

BUSINESS INTERRUPTION INSURANCE SERIES

LITIGATION, DISPUTE RESOLUTION AND INVESTIGATIONS
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Business Interruption Insurance Series: Analysis of Court's decision in publicans' business interruption test cases against FBD

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The Commercial Court's [decision](#) in the four test cases taken by publicans against FBD Insurance will assist in the resolution of a large number of claims brought against FBD relating to its refusal to provide cover for COVID-19 business interruption losses.

Mr Justice McDonald, who heard the four cases together last October, held that FBD is obliged to cover losses suffered by the publicans following the imposed closure of public houses at the request of the Government on 15 March 2020. The decision directly affects approximately 1,300 publicans who had purchased the FBD Public House Insurance policy. It is likely to impact other policies with similar wordings also.

The Court has not yet determined the extent to which FBD is liable for the pubs' losses. Another stage to the proceedings is to follow in which the Court will consider how the pubs' losses should be quantified.

Since the Court's judgment, the Central Bank has made it clear that it will not hesitate to take action against insurers where it is of the view that cover and causation exists and claims are being rejected by insurers.

Background

The test cases were taken by Hyper Trust Ltd (t/a as the Leopardstown Inn); Aberken Ltd (t/a as Sinnotts); Inn on

Hibernian Way Ltd (t/a as Lemon & Duke); and Leinster Overview Concepts Ltd (t/a as Seán's Bar).

The dispute between each of the pubs and FBD centred on the proper interpretation of a clause in the policy which provided that FBD would indemnify the pubs for losses: "*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*".

FBD accepted that there had been an imposed closure of the pubs by the Government. However, it argued that it was not obliged to cover the pubs' losses on the grounds that the imposed closure did not arise as a result of an outbreak of COVID-19 on any of the publicans' premises or within a 25-mile radius of their premises. It argued that the closure arose as a result of the presence of COVID-19 throughout Ireland and that, as such, the closure could not be said to have been causatively linked to a localised outbreak of the disease.

What is the insured peril?

FBD's position was that the nature of the risk insured in the pubs' policies (i.e. the insured peril) was the imposed closure. It argued that the words that followed "*imposed closure*" were restrictions or limitations on the cover available. The publicans argued that the relevant peril was a composite one involving (a) an imposed closure (b) by order of a local or government authority, following (c) an outbreak of infectious disease on the premises or within a 25-mile radius. The publicans also argued that the geographic limit was not part of the relevant peril.

The Court agreed with the first approach taken by the publicans. It held that the relevant peril was a composite one in which (a) an imposed closure (b) by order of a local or government authority (c) followed an outbreak of a contagious or infectious disease either on the premises itself or within a radius of 25 miles. This finding is consistent with the [decision of the UK Supreme Court in the FCA test case](#).

If FBD had been correct in its interpretation, it would have substantially

reduced the extent of any recovery by the publicans as they would have been required to show that the losses suffered by them stemmed from the closure, as opposed to the outbreaks of COVID-19 giving rise to the closure.

Is the cover available limited to closures arising solely from localised outbreaks?

FBD argued that cover available under the relevant policies should be confined to imposed closures arising solely from localised outbreaks of COVID-19. The publicans disagreed. They argued that cover should be available provided they could show that there had been an occurrence of COVID-19 within a 25-mile radius of their premises. They contended that each occurrence was part of a wider picture which dictated the Government's response and they argued, in the alternative, that each of the individual occurrences was a separate but effective cause of the imposed closure.

FBD argued (1) that the publicans were attempting to treat the insuring clause as a "disease clause"; (2) that the publicans were affording no meaning to the clear geographical restriction in the insuring clause; and (3) that the insuring clause did not say, and should not be read as saying, "on the premises or *in the State*".

The Court noted that a 25-mile radius around each pub was an extensive area. In the case of the Leopardstown Inn, for example, it encompassed the entire county of Dublin as well as Southeast Meath, Eastern Kildare and North Wicklow. It also noted that the Government's imposed closure of pubs on 15 March 2020 was in response to a national situation where cases of COVID-19 had arisen in many parts of the country and the Government was concerned about the difficulty of ensuring social distancing within public houses.

The Court held that cover should not be confined solely to closures following a localised outbreak of COVID-19. It said that for cover to be available under the policies, there must have been an outbreak of the disease on the premises or within a 25-mile radius. The fact that there were also outbreaks outside the radius would make it more difficult to demonstrate a causative connection between the imposed closure and the localised outbreaks, but it would not invalidate the cover.

