

Insurance News: Implications for Australian Policyholders

**United Kingdom High Court Decision on Insurance Policy
Response to COVID-19 Business Interruption**

CLAYTON UTZ

THE DECISION

On 15 September 2020, the UK High Court handed down its decision in the COVID-19 business interruption insurance test case: [The Financial Conduct Authority v Arch and Others \[2020\] EWHC 2448 \(Comm\)](#). The test case interpreted the meaning and effect of a range of business interruption insurance policy wordings in an effort to resolve contractual uncertainty around the validity of many insurance claims arising from the COVID-19 pandemic.

The UK High Court's decision predominantly favours policyholders and means that many should have cover for business interruption losses caused by COVID-19. The UK test case did not make any findings of fact and so policyholders still need to assess their insurance entitlements in light of the precise language in their business interruption policy.

Although an Australian court is not bound to follow this UK decision, we consider that it will be persuasive in Australia and gives support for Australian policyholders as they pursue insurance entitlements.

There is also an Australian test case, which is being supported by the Insurance Council of Australia and the Australian Financial Complaints Authority, which will address a narrower set of issues that are unique in the Australian insurance market. Clayton Utz are acting for the policyholders in the Australian test case. Those Australian policyholders with a disease extension with references to the Quarantine Act 1908 and "quarantinable diseases" in their policies will need to await the outcome of the Australian test case for clarity on their entitlements.

We provide a summary table of the findings from the UK High Court test case to help Australian policyholders to assess their own business interruption insurance policy wordings. The decision of the UK High Court will undoubtedly be appealed. In the meantime it may provide helpful guidance on how to approach certain relevant extensions as well as a basis for distinguishing some precedent case law which can present challenges for business interruption claims in the context of a widespread catastrophe or loss event.

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Disease Wording

Cover for loss resulting from:

- (a) interruption / interference with the business;
- (b) following / arising from / as a result of;
- (c) any notifiable disease / occurrence of a notifiable disease / arising from any human infectious disease manifested by any person; and
- (d) within 25 miles / 1 mile / the "vicinity" of the premises / insured location.

UK High Court said that cover was not limited to outbreaks wholly within the relevant policy area as:

- (a) the policies did not expressly state that the disease should **only** occur within the relevant policy area; and ¹
- (b) principles of construction required this conclusion as notifiable diseases include those capable of widespread dissemination, such as SARS, and these diseases may spread in a highly complicated and unpredictable fashion. Cases within the relevant policy area are not therefore independent of, and a separate cause from, cases outside the relevant policy area;²

Wording/ issue

UK High Court decision/ observation (for all wordings except the QBE wording)

"Vicinity"	"Vicinity" is to be widely construed as encompassing England and Wales, as "in the case of COVID-19, a highly contagious, and often fatal, disease, the relevant area would be the entirety of the UK because one would reasonably expect a national response which might affect the insured's premises wherever they were". ³
"an outbreak of disease"	"An outbreak of disease" is the "occurrence" of the disease, and occurs from the point in time at which at least one person who was suffering from COVID-19 was in the relevant area. The case does not have to have been actually verified by diagnoses or be symptomatic at that time, it is just required to be diagnosable. ⁴
"the insured peril"	"The insured peril" is the composite peril of interruption or interference with the business following the occurrence of the notifiable disease within the defined radius of the premises. The requirement for proximate causation is between the loss claimed by the insured and the composite insured peril. ⁵
QBE policy Disease wordings, which provide cover for " <i>Loss resulting from interruption or interference with the business in consequence of any of the following events: ... any occurrence of a notifiable disease within a radius of 25 miles</i> " (QBE2) and " <i>within a radius of one (1) mile of the premises</i> " (QBE3). ⁶	
"in consequence of" together with "events"	These had the effect of narrowing coverage, and in the context of COVID-19, required insureds to prove that the case(s) of COVID-19 within the relevant policy area, as opposed to elsewhere, was the cause of the business interruption. ⁷
" <i>within a radius of one (1) mile of the premises</i> "	This limit of the radius to 1 mile in the QBE3 policy supported the Court's view that the intention of the policy was to cover specific and localised events. ⁸

¹ The Financial Conduct Authority v Arch and Others [2020] EWHC 2448 (Comm) at [107].

