in the future. It may well be that such cover will be separately priced and/or that insurers will increasingly include pandemic exclusions in such policies.

One thing that is clear is that – for all the assistance and guidance which can be garnered from this decision for both policyholders and insurers – it is unlikely this will be the last time the issue is the subject of litigation.

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