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Orient-Express Hotels Ltd v Assicurazioni Generali SpA

July 2010

This recent decision (27 May 2010) arose out of a hotel owner's business interruption claim following Hurricanes Katrina and Rita in 2005. The case considers some key principles governing the recoverability of BI losses, specifically in relation to circumstances where an interruption results from both damage to insured property and wider area damage and loss of attraction. It also reaffirms existing market understanding of the application of "special circumstances" provisions in the adjustment of the interruption loss and confirms that the broader effects of the peril can be taken into account in such an adjustment.

Orient Express Hotels Ltd ("OEH") owned and operated the Windsor Court Hotel in New Orleans, which was seriously damaged by Hurricanes Katrina and Rita in August and September 2005.

The hotel suffered significant physical damage from the effects of the hurricanes and was closed throughout September and October 2005. It re-opened, although initially only partially and with repairs not fully completed, on 1 November 2005. The hurricanes also caused widespread devastation throughout New Orleans and the surrounding area. The authorities had earlier imposed a curfew on the city of New Orleans on 27 August 2005, followed by a mandatory evacuation, which was not lifted until late September.

OEH subsequently filed a claim under its combined property damage and BI policy. The insuring clause indemnified OEH against **"loss due to interruption...with the Business directly arising from Damage..."**. Damage was defined as direct loss destruction or damage to the hotel.

The BI section provided that: **"If any property owned... (by) the Insured for the purpose of...the Business suffers Damage as defined...and the Business be in consequence thereof interrupted...Insurers will pay to the Insured the amount of loss resulting from such Interruption."**

The Trends clause provided for adjustments to be made: **"to provide for the trend of the Business and for variations in or special circumstances affecting the Business...so that the figures thus adjusted shall represent as nearly as may be reasonably practicable the results which but for the Damage would have been obtained"**.

The most significant component of the claim

related to BI losses which OEH claimed had resulted from the physical damage to the hotel. Generali, OEH's insurers, denied this aspect of the claim, arguing that there was no insured interruption as, even if there had been no damage to the hotel, the curfew and widespread damage to the city would have prohibited it from receiving visitors.

The insurance cover included extensions for prevention of access ("POA") and loss of attraction ("LOA"), under which OEH did make a recovery. These were however subject to significantly lower limits than the principal BI cover consequent upon damage to the hotel.

The claim went to arbitration where the main issue in dispute was how the policy should respond to the situation where both damage to the hotel and damage to the wider area were causes of the BI losses. OEH argued that the law in relation to concurrent causes entitled it to a recovery even where the BI loss was caused by both damage to the hotel and damage to the surrounding city.

However, by an award dated 26 November 2009, the tribunal ruled that only BI losses caused by the damage to the hotel itself (rather than losses caused by other damage resulting from the peril) were indemnifiable.

The tribunal applied the "but for" causation test, holding that OEH could only recover for losses which it would have suffered if the damage to the hotel had not occurred. Given the existence of the wider area damage and the curfew, cover did not extend to most of OEH's claim.

OEH appealed under section 29 of the Arbitration Act 1996, which allows for appeal of an arbitral award to the courts on a point of law. It argued that the tribunal had been wrong in adopting a "but for" approach to causation and that the "Trends Clause" should not have been construed so as to permit an adjustment for other consequences of the same insured peril which gave rise to the insured damage.

The court was asked to determine two questions. Firstly, whether the policy would provide cover where BI loss was concurrently caused by physical damage to the hotel and by the effects of the peril on the surrounding area. Second, whether the same peril which caused the property damage giving rise to the covered BI loss could be a special circumstance for the purposes of the Trends clause.

OEH relied upon a settled principle of English insurance law that where there are two concurrent proximate causes of a loss, one of which is an insured peril and the other not expressly excluded, then the insured can recover.

The courts have recognised this principle where two proximate interdependent causes operate, where neither cause of itself would have caused the loss. The court referred to the oft-cited case of JJ Lloyd Instruments Ltd v Northern Star Insurance Co Ltd (The Miss Jay Jay) [1985] which confirmed this principle.

