



# UPDATE ON COVID-19 BUSINESS INTERRUPTION INSURANCE UK FCA TEST CASE: DECLARATIONS AND APPEALS

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

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Developments in the UK FCA test case for COVID-19 related business interruption could have implications for similar claims in Australia. The UK Court has:

- issued its detailed declarations to give effect to its reasons for judgment handed down on 15 September 2020 (a copy of the judgment is available [here](#) and a copy of HSF's detailed summary is available [here](#)); and
- granted permission to the parties (both the FCA and the insurers) to appeal and to 'leapfrog' the appeal directly to the UK Supreme Court (being the highest court of appeal in the UK).

The FCA has published further details on their website (available [here](#)). We understand that the appeal will be heard before the end of November. Whether a judgment can be delivered before the end of the year is unclear.

This is a potentially significant development for Australian policyholders (and insurers) in relation to the many claims that are currently pending.

# DECLARATIONS IN THE UK FCA TEST CASE

The declarations (available [here](#)) crystallise the Court's reasons as set out in the judgment into specific orders. They are detailed and address each of the insurers, and their specific policies, in turn. However, there are a number of general observations which may be of use to policyholders.

**Disease and prevalence:** In relation to COVID-19 generally, the declarations include (in reference to specific phrases used in specific policies) that:

- COVID-19 is a human infectious or contagious disease;
- to have been sustained or to have occurred (in a given area), COVID-19 did not have to be verified by medical testing or a medical professional; and
- the policyholder bears the burden of proving COVID-19 occurred within the area stated by the policy (if any). The declarations note a range of evidence that may be sufficient, including certain data published by stated UK government agencies if they are the best available evidence in a particular case.

**Causation / Trends:** In relation to issues of causation and the operation of the trends clause:

- the national COVID-19 outbreak is one indivisible cause, or alternatively each occurrence of COVID-19 is a separate, but effective, cause of a national action and any consequential business interruption; and
- the correct counterfactual for assessing business interruption is to assume that once cover under the policy is triggered none of the elements of the insured peril were present.

**Wordings of specific extensions:** The Court made specific declarations in relation to specific clauses. Those declarations are context dependent, with some words – such as 'vicinity' – imposing different requirements depending on the context in which it appears. Policyholders should therefore closely consider the wording of the extensions to their particular policy against the declarations (and reasons) issued in this matter.

However, the declarations do highlight that there are a number of key aspects to many extension clauses which policyholders should pay particular attention to:

- **Must the event occur within a stated area?** Many policies state areas in which particular events must occur. It is important to closely examine these requirements, both in relation to what the specified area is (noting that the word 'vicinity' can have different meanings in different contexts) and what event is required to occur (i.e. whether a nationwide occurrence of COVID-19 is sufficient).
- **What type of action is required?** Depending on the wording used by the policy, a mere instruction or recommendation may be sufficient. Other times specific legislative / regulatory action with the force of law may be necessary.
- **How must that interruption affect the business?** Depending on the wording used by the policy a simple interruption to business may be sufficient. Alternatively a greater interruption such as a prevention or an 'inability to use' may be necessary to trigger coverage.
- **What causal relationship is required?** Different extensions may require different tests of causation. For example, the Court in the FCA test case considers what causal relationship is imported by the word 'following'.

## THE GROUNDS FOR APPEAL IN THE UK FCA TEST CASE

The FCA has also released the applications for permission to appeal, including the proposed grounds for appeal. Separate grounds have been stated by the FCA and the various insurers.

Appeals by insurers, although not identical, broadly cover:

- whether COVID-19 is one indivisible cause;
- the categorisation of the extension clauses as creating a 'composite peril';
- in relation to specific clauses, what is imposed by specific wording stating that the event must occur in a stated area;
- issues of causation, such as the treatment of *Oriental Express Hotels*, and the operation of the trends and circumstances clause; and

- issues specific to the wording used in their particular policies.

The FCA will also seek for some points of the underlying decision to be addressed by the Supreme Court (their application to appeal is available [here](#)). These include:

- whether policyholders' claims should be reduced to reflect the ongoing effect of COVID-19 where that effect arose prior to policy coverage being triggered;
- in relation to specific policies, whether the specified action by an authority must have the force of law (or whether government recommendations are sufficient);
- in relation to specific policies, whether wording such as 'prevention' or 'denial of access' or 'inability to use' require complete closure; and
- in relation to specific clauses, what is imposed by specific wording stating the event must occur in a stated area.

## **IMPLICATIONS FOR POLICYHOLDERS IN AUSTRALIA**

Policyholders should be:

- closely watching the progress of this decision and the outcome of any appeal (we will provide further updates);
- closely watching the progress of other similar Australian proceedings currently on foot (which will be the subject of a separate update by us within the next fortnight); and
- closely considering the UK test case judgment and declarations – in particular in relation to how it may be relevant to the interpretation of specific wordings used in their own policy.

The key for policyholders is not to assume that they do not have a claim and not to assume that a rejection of that claim means that they do not have a valid claim. ASIC has written to insurers ([here](#)) reminding insurers to be careful about what they say in response to claims, warning against positions which could amount to misleading and deceptive conduct.

As this and other Australian cases demonstrate, there are a number of live issues that are currently being considered. If you suspect that your policy contains extensions that may provide you with a basis to claim, you should seek advice on the clause and your options in exploring your claim.



## KEY CONTACTS

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



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