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Delay in start-up cover
Current Issues

Welcome to our webinar hosted by Paul Reed QC, Tom Bell and Laurence Page. The session will start at 12pm.

This webinar will be recorded.

Please make sure your microphones are muted, your video is switched on and your full name is on display.

Thank you!

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2021 Construction All Risks Webinar Programme

This is the first of 6 webinars

considering current issues regarding

Construction All Risks Insurance

The Speakers

- **Paul Reed QC** is a construction and insurance practitioner.

- **Tom Bell** specialises in commercial, professional negligence and insurance disputes.

- **Laurence Page** is a commercial and construction barrister whose practice encompasses litigation and arbitration, including insurance law and professional liability.

Construction All Risks Insurance 3rd Edn.

Published at a time of significant change in the law.

- The law relating to business interruption cover has been reinterpreted in *FCA v Arch*.
- The law as to who is insured and for what has been clarified in *Gard Marine* and *Haberdashers'Aske*.
- Issues regarding defects exceptions continue to be problematic following the Canadian decision of *Acciona*.
- The law regarding betterment has evaluated in *Sartex*.
- The meaning of damage has been considered in the New Zealand earthquake cases.

Delay in start-up

- This talk is divided into 3 sections:
  - **Laurence Page** will introduce the topic and discuss evaluation of risk
  - **Paul Reed QC** will be looking at features of the cover and the impact of defects exclusions
  - **Tom Bell** will be considering causes of delay including concurrent causes and calculating delay.

Commercial background to DSU policies

- Definition:
  - Cover for financial losses caused by…
  - Delay to completion of construction project as a result of physical damage

- Underlying commercial rationale
  - Lenders / creditors
  - Parent companies / investors

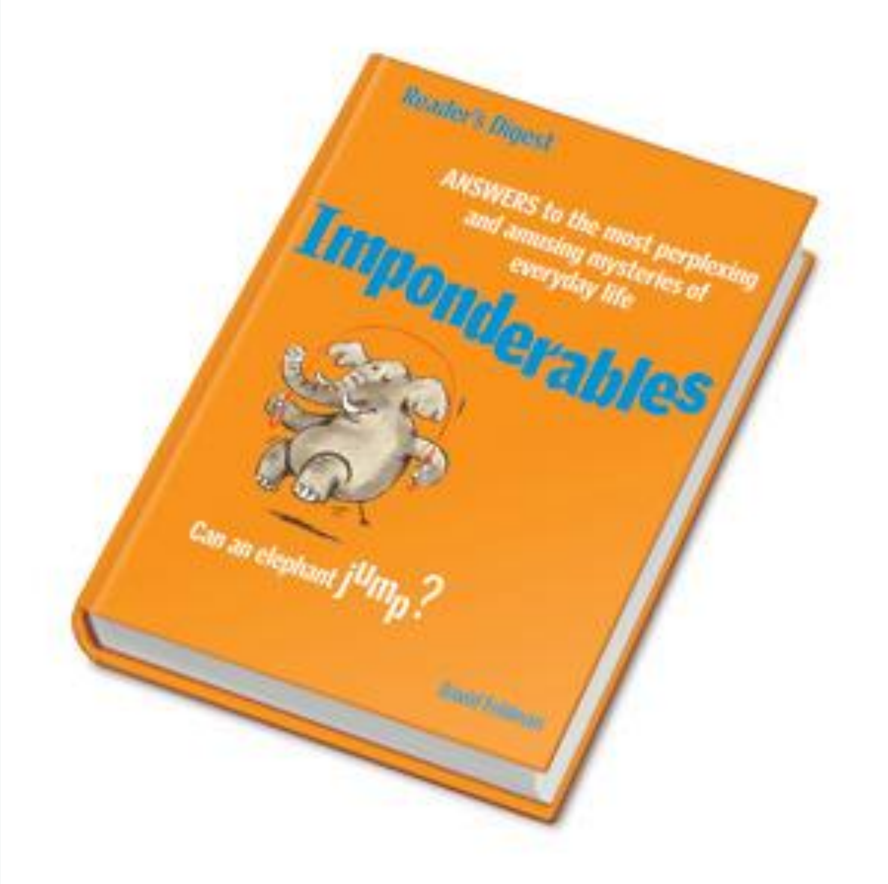
DSU evolved from business interruption cover

Inherent problem in BII: uncertainty as to genuine loss

- Problems with loss evaluation started 18th century
- Current approach: ***FCA v Various*** [2021] UKSC 1

1. Activities interrupted?
2. Actual income?
3. Counterfactual income? "*standard turnover, adjusted to reflect any trends or circumstances which affected those activities before the occurrence of the insured peril or which would have affected them had the insured peril not occurred.*" (see Hamblen & Leggatt JJSC §283-286)

No counterfactual is possible for DSU: no trading history from which "*standard turnover*" can be determined



Types of DSU: the choices

- Loss of profits
- Loss of revenue
- Fixed costs only
- Debt service only

Evaluation of risk: potential impact on business' scheduled commencement date

- Construction programme
- Working patterns/methods
- Supply chain issues
- Contractor's reputation/experience
- Damage to wider area
- Complexity of handover dates
- Period of indemnity
- Level of indemnity
- Contingency plans

Nature of cover provided

- Occurrence of an insured peril as the trigger.
  - Usually but not always the occurrence of damage
  - Is this:
    - The occurrence of any damage (in the non insurance sense)
    - Damage within the meaning of the insuring clause
    - Damage within the insuring clause but not covered because of an exception within the MD cover.

