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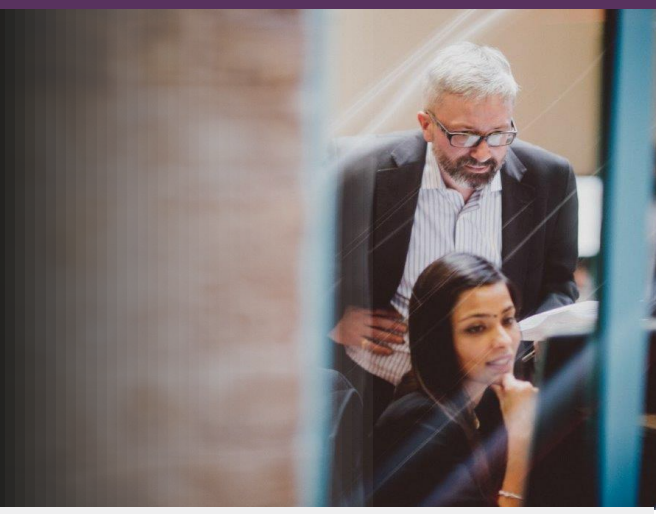
Business Interruption Insurance



December 2021

After the Supreme Court's judgment earlier in the year, what are the legal and practical impacts of the FCA's business interruption insurance test case?

On 15 January 2021, the Supreme Court handed down its judgment in FCA v Arch Insurance, a test case concerning the recoverability of losses suffered by businesses under business interruption insurance policies during the lockdown caused by the Covid-19 pandemic. The Supreme Court's decision ruled in favour of the policyholders relying on business interruption insurance policies.

Legal developments

The FCA brought the test case seeking clarity over some business interruption insurance policies' wording concerning the Covid-19 pandemic claims by policyholders.

The business interruption insurance wording in Arch Insurance's policies required the outbreak of a notifiable disease to have happened on the insured premises or within a defined proximity, for example, a 25-mile radius. However, the insurers argued that since the lockdown was a national measure to contain the COVID-19 virus, the business interruption would still have happened even if no COVID-19 cases had occurred within the insured premises or defined proximity.

Insurers relied on the "but for" test of causation. For example, would the loss of business still have happened but for the occurrence of a COVID-19 case in the insured premise or geographical radius?

The Supreme Court rejected the insurers' argument explaining that the "but for" test was inadequate in this case; there are situations, such as the COVID-19 pandemic, where an insuring clause may respond to many related but uninsured events.

The Supreme Court offered a legal limitation to cause-in-fact or "but for" by reiterating the principle of proximate causation. Every single case of COVID-19 in the country qualified as a proximate cause of loss because each case equally contributed to the national lockdown. Therefore, Any COVID-19 case in the radius of the business was as causative as those outside it. Thus, the causation element was satisfied if there was a single COVID-19 case in the radius of a business.

Positive news for policyholders?

The FCA estimates that approximately 370,000 policyholders are affected by the judgment of the test case. For some of these policyholders, the impact of the judgment has already been positive in terms of financial recovery. The FCA has confirmed that insurers have made £1bn pay-outs to small businesses following the Supreme Court's decision. However, the delay in recovering any losses, months following the businesses' closure during the lockdown, means that the difficulties faced by these businesses have not faded.

In addition, many businesses are battling over their claims with insurers who argue that the Supreme Court's decision does not bind them.

One of the biggest concerns for policyholders is that their arguments for business interruption insurance losses are based on contractual interpretation, which requires court involvement to resolve.

Corporate partner, Victoria Holland, says "This offers a warning to policyholders: scrutinise your policy's wording before launching a formal claim."

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If you have any concerns over your business interruption insurance, contact Victoria Holland today.

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Note: This is not legal advice; it is intended to provide information of general interest about current legal issues.