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What COVID Payout Ruling Means For Lockdown Loss Claims

By **Josianne El Antoury and Greg Lascelles** (March 20, 2024, 2:54 PM GMT)


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On Jan. 26, in a pro-policyholder COVID-19 business interruption, or BI, insurance test case, the High Court of Justice of England and Wales handed down its decision in Gatwick Investment Ltd. v. Liberty Mutual Insurance[1] on key questions relating to whether certain prevention of access, nondamage clauses in a BI policy responded to COVID-19-related loss.

This article will outline the key questions that the High Court considered, its findings in respect of each question and analyze the decision for policyholders. The key takeaways are that the High Court has held certain prevention of access, nondamage clauses, including those that require a so-called statutory authority action, respond to regulations imposed in response to a pandemic.

However, the position that furlough is deductible from BI sums payable to the policyholder, as set out in the High Court decision in Stonegate Pub Co. Ltd. v. MS Amlin Corporate Member Ltd. judgment on Oct. 17, 2022, remains unchanged by this judgment.

The position that composite policies permit multiple claims on a "per premises" basis, but single insured entities operating multiple premises may not, as held by the High Court in Corbin & King v. AXA Insurance UK PLC [2] on Feb. 25, 2022, is also unaffected.

Key Questions

The High Court considered the following questions:

- Whether certain prevention of access clauses — covering a situation where losses are incurred as a result of the effective closure of a premise — including those that require the action of a statutory authority to be triggered, responded to regulations that were imposed in response to the pandemic;

- The number of policy limits applicable to the various claimants in the case;

- How furlough payments under the Coronavirus Job Retention Scheme were to be treated for the purposes of the BI insurance calculation; and

- In respect to the claimant Hollywood Bowl, whether the regulations from July 4, 2020, or July regulations, that specifically applied to indoor sports and leisure facilities, including bowling

alleys, formed an additional interference separate from previous restrictions claimed by the other insured parties.

The last issue was relevant because each new restriction qualified as a separate interruption or interference for the purposes of making claims under the policies and attracted a new sub-limit and indemnity period.

The High Court's Decision

On the issue of the statutory authority action, the court found that statutory authority would ordinarily be understood by a reasonable policyholder as meaning any person, body or entity that has a lawful right or power to do something. The court thought that this was "obviously wide," and it was sufficient that the person or body was exercising authority that was derived from statute.

The court also held that the U.K. Supreme Court January 2021 ruling in Financial Conduct Authority v. Arch Insurance (UK) Ltd. on concurrent causes of loss — i.e., when a loss arises through a combination of two or more concurrent proximate causes, one covered and the other silent regarding coverage, the loss was held to fall within the coverage grant — applied to prevention of access clauses, so that they responded to COVID-19 losses arising from government measures. Permission to appeal was granted on this issue.

On the second issue regarding policy limits in Gatwick v. Liberty Mutual, the claimants were each in different positions based on their policy wording, but were all affected by multiple government orders to close, and each of their total losses exceeded the limit of indemnity.

The Gatwick claimants were separate corporate entities, each insured under their own policy. The Gatwick claimants argued that their £1 million ($1.3 million) limit should operate as a sublimit, rather than the limit of indemnity. As there were five relevant restrictions, Gatwick argued that each would qualify as a separate interference, attracting a £1 million limit for each of the premises, even though the per premises argument did not have any real significance to Gatwick, as each had one premise. However, this was significant to other claimants.

The claimants Fuller Smith & Turner PLC and Hollywood Bowl Group PLC were single insured entities operating multiple insured premises. They argued that the limit applied per premises and per government action.

Finally, the cases of the claimants Starboard Hotel Ltd., Liberty Retail Ltd. and Arena Group were also separate corporate entities, but were insured under a single composite policy. They argued the limit should apply not only per premises, per government action, but also per entity.

Liberty Mutual argued that the limit was an aggregate limit applicable to all claims and the claimants could not recover more than the limit under the prevention of access nondamage coverage, irrespective of how many separate restrictions there were.

The court held that the limit of indemnity would not apply per premises where it is owned or operated by a single insured, i.e., Fuller and Hollywood Bowl. However, the court found that the limit did apply separately to multiple insureds under a composite policy, i.e., Starboard Hotel, Liberty Retail and Arena Group. The court upheld the High Court's decision in Corbin & King v. AXA Insurance UK[3] on Feb. 25, 2022, in this regard, which involved composite policies.

