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# Recent developments in Covid-19 Business Interruption litigation

This article tracks recent developments in Covid-19 Business Interruption ("BI") litigation. In January 2021 the Supreme Court clarified the basic coverage provided by BI policies which include provisions responding to the occurrence of disease within the vicinity of insured premises ("Disease clauses") and/or to the restriction of access or use of insured premises (the so-called Non-Damage Denial of Access or "NDDA" clauses, though this includes restrictions on both access and use). However, there are a number of areas of outstanding dispute that appear likely to require further litigation to resolve. There has already been at least one high-profile arbitration award (which is published with the consent of the parties) and there are numerous sets of proceedings which have been issued with pleadings now closed and case management underway.

**The entity required to take action – "competent local authority"**

Non-damage Denial of Access ("NDDA") clauses usually incorporate requirements along the following lines: "interruption" / "interreference" with use or access to the policyholder's premises or business being "restricted" / "hindered" "following" / "arising directly from" the actions taken by a public authority.

Where reference is made to the "government" or the clause is drafted in broad terms such as "governmental authority" or perhaps by reference to "any other statutory body" policyholders are on firm ground, given that the March Regulations were laid before Parliament by the Secretary of State pursuant to statutory powers granted by the Public Health (Control of Disease) Act 1984.

However, when the entity is specified as "the police" or "competent local authority" there is more room for debate as to the true scope of such clauses. This was the determinative issue in the recent award handed down by Lord Mance in China Taiping Insurance. The question was whether, within the policy context concerned, references to instructions issued by or actions or advice of "the Police or other competent local authority" were intended to embrace measures taken or advice given by central government. Although a published arbitration award by Lord Mance has no formal status as precedent, his analysis will clearly carry great weight in any further consideration of these issues in the Courts.

The insurer's primary argument was that the Police are generally understood to be local in their constitution and organisation and that the concept of a competent local authority brings to mind a body with local authority. The wording therefore evinced an intention for the trigger to have a localised element, not generally present in the pandemic and the central government's response to it. In the alternative, the insurer argued that the central government's directions, actions or advice were only relevant if targeted locally.

The policyholders argued that "the Police or other competent local authority" encompassed any other authority with competence in the relevant locality, and can readily embrace central governmental.

In so doing they sought to rely on the conclusions reached in the FCA test case by the Divisional Court in respect of a POA clause produced by Ecclesiastical Insurance Office Plc, which referred to "competent local authority".

It should be held in mind that paragraph 9 of the Declarations Order of the Supreme Court ("SC Order") provides that the: "The UK Government is a government, governmental authority or agency, public authority, competent public authority, civil authority, competent civil authority, *competent local authority* and/or statutory authority within the different wording to this effect in Wordings (Arch1, Ecclesiastical1.1-1.2, Hiscox1-4, MSAmlin1-3, RSA2.1-2.2, RSA4, Zurich1-2)" (emphasis added).

However, Lord Mance observed that the Divisional Court had reached its conclusion as to the meaning of "competent local authority" by reasoning backwards from the wording of a co-existing Disease clause. In his view, the difference in context and wider policy wording opened the door to reaching a different conclusion in the context of the policy issued by China Taiping.

Lord Mance analysed the provision, adopting the orthodox iterative approach, focusing on the natural meaning of the words used, the context provided by related policy language, the legislative background, decided cases and the "logic", "artificiality" and/or commerciality of each party's suggested construction.

In relation to the wider policy wording, Lord Mance placed particular reliance on the fact that the policy recognised the concept of a local authority in "a day to day sense as distinct from other central governmental or public authority". The potential difficulty with this feature of the reasoning is that the references are to "local authority" rather than "competent local authority", which might be thought to generate different considerations in relation to whether the cover was intended to be "localised" or otherwise.

In terms of legislative context, both parties focused heavily on the legislative background enabling intervention by both central governmental and local authorities (a summary of some of the statutory provisions can be found from paragraph 80).

In Lord Mance's view the recognition under the Public Health (Control of Disease) Act 1984 and the Civil Contingencies Act 2004 Act of distinctions between the roles and duties, in relation to health crises or other emergencies, of the police and local bodies on the one hand and other authorities, including Ministers, on the other hand seemed to lend positive support to the likelihood that a parallel distinction between local bodies and central governmental authority was recognised and intended by the parties.

As to logicality, Lord Mance disagreed with the policyholder, in his view a limitation of cover by reference to the actions, instructions or advice of a local, as opposed to central governmental, was both an understandable aim and to be readily conceivable.

Ultimately Lord Mance favoured the arguments advanced by the insurer, finding that in context of the policy the instructions, actions or advice of a "competent local authority" did not encompass measures taken or advice given by central government.

The following more general points can be distilled from the award:

1. Ultimately, it is a question of construction and will turn on the particular wording, even where similar wording has been considered in policies already analysed by the court or indeed referred to in the SC Order.

2. Wider policy wording and the meaning to be distilled from other provisions of the policy are highly significant, providing a range of complex and potentially persuasive legal arguments.

