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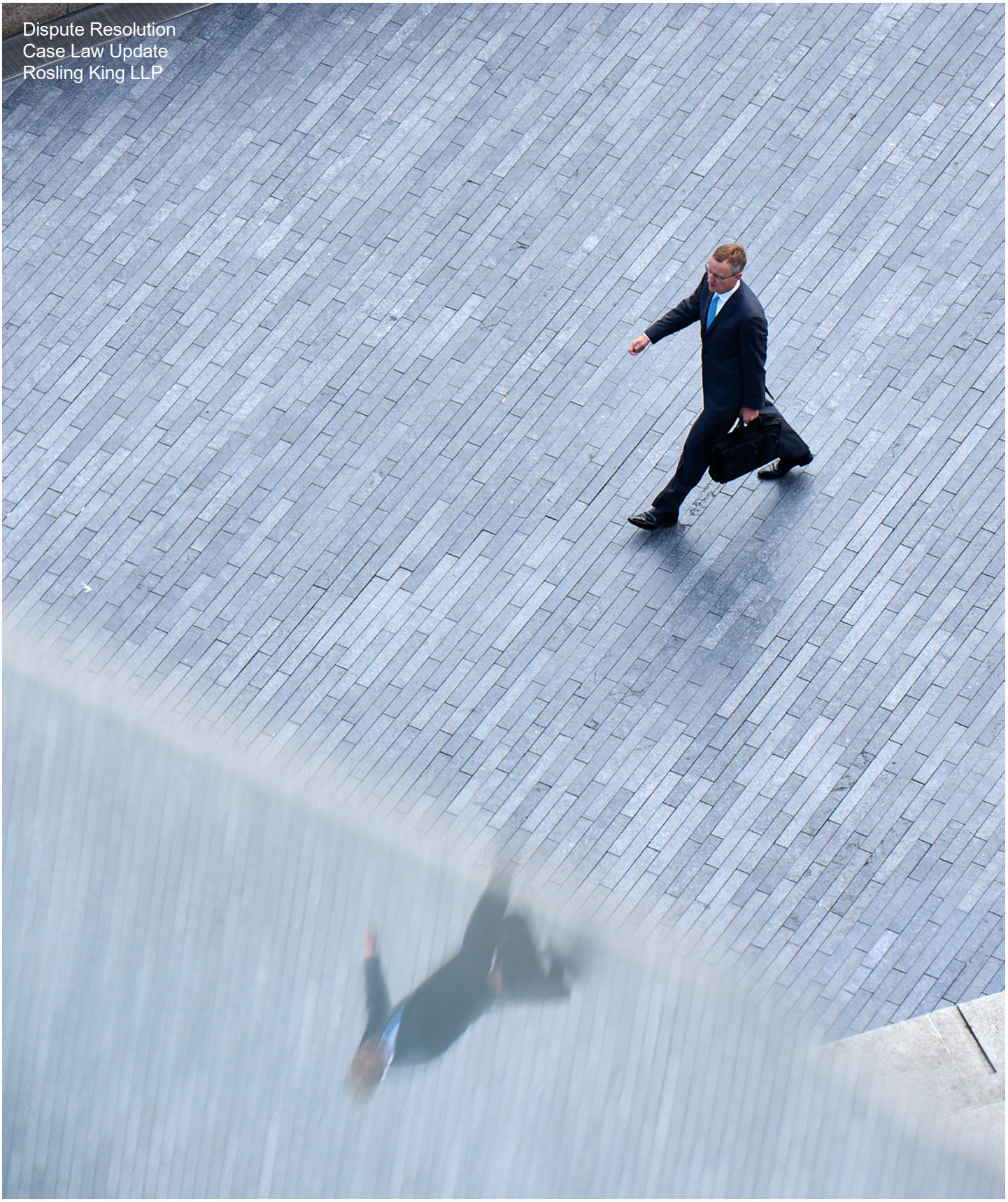
Dispute Resolution
Case Law Update
Rosling King LLP



Background

Following the UK government's response to the COVID-19 pandemic, hundreds of thousands of businesses across the UK have had to shut down or adapt and offer alternative, socially distant and remote services.

As a consequence, many businesses made claims to their insurers to be indemnified for business interruption (BI) losses under their BI insurance policies. Initially many insurers contested that the cover within the insurance policies did not include losses flowing from a government-mandated shut down of business activities. In response, the FCA brought a test case as the regulator for the defendant insurers to provide legal clarification on the extent and meaning of twenty-one "lead" BI policies against the background of the ongoing COVID-19 pandemic and the UK government's response to it.

