APPEAL NO. UKSC 2020/0178

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
FINANCIAL MARKETS TEST CASE SCHEME
([2020] EWHC 2448 (Comm)

B E T W E E N:

THE FINANCIAL CONDUCT AUTHORITY

Claimant

-and-

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

Defendants

-and-

(1) HOSPITALITY INSURANCE GROUP ACTION
(2) HISCOX ACTION GROUP

Interveners

HISCOX ACTION GROUP'S CONSEQUENTIAL SUBMISSIONS

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1. These are the HAG's submissions on consequential matters arising from the Judgment. Paragraph references to the Judgment are in the format [SC/Para].

2. In these brief submissions, the HAG draws attention to four discrete points that are of particular importance to the policyholders that comprise it. Subject to the points made below, the HAG agrees with and adopts the FCA's position as regards the terms of the Declarations Order, including in particular those aspects of the Declarations Order addressing causation and the trends clauses, in respect of which the HAG fully supports the FCA's position.

(1) The General and Specific measures

3. The Supreme Court held [SC/124] that whether the "general" and "specific" measures as defined at [SC/109-110] amount to "restrictions imposed" within the meaning of the Public Authority Clause should be left over for agreement or further argument. Hiscox has apparently interpreted that as meaning that those issues should be left to be resolved in future claims or cases, and thus should not feature in the Declarations Order at all. By contrast, the FCA seeks a determination by the Supreme Court that certain matters amounted to "restrictions imposed" in accordance with the two tests articulated at [SC/117-121].

4. On that specific issue of procedure and forum, the HAG adopts a neutral stance. If the Supreme Court's intention at [SC/124] was for those matters not to be determined by it, that is of course understood. In that case, it is respectfully submitted that the Declarations Order should reflect the fact that those matters remain "at large" for argument in future cases.

5. If, however, the Supreme Court's intention is to determine those issues now, then the HAG adopts the FCA's position that those measures the FCA has identified in its version of draft Declaration 17.4A satisfy the test for "restrictions imposed" (but strictly without prejudice to the HAG's right to argue in another forum that further measures, which the Supreme Court has not ruled upon, also amount to "restrictions imposed"). For the avoidance of doubt, the HAG does not agree that any order identifying "restrictions imposed" should be limited to the two matters proposed by Hiscox in its version of Declaration 17.4A (without prejudice to that position, the HAG comments on one specific aspect of the wording proposed by Hiscox in its Declaration 17.4A(b)-(c) at paragraphs 11-17 below). Also for the avoidance of doubt, the HAG does not agree with Hiscox's draft Declaration 17.4B.

6. Moreover, whatever the Supreme Court decides about which measures, if any, amounted to "restrictions imposed", then the HAG respectfully disagrees with Hiscox's proposal in its version of draft Declaration 17.4A that such a determination should be preceded by the wording "*The following* ***were also capable of amounting*** *to….".* The HAG respectfully suggests that it would better achieve the purpose of the Test Case in providing clarity to policyholders and the market, for the FCA's proposed introductory wording of "*amounted to"* to be adopted as appears in the FCA's version of draft Declaration 17.4A.

7. What is of critical importance from the HAG's perspective, however, is that whether some, all or none of the measures identified by the FCA as potential "restrictions imposed" are ruled upon by the Supreme Court now, there should be no doubt that those matters do not represent

a "closed list" of potential "restrictions imposed". In other words, policyholders should be free to argue that other measures – including measures articulated in the same speeches or communications from which the "general and specific measures" are derived – are also capable of amounting to "restrictions imposed", if they satisfy the tests at [SC/117-121]. The FCA's focus, necessarily, has been on a limited subset of measures that are of the most general application, consistently with the purpose of the Test Case. By contrast, the businesses that comprise the HAG come from many different sectors of the economy and geographical locations, and in various cases responded to restrictions that were directed at their particular sectors.

8. To take two examples:

   8.1 Both the Prime Minister's speech of 23 March 2020 and the PHE guidance of the same date contained clear instructions concerning the stopping of events such as weddings. (The Prime Minister's speech contained the words "*we'll stop all social events, including weddings…"*; the PHE Guidance stated "*Events have been stopped. This includes occasions like weddings and baptisms."*). The HAG includes policyholders involved in the hosting of weddings and other events, and who interpreted those words as a clear instruction to close their premises to that type of business. The HAG's position is that measures in those terms would clearly satisfy the test at [SC/120-121], yet they are not included in the "general or specific measures" listed at [SC/109-110], notwithstanding that other discrete parts of the same Prime Minister's speech and PHE Guidance are.

