IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL FROM

THE HIGH COURT OF JUSTICE, BUSINESS AND PROPERTY COURTS,

COMMERCIAL COURT (QBD), FINANCIAL LIST

Neutral Citation: [2020] EWHC 2448 (Comm)

BETWEEN:

(1) ARCH INSURANCE (UK) LIMITED
(2) ARGENTA SYNDICATE MANAGEMENT LIMITED
(3) HISCOX INSURANCE COMPANY LIMITED
(4) MS AMLIN UNDERWRITING LIMITED
(5) QBE UK LIMITED
(6) ROYAL & SUN ALLIANCE INSURANCE PLC

Appellants

-and-

THE FINANCIAL CONDUCT AUTHORITY

Respondent

COMMON SECTIONS OF APPELLANT INSURERS' APPLICATION FOR PERMISSION TO APPEAL

A. Introduction

1. Applications for permission to appeal have been or will be filed on behalf of six of the eight insurers who were the defendants in the above action.[1] Those insurers are:

   (1) Arch Insurance (UK) Limited ("**Arch**");

   (2) Argenta Syndicate Management Limited (**"Argenta"**) which is the managing agent of Argenta Syndicate 2121 at Lloyd's;

[1] The Third Defendant was Ecclesiastical Insurance Office Plc and the Eighth Defendant was Zurich Insurance Plc.

(3) Hiscox Insurance Company Limited ("**Hiscox**");

(4) MS Amlin Underwriting Limited ("**MSA**");

(5) QBE UK Limited ("**QBE**"); and

(6) Royal & Sun Alliance Insurance Plc ("**RSA**");

collectively "**the Appellant Insurers**".

2. The Appellant Insurers' applications are made pursuant to section 13(1) of the Administration of Justice Act 1969 ("**the AJA 1969**") and follow the order of Flaux LJ and Butcher J (sitting as a Divisional Court) dated 2 October 2020, which certified for the purposes of section 12(1) of the AJA 1969 that the alternative conditions in section 12(3A) of the AJA 1969 are satisfied in relation to these proceedings and there is a sufficient case for an appeal to the Supreme Court under Part II of the AJA 1969 to justify an application for leave to bring such an appeal.

3. Accompanying the application of each of the Appellant Insurers is a document setting out those aspects of the application which are specific to its appeal. This document sets out matters which are common to the Appellant Insurers.

B. Narrative of the facts

4. This test case concerns a claim for declaratory relief issued by the Financial Conduct Authority (the **"FCA"**) on 9 June 2020 against eight insurers. The FCA sought declarations that insuring clauses contained in 21 'lead' policy wordings responded to claims for business interruption (**"BI"**) losses caused by the Covid-19 pandemic.

5. The trial was conducted on the basis of certain agreed facts, including an agreed chronology (referred to at the trial as 'Agreed Facts 1'). That chronology is summarised at paragraphs 9 to 60 of the judgment of Flaux LJ and Butcher J dated 15 September 2020 (the **"Judgment"**): see [2020] EWHC 2448 (Comm). In brief, the following principal events concerning the Covid-19 pandemic, and the governmental response thereto, are relevant to the Appellant Insurers' application:

(1) 31 January 2020: the UK confirmed its first Covid-19 cases.

(2) 5 March 2020: Covid-19 became a 'notifiable disease' in England pursuant to the Health Protection (Notification) (Amendment) Regulations 2020.

(3) 6 March 2020: Covid-19 became a 'notifiable disease' in Wales pursuant to the Health Protection (Notification) (Wales) (Amendment) Regulations 2020.

(4) 16 March 2020: the Prime Minister advised members of the public to undertake 14 days of household isolation if they developed Covid-19 symptoms, and also advised everyone to avoid non-essential contact with others and to stop all unnecessary travel.

(5) 20 March 2020: the Prime Minister makes an announcement saying that businesses across the UK selling food and drink for consumption on the premises and also certain leisure businesses should close as soon as they reasonably could and not reopen the following day.

(6) 21 March 2020: the Secretary of State made the Health Protection (Coronavirus, Business Closure) (England) Regulations 2020 (the **"21 March Regulations"**), which required the closure in England of businesses selling food and drink for consumption on the premises and certain leisure businesses. Similar regulations were made in relation to Wales on the same date.[2]

(7) 23 March 2020: the Prime Minister advised everyone to stay at home, save for a limited number of purposes (such as shopping for basic necessities). He also announced the closure of all shops selling non-essential goods and other premises including libraries, playgrounds, outdoor gyms and places of worship.

(8) 24 March 2020: the UK Government advised that businesses providing holiday and self-catering accommodation should have taken steps to close, subject to a limited number of exceptions.

