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Update

"Trigger date" for insurance of SARS business interruption losses

Cover started from date disease became "notifiable" (not before)

The Court of Final Appeal recently handed down an important judgment in New World Harbourview Hotel Co. Ltd & Ors v ACE Insurance Ltd & Ors, FACV No.12 of 2011, [2012] HKEC 264, concerning the interpretation of an insuring provision in a policy dealing with business interruption losses, said to have been sustained as a result of (among other things) a "notifiable" disease in Hong Kong; namely, Severe Acute Respiratory Syndrome (SARS). Readers will recall the events surrounding SARS and its dramatic effect on Hong Kong's economy in 2003. The case raises some important points regarding the construction and drafting of provisions in an insurance policy that "trigger" cover. It also re-emphasises the purpose of insurance, which is to provide cover for loss arising from an insured peril only. In this article we take a look at the judgment and some key points to note.

Key points

- As readers will know, the insuring provision in an insurance contract (which defines the scope of cover) is crucial. Insurance cover is triggered according to the wording of an insuring clause.
- Once insurance cover is triggered it is not (usually) retrospective. Only loss arising as a consequence of the insured peril that triggers the policy is covered.
- Insurers, brokers and insureds should pay particular attention to the wording of insuring clauses when putting cover in place.
- Business interruption insurance is about covering loss for a specific insured peril only. It is not a profit guarantee.

- Foreseeing events that could arise and should be insured against is notoriously difficult, particularly in a commercial context. Sometimes there will be events which catch everyone by surprise; in our experience, most insureds and insurers are not imbued with the foresight of a clairvoyant.
- The courts in Hong Kong interpret insurance contracts just as they do other commercial contracts; giving effect to the words used in the context in which they are used. Where the words used are clear (according to their meaning and context) there is no place for the "contra proferentem rule"; namely, that a contractual provision should be interpreted against the interests of the party that insisted on its inclusion.

Facts

In February 2003 media reports began in Hong Kong of a pneumonia-like disease that had spread from the south of China. Following reports of an outbreak of acute respiratory syndrome in south China on 11 February 2003, the Hong Kong government immediately requested public and private hospitals to report all cases of severe community acquired pneumonia; that reporting was voluntary.

On 12 March 2003 the World Health Organisation declared SARS a worldwide health threat. SARS was subsequently added to the 1st Schedule of the Quarantine and Prevention of Disease Ordinance (the Ordinance) on 27 March 2003, since replaced by the Prevention and Control of Disease Ordinance. At this date there became a mandatory obligation on all hospitals and doctors to notify SARS.

The plaintiffs (the appellants) are all part of the New World Development Group; a well known publicly listed conglomerate in Hong Kong, which operates (among other things) convention centres, hotels and car parks in Hong Kong. They had taken out two "Composite Mercantile Policies" (the policies) with the defendant insurers (the defendants).

Sections 1 and 2 of the policies provided cover for property damage and machinery breakdown. Cover under these sections is triggered by physical damage. In contrast, cover under section 3 extended to various insured perils which did not involve physical damage. Clause 14.5 was the relevant "insuring clause" in this case providing cover for (among other things): "…infectious or contagious disease, food or drink poisoning or contamination, and closure… due to vermin or pests all occurring on the Premises of the Insured *or* of *notifiable* human infectious or contagious disease occurring within 25 miles of the Premises." (emphasis added).

Therefore, in the context of infectious or contagious diseases, there were two limbs of cover: (i) loss as a result of infectious or contagious diseases at the insured premises (the first limb) or (ii) loss as a result of a "notifiable" disease occurring within 25 miles of the premises (the second limb). The appellants' businesses did not suffer an outbreak of SARS on any of their premises so they claimed under the second limb for various business interruption losses arising from SARS within 25 miles of the premises; the earliest of which was said to have occurred on 9 March 2003.

Unlike most such extensions used in the market nowadays, the policies did not include a definition of "notifiable" or a list of such diseases which would trigger cover.

Issue

In the first instance judgment five policy construction issues were clarified by the judge; all in favour of the defendants, except for the fifth point which had no bearing on the appellants' business interruption claim (it related to claims preparation costs only).

On appeal, the appellants argued that the insurance cover extended to loss incurred within the period of insurance provided it was sustained as a result of a "notifiable" disease and even if the loss occurred before SARS became "notifiable".

That argument was rejected. The appellants obtained permission to appeal to the Court of Final Appeal (the CFA) on a point of law of great general or public importance. In short, that issue, as argued before the CFA, was whether insurance cover in policies of the type in dispute: (i) was limited to losses sustained as result of infectious diseases which had become "notifiable" as a matter of law (as the defendants argued) or (ii) extended to losses caused by a disease before it became "notifiable" as a matter of law and while the disease was subject to administrative reporting requirements (as the appellants argued).

