FCA note of Corbin & King Ltd and others v Axa Insurance UK plc

Background

The High Court handed down its judgment in the test case on 15 September 2020. Large parts of the High Court's judgment (and the associated declarations) are superseded by the judgment of the Supreme Court. The decision in Corbin & King Ltd relates to parts of the High Court judgment that were not appealed to the Supreme Court, specifically the cover provided by denial of access (non-damage) clauses.

The decision in Corbin & King Ltd v Axa: Cover

On 25 February 2022, Mrs Justice Cockerill handed down judgment in the case of Corbin & King Ltd and others v Axa Insurance UK plc [2022] EWHC 409 (Comm). The case concerned a combined business insurance policy issued by Axa. The 'Full Client name' in the policy listed 11 different companies (para 9). There were two main issues: first, whether the Denial of Access (Non-Damage) (NDDA) clause in the policy provided cover to the Claimants; second, whether the policy limit applied in respect of all premises, or only for each set of premises held by the different companies. Mrs Justice Cockerill decided that the clause did provide cover and that the policy limit applied to each set of premises held by the different companies.

The decision in Corbin & King Ltd v Axa: Cover

In her judgment on whether the NDDA clause provided cover to the policyholders, Mrs Justice Cockerill analysed the reasoning of the Divisional Court and the Supreme Court in the FCA's business interruption insurance test case, as well as other leading decisions.

The NDDA clause provided cover for loss resulting from business interruption or interference '*where access to your premises is restricted or hindered for more than [2 hours] arising directly from … the actions taken by the police or any other statutory body in response to a danger or disturbance at your premises or within a 1 mile radius of your premises'* (para 14). The indemnity period was 12 weeks. The clause did not provide cover where the restriction or hindrance on access resulted from a disease which was listed in the policy; the list did not include SARS or SARS-CoV-2.

NDDA clauses were addressed in detail in the decision of the High Court but only in a limited fashion by the Supreme Court. Mrs Justice Cockerill decided that she could look at the NDDA clause in this case afresh and she was not bound to follow the decision of the Divisional Court. This was for three, freestanding reasons: (1) the wording was sufficiently different to the policies considered in the test case (paras 153-158, 195); (2) the argument made to her were different to the arguments made by the FCA in the test case (paras 159-169); and (3) the Supreme Court decision had 'moved the goalposts' and 'opened up the field for a different iteration of the construction argument', enabling new arguments to be advanced by the policyholder (paras 169-170, 196).

Having decided that she could consider the NDDA clause in this case fresh, Mrs Justice Cockerill then went on to consider whether it provided cover to the policyholder. She decided that it did:

(1) cases of COVID-19 could constitute a 'danger… at your premises or within a 1 mile radius of your premises' within the NDDA clause (paras 133, 172-193, 205), and

(2) this danger, coupled with other dangers outside the premises or 1-mile radius, led to the Government action which caused the closure of the Claimants' businesses and business interruption loss (paras 207-220).

Mrs Justice Cockerill's decision, that this clause provided the Claimants with cover, was therefore different to the Divisional Court's conclusions in the FCA test case, that certain other NDDA, 'action of competition authority' and prevention of access clauses did not provide cover to policyholders. This means that policyholder claims previously rejected by insurers (or only partly accepted) following the Divisional Court's decision, may need to be reconsidered in light of this judgment.

What the Corbin & King decision on cover means for insurers and policyholders: new and pending claims

Firms will need to take this judgment into account when considering coverage and causation in business interruption claims brought by policyholders. Whilst firms should consider the judgment as a whole, in our view paras 172-206 of the judgment should be considered particularly carefully.

The judgment is likely to be most relevant to claims brought in reliance on NDDA, 'action of competition authority' and prevention of access clauses which were originally within the scope of the test case, and any similar policies per our guidance.

However, the judgment is also likely to be relevant to claims brought in reliance on other clauses that were not within the scope of the test case. This will include NDDA, 'action of competition authority' and prevention of access clauses which were not originally within the scope of the test case and were not similar policies per our guidance.

The judgment is also likely to be relevant to claims brought in reliance on 'disease at the premises' clauses. Firms should consider the entire judgment as a whole, but in our view, Mrs Justice Cockerill's analysis of the extent to which the paradigm coverage under a clause informs the approach to contractual construction (paras 174-180), and her conclusion that that the Supreme Court's approach to causation should be 'read across' more generally to other clauses (paras 207-220), could be particularly relevant to 'disease at the premises' clauses.

