Regulators v Insurers: The Verdict

Sometimes white smoke appears from a chimney and the result is clear. Sometimes, smoke rises from the battlefield, casualties are counted and it takes a century or two to work out who won and lost. This case lies somewhere in between. And of course, nothing is decided until it is decided, in this case possibly by the Court of Appeal or the Supreme Court, with appeals by everyone on the cards.

First, the good news. Most of those insuring through Hiscox are sitting relatively pretty for now. While detailed policy wordings varied, a very common wording provided cover against an inability to use premises due to an interruption to the business caused by restrictions imposed by public authorities following an outbreak of disease. In 156 pages of written submissions Hiscox set out myriad arguments why those words did not mean what many would have considered their obvious meaning. For example, they opined that a pandemic was actually not an occurrence at all and so did not count, together with many other more or less abstruse postulations. These were synthesised by the court into a mere eight, and then largely dismissed.

Importantly, the Court did not accept that only complete closure would do. So a hindrance in access would suffice, eg where people could only eat outside. The Court also squashed one of the commoner defences, that when assessing loss you had to compare a situation where the pandemic was rife but there was no closure, in which case there would be no loss. The Court accepted a point that had been made from the outset by the Night Time Industries Association, that that would be like saying that if premises were closed because of rats, you would have to pretend there were still rats when calculating loss.

Second, the not so good news. The Court looked at a raft of policies from QBE. While some of these crossed the line, one nightclub and late night venue policy did not. That required loss resulting from interruption or interference with the business in consequence of “events” including an occurrence of the disease within a set distance from the premises. The Court subjected the clause to close scrutiny, and decided that the use of words “events” meant that it was not enough that there had been an example of the virus within the set radius, but that it must be that specific example, rather than the pandemic as a whole, which caused the loss. Predictions are invidious, but it would be surprising if the Financial Conduct Authority, whose conduct has been vigorous and assiduous, did not try to appeal that finding.

All in all, for the FCA and the insurers, it is a game of two halves, with the second half, in front of the appeal courts, still to come. For the leisure operators facing penury, of course, this is no game at all. For some insurers their strapline might be “insurance till you need it.” As such, it is no doubt comforting to the shareholders of one whose published reaction to the judgment was that their capital position remains strong. As mortals, policy-holders can only watch as the gods fight these battles above their heads. The first insurer who breaks ranks and pays out, whatever their lawyers and accountants might think, simply because that is the ethical thing to do, will be garlanded with roses. For the others, let their stance be their epitaph.

Philip Kolvin QC is a barrister who has been advising the Night Time Industry Association and the leading leisure insurance brokers NDML in relation to these claims.