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CORBIN & KING: DENIAL OF ACCESS CLAUSE AND COMPOSITE POLICY COVER FOR COVID-19

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SUMMARY

The Commercial Court has found in *Corbin & King Ltd v Axa Insurance UK Plc* that a Non-Damage Denial of Access ("**NDDA**") clause responds to COVID-19 business interruption losses. Further, that where the policy provides cover by reference to the Insureds' "business" where access to its "premises" was restricted, that the insured would be entitled to claim the sub-limit of cover in respect of each premises, for each lockdown or restriction. This decision, if upheld by appellate courts, could materially increase some insurers' exposure to COVID-19 business interruption losses if they have underwritten comparable NDDA covers.

BACKGROUND - FCA TEST CASE

The FCA Test Case was at first instance heard before a Divisional Court comprised of a Financial List judge and a Court of Appeal judge. The Divisional Court determined that NDDA clauses typically required the danger, incident or risk for which cover was provided to be something local and not national/international like a pandemic. Since it could not be said that any particular COVID-19 case within 1 mile of a particular insured premises had caused the government lockdown, it was thought NDDA clauses would not respond at all. The Divisional Court's decision on this was not appealed to the Supreme Court.

NOT BOUND BY DIVISIONAL COURT

In *Corbin & King*, the Commercial Court was asked to come to the opposite conclusion, and on 25 February, Mrs Justice Cockerill handed down a judgment in which she determined that the NDDA wording before her *did* provide coverage for business interruption loss caused by COVID-19. The judge reasoned that the Axa wording was sufficiently different to the wordings considered during the course of the FCA Test Case, and the arguments raised in relation to the Axa wording had not been heard by the Divisional Court, such that the Commercial Court is not bound by the Divisional

Court's decision in the FCA Test Case in relation to the interpretation of coverage afforded by the Axa NDDA clause.

The Court appears to have been particularly persuaded that the parties' arguments were different because the parties before the Divisional Court had assumed that they would never be able to establish that a single COVID-19 case in the vicinity of an insured premises would be found to have caused the government action (and had therefore not argued the point), whereas the Supreme Court later found that each case of COVID-19 *was* causative of the government action (giving rise to the new arguments made before the Commercial Court in *Corbin & King*). The goal posts had therefore been moved by the Supreme Court decision. The implication is that the Divisional Court would have come to a different conclusion had it had the benefit of the Supreme Court's judgment (a view also expressed by Lord Mance in his award in an arbitration brought by policyholders against China Taiping Insurance).

COVERAGE PROVIDED BY AXA

The Commercial Court found there was cover for "*loss resulting from denial of access arising directly from actions taken by a statutory body in response to a danger within a mile of your premises*" since:

1. Actions taken by a statutory body included nationwide government action;

2. A "danger" included COVID-19 disease; and

3. "Within a mile of your premises" did not mean that all of the danger needed to be localised – danger could exist within the mile radius and outside it at the same time (as was the case with COVID-19 infections).

This decision is therefore at odds with the Irish Court's decision in *Brushfield v Axa,* which considered the very same wording and found that "danger within a mile" meant a local danger similar to one in the "vicinity", considered by the Divisional Court. However, the Commercial Court's decision accords with the views expressed by Lord Mance in the *China Taiping* arbitration where a "vicinity" wording (rather than "within a mile") was in issue. Lord Mance also expressed a view that the Divisional Court might have reached a different conclusion with the benefit of the Supreme Court's decision as to the causative effect of each COVID-19 infection on the governmental measures imposed in the UK.

COVERAGE ELSEWHERE FOR INFECTIOUS DISEASE IRRELEVANT

Axa also argued that since its policy provided cover elsewhere for interruption caused by notifiable diseases and excluded NDDA cover where denial of access was a result of one of a list of notifiable diseases that did not expressly include COVID-19, COVID-19 loss could not be included within the NDDA cover. The Court was not convinced by this argument: it found that diseases not within the

excluded list could be covered by the NDDA clause. Lord Mance had reached a similar view in *China Taiping*.

It should be noted that other wordings may produce different outcomes. For example, the Federal Court of Australia considered Lord Mance's award in the context where insurers argued an infectious disease cover elsewhere in a policy meant a cover for government action to retard a "conflagration or other catastrophe" could not be read as including COVID-19 as an "other catastrophe". The Australian Federal Court considered the wording before it as distinguishable from the China Taiping wording before Lord Mance and decided the presence of contagious disease cover elsewhere in the policy meant a clause relating to government action to retard an "other catastrophe" could be construed as not including responses to infectious disease (see decision here).

Given that the above coverage issues were not argued before the Supreme Court during the course of the FCA Test Case, it seems likely that this decision will be appealed so that a final determination can be made on it.

CAUSATION

In *Corbin & King*, the Commercial Court determined that the Supreme Court's approach to causation in the test case was equally applicable to establishing liability under NDDA clauses as it was under disease clauses. Namely, that each and every COVID-19 infection was causative of the government response to the pandemic, and so a COVID-19 infection within the 1 mile radius described in the NDDA clause was a danger causative of the lockdown that caused the closure of the business and loss for which indemnity was sought.

QUANTUM – LIMIT PER PREMISES OR FOR ALL PREMISES?

The Insureds sought to argue that they were entitled to indemnity up to a sub-limit of £250,000 for each of three lockdowns and for each insured premises. Axa accepted the Insureds would be entitled to indemnity in respect of three sets of restrictions, but that the sub-limit applied to all premises (i.e. a total of £750,000 for three lockdowns). Axa raised a number of arguments including that while other sections of cover stipulated limits specific to each premises, the business interruption section of cover did not specify a per premises limit and its limit should be taken as a single limit for all Insureds.

The Court determined that the policy was a composite policy since each "*company has a separate interest represented by the restaurant or restaurants/cafe which it owns"*, and considered that a single limit would not be the expectation in the context of a composite policy. Rather, the cover was in respect of interruption to "*the business where access to your Premises is restricted"* and each premises could be differently affected by a danger triggering cover. The result was that the Court declared that Axa is bound to indemnify the Insureds in respect of each premises up to £250,000 for each lockdown or set of government restrictions.

This decision may have a very material impact on insurers who adopted the position that NDDA clauses would not provide cover on the basis of the Divisional Court's decision and, depending on the nature of their wording and way in which policy limits are expressed, could result in very large sizeable exposures where claims are made on a per-premises basis that were otherwise being adjusted on a per Insured or aggregate basis.

Insurers and Policyholders alike will no doubt want to carefully check their policy wordings in light of this decision to determine whether there is NDDA cover where there was previously thought to be none and/or per-premises cover where a sub-limit was previously thought to operate on an aggregate or per-Insured basis.

In light of the potential impact of this decision, it is likely that it will be appealed.

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