   8.2 The HAG includes estate agents (a category of business not listed for closure in the 21 March 2020 Regulations) who acted upon communications from the Ministry for Housing Communities and Local Government on 24 March 2020, indicating that estate agents were non-essential businesses and should close their premises immediately. The HAG's position is that those matters would also clearly satisfy the test at [SC/120-121], yet again, those particular measures did not feature in the cases presented by the parties to the Supreme Court. Of course, it would not have been proportionate for all cases and variations to have been so argued.

9. The HAG therefore respectfully suggests that, insofar as the Supreme Court is going to rule upon whether the matters set out at paragraph 17.4A of the draft Declarations Order amounted to "restrictions imposed", then it should be made clear, either in the terms of the

Declaration Order itself, or by all parties communicating their shared understanding, that any matters ruled upon by the Supreme Court do not represent a "closed list" and do not preclude further argument based upon other potential "restrictions imposed" in future cases. From the HAG's perspective, the FCA's proposed drafting at paragraph 17.4A of the draft Declarations Order achieves that purpose.

10. Of course, it is also open to Hiscox to provide clarification that it would not take any such point in future disputes with policyholders.

(2) Draft Declaration Order 17.4A(b)-(c): insurers' proposed wording

11. Hiscox proposes, if the Supreme Court is to rule on whether the general and specific measures amounted to restrictions imposed, a declaration in the following terms:

> "*17.4A The following amounted to "restrictions imposed":*
>
> ….
>
> *(b) The instruction to Category 1 and Category 2 businesses to close given by the Prime Minister on 20 March 2020 (paragraph 110(ii) of the Judgment)* ***but only if and insofar as such Category 1 and 2 businesses were subsequently required to close by the 21 March 2020 Regulations****."*
>
> *(c)* ***The instruction in 17.4A(b) was not a "restriction imposed" more extensive or less qualified than nor did it have any existence beyond the date of the 21 March Regulations***. (emphasis added)

12. The HAG's position is that, as set out above, any order identifying "restrictions imposed" should not be limited to the matters identified by Hiscox, and the HAG agrees that all the matters identified by the FCA amount to "restrictions imposed". However, whatever the Court decides about that issue, the HAG submits that the qualifications highlighted in bold above are inappropriate, and inconsistent with the Judgment and the tests at [SC/117-121], for the following reasons.

13. First, Hiscox's proposal appears to amount to an incorrectly narrow version of the category of measure addressed at [SC/117-119] – i.e. the type of mandatory instruction referred to in [SC/117] is not necessarily followed by a legally binding measure because *"… legally binding measures will follow shortly afterwards, or will do so if compliance is not obtained"*. Further, Hiscox's approach inadvertently fails to reflect, at all, the further category of measure amounting to a "restriction imposed" addressed at [SC/120-121]. The qualification proposed by Hiscox is therefore, with respect, inappropriate and should be removed.

14. Second, as the Supreme Court held at [SC/120], a measure can amount to a "restriction imposed" even if there is no threatened exercise of legal powers or anticipated legal basis for the instruction. Hiscox's proposal, however, seems to be premised on a far narrower understanding, namely one whereby a measure can only amount to a "restriction imposed" if it is subsequently translated into a measure with the force of law, and only to the extent of that measure with the force of law. That is, of course, contrary to the whole basis for the Supreme Court's conclusion at [SC/120-121]. As set out above, Hiscox's qualification is essentially an incorrectly narrower version of the test in [SC/117-119], but of course the Judgment plainly addresses a further, and wider, category of instruction which amounts to a "restriction imposed" at [SC/120-121].

15. Third, as a matter of principle, and of course without seeking to reargue points already determined in the Judgment, Hiscox's proposal is problematic. Whether or not one element of the composite insured peril is triggered at T1 cannot sensibly depend on events which occur at T2. Similarly, whether a public authority instruction amounted to a "restriction imposed" should not depend on material subsequent to and extraneous to that instruction. Such an approach is doubly inappropriate where, as here (and as the Supreme Court held at [SC/120-121]) the relevant restrictions are being imposed in an emergency situation, where immediate compliance is to be expected.

16. Fourth, Hiscox's proposed approach, if applied generally to other potential "restrictions imposed", would lead to great difficulty of application, in that there would always be a dispute about how far later in time one could look for materials relevant to the interpretation of a particular public authority instruction. But, more fundamentally, Hiscox's qualification seems to the HAG to restrict the Judgment to an incorrectly narrow version of [SC/117-119] and gives no effect at all to [SC/120-121].

17. The principles articulated at [SC/120-121] involve a clear and straightforward test based on the nature and quality of the communication itself, and how it would be understood by a reasonable person. There is no room in that test for reinterpreting those communications by reference to subsequent extraneous materials.

