# COVID-19: JUDGMENT OF UK SUPREME COURT ON FCA BUSINESS INTERRUPTION LITIGATION

*Published 15 January 2021*

The Supreme Court has delivered Judgment on the Appeals by both the UK Financial Conduct Authority and certain Insurers in the FCA Test Case litigation concerning COVID-19 Business Interruption claims. The FCA is one of the regulators of insurers and reinsurers conducting business in the UK, with a particular focus on financial services provided to consumers and SMEs.

The Judgment clarifies a number of matters arising from Appeals by both the FCA and six of the Insurers involved in the original Test Case on the Disease clauses, Prevention of Access and Hybrid clauses, Causation, Trends clauses, Pre-Trigger Losses and the *Orient Express Hotels* case.

## A INTRODUCTION

In June 2020 the FCA commenced proceedings against eight Insurers as a representative sample of the Market and in respect of the representative sample Wordings. The litigation was conducted under the Financial Market Test Case regime. The aim of the Test Case was to obtain certainty for Policyholders (and Insurers) in relation to numerous claims which had been made by Policyholders arising from losses said to have been caused by COVID-19.

The Trial of the Test Case took place in July 2020 and Judgment was delivered on 15 September 2020 followed by a number of Declarations. The FCA appealed on certain issues on which it did not succeed at First Instance and six of the eight Insurers involved in the Test Case appealed in respect of matters on which they had been unsuccessful at First Instance. The Appeals proceeded directly to the Supreme Court under the Leapfrog Procedure.

The Judgment of the Supreme Court ("the Judgment") is lengthy at some 112 pages and some 326 paragraphs. The main findings in the Judgment are set out in the first part of the Judgment in the speeches of Lord Hamblen and Lord Leggatt (with whom Lord Reed agreed). There is also a minority view from Lord Briggs (with whom Lord Hodge agreed) which does not dissent from the conclusions reached by the majority but sets out a different rationale for some of those conclusions.

We summarise below the key findings of the Judgment on each of the six key issues addressed in the Appeals.

## B DISEASE CLAUSES

The Judgment disagrees with the approach of the Court at First Instance and accepted Insurers' arguments and rejected the view that the relevant Insured Peril was the disease itself and not a particular outbreak of the disease in any particular place. The Court emphasised that any "Occurrence" must be regarded as something that happens on a particular date and at a particular place and is not something capable of extending over more than one date. In the Court's view a disease which spreads cannot be regarded as something that occurs *"at a particular time and place and in a particular way: it occurs at a multiplicity of different times and places and may occur in different ways…"*.

On that approach Disease clauses generally only cover cases *"resulting from COVID-19 that occurs within the 25 mile radius specified in the clause"*. On that basis cases occurring outside the specified radius cannot be regarded as part of the peril insured against. However, and importantly, the Judgment finds that the occurrence of cases elsewhere is important where considering overall questions of causation (see below).

## C PREVENTION OF ACCESS AND HYBRID CLAUSES

The FCA's Appeals on these clauses were narrow but largely successful. The Judgment rejects the interpretation at First Instance in relation to many of the clauses where there were *"restrictions imposed"* which were to be interpreted as triggering cover only where restrictions were mandatory and had the force of law. The Supreme Court has rejected such an interpretation as too narrow and holds that an instruction given by a public authority may of itself amount to *"a restriction imposed"* if it carries the imminent threat of legal compulsion or is in mandatory and clear terms and indicates that compliance is required without recourse to legal powers.

The Judgment also addresses the meaning of the words *"inability to use"* in relation to insured premises and holds that this

means complete and not merely partial inability to use the premises but goes on to find that the requirement may be satisfied where a Policyholder is unable to use the premises for a discrete business activity or is unable to use a discrete part of the premises for its business activities. The Judgment interprets wording requiring *"prevention of access"* to the premises in a similar fashion.

**D CAUSATION**

On the basis that the majority of the Supreme Court had interpreted Disease clauses in the manner set out above Causation became a key issue. At First Instance the Court found that the relevant measures taken by the Government in response to COVID-19 was a response to information about all cases of COVID-19 as a whole. Although the Supreme Court has approached interpretation of the Disease clause differently from the Court at First Instance it has held in the Judgment that all individual cases of COVID-19 which had occurred by the date of any Government measure were to be treated as equally effective *"proximate causes"* of that measure.

It follows in the Judgment that it was sufficient for any Policyholder to show that at the time of any relevant Government measure there was at least one case of COVID-19 within the relevant radius required by any given Disease clause.