The ambit of cover available

The Court held that the policies provide cover where business interruption is shown to have been proximately caused by a government imposed closure which, in turn, had as one of its

causes an "outbreak" of an infectious or contagious disease within 25 miles. The Court clarified that it is not necessary to establish that the outbreak was the proximate cause of the imposed closure provided the outbreak was a cause.

In respect of the meaning of "outbreak", the Court held that a single instance of a serious disease such as COVID-19 within the 25-mile radius would be sufficient provided the single instance could be shown to have been a cause of the closure.

For the purposes of the trial, FBD had accepted that there had been cases of COVID-19 within 25 miles of the publicans' premises before they were required to close on 15 March 2020, but it argued that the imposed closure was not decided by reference to or due to these cases, and did not follow from them.

Causation

The Court provided guidance on a number of issues in relation to causation.

It considered what level of causation was required by the use of the word "following" in the insuring clause. It found that it had a causative meaning but required a lesser standard than proximate cause. It therefore held that it should be interpreted as requiring that the outbreak of disease within the 25-mile radius of the insured premises should be a cause, but not necessarily the dominant cause, of the imposed closure.

The Court held that this test was satisfied on the facts. FBD had argued that the Government's decision to close pubs was not prompted by a localised outbreak of COVID-19, but by concern at a nationwide level. It had also argued that the closure was prompted by challenges that would have been faced by publicans ensuring social distancing in their premises. The Court considered the minutes of NPHEET meetings from the days leading up to the imposed closure and it was satisfied that each outbreak of disease in the State was instrumental in the Government's decision to close the pubs. Therefore it held that there had been a causative link between outbreaks of COVID-19 and the imposed closure.

The Court found that even if the word "following" imposed a requirement of proximate causation, it would have reached the same conclusion as it considered that the real, effective or dominant reason for the imposed closure was the existence of outbreaks of COVID-19. FBD tried to argue that there could be no causation because the government closure could not be attributed to any individual outbreak of disease. The Court rejected this and said it is artificial to say that because

an action has been taken in response to all of the cases of COVID-19, it could not be regarded as taken in response to any particular cases. It noted that there can be more than one proximate cause of an event. It held that the publicans had succeeded in establishing that the outbreaks within 25 miles were each a proximate cause of the imposed closure.

Was the composite peril the proximate cause of the publicans' losses?

FBD argued that the effective cause of the publicans' losses was public reaction to the COVID-19 pandemic and not the insured peril. It claimed that even without an imposed closure, the pubs would have suffered a fall-off in business. FBD was advocating for the Court to apply the "but for" test and it sought to rely on the approach that had been taken in the [Orient-Express case](#). The UK Supreme Court held in the recent FCA decision that *Orient-Express* had been wrongly decided. However, while Mr Justice McDonald said this did not prevent FBD from arguing that *Orient-Express* should be followed in the present case, he ultimately held that *Orient-Express* should be distinguished.

The Court rejected a strict approach to the "but for" test. Similar to the conclusion reached by the UK Supreme Court in the FCA case, the Court held that where it is not possible to determine whether a loss sustained by a publican was caused but for the occurrence of the insured peril, on the one hand, or some other interdependent or interrelated non-insured (but not excluded) cause, on the other, the insured peril should be regarded as a sufficient cause for the purposes of the "but for" test.

The Court accepted that the closure following outbreaks might not be the only effective cause of loss, but it said that did not necessarily mean the publicans should be unable to recover. It held that there may be overlapping proximate causes of the publicans' losses, one of which is the composite peril and the other which is changed societal behaviour in response to COVID-19, however, a fair and reasonable approach, it said, required modifying the "but for" test.

If the "but for" test had been applied without modification, it would have created significant problems for the publicans as they would have been required to prove that but for the imposed closure arising from the outbreaks within 25 miles of their premises, they would not have suffered losses.

Indemnity period

The Court was tasked with interpreting the definition of "Indemnity Period", which

was defined in the policy as "[t]he period beginning with the occurrence of the loss or damage and ending not later than the twelve months thereafter during which the results of the business shall be effected (sic) in consequence of the loss or damage".

