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WHAT TO EXPECT FROM THE FCA TEST CASE APPEAL TO THE SUPREME COURT

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On 16 November all eyes will turn to the Supreme Court as a 4-day hearing commences to determine the appeals of the FCA, the Hiscox Action Group, and six of the original eight insurers who were party to the FCA's Test Case. This is very likely to mark the beginning of the end of one of the most important pieces of litigation in the insurance sector for decades.

The subject of the appeal is of course the Commercial Court's judgment that was handed down in September, but it is important to remember that not all of the Court's conclusions are being appealed, including some quite significant findings in insurers' favour. For example, the FCA has made it clear in its appeal that it is not challenging the ruling that there is unlikely to be cover for many of the 'prevention of access' type clauses often found in BI policies unless an insured can demonstrate that the risk or existence of COVID-19 within a specific (often restrictive) locality, rather than a pandemic affecting the whole country, led to the relevant order to close.

That finding dealt a hammer blow to many policyholders' prospects of successfully recovering from their insurers, and nothing will be changing on that front following the Supreme Court's ruling. However, there are still some very significant issues before the Supreme Court, including some which will be of importance to the BI market long after the pandemic has passed.

What parts of the judgment are the FCA appealing?

The FCA will be appealing 2 main categories of issues:

(1) **The interpretation of particular terms**: The FCA is appealing the Commercial Court's finding that terms like "restrictions imposed" and "enforced closure" mean a business must be legally required to close before cover is engaged. The FCA argue that explicit instructions to close, such as the Government's advice to pubs and theatres on 16 March, should also be sufficient. The FCA also plan to challenge the Court's finding that certain 'notifiable disease' clauses did not provide cover on the basis that the particular wording used in those policies (such as "event") meant that coverage under the policy was confined to local-only outbreaks. This was in contrast to the Court's findings on most other 'notifiable disease' clauses, where a solely 'local' impact was not required. The FCA

believes that the Court was wrong to attach such weight to the particular terms in those event type policies. The Court's interpretation of other terms such as "inability to use" are also being appealed.

(2) **Quantum:** The Commercial Court ruled that a decline in income *prior* to cover being triggered under the policy because of the pandemic could be taken into account by insurers as a trend of the business, thereby potentially limiting the amount a policyholder might be able to recover under its BI policy. In such a scenario insurers could point to a business' 70% drop in income in the days/weeks prior to cover being triggered, and therefore limit the insurance recovery to 30% of ordinary income during the covered period. The FCA disagrees with this approach, and argues that any pre-trigger depreciation due to COVID-19 should not be taken into account when calculating post-trigger losses.

What parts of the judgment are the insurers appealing?

As for insurers, their grounds of appeal include, but are not limited to:

(1) **Composite peril**: Insurers do not agree with the Court's characterisation of the relevant insured peril as a "composite" one, made up of many constituent parts. One insurer goes so far as to describe a composite peril has a previously "unknown concept in insurance law". Determination of this issue may impact significantly on the amount an insured might be able to recover from its insurer.

(2) **Causation**: Many insurers are unhappy that, as a result of the Commercial Court's judgment, a policyholder with a 'notifiable disease' clause may be entitled to cover simply because an individual with COVID-19 happened to wander into the vicinity of the insured's premises, even though the insured's loss was proximately caused by the national lockdown, and not that particular person with COVID-19. Insurers will challenge the notion that each individual formed an indivisible part of the COVID-19 pandemic that spread across the UK and led to the nationwide action.

(3) **Quantum/Trends clauses/Orient Express:** Insurers do not agree that the continued existence of COVID-19 should be disregarded when calculating the loss a policyholder would have suffered as a result of the business interruption. In other words, a business' losses should be based upon them being allowed to remain open while COVID-19 still gripped the country. Insurers also do not agree with the Court's criticism of the previous leading case on this area: *Orient Express Hotels v Assicurazioni Generali*. That Commercial Court criticism now comes before Lord Hamblen (the judge in *Orient Express*) and Lord Leggatt (one of the tribunal in the underlying *Orient Express* arbitration) who are now both members of the Supreme Court. Whether or not the Supreme Court endorses the approach in *Orient Express* could have huge implications for the assessment of BI claims across the market.

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