21 February 2025

PRESS SUMMARY

Liberty Mutual Insurance Europe SE and others v Bath Racecourse Company Limited and others [2025] EWCA Civ 153
On appeal from [2024] EWHC 124 (Comm)

Court of Appeal (Civil Division): Sir Julian Flaux (Chancellor of the High Court), Lord Justice Popplewell, Lord Justice Phillips

BACKGROUND

These five appeals are against the decision of Jacobs J dated 26 January 2024 in respect of several business interruption insurance claims arising out of the Covid-19 pandemic which were case managed and tried together in the Commercial Court.

The insurance cover in these cases concerns prevention of access (non-damage) ("POAND") and/or denial of access ("DOA"). This form of insurance covers business interruption losses where a "*danger*" within a certain radius of the insured premises prevents access because of police or governmental action.

Similar clauses were considered by the Supreme Court in *Financial Conduct Authority v Arch Insurance (UK) Ltd and others* [2021] UKSC 1 (the "*FCA test case*"). The Supreme Court held that cover had been engaged by the nation-wide pandemic because each incidence of Covid-19—including any incidences within the relevant insured radius—was a concurrent and equally efficacious cause of the UK Government's lockdown measures.

Jacobs J's judgment addressed numerous preliminary issues concerning the interpretation of the relevant policies in these claims. Both the insurers and insureds appealed.

The insurers' appeals generally concerned the interpretation of the limits applicable to the claims (the "insurers' appeal"). They advanced three grounds of appeal, namely Jacobs J erred by: (i) following the approach of Cockerill J in *Corbin & King Ltd v Axa Insurance UK plc* [2022] EWHC 409 (Comm) ("*Corbin & King*") to the effect that there was an 'expectation' that composite policies contained separate limits per insured rather than in aggregate; (ii) finding that, in one policy (the "Bath Racecourse policy"), an amendment to the limit had retained "any one loss" language rather than be deleted and replaced with a three-month maximum indemnity period; and (iii) holding that, also in the Bath Racecourse policy, the claims preparation cover is limited to £50,000 in respect of any one claim or series of claims arising from the same occurrence rather than an aggregate limit applicable to the insureds collectively.

The insureds' appeals concerned Jacobs J's decision that payments received by the insured under the Government's Coronavirus Job Retention Scheme ("CJRS"), so-called "furlough payments", were deductible from the insurance payment (the "furlough appeal"). Their three grounds of appeal were that Jacobs J erred in his interpretation of the relevant savings clause because: (i) the insureds' employee costs did not "*cease*" and were not "*reduced*" by the furlough payments; (ii) furlough payments were not "*in consequence of*" the insured peril because such payments did not correlate to the insured peril; and (iii) furlough payments were

not "*in consequence of*" the insured peril because the payments were collateral or *res inter alios acta* (i.e., a benevolent gift that did not have the legal effect of reducing the insureds' loss).

JUDGMENT

The Court of Appeal unanimously dismissed the insurers' appeal and the furlough appeal.

REASONS FOR JUDGMENT

The insurers' appeal

Composite policies

The starting point is that a composite policy contained in one document is, as a matter of legal analysis, a series of contracts of insurance insuring each insured separately [161]. The insurers' submission that this finding in *Corbin & King* has caused disquiet in the insurance market is unevidenced and, in any event, based on an ignorance of the law [163].

If the parties had intended for the limits in the composite policies to apply in the aggregate across all insureds, one would have expected clear words to that effect, together with provisions dealing with priority of competing claims [165]. The absence of any such words indicates that the correct construction is that the limits apply per insured separately.

This approach does not rely on any 'presumption' regarding composite policies [166]. Rather, it reflects the proper construction of the respective policies and reflects what a reasonable reader would expect the position to be.

Claims preparation cover

As the Court had decided that the composite policies gave rise to separate limits per insured, the insurers accepted that the same conclusion would apply to the claims preparation cover [168].

The amendment

The amendment in Condition 22 in the Bath Racecourse policy did not have the effect of removing the "any one loss" wording [169]. First, if it had been the intention to change the basis of cover so fundamentally, then the wording would have made the change clear as had been done elsewhere. Second, and similarly, if it had been the intention for the basis of cover to have been in aggregate, one would have expected clear words to that effect as had also been done elsewhere [170]. Third, the insurers' argument regarding the opening words of the amendment is circular and cannot have the effect of deleting the "any one loss" language [171]. Fourth, the relative size of the amended limit does not affect the analysis as the unamended limit was already relatively large [172]. Fifth, arguments regarding surplusage are generally weak, and that was the case with the insurers' surplusage argument [173].

The furlough appeal

Cease or reduce

The insureds' argument that furlough payments did not cease or reduce their wages costs embraced form over substance [174]. The commercial and economic reality against which the policies were to be construed was that furlough payments reduced the insureds' wages costs by 80% within the meaning of the savings clause. This is how a reasonable policyholder would view the situation. Butcher J's observations in *Stonegate Pub Company Ltd v MS Amlin Corporate Member Ltd and others* [2022] EWHC 2548 (Comm) ("*Stonegate*") [175] regarding the net financial effect were correct. The Australian case of *LCA Marrickville Pty Ltd v Swiss Re International SE* [2022] FCAFC 17 does not affect the position and, in any event, does not reflect English law [176].

This construction also accords with the basic principle that the policies are contracts of indemnity and, as such, should reflect the insureds' actual losses [178]. While the policies did not provide cover for the total loss, the clear intention is still, after certain adjustments had been made, that the final figure represent the actual loss. Butcher J was, therefore, right in *Stonegate* to hold that insurance policies should be construed to give effect to the indemnity principle, unless the wording of the policy dictates a different result [179].

Causation

The starting point on the issue of causation is to consider the purpose of the savings clause, which is to give credit for charges or expenses ceased or reduced by the insured peril [182]. In principle, given the focus on the insured peril, one would expect the same causation analysis to apply for the assessment of loss as applies to whether the loss is covered. The correct approach to the latter was the concurrent approach of the Supreme Court in the *FCA test case*.

Applying the concurrent approach, it was the general prevalence of Covid-19 (including within the relevant radius) which led to the Government restrictions [185]. The CJRS was announced at the same time as those restrictions and was intended to mitigate their effects. The incidences of Covid-19 that led to the restrictions were, therefore, the same incidences that were the effective cause of the CJRS. Those restrictions led to a prevention or denial of access and caused the insureds to furlough their employees and, in turn, claim furlough payments [186].

The insureds' arguments wrongly focused on the terms of the CJRS rather than on whether the charges and expenses were ceased or reduced as a consequence of the insured peril [187]. The insureds' argument effectively sought to impose a 'but for' test, which had been rejected by the Supreme Court in the *FCA test case*.

The insureds' further arguments regarding the furlough payments being collateral or *res inter alios acta* were inextricably connected to causation and failed because the furlough payments satisfied the causation requirement of the savings clause [188]. Butcher J correctly held in *Stonegate* that the furlough scheme was not intended by the Government to benefit the insureds to the exclusion of the insurers and, as such, was not collateral [190]-[191].

References in square brackets are to paragraphs in the judgment.

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative documents. Judgments are public documents and are available at: https://caselaw.nationalarchives.gov.uk/