The publicans claimed that they were entitled to be indemnified for as long as their businesses were affected by the damage, subject to the limit of twelve months. They also claimed that they were entitled to claim for loss of business suffered in the period after the pubs reopened where they continued to suffer loss in consequence of the continued impact of COVID-19.

The Court accepted the former argument but rejected the latter. It held that the indemnity period began on 15 March 2020 when the businesses were first interrupted by the imposed closure following the relevant outbreaks of disease and it continued thereafter during the time when the results of the businesses were affected "*in consequence of the loss or damage*" i.e. loss or damage as a result of the businesses being affected by the insured peril. This should not, the Court said, be equated with the publicans' second argument which was an attempt to recover losses, after the closure came to an end, for the continuing effects of the COVID-19 pandemic on their businesses.

The appropriate counterfactual

The Court was required to determine the appropriate counterfactual to be applied. In other words, it had to construct a picture of what position each of the publicans' businesses would have been in but for the occurrence of the insured peril in order for the publicans' losses to be assessed.

FBD claimed that the appropriate counterfactual should be a situation where each of the publicans' premises remained open but continued to be affected by the impact of outbreaks of COVID-19 (including society's reaction to the pandemic etc.). The publicans claimed that the correct counterfactual was a world without an imposed closure and which was not affected by COVID-19.

If the Court had accepted FBD's approach it would have significantly curtailed the

publicans' potential to recover under the policy because FBD could have argued that the pubs' losses arose from society's reaction to the virus. However, the Court held that for as long as the closure endures, both the closure and the effects of outbreaks of the disease must be stripped out of the counterfactual.

The Court also had to consider whether the counterfactual required stripping out all of the effects of COVID-19 or only the effects of the outbreaks within a 25 mile radius. The Court held that to the extent that the effects of the existence of COVID-19 outside the relevant 25 mile radius may be established to be a concurrent proximate cause of the publicans' losses alongside the closure following the outbreaks within that radius, that concurrent factor, in the absence of a relevant exclusion in the FBD policy, must also be stripped out of the counterfactual. It stated that losses which have no sufficient connection to the composite peril cannot be excluded from the counterfactual.

It concluded that so long as the publicans 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. The Court held that it would need to receive further submissions from the parties in order to determine (1) whether the concurrent causes to be stripped out of the counterfactual are confined to those affecting the State or whether they extend to the worldwide effects of COVID-19 (in respect of the Leopardstown Inn, Sinnotts and Seán's Bar); and (2) whether the counterfactual to be applied to Lemon & Duke should be assessed by stripping out the presence of COVID-19 in the State or its existence anywhere in the world. The Court's decision on this, which is expected at a later stage, could be of some significance to the publicans depending, for example, on the extent to which their businesses depend on tourism.

Lemon & Duke

While the Court heard the cases together

and the issues being considered were generally the same, the facts that arose in the case of the Lemon & Duke bar were different to the other pubs. The owners of Lemon & Duke purchased the FBD pub policy after COVID-19 had emerged and FBD had, upon request, confirmed in writing that the policy would cover COVID-19 if the bar was forcibly shut down. The Court held that Lemon & Duke was entitled to rely on that representation and as it made no reference to outbreaks being confined to a 25-mile radius of the premises, the Court said it seemed that the counterfactual to be applied was a world in which there was no imposed closure and no COVID-19. However, this was subject to the Court's view outlined above that further submissions would be required on the geographical scope of the counterfactual.

Trends clauses

The Court rejected FBD's claim that losses sustained by the publicans in the days immediately prior to the imposed closure in March 2020 constituted a trend which should be applied for the duration of the insured peril. However, the Court held, and the publicans accepted, that the downturn in the publicans' businesses caused by COVID-19 in the days prior to the closure could be taken into account for the purpose of calculating the publicans' revenue in the twelve months before the closure. This figure was needed as a comparator in order to calculate the reduction in the publicans' businesses as a result of the insured peril.

Commentary

The Court's detailed and lengthy judgment provides considerable guidance on issues of interpretation and causation. Similar to the FCA litigation in England, the outcome of this case is positive news for policyholders, in particular, for the approximately 1,300 publicans with FBD's Public House Insurance policy, but potentially also for other insured businesses with similarly worded policies where cover for COVID-19 business interruption losses has been declined to date.

Affected parties now eagerly await the conclusion of the next stage of the proceedings in which the Court will give its decision on the quantification of losses.

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