(9) 26 March 2020: the Secretary of State made the Health Protection (Coronavirus) (Restrictions) (England) Regulations 2020 (the **"26 March Regulations"**), which required various types of businesses in England to close

[2] Health Protection (Coronavirus, Business Closure) (Wales) Regulations 2020.

(including businesses providing holiday and self-catering accommodation, subject to limited exceptions), and also prohibited people leaving their homes without a reasonable excuse.[3]

(10) 3 July 2020: the Secretary of State made the Health Protection (Coronavirus, Restrictions) (Leicester) Regulations 2020 ("**the Leicester Regulations**"), which required certain types of businesses in Leicester to close as a result of a rise in Covid-19 cases within that city.

(11) 4 July 2020: the 26 March Regulations were revoked and replaced with more limited restrictions contained in the Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020.[4]

C. Statutory framework

6. The following is set out in addition to the legislation set out in section B above.

Proximate Causation

7. Section 55(1) of the Marine Insurance Act 1906, provides: "*Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against*". That provision reflects a basic principle of law applicable to contracts of indemnity insurance, namely that, in the absence of clear words to the contrary, an insurer is liable to provide an indemnity only for loss proximately caused by the insured peril.

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3 The 26 March Regulations revoked most of the 21 March Regulations, but continued the restrictions on the businesses closed by the 21 March Regulations. Similar regulations were made for Wales and Scotland on the same date, and for Northern Ireland on 28 March 2020. See the Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020, the Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020 and the Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020.

4 Similar, regulations were later made for Wales, Scotland and Northern Ireland. See the Health Protection (Coronavirus Restrictions (No. 2) (Wales) Regulations 2020 (10 July 2020), the Health Protection (Coronavirus, Restrictions) (No. 2) Regulations (Northern Ireland) 2020 (23 July 2020) and the Health Protection (Coronavirus) (Restrictions and Requirements) (Scotland) Regulations 2020 (11 September 2020).

Notifiable Diseases

8. The procedure for the notification of diseases in England and Wales is governed by the Public Health (Control of Disease) Act 1984 (the **"1984 Act"**).

9. Section 45C(1) of the 1984 Act empowers the Secretary of State or the Welsh Ministers (as applicable) to make regulations "*for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination in England and Wales (whether from risks originating there or elsewhere)"*. Such regulations may include "*imposing duties on registered medical practitioners or other persons to record and notify cases or suspected cases of infection or contamination*" (s.45C(3)(a)).

10. The Secretary of State made the Health Protection (Notification) Regulations 2010 (the **"2010 Regulations"**) pursuant to the 1984 Act. Regulation 2 of the 2010 Regulations provides that registered medical practitioners in England must notify the relevant local authority if, *inter alia*, they have reasonable grounds for suspecting that a patient has a 'notifiable disease', i.e. one of the diseases identified in Schedule 1 to the 2010 Regulations.[5]

D. Chronology of the proceedings

11. The policy wordings selected by the FCA for inclusion in this test case were said to be representative of numerous policy wordings issued by insurers operating in the UK market, and they were selected by the FCA in order to enable the Court to determine the key issues of coverage and causation relating to non-damage BI claims based on Covid-19. The FCA estimated that, in addition to the particular policies chosen for the test case, around 700 types of policies across over 60 different insurers and 370,000 policyholders could potentially be affected by the test case (see para. 7 of the Judgment).

12. Framework Agreement (31 May 2020). The FCA, and each of the Defendants in the action, signed a Framework Agreement which acknowledged that it was in the

[5] An equivalent provision is contained in regulation 2 of the Health Protection (Notification) (Wales) Regulations 2010. Equivalent duties are imposed on registered medical practitioners in Scotland and Northern Ireland by, respectively, Part 2 of the Public Health etc. (Scotland) Act 2008 and Part I of the Public Health (Northern Ireland) Act 1967.

interests of all parties to achieve certainty in respect of the legal issues raised in these proceedings as soon as possible and set out a framework for the commencement of the litigation.

13. Claim Form, Particulars of Claim and Application (9 June 2020). Pursuant to the Framework Agreement, the FCA issued a Claim Form, filed its Particulars of Claim and filed an application on 9 June 2020. The latter sought directions (which were unopposed) assigning the case to the Financial Markets Test Case Scheme,[6] and for the listing of a trial to commence on 20 July 2020.

14. First CMC (16 June 2020). Butcher J. made an order allocating the case to the Financial Markets Test Case Scheme, listing an expedited trial to commence on 20 July 2020 and directing that the trial be heard by Flaux LJ and Butcher J.

15. Defences (23 June 2020). Defences were filed by Insurers on 23 June 2020.

16. Second CMC (26 June 2020). This was heard by Flaux LJ and Butcher J and, amongst other things, two groups of policyholders (the 'Hiscox Action Group' (**"HAG"**) and the 'Hospitality Insurance Group Action' (**"HIGA"**)) were granted permission to intervene in these proceedings.