The Supreme Court therefore rejected Insurers' arguments on *"but for"* Causation which it regards as often inadequate and meant not that it returned false negatives *"but that it returns a countless number of false positives"*.

In its consideration of concurrent causes the Court concluded that there is:

*"…nothing in principle or in the concept of Causation which precludes an Insured Peril that in combination with many other similar uninsured events brings about a loss with a sufficient degree of inevitability from being regarded as a cause – indeed as a proximate cause – of the loss, even if the occurrence of the Insured Peril is neither necessary nor sufficient to bring about the loss by itself".*

The Judgment then rejects the concept of *"weighing"* different causal factors on the basis that such a process is unworkable and unreasonable.

Applying that approach to causation to the Disease clauses the Court said it followed that:

*"…no reasonable person would suppose that, if an outbreak of an infectious disease occurred which included cases within such a radius* [i.e. 25 miles] *and was sufficiently serious to interrupt the Policyholder's business, all the cases of disease would necessarily occur within the radius"*.

In short, therefore, the Judgment found that the causal basis of Government action was met where the Government action was in response to cases of COVID-19 which included at least one case of illness within the relevant radius. It found that each of the individual cases of illness which had occurred by the date of any Government action was a separate and equally effective cause of that action.

In relation to composite perils generally and particularly in relation to the hybrid clauses the Judgment finds that there is an indemnity against the risk of all elements of the Insured Perils acting in causal combination which cause Business Interruption loss but that is regardless of whether the loss was concurrently caused by other (uninsured but non-excluded) consequences of the COVID-19 pandemic which was the underlying or originating cause of the Insured Peril. As set out below this also affected the approach to pre-trigger losses.

**E TRENDS CLAUSES**

Consistent with the new approach adopted by the Judgment to concurrent causation, the Supreme Court has construed Trends clauses as allowing for adjustments only to reflect circumstances which are unconnected with the Insured Peril and not circumstances which are inextricably linked with the Insured Peril in the sense that they have the same underlying or originating cause.

It follows that on its approach to the interpretation of the Disease clauses the Trends clauses do not require losses to be adjusted on the basis that, if the Insured Peril had not occurred, the results would still have been affected by other consequences of the COVID-19 pandemic.

**F PRE-TRIGGER LOSSES**

At First Instance the Court permitted adjustments to be made under the Trends clauses to reflect a measurable downturn in the turnover of business due to COVID-19 before any Insured Peril was triggered. The Supreme Court has rejected this approach and consistent with its approach to the interpretation of Trends clauses generally states that adjustments can only be made to reflect circumstances affecting the business which are unconnected with the cause of the Insured Peril vis

COVID-19.

### *G* STATUS OF *ORIENT EXPRESS*

At First Instance the Court had distinguished Orient Express and/or suggested that it was wrong. The Judgment concludes that Orient Express was wrongly decided.

The Judgment finds, contrary to the arguments advanced by Insurers, that one should apply the analysis set out above in relation to causation since the Hotel and the surrounding area were damaged by two concurrent causes, each of which was by itself sufficient to cause the relevant Business Interruption but neither of which satisfied the "but for" test because of the existence of the other. It followed that when there was an insured peril and an uninsured peril which operated together (essentially the hurricanes damaging the Hotel and also damaging New Orleans) then provided that damage proximately caused by the uninsured peril i.e. the damage to the rest of the city was not excluded, any loss resulting from both causes operating concurrently is covered.

The Supreme Court found, accordingly, that Orient Express was wrong and that the correct approach would have been to construe the trends clause "*so as to exclude from the assessment of what would have happened if the damage had not occurred circumstances which had the same underlying or originating cause of the damage, namely the hurricane*".

### H CONCLUSION

Although the Supreme Court agreed with many of the Insurers' arguments, that has not affected the outcome of the appeal so that all of Insurers appeals were dismissed, but some of the FCA's appeals were successful. Further court directions based upon the judgment are expected to follow.

The full Judgment can be found on https://www.supremecourt.uk/news/latest-judgments.html

**Julian Miller**
**Partner**
DAC BEACHCROFT

DAC Beachcroft LLP
25 Walbrook, London EC4N 8AF
**T**: +44 (0)20 7894 6859
**M**: +44 (0)7884 000 612
jmiller@dacbeachcroft.com

LinkedIn: https://uk.linkedin.com/in/julianmiller1