Interestingly, permission to appeal was refused by the Court of Appeal, with one of the appeal judges describing the issues raised as "rather esoteric". It is possible that an insurance dispute against a background of SARS caught some of their Lordships' attention in the CFA; hence, leave to appeal being granted.

The correct meaning of "notifiable" in order to determine the extent of cover under the second limb of clause 14.5 was crucial.

Decision

The appeal was dismissed outright by the CFA, constituted by what many consider to be its strongest panel of five judges. The CFA's unanimous judgment (the judgment) was delivered by Sir Anthony Mason NPJ (former Chief Justice of the High Court of Australia).

The CFA held that the expression "notifiable human infectious or contagious disease" meant an infectious or contagious disease which was required by law to be notified to an authority. In the case of SARS, it was only when it was added to the 1st Schedule of the Ordinance on 27 March 2003 that there was a mandatory requirement to notify and, as such, that SARS became an insured peril triggering cover. The CFA considered that such an outcome

was consistent with the most common dictionary meaning of the word "notifiable" and, importantly, with the context of the wording of the policies, noting that:

"The interpretation which should be adopted in the case of an insurance contract, as with other commercial contracts, is that which gives effect to the context, not only of the particular provision but of the contract as a whole, consistently with the sense and purpose of the provision."

"…The object of cl. 14.5 is not, as the appellants suggest, to indemnify against loss which results from serious infectious disease which is 'likely to cause loss' to the appellants' business. Rather, it is to indemnify against actual loss of revenue sustained as a result of a *notifiable human infectious or contagious disease*." (the judge's emphasis)

The CFA also noted that such an interpretation was the clearest and most precise meaning and was supported by context. For example, a more stringent requirement in respect of cover for losses said to have been sustained away from the premises was not to be unexpected. The definition of the second limb by reference to a "notifiable" disease made sense in the context of the first limb ie, specific, but less severe, insured perils occurring on the premises.

Comment

The main preliminary issues in the case having been decided in favour of the defendants, the court proceedings continue as regards the quantum of the appellants' alleged business interruption losses.

What is, however, clear is that the appellants can only claim losses arising from when SARS became a "notifiable" disease in Hong Kong, which is the date it became an insured peril triggering cover. Any loss sustained prior to that date, whether caused by SARS or some other uninsured peril, is not covered. This is clearly correct. Insurance only responds to losses arising from an insured peril. The CFA's decision regarding the date SARS became a notifiable disease reflects "business interruption" market practice. Clearly, the parties used the word "notifiable" to draw a distinction between cover under the first limb (for *any* infectious or contagious disease at the premises), and the second limb (for a more serious disease in a wider area).

One issue not dealt with by the CFA is worth highlighting and is significant to business interruption claims more generally. This relates to how to interpret a "trends" or "other circumstances" clause when quantifying business interruption loss. We previously wrote an article on Orient-Express Hotels Ltd v Assicurazioni General SpA (UK) (the OEH case[1]), which concerned a business interruption claim following damage to a hotel in New Orleans as a result of Hurricanes Katrina and Rita in August and September 2005[2].

In the OEH case one of the key issues was whether the broader effects of a peril could be taken into account as an adjustment in the "other circumstances" clause. The hurricanes, which had caused the damage to the hotel, had also caused damage to the wider area and led to a curfew being imposed by city authorities. The court held that most of OEH's losses were not covered because they were the result of the curfew and the wider damage caused by the hurricanes. In short, the court held that it was permissible to make an adjustment for other consequences of the same peril which gave rise to the damage (thereby limiting the extent of the business interruption cover).

Similar principles were followed in the current case, which is significant because some loss was suffered by the appellants prior to 27 March 2003 as a result of the negative impact that SARS had on the appellants' revenue. However, any such loss is not covered because it was not caused by a notifiable disease.

The critical point which is often lost on insureds is that business interruption cover is not designed to cover the loss arising from a catastrophe but, rather, from a specifically defined insured peril. Critically, in this case, the defendants were not insuring SARS but the loss arising from a "notifiable" infectious or contagious disease. This can be tested simply by asking – "what cover would have been available if SARS had never been made notifiable?". The loss would have been exactly the same but cover would not have been triggered.

If there is one point to take away from all this – it comes down to realising that business interruption insurance is about covering loss for a specific insured peril only. It is not a profit guarantee.

In this case Clyde & Co's David Smyth and Antony Sassi acted for the defendant insurers. The merged firm of Clyde & Co and Barlow Lyde & Gilbert have some fifty-five years of combined experience representing clients in the insurance industry in Asia.

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1 [2010] EWHC 1186 (Comm)

2 Asia Insurance Briefing, October 2010

Further information
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