BUSINESS INTERRUPTION INSURANCE SERIES

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Court finds for publicans in Irish business interruption test cases taken against FBD

February 2021

The Commercial Court today delivered its judgment in four test cases taken by publicans against FBD Insurance, with Mr Justice McDonald finding that the publicans' business interruption insurance policies cover losses caused by COVID-19. The decision comes following a short adjournment to facilitate submissions to the Court on the recently published UK Supreme Court decision on business interruption insurance. The Irish Court's decision will be of great importance to insurers and businesses throughout the country, many of whom have eagerly awaited today's judgment.

The decision will allow over 1,100 publicans insured with FBD to receive indemnities. FBD estimated last year that it could face costs of over €30 million if it was unsuccessful in these cases and others currently in the courts also relating to business interruption insurance claims resulting from the pandemic. In the three week trial which took place last October, the Court was informed that its decision in this case could also impact a large number of claims involving other insurers.

The test cases were taken by Hyper Trust Ltd, t/a as the Leopardstown Inn; Aberken, t/a as Sinnotts Bar; Inn on Hibernian Way Ltd, t/a as Lemon & Duke; and Leinster Overview Concepts Ltd, t/a as Sean's Bar.

The pubs, three of which are in Dublin and one in Athlone, initiated these proceedings after FBD informed them that the losses they had experienced as a result of COVID-19 were not covered by their business interruption insurance. The dispute centred on a clause in the policy in which FBD had provided that it 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 argued that the policy did not provide pandemic cover and that it was never intended to do so. It said its insurance products had been designed and priced to cover *"standard foreseeable risks and not those associated with extraordinary events"* such as Covid-19. It also stated that if there had been an imposed closure of pubs in response to local outbreaks of a disease, rather than a pandemic, this would have been covered.

The pubs' lawyers told the Court that the clause at issue should be given its *"ordinary meaning"*, that there had been no exclusion of pandemics and, on a proper interpretation, the clause covered the losses incurred as a result of COVID-19.

The parties asked the Court to determine: 1) if cover was triggered under the relevant policies; and if it was: 2) what was the insured peril; 3) what was the "counter factual" that should be used to identify the loss to the publicans; and 4) how the trends clause should be applied.

We are currently considering the Court's detailed decision on these issues and will shortly publish our full analysis.

KEY CONTACTS

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