OEH argued that this principle should extend to a situation such as theirs, where two **independent** concurrent causes were operating and where either (the insured hotel damage or the area damage and related curfew) would by itself have resulted in the interruption. It argued that this was an instance where applying the 'but for' test was unfair and unreasonable (and that the tribunal had therefore been wrong to do so) because a logical consequence of applying the test in such circumstances was that there would necessarily be no recovery.

The court's decision

However the English High Court dismissed OEH's appeal and found fully in favor of insurers Generali. Hamblen J noted that the principle on concurrent proximate causes, exemplified in The Miss Jay Jay, had never been applied to a case in which the loss was caused by two concurrent independent causes.

Whilst the court had sympathy for the insured's arguments, it ruled that the policy wording clearly anticipated a "but for" causation test. In light of this, the claim failed as it couldn't be said that, 'but for' the damage to the hotel there would have been no BI loss. It was also relevant that the court could not obviously see what other test could sensibly be applied to the situation before it. The judge also stated that the question of whether the application of this

BARLOW LYDE & GILBERT

BARLOW LYDE & GILBERT LLP
Beaufort House 15 St Botolph Street London EC3A 7NJ
(For online map and SatNav systems use: EC3A 7DT)
tel +44 (0)20 7247 2277 **fax** +44 (0)20 7071 9000
DX 155 London CDE

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For further details, please contact:

Victoria Sherratt
Partner
+44 (0)20 7643 8974
vsherratt@blg.co.uk

David Abbott
Partner
+44 (0)20 7643 7338
dabbott@blg.co.uk

Mark Errington
Senior Associate
+65 6578 6102
merrington@blg.com.sg

rule was fair and reasonable was properly one of fact for the tribunal to determine.

OEH also contested the Tribunal's construal of the effect of the Trends clause. The trends clause in the policy was similar to the ABI recommended wording (although the latter refers to "other" circumstances and to an interruption consequent upon an "Incident", rather than damage – but then defines an incident as damage to the insured's property).

The role of such a clause, commonly referred to as a "special circumstances"; "other circumstances" or "adjustments" clause, is specifically in relation to the assessment of profit. It typically appears in policies bracketed against the definitions of rate of gross profit, annual profit and standard turnover and enables adjustments to be made to establish, as far as possible, the insured's true indemnity for his loss. This is, necessarily, something of a hypothetical exercise.

OEH argued that the Trends Clause should not be construed so as to permit an adjustment for the broader consequences of the same insured peril (here the effects of the hurricane on the city) which had caused the insured damage to the hotel and consequent BI.

However the court disagreed and ruled that there was nothing in the Trends clause which restricted it to circumstances which were entirely independent of the events leading to the insured loss. Hamblen J noted that the clause was concerned only with indemnifying losses caused by damage to the hotel and held that the same events which caused insured property damage were capable of forming / giving rise to special circumstances for the purposes of an adjustment under the Trends clause.

Comment

This court's construction of the clearly worded Trends clause is manifestly correct and reflective of market understanding and practice. Cover under standard UK BI wordings, is not insurance against consequential loss caused by insured **perils**. Nor is it a form of profit guarantee taken out to ensure profit levels after an incident are equivalent to those enjoyed prior. Rather, it is cover against interruption arising from **insured damage**. The Trends clause simply provides a mechanism for adjustments to most accurately calculate that measure of an insured's loss which is in consequence of insured property damage. That this mechanism is recognized by the courts is to be welcomed.

The BI cover purchased by OEH did not extend to the economic fallout to the business resulting from the devastation of New Orleans. However it was never intended that it should. BI cover aims to provide an indemnity for the interruption effects of damage to insured property, not to indemnify a policyholder for all economic effects of a major catastrophe.

A number of arguments were put to the court which were similar to those raised following other catastrophes and the judgment provides welcome confirmation of the market understanding of the effects of clearly worded BI provisions. Applying principles of causation in such a context is not always straightforward, and may seem at times to yield inequitable results. Insurers could however have provided cover of the type argued for by the insured through appropriate wording, although calculating premium for such wide ranging cover would be a more complex exercise.

Hamblen J emphasized the fact that the very clear policy wording gave little option but for him to reach the conclusions he did. However wordings are not always so clear and, where policy wordings are ambiguous, courts and arbitration tribunals may not necessarily reach the same result.

The judgment can be obtained from: http://www.bailii.org