



## How big a hangover could the Business Interruption decision cause to Insurers and Policyholders?



### Introduction

The date of 15 March 2020 is a date that publicans in Ireland will most likely never forget. This is of course the date that the Government called on all pubs and restaurants to close due to COVID-19 after discussions with the Licenced Vintners Association (LVA) and the Vintners' Federation of Ireland (VFI).

Initially pubs and restaurants were asked to close until 29 March 2020 in order to curb the initial spread of COVID-19. Fast forward nearly a year later; Ireland is currently in the throes of its third lockdown and all pubs and restaurants are currently closed. Regrettably, there is no immediate prospect of pubs and restaurants reopening and while restrictions have been relaxed intermittently throughout the course of 2020 allowing a number of pubs and restaurants to recommence business, it was under strict safety restrictions which even the most frequent of attendees at pubs or restaurants would accept took some of the enjoyment from a night out and undoubtedly reduced footfall in such venues.

### Business Interruption Cover & Notifiable Disease

Broadly speaking, a number of Policyholders in Ireland have purchased policies which provided cover for business interruption as a consequence of: (a) notifiable disease within a certain radius from a business premises; or (b) prevention / hinderance of access to business premises caused by an outbreak of a notifiable disease.

Four pubs issued proceedings in the Commercial Court following FBD's refusal to cover the respective pubs under their specific business interruption policy. The judgement was due be delivered on 15 January 2021 but was deferred until 5 February 2021 to allow the parties to make legal submissions following the UK Supreme Court's judgment in a similar test case, which was also delivered on 15 January 2021.

### The UK judgement

In its judgment, the UK Supreme Court ruled in favour of the UK's financial regulator, the Financial Conduct Authority (FCA) and Insured businesses. Amongst their key findings were as follows:

- The "disease clause" provided cover for business interruption caused by any cases of illness resulting from COVID-19 that occurred within a specified radius of the business premises.
- That an instruction given by a public authority may amount to a "restriction imposed" if it carries the imminent threat of legal compulsion or is in mandatory and clear terms and indicates that compliance is required without the use of legal powers. For example, Boris Johnson's address of 20 March 2020 instructing businesses to close "tonight", indicates that compliance is required without recourse to legal powers.
- "Trends clauses" cannot be relied on by Insurers to reduce the indemnity because of the effects of COVID-19. The only adjustments which can be factored into the indemnity calculation are in respect of trends or circumstances entirely unrelated to COVID-19.
- Insurers relied heavily on the Orient Express Hotels case of 2010. However, the UK Supreme Court determined that this was wrongly decided and was therefore overruled. In this case a policy contained a trends clause with similar wording to those in this case and it accepted the Insurer's argument that cover

did not extend to business interruption losses which would have been sustained anyway as a result of damage to the city of New Orleans.

### **Conclusion**

The ruling provided by the UK Supreme Court will have given the Policyholders seeking to rely on FBD's policy wording reason for cautious optimism. FBD have been unwavering in their view; FBD maintains that the indemnity period should be limited only to when the Policyholder doors were closed by way of Government order. Clearly this considerably narrower interpretation is at odds with the Policyholders who have taken legal action.

All eyes will inevitably now move to the expected judgement on 5 February 2021. While the outcome of the judgement remains uncertain, one certainty remains, the decision by Justice McDonald will be far reaching as it is thought that FBD has 1,300 customers in the hospitality industry meaning that there is a significant exposure to whomever falls the wrong side of this decision.

### **Further Information**

Given the generality of the note it should not be treated as specific advice in relation to a particular matter as other considerations may apply.

Therefore, no liability is accepted for reliance on this note. If specific advice is required, please contact one of the Partners at Caytons who will be happy to help.

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