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Example 1: Damage to refractory lining during start up

Is DSU cover triggered

Damage according to ordinary usage

- Pure financial loss, damage or physical damage.

Is the damage within the meaning of the operative wording?

- What is the peril - *Technology Holdings*.
- Damage to the refractory linings <u>and</u> other parts.
- Damage to the refractory linings within retained liability.
- Damage excluded under a refractory linings exclusion.

Potential impact of defect exclusion clauses

LEG 2/96 example:

Excluded is the cost that would have been incurred rectifying the defect in the damaged portion immediately before the damage occurred.

LEG 2/96

- If damage is only to a defective portion, does LEG 2/96 operate to exclude cover for delay?

- This will depend on the DSU operative wording.
    - If the trigger is simply damage to property insured; and
    - LEG 2/96 only excludes the cost repairing that damage; then
    - it does not appear to narrow the definition of covered damage.

“Damage that is the subject of indemnity under the material damage section”

- Does it make any difference?

  - It would not appear so for LEG 2/96 if it is only the cost of repairing the damage that is excluded.

  But

  - as delay due to defects is not covered is the co extensive cost of repairing the damage in the same portion (and the resulting delay) also not covered?

Example 2: Damage to a defective turbine blade

Example 2: Damage to a defective turbine blade

- The majority of the costs and financial loss will be dismantling and reassembling the turbine.
- These costs and losses will be incurred in remedying the defective blade in any event.
- Such costs (although not the financial loss) are excluded from cover under LEG 2/96.
- But what of the other components of the turbine that are not defective but have been damaged?
- Would the greater proportion of this cost be excluded on the basis that it is concurrent with or consequent on the remedy of the defect?

Time

- Damage must be when the Insurer is on risk.

- Indemnified period

  - Between the 'would-have-been' commencement date; and

  - The end of the effects of the delay (unless an ealier date is specified).

Key points

- The definition of the trigger for DSU requires careful consideration.

- The effect of Defects exclusions in the MD or DSU sections of a CAR policy may define the extent of cover that is provided.

Causes of Delay and Concurrent causes

- Causation disputes are common in DSU claims
- Key question: was the delay caused by an insured peril – i.e. damage to insured property?
- Specific issue in context of DSU – *concurrent causes*

Concurrent causes

- Orient-Express Hotels Ltd v Assicurazioni Generali SpA (UK) [2010] EWHC 1186 (Comm)
  - Hurricanes Katrina and Rita hit New Orleans
  - Extensive damage to OEH’s hotel; but the city as a whole was also devastated
  - ‘But for’ the damage to the hotel, would the hotel still have suffered a loss of business? It all depends on the counterfactual: do you proceed on the basis that the city would still have been damaged?

Decision at first instance…

- First instance decision by arbitrators (incl George Leggatt QC)
- HELD: the language of the policy:

> "requires OEH to establish that the cause of the loss claimed is the Damage to the Hotel. It is not necessary or relevant for this purpose to go behind the Damage and consider whether the event which caused the Damage also caused damage to other property in the City: the fact that there was other damage which resulted from the same cause does not bring the consequences of such damage within the scope of the cover."

Decision on s.69 appeal...

- Hamblen J dismissed OEH's appeal
- No error of law by arbitrators
- It is only the <u>damage to the hotel</u> that is stripped out of the counterfactual

Financial Conduct Authority v Arch Insurance (UK) Ltd [2021] UKSC 1

- Well-publicised Supreme Court decision about whether notifiable disease clauses cover BI losses from Coronavirus lockdown
- The core issue: did individual occurrences cause the lockdown, or was it (just) the nationwide outbreak that caused it?
- HELD: each individual occurrence caused the lockdown

The Supreme Court overrules *Orient-Express*

- Despite being judges at each stage of *OEH*, both Lord Leggatt and Lord Hamblen say that they were wrong
- HELD: *OEH* wrongly decided: correct analysis is that the damage to the hotel and the damage to the surrounding area were <u>concurrent causes</u> of the BI losses
- Since the latter was uninsured, as opposed to excluded, the claim is covered applying orthodox principles
- Implications for DSU claims?

Calculating delay

- Critical path – the key concept. Defined as:

  "the longest sequence of activities whose completion is necessary before the next activity can begin"

- Big question: is an activity truly on the critical path?
- Can the programme or the manner of working be changed?
- Post-loss and pre-loss approach to assessing delay claims

Thank you!

Any questions?

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