

# JUDGMENT IN UK TEST CASE ON INSURANCE COVER FOR COVID LOSSES

16 September 2020 | Australia

Legal Briefings - By **Mark Darwin, Guy Narburgh and Travis Gooding**

---

The decision in the UK test case on business interruption insurance coverage related to Covid-19 was handed down last night (Australian time) and represents a potentially significant win for policyholders.

The UK Financial Conduct Authority, which brought the case on behalf of policyholders, was represented by Herbert Smith Freehills' London insurance team who have prepared a summary update in relation to the matter (which can be accessed [here](#)). The full judgment is available [here](#).

This is a potentially important decision for Australian policyholders, particularly those currently facing declinatures for their business interruption claims. Although not binding in Australia (and subject to a potential appeal by insurers), policyholders should give careful consideration to its impact on arguments insurers may have for resisting or adjusting claims.

## SNAPSHOT OF KEY FINDINGS

In our previous update on the UK test case (available [here](#)) we identified the two key issues as being (1) the application of particular coverage extensions to Covid-19 losses and (2) causation issues relating to the specific and general impact of Covid-19. The Court made key findings on these issues as follows:

- **Coverage in relation to ‘disease’ extensions:** these extensions cover business interruption loss in consequence of a notifiable disease within a specified radius of the insured premises. The Court generally concluded (subject to some exceptions) that these clauses covered Covid outbreaks and that the proximate cause of the business interruption was the notifiable disease. Importantly, the Court concluded that the individual outbreaks are indivisible from the general pandemic, meaning that cover was not limited to outbreaks wholly within the area specified in the policy.
- **Coverage in relation to prevention of access / public authority extensions:** these extensions cover business interruption loss resulting from a prevention or hindrance of access to or use of premises as a consequence of government or other authority action or restrictions. Generally, the Court adopted a more restrictive approach compared to that for disease wordings. It concluded that claims premised on these clauses will turn very closely upon the precise terms of the policy and the application of the government advice and regulations to the insured’s particular business.
- **Causation, trends and other circumstances:** insurers argued that the insured peril should be construed narrowly as the local occurrence of the disease – and that the broader impact of the pandemic could then be taken into account as a ‘trend’ which would otherwise have affected the policyholder’s business (effectively negating the cover). Unsurprisingly, the Court had little sympathy with this argument, and adopted a broad view of what constituted the insured peril, thereby precluding insurers from relying on the broader impact of the pandemic to reduce claimable loss. Importantly, the Court also both distinguished and criticised the decision in *Orient Express Hotels v Assicurazioni Generali SpA* [201] EWHC 1186 (the previous leading authority on this issue) which insurers relied on heavily in their submissions on causation.

A hearing will shortly be fixed with the UK High Court, where any applications for appeal will likely be made.

## AUSTRALIAN CASES

At the same time, there are also currently at least two significant cases on foot in Australia in respect of Covid-19 business interruption claims: the AFCA/ ICA case in the NSW Supreme Court and the Star Entertainment Group case in the Federal Court. Both are in their early stages. We anticipate there will be some overlap between the UK decision and these Australian test cases, but that a number of additional issues will be dealt with in the Australian cases.

We will continue to provide updates on developments in the UK case, and will also be releasing further issue-specific updates in the coming weeks.

## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



**MARK DARWIN**  
PARTNER, BRISBANE

+61 7 3258 6632  
Mark.Darwin@hsf.com



**GUY NARBURGH**  
SPECIAL COUNSEL,  
SYDNEY

+61 2 9322 4473  
Guy.Narburgh@hsf.com

---

## LEGAL NOTICE

The contents of this publication are for reference purposes only and may not be current as at the date of accessing this publication. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

© Herbert Smith Freehills 2021

---

**SUBSCRIBE TO STAY UP-TO-DATE WITH LATEST THINKING, BLOGS, EVENTS, AND MORE**

Close