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Pre-Trigger Losses and Trends Clauses

The Supreme Court judgment in the FCA's Covid-19 Business Interruption Test Case handed down today is very good news for many insured whose business interruption claims have been accepted, but who have received low indemnity offers, justified by apparently permissible downward adjustment of business interruption losses via the policy's trends clause. This had been enabled by the High Court's earlier decision on the effect of trends clauses and the impact of pre-trigger losses. In its judgment the Supreme Court considered and ruled on trends clauses in the policies under consideration and disagreed with the High Court's conclusions. This is most welcome for our clients, and we would say, plainly correct.

The purpose of a trends clause is to exclude from the insurer's obligation to indemnify such losses as would have arisen in any event, whether or not the insured peril occurred. In an effort to prune back pay-outs, insurers have relied on trends clauses and asserted "trends" manifesting immediately before the first lockdown instructions were given by the Government. In many instances that approach had the practical effect of reducing the offered indemnity to next to nothing. The Supreme Court gave an example of how the adoption of this approach worked to the detriment of the insured: a pub which had seen its turnover fall by 30% as a result of the public's concern about the prevalence and spread of Covid-19 during the week ending 20 March 2020 (when the pub was instructed to close) manifested, so the insurers contended, a "trend" in that preceding week, and the reduction in turnover had to be calculated by reference to that trend. This had the effect that the indemnity would be much smaller than if the pub had not suffered the reduction in turnover in the week preceding the instruction to close.

The Supreme Court rejected the High Court's permitted adjustments under the trends clauses and ruled that adjustments should only be made to reflect circumstances affecting the business which were unconnected with Covid-19. That decision is obviously consistent with the purpose of a trends clause which is to calculate the turnover/business results that would have been achieved if the insured peril (or its underlying or originating cause(s)) had not occurred.

We have unfortunately seen examples of insurers who, relying upon the earlier High Court decision, offered derisory amounts for business interruption losses in reliance on an immediately preceding "trend". A particularly egregious example was the offer of a business interruption indemnity of £1,500 to a café business trading on railway station platforms. To put that matter in context, the client's actual trading losses caused by the first lockdown and travel advice/restrictions exceeded £2million in the indemnity period, although subject to the usual £50,000 cap on losses caused by hindrance of access. That client will now be able to claim the full capped amount.

We expect that in consequence of the Supreme Court judgment very many business disruption loss offers will now be increased as a matter of course, but recalcitrant insurers can be sure to be met with an interventionist Financial Ombudsman Service keen to ensure adequate compensation for policyholders.

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