Commercial: Business Interruption Insurance

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The High Court has handed down its much anticipated decision in ***FCA v Arch Insurance (UK) Ltd and others [2020] EWHC 2448 (Comm)***, a test case brought by the FCA seeking clarity on the meaning and effect of certain non-damage business interruption insurance policy wordings, as applied in claims made in light of the current COVID-19 pandemic. The decision is complicated, running to over 150 pages. There is to be a further hearing to consider any applications to appeal. Such an appeal will be direct to the Supreme Court.

It seems unlikely that this decision will be the end of the matter. However, the court tended to support the interpretation advanced by the FCA on behalf of policyholders. If the decision stands, then it will be favourable to many policyholders. Given the complexity of the decision, it is difficult to summarise, however, the FCA has taken the following key points from the judgment:

- In order to establish liability under the representative sample of policy wordings considered by the court, the FCA argued for policyholders that the 'disease' and/or 'denial of access' clauses in the representative sample of policy wordings provide cover in the circumstances of the Covid-19 pandemic, and that the trigger for cover caused policyholders' losses.
- The judgment says that most, but not all, of the disease clauses in the sample provide cover. It also says that certain denial of access clauses in the sample provide cover, but this depends on the detailed wording of the clause and how the business was affected by the Government response to the pandemic, including for example whether the business was subject to a mandatory closure order and whether the business was ordered to close completely.
- The test case has also clarified that the Covid-19 pandemic and the Government and public response were a single cause of the covered loss, which is a key requirement for claims to be paid even if the policy provides cover.

Ultimately, each policy will need to be considered on its own merits. So whilst the decision will provide some comfort to policyholders, it seems likely that with or without an appeal, there continues to be scope for insurers to avoid or, at least, attempt to avoid paying out and, therefore, for litigation (the court did not find that the defendant insurers to be liable across all of the twenty-one different types of policy wording in the representative sample).