On the third issue of furlough, the court upheld the High Court's decision in Stonegate v. MS Amlin Corporate Member[4] on Oct. 17, 2022, that furlough was to be taken into account under a savings clause to the benefit of insurers. Permission to appeal was also granted on this issue.

On the fourth and final issue of the July regulations, the court held that they could not sensibly be said to constitute new restrictions, as nothing changed for Hollywood Bowl in July. Hollywood Bowl's premises simply remained closed, as they had done since March 2020.

The court dismissed Hollywood Bowl's arguments that the July regulations introduced new restrictions to its business because it was listed in Schedule 2, alongside indoor play areas, indoor gyms etc., as being required to cease to carry on by the regulations. Similar arguments were made before the Court of Appeal of England and Wales in Various Eateries Trading Ltd. v. Allianz Insurance PLC[5] in respect of a Part 1, Schedule 2 business — a restaurant in that case — which were also dismissed in that judgment on Jan. 16, 2024.

Analysis

As the latest figures collected on March 6, 2023, and published in April 2023 by the Financial Conduct Authority show, out of an expected 370,000 claims made by policyholders, insurers have accepted 43,000 claims from business interruption policyholders and paid out £1.4 billion since January 2021.[6]

That figure is likely to continue to increase in light of the Liberty test case and other COVID-19 BI test cases, as this judgment means that policyholders that might have been refused COVID-19-related claims in the past and have similar wordings to those of the claimants in this test case may now be able to recover from their insurers.

As the Liberty test case dealt with preliminary issues only, policyholders still need to prove the occurrence of a case of COVID-19, and, for some policy wordings, this will require proof of a case of COVID-19 at their premises that led to the interruption to their business to trigger coverage.

In another BI test case in June 2023, in London International Exhibition Centre PLC v. Royal & Sun Alliance Insurance, the High Court accepted the application of the FCA test case judgment by the High Court on Sept. 15, 2020,[7] and the U.K. Supreme Court on Jan. 15, 2021,[8] in FCA v. Arch — dealing with radius policy wording — to an "at the premises" policy wording. Therefore, the FCA guidance on how to prove an occurrence of COVID-19 within a certain radius also applied to proving COVID-19 at the insured premises.[9]

Applying the FCA guidance can be challenging due to the geographically smaller insured premises and the fact that COVID-19 statistical data, which is collated at council or other group level, has generally not been collated in a form that can be directly applied to smaller insured premises without applying statistical modeling. As specific evidence, such as personal knowledge of a staff member or a customer who tested positive within a period after being present at insured premises, is sufficient to prove prevalence of COVID-19 at that insured premises, policyholders should work closely with each other via claims consultants to pool such evidence.

Given that some aspects of the Liberty test case are subject to appeal, including, in particular, the treatment of furlough, which has the potential to make a significant impact on the BI amount due, policyholders should reserve their position with insurers by avoiding any settlements with insurers on a full and final basis, and reserving rights to revisit a settlement in the event of further judicial

determination on these issues.

Relatedly, there have been a couple of Financial Ombudsman Service decisions granting interest as high as 8% per annum to policyholders for insurers' late payment of COVID-19-related BI claims.[10] While the Financial Ombudsman Service decisions are not binding, some insurers, such as QBE Group, are making interest payments, and policyholders should also consider claiming interest on late payments in any settlement or at least reserve their rights to do so.

Policyholders should also consider requesting that insurers, where relevant, proceed to adjust the claim pending certain appeals to facilitate faster payouts once test cases have reached a final unappealable judgment.

There are further cases working their way through the courts that deal with similar issues. These forthcoming decisions will likely deal with issues that are subject to different BI policy wording, but might still have implications on policyholders affected by the policy wordings in the Liberty test case, for example, on issues such as policy limits and furlough.

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[1] [2024] EWHC 124 (Comm).

[2] [2022] EWHC 409 (Comm).

[3] [2022] EWHC 409 (Comm).

[4] [2022] EWHC 2548 (Comm).

[5] [2024] EWCA Civ 10.

[6] https://www.fca.org.uk/data/bi-insurance-test-case-insurer-claims-data .

[7] [2020] EWHC 2448 (Comm).

[8] [2021] UKSC 1.

[9] London International Exhibition Centre (the "Excel Centre") -v- Royal & Sun Alliance Insurance [2023] EWHC 1481 (Comm).

[10] https://www.theguardian.com/business/2024/jan/03/insurer-qbe-forced-pay-thousands-pounds-small-firms-hit-covid-payout-delays.