Claim No: FL-2020-000018

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
COMMERCIAL COURT (QBD)
FINANCIAL LIST

BEFORE: Lord Justice Flaux and the Honourable Mr Justice Butcher

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

DRAFT GROUNDS OF APPEAL

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1. [On the premise that Hiscox's approach to this issue is preferred in the Consequentials Hearing] The Court erred in finding that if there was a measurable downturn in the turnover of a business due to COVID-19 before the insured peril was triggered, then it is in principle appropriate for the counterfactual to take into account the continuation of that measurable downturn and/or increase in expenses or circumstance (under a trends clause or similar) in calculating the indemnity payable in respect of the period during which the insured peril was triggered and remained operative:

(1) This is inconsistent with paragraphs 278-283 and 530-533 of the Judgment and the correct approach to the counterfactual as identified there, meaning that the Judgment is internally inconsistent.

(2) This renders cover under the Hiscox policies illusory, when this was clearly not intended (see paragraph 283 of the Judgment).

(3) The reasons why paragraphs 278-283 and 530-533 of the Judgment are *correct* as to the counterfactual mean that [if Hiscox's approach to the Judgment is correct] the Judgment is *incorrect* in the respects above.

(4) This is contrary to the HAG's and the FCA's written and oral submissions at the hearing on the counterfactual issue, which were correct.

2. The Court erred in finding that "*[they] did not consider that it could be said that Regulation 6 of the 26 March Regulations amounted to a "restriction imposed" which could have led to an "inability to use" the premises of all insureds where that insured's business had relied on the physical presence of customers*" (Judgment, paragraph 270):

(1) Regulation 6 is in all cases (albeit subject to the facts) a "restriction imposed" as the relevant "restrictions" include both direct requirements to close specific businesses and also other restrictions which on the facts result in the inability to use the Insured Premises normally, because the business owners, employees, workers, customers and other users could not use the Insured Premises normally.

(2) Contrary to [paragraph 270], the cases in which Regulation 6 would have caused an "inability to use" premises would not be rare.

3. The Court erred in finding that "restrictions imposed" refer only to "*legally binding powers… promulgated by statutory instrument*", and that "*guidance, exhortation and advice given by the Government, including by the Prime Minister… do not count as "restrictions imposed" by a public authority*" (Judgment, paragraphs 266-267):

(1) If the Government tells its citizens to do something then that is mandatory, and it is an 'imposition', the important thing is whether the core sense is that what the

citizen is being told/asked to do is not understood to be optional giving the citizen a genuine choice but rather to be compulsory. This is the case whether or not the instruction is backed by legislation or not.

(2) A "restriction imposed" does not require force of law.

(3) Properly construed, all of the restrictions pleaded by the FCA at paragraph 18 of the Particulars of Claim amount to restrictions imposed by a public authority.

(4) In particular, the government announcements made on 16, 20 and 23 March 2020 amount to "restrictions imposed".

4. The Court erred in finding that "*[inability to use] means something significantly different from "hindered in using" or similar… there will not be an "inability to use" premises merely because the insured cannot use all of them; and equally there will not be an "inability to use" premises by reason of any and every departure from their normal use*" (Judgment, paragraph 268):

(1) The meaning of "your inability to use" is the inability to utilise or employ the premises for or with its intended aim or purpose, i.e. the insured's business activities. That inability may be partial or total.

(2) An example of this is if the business (or part of the business) relies on it being able to invite customers into the premises and it is unable to do so without acting in contravention of Government advice – it is unable to use the premises for the purposes of the clause.

Interveners
R Leedham
Second
N/A
28 September 2020

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Interveners

SECOND WITNESS STATEMENT OF RICHARD LEEDHAM

I, RICHARD LEEDHAM, of MISHCON DE REYA LLP, Africa House, 70 Kingsway, London, WC2B 6AH, WILL SAY as follows:

1. I am a solicitor of the Senior Courts, and a partner at Mischon de Reya LLP. I am conducting this matter on behalf of the Hiscox Action Group (the "**HAG**"), the second Interveners in this matter.

2. I make this witness statement in support of the HAG's application for the grant of a certificate, pursuant to section 12 of the Administration of Justice Act 1969 (the "**Act**") for leave to apply to the Supreme Court on a "leapfrog" basis for permission to appeal the decision in *The Financial Conduct Authority v Arch Insurance (UK) Limited & Others* [2020] EWHC 2448 (Comm) (the "**Judgment**").

3. For the reasons and in the circumstances summarised below, this application is respectfully made on a protective and provisional basis only (subject to the points made at paragraph 7(5) below).

4. This witness statement has been prepared by email and by telephone.

5. The facts and matters set out in this witness statement are, unless I state otherwise, within my own knowledge, and I believe them to be true. Where I refer to facts and matters not within my own knowledge, I state the source of my information or belief, and they are, to the best of my knowledge and belief, true.