What the Corbin & King decision on cover means for insurers and policyholders: rejected and settled claims

Where a policyholder accepted a full and final settlement offer and the related communications were clear, fair and not misleading then the full and final settlement is likely to be binding, unless there are other circumstances suggesting otherwise**.** However, where a policyholder accepted an offer that did not meet this requirement, we consider that the firm may, depending on the facts, breach its regulatory obligations[1] if it sought to hold the

[1] namely to treat the customer fairly (Principle 6) and to act fairly, honestly and professionally in the best interests of its customers (ICOBS 2.5.-1R),

customer to the settlement agreement. This is especially so if the breach may have caused the customer to enter into the full and final settlement agreement on the agreed terms.[2]

Where, in the light of the High Court's ruling in Corbin & King v Axa, firms voluntarily elect to reconsider claims made on NDDA clauses that they previously rejected, we welcome this step by these firms as a good example of treating their customers fairly.

Where a policyholder requests that a firm reconsider their claim under an NDDA clause, or any other clause which may need to be re-considered in light of the impact of the Corbin and King ruling, we expect firms to respond to that request consistently and in accordance with our rules, including Principles 6 (*a firm must pay due regard to the interests of its customers and treat them fairly*) and 7 (*a firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading*).

Where firms decide not to reopen claims – for example, because they consider they would have reached the same outcome even applying the reasoning in this judgment – we expect firms, in appropriate circumstances, to be open and transparent about their reasons for doing so. Customers should be given a chance to consider those decisions and complain if they disagree with them.

The decision in Corbin & King Ltd v Axa: limits

The policy in the Corbin & King case named the insured as 'Corbin & King Limited & Subsidiaries' (para 9). The 'Full Client name' in the policy listed 11 different companies (para 9).

The policy provided a limit of £250,000 under the NDDA clause (para 13). Axa accepted that this limit should be applied separately to the three closures of the Claimants' premises in March 2020, September 2020 and November 2020, meaning the Claimants were entitled to an indemnity of up to £750,000 (paras 128 and 221).

However, the parties disagreed over whether each limit of £250,000 for each closure applied a single limit across all the premises, or was a separate limit for each premises. The Claimants therefore said that the limit should be £750,000 for each of their premises, whereas Allianz said that the limit should be £750,000 in total (para 222).

Mrs Justice Cockerill concluded that each premises had a maximum £750,000 limit: her analysis is set out at paras 223 to 244. This was reached for broadly two reasons: first, the policy was a 'composite policy', which was to be treated as separate contracts of insurance between each insured company and Axa; and the construction of this particular policy also supported the Claimant's position that each premises should have a separate limit.

What the Corbin & King decision on limits means for insurers and policyholders: new and pending claims

[2] We are not commenting here about any rights policyholders may have to challenge the enforceability of a settlement agreement as a matter of contract law, for example, where there has been a misrepresentation, duress or mistake. Policyholders' ability to do so is heavily fact dependent and we understand the circumstances in which these arguments would succeed are likely to be limited.

Firms will need to take this judgment into account when considering limits in business interruption claims brought by policyholders.

The judgment is likely to be highly relevant to claims where there are multiple insureds or policyholders, and/or where the policy is a 'composite policy' which is treated as a series of contracts. However, the judgment is not limited to this situation, and may also be relevant to policies with one insured or policyholder which holds multiple premises; in our view, paras 239-242 will need to be considered in this situation.

What the Corbin & King decision on limits means for insurers and policyholders: rejected and settled claims

Where a policyholder accepted a full and final settlement offer and the related communications were clear, fair and not misleading then the full and final settlement is likely to be binding, unless there are other circumstances suggesting otherwise. However, where a policyholder accepted an offer that did not meet this requirement, we consider that the firm may, depending on the facts, breach its regulatory obligations if it sought to hold the customer to the settlement agreement. This is especially so if the breach may have caused the customer to enter into the full and final settlement agreement on the agreed terms.

Firms may need to revisit claims where they have paid out a sum in reliance on limits within the policy wording, and consider whether the amount they paid would have been larger had they applied the reasoning in this judgment.

Where firms decide not to reopen claims – for example, because they consider they would have reached the same outcome even applying the reasoning in this judgment – we expect firms, in appropriate circumstances, to be open and transparent about their reasons for doing so. Consumers should be given a chance to consider those decisions and complain if they disagree with them.