The Financial Conduct Authority ("FCA") Business Interruption Test Case – How does this affect the Food and Drink Sector?

So many businesses in the food and drink sector have been ravaged by the effects of covid-19. Could the recent FCA case be a lifeline for those with BI cover?

In January 2021, the Supreme Court allowed an appeal brought by the FCA on behalf of policyholders looking for confirmation that their BI policies covered covid-19 related losses. The Supreme Court's ruling is of particular importance to SMEs in the food and drink sector which have suffered significant financial losses due to covid-19-related restrictions and closures.

The FCA's case was brought in response to a widespread refusal by insurers to pay out on such claims. The basis of refusal most often came down to either: 1) the interpretation of "disease" and "prevention of access" clauses within such policies; or 2) the operation of "trends" clauses intended to ensure that the indemnity was consistent with the policy coverage (it was contended by insurers that the pandemic had such a wide-reaching impact that business interruption policies should not cover losses which would have arisen anyway). Insurers such as Hiscox, Arch Insurance and Royal & Sun Alliance joined proceedings to seek clarification on the issue. Read the article Judgment handed down in the Financial Conduct Authority's test case for more detailed discussion of the underlying issues and in particular a focus on the landlord and tenant perspective.

The judgment

The Supreme Court analysed the "disease" and "prevention of access" clauses in a sample of policies and found that the majority were sufficiently wide to apply to losses caused by covid-19. The Court held that cover ought to apply equally to premises that were forced to close to comply with specific covid-19 legislation, as to those which closed when simply told they must by the Prime Minister (considered to be "mandatory terms" but not actually law). On the operation of "trends" clauses, the Court held that insurers could not avoid their obligations to pay out or reduce pay outs simply because the loss in question would have arisen regardless of Government measures, because of the effects of the pandemic on businesses. Nor could insurers reduce amounts paid out on the basis that the pandemic had already caused businesses to suffer even prior to lockdown.

What does this mean for the food and drink sector?

The food and drink sector has been hit hard by the coronavirus pandemic. The Guardian reported in 2020 that 7 out of 10 pubs and restaurants feared becoming financially unviable due to covid-19 restrictions, resulting in permanent closure. Even sector businesses which have been permitted to stay open, such as factories, have suffered as a consequence of localised outbreaks; in August 2020, 300 workers tested positive for coronavirus at a sandwich-making factory, Greencore, with the consequence that the factory was forced to close temporarily and undertake a deep clean.

The FCA judgment will therefore be welcome news for the sector. "Prevention of access" clauses, when worded correctly, will cover claims by pubs and restaurants which have been forced to close completely. Businesses which have been forced to operate on a reduced take-out only basis, are also afforded protection, as the Supreme Court judgment also permits recovery for losses from partial closures. Losses arising from an onsite covid-19 outbreak are also recoverable under an appropriately-worded "disease" clause.

How we can help

It is important to note that the business interruption policy must be worded correctly in order to substantiate a claim, each policy will be judged on its own precise wording and many policies do not offer cover for these kinds of losses. For further advice on legal issues affecting food and drink businesses, contact Tom Bourne at tom.bourne@cripps.com. If you need any advice in relation to the judgment or your policy wording, please contact pradeep.oliver@cripps.co.uk or mike.scott@cripps.co.uk.

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