Coronavirus economic impact

Covid insurance ruling based on flawed arguments, top court told

Hearing challenges test case brought by FCA over 'business interruption' claims

Shuttered shops in London. The High Court ruled in the regulator's favour in September on behalf of business owners who were denied payouts because of strict policy definitions © Hollie Adams/Bloomberg

Matthew Vincent YESTERDAY

Insurance companies disputing a judgment in favour of small businesses seeking millions of pounds in payouts for coronavirus disruption told the Supreme Court on Monday that the earlier ruling was based on fundamentally flawed arguments.

In a fast-tracked appeal of an earlier High Court judgment — which largely ruled in favour of up to 370,000 affected policyholders — lawyers for the insurers attacked the judges' rulings on the cause and calculation of financial losses.

The four-day hearing will challenge a successful test case brought by the Financial Conduct Authority in September on behalf of holders of "business interruption" insurance who were denied payouts because of strict policy definitions.

The High Court ruled in the regulator's favour after the judges found that the coronavirus pandemic and the government's lockdown measures should be treated as a single and "indivisible cause" of loss. This ruling meant a large number of the policies would be triggered.

The core argument brought by the FCA at the time was that insurers demanding proof of local disease cases and arguing that businesses would have lost money anyway because of wider disruption defied "common sense". "What we say is we have one indivisible cause or a collection of jigsaw pieces that make up the picture," Colin Edelman QC, the FCA's lead lawyer, told the High Court.

But lawyers representing two of the six insurers at the Supreme Court ridiculed these arguments. Simon Salzedo, QC, appearing for Argenta, said the suggestion there was an "indivisible cause" of policyholders losses was "a fig leaf" and a "euphemism" being used by the FCA to cover its weak case.

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Gavin Kealey, QC

He claimed the jigsaw allusion made no sense. "The two metaphors are not even compatible with each other," he told the five justices hearing the appeal. "A jigsaw is divisible into separate parts . . . causation generally runs in chains not in jigsaws."

Gavin Kealey, QC, representing MS Amlin, told the court that policies were only designed to cover cases of contagious diseases within a specific geographic radius, and wider causes of loss were not relevant.

"My illness is not your illness, my pathogen is not your pathogen. Distinctions are required to be drawn . . . that dispatches the FCA argument of indivisibility. [The idea] that there is one indivisible cause of business interruption losses and . . . cases beyond a 25-mile radius are somehow harvested does not work as a matter of logic," Mr Kealey said.

He said losses may have been caused by wider national government responses, but these were not covered.

Mr Kealy also argued that how much a business had lost could only be worked out by assuming the "insured peril" in the policy had not occurred. If that insured peril was defined merely as disease within a small radius, then claims would have to be reduced by a wider trend of falling revenues, owing to national lockdown.

He cited the precedent of Orient Express Hotel in New Orleans, which had its claim limited by a judgment in 2010 to property damage caused by two hurricanes not to wider losses from the resulting disruption to tourism. The ruling in that case was determined by two of the judges hearing the appeal.

“Some disease outside [the policy radius] is an irrelevance,” he told them.

Earlier, Michael Crane QC, for insurer QBE, made similar arguments about locality. Lawyers for the other three insurers — Arch, Hiscox, RSA — and the FCA will put their arguments over the next three days.

One insurance lawyer not involved in the case suggested the FCA and policyholders could yet seek to change their arguments.

Rather than insisting that the pandemic and lockdown were one indivisible cause of losses, they could claim they were individual causes but concurrent. “If the Supreme Court won’t accept the [High Court] approach to causation it might still uphold the decision by applying an alternative concurrent cause approach,” said Ravi Nayer, a partner at law firm Brown Rudnick.

The Supreme Court hearing is scheduled to run until Thursday, with judgment delivered at a later date.