

Insights**FCA TEST CASE - NEW DECLARATIONS: THE FINAL HURDLE**

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On 15 February 2021 the FCA released the draft “declarations” that the parties are asking the Supreme Court to make following its judgment in January. The declarations are intended to neatly capture the decisions of the Commercial Court and the Supreme Court, and finally determine whether the policies forming part of the representative sample at issue in the Test Case offer cover or not. Alongside the judgments themselves, the declarations will be used by insurers and claims handlers to assess coverage and adjust the claims of hundreds of thousands of policyholders. However, the declarations will also provide policyholders with an easier way to navigate the ramifications of the judgments.

Whilst many of the declarations are now agreed between the parties, there remain disagreements about the wording of some of them. It is not anticipated that there will be a further hearing, and so the Supreme Court will most likely consider the submissions made by the FCA and Insurers and rule on the most appropriate wording to be included in the declarations.

Having analysed the parties’ submissions, the most significant issues to be resolved appear to be the following:

(1) There is a disagreement between the FCA and Hiscox and RSA as to what Government advice, instructions, publications and statements will constitute “restrictions imposed”, a “closure or restriction placed”, or an “enforced closure” of or on Premises. The FCA is arguing for a very broad interpretation of these terms, such that a policyholder could claim there was a “restriction imposed” when the Government instructed people to observe 2-metre social distancing. In contrast, Hiscox and RSA want a declaration to the effect that some of the more ‘general’ matters (such as 2-metre social distancing) do not amount to an “enforced closure” or a “restriction imposed”. The fact that this is in issue is unsurprising, given the Supreme Court stated in its judgment that it would leave this issue over for “agreement or further argument”.

(2) There is a disagreement between the FCA and Insurers as to whether a person “merely passing through” a particular area will be sufficient for there to have been an “occurrence” or a “manifestation” of COVID-19 in the particular policy area. Insurers want to include a declaration to the effect that transitory passage will not be sufficient, the FCA do not want such a declaration

included arguing it may caveat the Court's clear findings on the meaning of "occurrence" (for example) and on causation. In any event, it is unclear how much of an impact this disagreement will have in practice for the majority of claims, given the significant prevalence of COVID-19 across the UK by March 2020 (whether or not that can be proved satisfactorily).

(3) There is a disagreement between the FCA and Insurers as to how the Supreme Court's judgment on the 'counterfactual' (i.e. the matters to be taken into account/excluded when assessing a policyholder's loss) should be best distilled into a declaration no longer than a sentence or two. Each side prefers its own phraseology, and it will be for the Supreme Court to determine which it prefers, or if a blended version of the two is most appropriate.

(4) There are some rather niche disagreements about the declarations on 'causation', particularly around (a) the weight to be given to certain examples referred to by the Supreme Court for which there was less likely to be cover, and (b) whether more complex terminology (like "concurrent causes") should be included in the declarations, particularly if they are to be referred to by a lay person. Again, in practice this may not make too much of a difference, but optically it has some relevance.

(5) The Supreme Court held that a "restriction imposed" need not have the force of law. However, there is a disagreement between the FCA and Hiscox as to what test (or tests) must be satisfied in order for a particular Government measure without the force of law to be a "restriction imposed". The FCA argue there are two circumstances when this definition might be met, Hiscox argues there is one.

The above list is not exhaustive, and there are some more nuanced, insurer-specific matters which will also need to be resolved by the Supreme Court prior to finalising all declarations.

Whilst the declarations form the final hurdle in the Test Case, there is no doubt that there will be further litigation related to business interruption insurance arising from the COVID-19 pandemic. In particular, in the absence of clearer guidance from the FCA, we expect to see disputes about whether Government support measures (such as grants, furlough payments, and business rates relief) may be taken into account by insurers when calculating a policyholder's loss.

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