In a landmark decision of Lord Justice Flaux and Mr Justice Barber, the Court agreed with the majority of the policy interpretations presented by the policyholders. As a result, an estimated 370,000 affected policyholders could now be indemnified.

Amongst the contested issues was the meaning of "vicinity" within various policy provisions and what constitutes business interruption for different types of businesses. Each of the lead policies was considered in detail.

Judgment

The judgment considered the construction of numerous provisions in twenty-one "lead" policies which the FCA divided into "disease clauses"; "hybrid clauses"; and clauses covering prevention of access and similar perils.

As each of the considered "lead" policies naturally have different wordings, with the scope of some being wider than others, how the Court interpreted each one was policy specific. However, the over-arching theme of the judgment was the Court finding in favour of many of the broader constructions of the provisions put forward by the FCA on behalf of BI policyholders.

The Court first considered "disease clauses" across various policies, including RSA 3 and RSA 4 (two policies issued by Royal & Sun Alliance Insurance plc). "Disease clauses" refer to provisions of cover where business interruption is caused by the incidence of a notifiable disease in a specified proximity to the premises of the insured business.

Several favourable broad constructions for BI policyholders were decided. For example, in RSA 3, the Court held that there will have been an "occurrence" of COVID-19 within an area when at least one person who was infected with COVID-19 was in the relevant area, and that this "occurrence" does not require a diagnosis. In RSA 4, the Court decided that although it would not be normal to refer to the whole of England and Wales as within the "vicinity" of any part of England and Wales, it was correct in this case that such an extensive area can be

regarded as the relevant "vicinity".

"Hybrid clauses" were then considered. These are provisions that refer both to restrictions imposed on the premises and to the occurrence or manifestation of a notifiable disease. Policies under this subheading included Hiscox 1-4 (four policies issued by Hiscox Insurance Company Limited).

Again, decisions made by the Court regarding "hybrid clauses" were favourable to BI policyholders. For example, the phrase "business interruption" was not held to mean complete cessation, as argued by Hiscox. The Court instead held that this wording covers general disruption and interference as well.

One interesting decision made in favour of insurers, here Hiscox, was the meaning of "restrictions imposed" on businesses. The FCA's argument that the stay at home instruction given by the Prime Minister on 16 March 2020 amounted to "restrictions imposed" was rejected by the Court. Rather, the Court held it was the statutory instruments with the force of law behind them, namely the "21 March Regulations" and "26 March Regulations" that constituted "restrictions imposed".

The 21 March Regulations are the Health Protection (Coronavirus, Business Closure) (England) Regulations 2020 made by the Secretary of State for Health and Social Care. The 26 March Regulations revoked most the 21 March Regulations and introduced a more expansive regime for business closures.

Thirdly, clauses that provide cover where there has been a prevention or hindrance of access to or use of the premises because of government or local authority action or restriction were considered. Of the several policies considered by the Court under this category, one was MSA 1 (one of three policies issued by MS Amlin Underwriting Limited).

One notable decision made by the Court here was that only total closure rather than partial closure would suffice under MSA 1. Therefore, a business that was able to continue with part of its business, such as a café providing takeaway services before the pandemic and then continued to do so after restrictions were imposed, would not be covered by such a clause. Because they did not suffer total closure, they did not suffer a prevention of access. In contrast, a café that set up its takeaway business after restrictions were imposed would be deemed to be carrying on a new business and therefore would be covered by a prevention of access clause.

Finally, the judgment considered issues of causation and prevalence. Regarding prevalence, the Court did not make any findings of fact about the actual prevalence of COVID-19 at particular times or locations but considered at a general level what types of evidence could be used to discharge the burden of proof on the insured as to prevalence and whether, assuming the FCA's evidence to be the best available, that would be enough to discharge the burden of proof.

Commentary

This is very good news for many policyholders. The High Court's decision has provided clarity on twenty-one specific "lead" policies, which is estimated to impact 700 similar types of policies across 60 different insurers, meaning 370,000 policyholders could be affected by the decisions made. Whilst many of the Court's decisions were in favour of the broader constructions put forward by the FCA, all was not lost for insurers with several important lines drawn in the sand to protect insurers' interests.

It will be an interesting exercise to compare these twenty-one "lead" policies with how BI policies will be worded going forward to account for the likes of a new pandemic similar to COVID-19 or indeed a second wave of the current pandemic. Policyholders will on the whole be pleased with many of the wide constructions of several policies outlined within the judgment and many now be able to seek indemnity from losses caused by business interruption that was initially being denied to them by their insurers.

For further information, please contact Georgina Squire or the Partner with whom you usually deal.