

Covid 19 Business Interruption Insurance Claims: Business and Property Courts in Newcastle

Please see the below letter which was circulated to BPC Users in Birmingham by HHJ Worster. At a meeting of Circuit Commercial Court Judges on 30th November 2020 I was asked to bring the below information to the attention of practitioners using the BPC in Newcastle.

HHJ Kramer

02.12.20

Update

The judgment of the Supreme Court in the appeal from the decision of the Divisional Court in *FCA v Arch Insurance and ors* [2020] EWHC 2448 (Comm) is now expected either just before Christmas or early in the New Year.

Arch is a test case brought by the FCA designed to determine the construction of certain provisions in insurance policies written by the Appellant Insurers, and obtained by a range of businesses and others which purport to provide coverage in the event of business interruption.

The Divisional Court dealt with a substantial number of issues, not all of which are appealed by the insurers. The Supreme Court is being asked to determine matters of construction relating to:

- (i) "Disease Clauses"; i.e. those which can be triggered by the occurrence of severe acute respiratory syndrome coronavirus 2 ("COVID-19"), typically within a specified distance of the insured's premises;
- (ii) "Prevention of Access Clauses"; i.e. those triggered by public authority intervention preventing access to, or use of, premises as a result of COVID-19; and
- (iii) "Hybrid Clauses"; i.e. those clauses which contain wording from both Disease and Prevention of Access Clauses.

In addition, the appeal raises questions as to whether the Divisional Court was correct:

- (iv) to apply certain counterfactual scenarios in relation to the operation of the clauses in relevant policies which provided for loss adjustments (the "Trends Clauses"); and
- (v) in its analysis of *Orient-Express Hotels Ltd v Assicurazioni Generali S.p.A.*

It is anticipated that there will be a substantial number of insurance claims of this sort arising from the pandemic. The courts are concerned to ensure that they are efficiently managed and heard. To that end Mr Justice Butcher has been nominated as the Judge of the Commercial Court who will oversee this litigation.

Claims should be issued in the relevant local Business and Property Courts in accordance with established practice. The nature of many of the claims will make them suitable for the Circuit Commercial Court. Subject to the need for transfer, they will be managed locally. There will be regular consultation between the local Circuit Commercial Court judges and Mr

Justice Butcher, with a view to promoting consistency, and to identify further issues which may be suitable for early definitive determination.

If the case is one which justifies a trial by a Judge of the Commercial Court, the necessary arrangements will be made. It is intended that any such trials by Commercial Court judges will be heard locally.

When issuing such a claim on CE File, Claimants should send the Court a covering letter headed "*Covid 19 Business Interruption Insurance claim*" and should identify any issue of law or construction which in their view may be suitable for early determination.

Mr Justice Butcher has also requested that when a claim is issued, the Claimants solicitor should inform the Commercial Court by emailing their senior listing team with details of the case title, court reference and the location the hearing is issued.

Hull, Daniel <daniel.hull@Justice.gov.uk>;

Tame, Michael <michael.tame@Justice.gov.uk>

A copy of the covering letter sent to the issuing Court with a note of the claim number assigned to the case will suffice.

1.12.20