² Ibid [160]-[161].

³ Ibid [133]. See also [140].

⁴ Ibid [93], [165].

⁵ Ibid [94].

⁶ Ibid [208], [213].

⁷ Ibid [235].

⁸ Ibid [238].

Prevention of Access/ Public Authority Wording

Cover for loss resulting from:

- (a) prevention / denial / hindrance of access to the Premises;
- (b) due to actions / advice / restrictions of / imposed by order of;
- (c) a government / local authority / police / other body; and
- (d) due to an emergency likely to endanger life / incident within a specified area.

The UK High Court adopted a more restrictive approach in interpreting these clauses than it did with the disease wordings.

Most prevention of access / public authority wordings would not cover losses caused by COVID-19 unless the Government Regulations specifically required a *total closure* of the insured's business *as a result of a localised occurrence* of COVID-19.⁹

Wording/ issue

UK High Court decision/ observation

Location and nature of the emergency / incident

The word "incident" should be given the same essential meaning as "an event": something which happens at a particular time, at a particular place, in a particular way.¹⁰

The COVID-19 pandemic cannot constitute "an incident", as the disease is too geographically dispersed, prolonged and non-specific. Although the pandemic is everywhere, it is not necessarily present at a particular insured premises and does not mean that it amounts to a specific incident, even if someone with COVID-19 is present within the radius of the premises;¹¹

The further geographical requirement that the incident occur "in the vicinity" or within a particular radius of the premises indicates that the clause is intended to cover local incidents only.¹²

For cover to apply, the action of the relevant authority would have to be in response to the localised occurrence of COVID-19, and not general action taken in response to the pandemic.

authority actions / advice / order

An "action" by an authority which "prevents" access requires steps which have the force of law, and must impose mandatory requirements.

The government announcements on 16, 20 and 23 March 2020 were merely advisory, and therefore could not trigger cover.

However, the Regulations issued by the UK Government on 21 and 26 March may trigger cover if they required mandatory closure of an insured's business.¹³

prevention / hindrance of access

Prevention of access requires a complete closure of the premises for the purposes of carrying on the business as defined in the policy schedule.¹⁴ Prevention is to be contrasted with and is not synonymous with "hindrance". Hindrance means rendering something more or less difficult, and prevention means rendering something impossible.¹⁵ The prevention does not have to be physical, so that if the policyholder accessed the premises to carry out essential maintenance, that would not preclude there being a prevention of access.¹⁶

⁹ Ibid [437]

¹⁰ Ibid [404].

¹¹ Ibid [405].

¹² Ibid [404].

¹³ Ibid [434].

¹⁴ Ibid [326].

¹⁵ Ibid [324], citing *Tennants (Lancashire) Ltd v CS Wilson & Co Ltd* [1917] AC 495, [518].

¹⁶ Ibid [330].

Example:

A pub or restaurant that already had a takeaway service prior to the government regulations which required the restaurant to close so far as consumption of food and drink on the premises is concerned, would not be "prevented access" to the premises as their business was partially, not fully closed.

However, where a restaurant or pub only offered dine-in services prior to the regulations, access to the premises would be "prevented" as there would be a full closure of the premises for the purposes of carrying on the business.¹⁷

Interruption

"Interruption" did not require a complete cessation of the business, but was intended to mean "business interruption" generally.

¹⁷ Ibid [327].

Hybrid Wording

Cover for loss resulting from:

- (a) an interruption to the business;
- (b) due to an inability to use the premises / enforced closure;
- (c) due to restrictions imposed by a public authority; and
- (d) following an occurrence of disease.

These clauses are a blend of a disease wording and prevention of access / public authority wording.

The UK High Court found in favour of the policyholders in that an "occurrence" of disease does not have to be localised. However, it interpreted "restrictions imposed" and "inability to use" more narrowly. It is likely that these wordings will provide cover if mandatory restrictions cause a business to be somewhat "unable to use" the premises for its normal business purpose.

