

Orient-Express Hotels Ltd v Assicurazioni General S.p.a. (UK Branch)

[2010 EWHC 1186 (Comm); decided on May 27, 2010]

Summary

This case deals with the issue of business interruption and applicability of the “but for” test.

The question arose as to whether the arbitration tribunal had been correct in concluding that the hotel could only recover for those losses which would not have arisen had the damage to the hotel not occurred, i.e. which satisfied the “but for” test of causation. The hotel sought to contend that the case was one of the exceptional cases where it was fair and reasonable to depart from the “but for” test and to allow recovery where two independent causes resulted in loss and the cause not included in the policy was not expressly excluded.

The Court upheld the order of the arbitral tribunal.

Brief facts

Orient-Express Hotels operated a hotel in New Orleans. In 2005 New Orleans was hit by Hurricane Katrina and Hurricane Rita. A state of emergency was declared and a curfew was imposed on 27 August 2005: the curfew was not lifted until the end of September 2005.

The Hotel suffered significant physical damage and was closed throughout September and October 2005. It reopened on 1 November 2005, but its services and amenities were not fully functional at that time.

OEH had a combined property damage and business interruption policy, with business interruption cover becoming available only where it was caused by physical damage to the hotel. The policy provided cover for business interruption loss caused by physical damage.

The question arose as to whether the arbitration tribunal had been correct in concluding that the hotel could only recover for those losses which would not have arisen had the damage to the hotel not occurred, i.e. which satisfied the “but for” test of causation. The hotel sought to contend that the case was one of the exceptional cases where it was fair and reasonable to depart from the “but for” test and to allow recovery where two independent causes resulted in loss, and the cause not included in the policy was not expressly excluded.

Reasoning and judgment

The Court vide judgment dated May 27, 2010 held that the arbitrators had not erred in applying the “but for” test:

- (a) the rule that the assured could recover where his loss was caused by concurrent interdependent causes had never been applied to a case in which the loss was caused by two concurrent independent causes, although there was force in OEH's argument that it might be wrong on the grounds of fairness and reasonableness to apply the "but for" test if it led to the conclusion that there was no cause of the loss;
- (b) in the present case, however, the policy provided for a "but for" test, and the question of whether its application was fair and reasonable was a matter of fact for the arbitrators and not the court; and
- (c) it was not obvious what alternative test might have been applied - assuming an undamaged hotel in an undamaged city would have led to OEH recovering losses which had nothing to do with the hurricanes, and assuming a damaged hotel in a damaged city would lead to nil recovery, whereas the "but for" test at least gave a limited recovery.

For further information on this topic please contact Tuli & Co by telephone

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