(3) Draft Declarations Order 19: Insurers' proposed wording

18. The HAG supports the FCA's position that the following wording at paragraph 19 of the draft Declarations Order is inappropriate and should be removed:

"*and the correct counterfactual can only assume that the insured peril applies from the time that the restrictions are imposed and only for as long as they are imposed*"

19. That wording – which featured in the High Court Declarations Order – is unnecessary, and cannot easily be reconciled with either the wording of the Public Authority Clause or the Supreme Court's judgment.

20. In each of Hiscox 1-4, the "indemnity period" is defined in materially the same way, as follows:

    20.1 In Hiscox 1[1], "*The period, in months, beginning at the date of the* ***insured damage, insured failure****, when the* ***loss of licence*** *takes effect or the date the restriction is imposed, and lasting for the period during which* ***your income*** *is affected as a result of such* ***insured damage****,* ***insured failure*** *or restriction, but for no longer than the number of months stated in the schedule."*

    20.2 In Hiscox 2[2], "*The period, in months, beginning at the date of the insured damage or the date the restriction is imposed, and lasting for the period during which your income is affected as a result of such insured damage or restriction, but for no longer than the number of months shown in the schedule."*

    20.3 In Hiscox 3[3], "*The period beginning at the date of the* ***insured damage****, or the date the restriction is imposed, and lasting for the period during which* ***your gross profit*** *is affected as a result of such insured* ***damage*** *or restriction, but for no longer than the number of months shown in the schedule."*

    20.4 In Hiscox 4[4] "*The period, in months, beginning at the date of the* ***insured damage*** *or* ***insured failure****, or the date the restriction is imposed, and lasting for the period during which your* ***gross profit*** *is affected as a result of such insured damage, insured failure or restriction, but for no longer than the number of months shown in the schedule."*

21. It can therefore be seen that each of Hiscox 1-4 envisages an insured being able to recover for losses that occur after the restriction ceases to be imposed, insofar as those losses are caused by the restriction (i.e. the insured's income continues to be affected as a result of the restriction). This will commonly be the case, as it is unlikely that as soon as an insured is able

[1] Hiscox 1 **{C/6/399}**.
[2] Hiscox 2, **{C/7/430}**.
[3] Hiscox 3, **{C/8/461}**.
[4] Hiscox 4, **{C/9/497}**.

again to reopen its premises in whole or in part, its income will immediately recover to the level prior to the operation of the insured peril and the concurrent effects of the pandemic.

22. Whilst it might be said that the inclusion of these words in paragraph 19 of the draft Declarations Order is therefore irrelevant, because (as the earlier and uncontested wording of paragraph 19 makes clear), that aspect of the Declarations Order is subject to the terms of the policy, including the definition of indemnity period, the HAG is nonetheless concerned that the inclusion of these words will give a misleading impression, particularly in circumstances where the Declarations Order is likely to be used by loss adjusters, brokers and policyholders to negotiate and to adjust claims outside of the litigation context. Moreover, it is also hard to reconcile those words with [SC/215-216], which makes clear that the insurers' liability is to pay an indemnity for interruption proximately caused by the insured peril, which therefore envisages that such interruption can subsist beyond the presence of the insured peril itself.

23. For these reasons, the HAG respectfully invites the Supreme Court to adopt the FCA's proposed drafting of paragraph 19 of the Declarations Order and omit the words quoted above.

(4) Overall scope and impact of the Declarations

24. The HAG is concerned that, as can be seen from the extent of the parties' disagreement over the terms of these Declarations, what should be an exercise in clarification risks failing to achieve that purpose. Intense focus is being placed by all parties on whether particular sentences from the Judgment should be included in the Declarations, in certain cases (and entirely understandably) because parties with differing interests naturally read the Judgment in ways most beneficial to their interests. The HAG is therefore concerned that the Declarations may be used by Hiscox, for example, to seek to "read down" the Judgment when applying it on the facts of individual policyholders' cases, on the basis that significance is to be attached to the inclusion or exclusion in the Declarations of particular aspects of the Supreme Court's reasoning.

25. Ultimately, however, the Supreme Court's reasoning is contained in its Judgment. Whilst the Declarations are a useful tool, it is the Judgment that should take precedence as the basis for understanding the Court's reasoning. If appropriate, the HAG would respectfully invite the Court to incorporate a form of words, either into the Declarations Order or its Ruling, to make this plain.

26. Finally, one minor point is that the following underlined wording in the recital "**AND UPON** the terms in this Order reflecting those used in the Judgment, in particular the Categories at para 36 and the general measures and specific measures at paras 109-110" is no longer necessary, based on the current drafts of the Declarations.

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12 February 2021