Wording/ issue	UK High Court decision/ observation
Restrictions imposed	This requires something mandatory that has the force of law and was thereby promulgated by statutory instrument (such as the 21 and 26 March Regulations). Guidance, exhortation and advice given by the Government including as to social distancing, are not "restrictions imposed". ¹⁸
Inability to use	This requires something more than just an impairment of normal use, and what constitutes an inability to use will depend on the facts of the particular case. ¹⁹
Occurrence	In line with the Court's analysis above, the Court rejected the insurer's argument that the occurrence had to be one which is 'small scale, local and in some sense specific to the insured' ²⁰ , finding that the COVID-19 outbreak in the UK could qualify as an occurrence;
Interruption	"Interruption" did not require a complete cessation of the business, but was intended to mean "business interruption" generally. ²¹
Enforced closure	Requires there to be a closure of all or part of the premises under legal compulsion. ²²

¹⁸ Ibid [266]-[267].

¹⁹ Ibid [268].

²⁰ Ibid [271] citing Mr Gaisman QC of Hiscox.

²¹ Ibid [274].

²² Ibid [303].

Trends Clause/ Causation

Trends clauses generally provide that calculations of loss must be adjusted to reflect any overarching trends in the business.

Trends clause example:

"Under Rate of Gross Profit, Annual Turnover, [etc]...adjustments shall be made as may be necessary to provide for the **trend of the Business** and for variations in or other circumstances affecting the Business either before or after the Incident or which would have affected the Business had the Incident not occurred so that the figures thus adjusted shall represent as nearly as may be reasonably practicable the results which **but for** the Incident would have been obtained during the relative period after the Incident."²³

UK High Court said:

- the trends clause is intended simply to put the policyholder in the same position as it would have been had the insured peril not occurred.

Wording/ issue	UK High Court decision/ observation
"But for" test	<p>The "but for" test requires that the insured be put in the same financial position as it would have been had the insured peril not occurred.</p> <p>The "insured peril" should not be narrowly defined. For example in relation to disease wording, the peril should not be the local occurrence of the disease alone, and the other effects of the pandemic could not be set up as part of the counterfactual as a business "trend" to reduce the claim.</p>
<i>Orient-Express Hotels Limited v Assicurazioni Generali Spa (UK) [2010]</i> ²⁴	<p>The UK High Court distinguished <i>Orient Express</i> from the COVID test cases as it was concerned with different types of insured perils. Nothing in the analysis in the <i>Orient Hotels</i> case had any impact on the correct construction of the wordings it was considering in the COVID test cases.</p> <p>The High Court did say that if it had to rule on the <i>Orient Hotels</i> case it would have determined that it was wrongly decided and the High Court would not have adopted it in the COVID test cases.</p> <p>The <i>Orient Hotels</i> decision misidentified the insured peril (by treating the "Damage" as the insured peril, rather than Damage caused by a covered fortuity – hurricanes) and the proximate cause of the loss was not "Damage" but "Damage caused by hurricanes".</p> <p>The <i>Orient Hotels</i> decision resulted in the absurd result that the more serious the fortuity the less cover was available: if the hurricane had only damaged the hotel, there would have been a full recovery.</p> <p>The "proximate" cause is not the cause nearest in time to the loss but the "dominant cause" of the loss.²⁵ Therefore in <i>Orient Express</i>, the proximate cause should have been business interruption arising from damage caused by the hurricanes.</p>
<i>Test for causation</i>	<p>The relevant causation test to be applied in this case is the "proximate cause" test, rather than the "but for" test. This test requires insureds to show that the dominant cause of the loss was the insured peril.</p>

²³ Ibid [90].

²⁴ [2010] EWHC 1186 (Comm).

²⁵ Ibid [524] citing *Leyland Shipping Ltd v Norwich Union Fire Insurance Society Limited* [1918] AC 350.

The Court held the test for causation will depend on the particular wording connecting the insured peril. For example, policies that refer to business interruption “following” an occurrence (or similar) require a looser causal connection than proximate cause.²⁶

The Court held even if a proximate cause was required, this would be satisfied as:

[111]...Even if the word “following” imports the requirement of proximate causation we would consider that, given the nature of the cover as we consider it to be, this is to be regarded as satisfied in a case in which there is a national response to the widespread outbreak of a disease. In such a case we consider that the right way to analyse the matter is that the proximate cause of the business interruption is the Notifiable Disease of which the individual outbreaks form indivisible parts.

²⁶ Ibid [95].