17. Reply (3 July 2020). The FCA filed its Reply on 3 July 2020.

18. Trial (20-30 July 2020). The FCA, HIGA and HAG filed their skeleton arguments on 10 July 2020 and the Defendants filed their skeleton arguments on 14 July 2020. The trial was heard remotely by Flaux LJ and Butcher J over eight days.

19. Judgment (15 September 2020). Judgment was handed down remotely (see [2020] EWHC 2448 (Comm)) and an order was made, amongst other things, permitting any applications to be made pursuant to section 12 of the AJA 1969 by 28 September 2020 and adjourning the hearing for the purpose of determining any such applications.

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6 Under Practice Direction 51M. This operated as a pilot scheme until 30 September 2020. On 1 October 2020 the Financial Markets Test Case Scheme was incorporated into CPR PD 63AA pursuant to amendments to the Practice Directions supplementing the Civil Procedure Rules 1998 (within the 122nd update dated 16 July 2020) made by the Master of the Rolls under the powers delegated to him by the Lord Chief Justice under Schedule 2, Part 1, paragraph 2(2) of the Constitutional Reform Act 2005.

Each of the Appellant Insurers, the FCA and the HAG made an application pursuant to section 12 of the AJA 1969 on 28 September 2020.

20. ‘Consequentials’ Hearing (2 October 2020). Following a remote hearing, Flaux LJ and Butcher J made an order containing various declarations to give effect to the Judgment and granted certificates for a direct (‘leapfrog’) appeal to the Supreme Court pursuant to sections 12(1) and 12(3A) of the AJA 1969 to the FCA, the Appellant Insurers and HAG. The Court also granted those parties (and Ecclesiastical Insurance Office Plc, in respect of its grounds of cross-appeal) permission to appeal to the Court of Appeal (if required). The Court refused an application by a non-party insurer (QIC Europe Limited) to be added to the proceedings as a new party for the purpose of pursuing an appeal.

E. Expedition

21. All parties to these proceedings agree that any appeal in this matter should be heard on an expedited basis. This is due to the exceptional public importance of this case and, in particular, the key objective of providing certainty to policyholders and insurers in respect of business interruption claims made as a result of the ongoing Covid-19 pandemic.

22. The trial in the High Court was heard on such an expedited basis as part of the Financial Markets Test Case Scheme. The High Court further recognised the urgency of any appeal and the importance of certainty being obtained as quickly as possible by way of its granting of ‘leapfrog’ certificates referred to above.

23. Ultimate legal certainty is of paramount importance in circumstances such as this where neither individual policyholders nor reinsurers are party to these proceedings or bound by its outcome as a matter of res judicata.[7] The ‘mutual objective’ stated in the Framework Agreement is to achieve “*the maximum clarity possible*” for policyholders and insurers. A decision of the Supreme Court is the only way of achieving the level and authority of clarity required.

[7] Nor other insurers who are not party to these proceedings but who write policies on the same or substantially the same wordings as those selected for inclusion in the test case (see paragraph 11 above).

24. It is also common ground that very large numbers of policyholders have suffered significant losses as a result of the Covid-19 pandemic and the UK Government's response to it, and the claims they have made to insurers need to be resolved as soon as possible. The issues which will inform the resolution of those claims should, accordingly, be authoritatively determined as a matter of urgency.

25. In the witness statement of Matthew Brewis (the Director of General Insurance and Conduct Specialists at the FCA) dated 9 June 2020, he describes the need for urgent resolution in the following terms (at paragraph 8):

> "*The matter [i.e. the test case] is urgent because insureds with policies in respect of which legal uncertainties arise as to whether there is cover for business interruption losses, and which are underwritten by the defendants and other insurers that wrote materially similar policies, are suffering widespread financial distress on a very large scale …*"

26. This is agreed by all parties. Mr Brewis went on to state at paragraph 70 that it is the view of the FCA that "*it is therefore a matter of compelling public interest to provide urgent legal certainty for the benefit of the FCA, policyholders, the defendant insurers and the wider insurance market*". This is also agreed.

27. It was on this basis that this case was originally allocated to the Financial Markets Test Case Scheme and was heard on an expedited basis as noted above; indeed, notwithstanding the scale of this case, the trial commenced only six weeks after the FCA's claim was issued. Further, the High Court handed down its Judgment only around six weeks after the conclusion of the trial. For the same reasons, all of the parties agree that any appeal should be heard as soon as possible.

28. Indeed, clause 8.2 of the Framework Agreement provides that any party seeking to appeal in this test case must "*seek to have their appeal heard on an expedited basis, and undertakes to take all reasonable steps to ensure that the appeal is conducted and determined on an expedited basis as soon as is reasonably practicable*".