3. The statutory context is significant and a helpful analysis can be found in Lord Mance's award.

As a final consideration, a further option not fully explored in China Taiping Insurance is whether there may be circumstances in which it is possible for policyholders to identify actions taken by the police or a local authority which have hindered use or restricted access to their businesses. The restrictions set out in the Regulations were enforceable and enforced by the police and local authorities. The challenge for such arguments is proving that such enforcement action was genuinely an effective cause of their loss. This might succeed in cases of over-zealous actions taken in the name of enforcement, but it seems unlikely that policyholders will be able to rely upon a willingness to break the rules (i.e. acting illegally) that was only thwarted by local enforcement action.

**Rejection of causation based locality arguments**

For NDDAs not restricted to "competent local authorities" in the sense identified by Lord Mance, his award provides more positive news. In particular, Lord Mance was minded to reject reliance on causation based arguments which sought to restrict the China Tai Ping NDDA to emergencies operating only on a local level. The argument that NDDAs only afford a "localised" form of cover as a matter of causation met with substantial success in the Divisional Court in the FCA test case, in a part of the decision which was not appealed.

Where action is required in response to a "danger" or "emergency" within the vicinity or a defined geographical range of the insured premises, the argument is made on behalf of policyholders as follows:

1. an occurrence of Covid-19 is a danger or emergency, and (subject to proof) there was Covid-19 within the relevant radius;

2. it is not a requirement that it should be exclusively present within that area;

3. the Regulations were passed in response to each and every actual or threatened case of Covid-19, both within the relevant geographical and outside it, they were all effective causes; and

4. the cases within the relevant range constituted a danger or emergency which was also an effective cause of the Regulations.

The main defence to this argument is in essence a locality argument. It contends that the measures were not taken in response to a danger or emergency within the relevant radius. Rather, the measures taken were taken in response to the spread of Covid-19 in the country as a whole and the NDDA clause was not intended to embrace such generalised dangers or emergencies.

These arguments were considered by Lord Mance. Although he did not express a finally concluded view, he began his analysis by focusing on the wording of the relevant provisions and observed that they refer to the existence of certain local elements (e.g. "the closing down or sealing off of the Premises or property in the vicinity of the Premises").

Unsurprisingly, the insurer placed particular weight on the reasoning of the Divisional Court in relation to a number of NDDA provisions which it had held only provided "localised" cover. The appeal to the Supreme Court did not include this aspect of the Divisional Court's decision.

Lord Mance agreed that the reasoning of the Divisional Court appeared to provide an answer in favour of the insurer, such that the policyholders would have to demonstrate that it was “an emergency by reason of COVID-19 in the vicinity, in that sense of the neighbourhood, of the insured premises, as opposed to the country as a whole, which led to the actions of the government”. The Divisional Court had remarked that it was “highly unlikely” that this could be achieved.

However, Lord Mance noted that the Supreme Court’s rationale on causation should be applied. He concluded that if the Divisional Court had applied the Supreme Court’s analysis of causation it would have reached a different conclusion. The key analysis of causation was that all the cases of Covid-19 countrywide were concurrent causes of any business interruption loss and there was no requirement that the business interruption “has resulted only from cases of a notifiable disease within the radius, as opposed to other cases elsewhere.”

The insurer anticipated this point by arguing for recognition of a distinction between Disease or Hybrid clauses, and NDDA clauses. The insurer contended that the nature of disease means that outbreaks are likely to elicit a response which is more widespread than local. Disease and Hybrid clauses needed to be construed with this in mind, NDDA clauses did not.

However, and of particular significance for policyholders, Lord Mance reasoned that although “causation required under an insurance is, in the last analysis, a matter of construction, the Supreme Court was, contrary to the Insurer’s submission, prepared to state quite generally that its general approach to causation was applicable across the whole range of wordings, ranging from Disease clauses to Hybrid clauses to NDDA clauses”. Furthermore, there was nothing in the wording of the extension which on the face of it precluded the application of such reasoning.

This conclusion effectively trumped the “localised cover” argument as a matter of causation. Although Lord Mance’s overall decision turned on his conclusions as to the ambit of “competent local authority”, this analysis will no doubt be keenly adopted by those representing policyholders with NDDAs not restricted in this way.

Richard Harrison has extensive expertise across the spectrum of commercial litigation, including regular involvement in arbitration and ADR, as well as advisory work. He has particular expertise in insurance and reinsurance and professional negligence matters. Richard’s practice entails handling a high-profile caseload of complex insurance and reinsurance disputes.

Richard acted for the Financial Conduct Authority in the High Court stage of the Covid-19 Business Interruption test case, leading the junior team of counsel.

John Platts-Mills is a natural and persuasive advocate, and possesses a “first class mind”, which allows him to develop a command of complex issues quickly. He is regularly instructed on a range of Insurance and Reinsurance disputes.

Before joining the Bar, John worked in the Shell Global Litigation team, and as a corporate finance analyst in Deutsche Bank’s mergers and acquisitions team.