BACKGROUND

6. The background to this matter will of course be well-known. By way of procedural background, I refer to the following points:

   (1) Judgment was handed down at 10:30am on 15 September 2020;

   (2) The hearing for determination of any consequential directions (including applications for permission to appeal) is listed for 10:30am on 2 October 2020 (the "**Consequentials Hearing**"); and

   (3) The deadline for an application for a certificate pursuant to s.12 of the Act was 4pm (extended to 11.59pm) on 28 September 2020 (the "**Application Deadline**").

7. In the circumstances, and for the reasons set out below, the HAG adopts the following position in relation to this application:

   (1) As set out above, the HAG is issuing this application on a protective and provisional basis, as it currently appears that there may be differences between the

HAG's understanding of the Judgment (in particular, as to the correct counterfactual to be applied) and Hiscox's understanding of the same (as outlined at paragraphs 12 to 16 below). If at the Consequentials Hearing, Hiscox's understanding is determined to be correct, the HAG would seek permission to appeal; but if Hiscox's understanding is incorrect, the HAG will likely not seek permission to appeal (as to which, please see sub-paragraph (5) below).

(2) The HAG's firm view is that Hiscox's understanding is wrong and, indeed, irreconcilable with the Judgment. Should Hiscox maintain its position on this issue at the Consequentials Hearing, the HAG will seek clarification from the Court at the Consequentials Hearing as to the correct counterfactual, alongside any appropriate declarations.

(3) However, the Application Deadline pre-dates the Consequentials Hearing. In the circumstances, and at the present time, the HAG does not have the benefit of the learned Judges' decision on this issue.

(4) The HAG therefore makes this application to protect its position, should the learned Judges agree with Hiscox's understanding of the Judgment (and that becomes clear at the Consequentials Hearing). In those circumstances, the HAG makes this application now, because it is a necessary step to applying for permission to appeal to the Supreme Court under s.13 of the Act (if appropriate).

(5) If, however, the Court agrees with the HAG's understanding of the Judgment and the correct counterfactual, then the HAG currently believes that it will likely seek to withdraw this application. The HAG expresses some hesitation here because it is understood that Hiscox (and other insurers) have applied for "leapfrog" certificates also, meaning that the HAG must prepare for the situation where full appeals are sought by Hiscox and other insurers, which may influence how the HAG seeks to proceed.

(6) The HAG regrets troubling the Court in this way. However, the timetable above and the Application Deadline means that the HAG is essentially compelled to make

this application now. The HAG, of course, makes this application in the hope that it will be withdrawn at the Consequentials Hearing.

(7) The HAG is immensely grateful to the Court for its time in considering this application and hopes that it does not inconvenience the Court to be applying on this protective and provisional basis.

8. By way of further introduction, the HAG believes that it is appropriate to draw the Court's attention to the following issues relating to *locus standi*:

(1) The Supreme Court Practice Direction 3, paragraph 3.6.2 states that "*an application for a certificate may be made by any of the parties*". Further, s.12 of the Act itself provides (in relevant part) "Where on the application of any of the parties to any proceedings …". Neither of these expressly include interveners and, of course, the HAG was permitted to intervene in the proceedings under paragraph 2.5(a) of Practice Direction 51M.[1]

(2) It is therefore not entirely clear whether or not the HAG has standing to make this application. The HAG does, however, have standing to appeal to the Court of Appeal,[2] and the policy behind leapfrog appeals is to "*cut out one layer of appeals*".[3] Further submissions on this issue will, as appropriate, be made at the Consequentials Hearing.

(3) Should it be held that the HAG does not at present have relevant standing to make this application, the HAG respectfully applies (in the alternative) to be joined as a party[4] to the proceedings for the purpose of making this application.

[1] *The Financial Conduct Authority v Arch Insurance (UK) Limited & Others* [2020] EWHC 1724 (Comm) (i.e. as determined at the second Case Management Conference on 26 June 2020).
[2] *MA Holdings Ltd v George Wimpey UK Ltd* [2008] EWCA Civ 12 [19]; and *Re W (A child)* [2016] EWCA Civ 1140 [41].
[3] *Jones v Ceredigion CC* [2005] EWCA Civ 286 [37].
[4] Under paragraph 2.5(a) of Practice Direction 51M.

9. The HAG applies for the Judges' certificate on the following grounds: (1) under s.12(1) of the Act, there is a sufficient case for an appeal to the Supreme Court to justify an application for leave to bring such an appeal; and (2) the proceedings satisfy the statutory conditions set out in s.12(3A) of the Act. Further, it is respectfully submitted that the grounds on which this application are based have real prospects of success, applying the test under CPR 52.6(1)(a), and that it would be appropriate to grant permission to appeal to the Court of Appeal (were no "leapfrog" certificate granted).

10. What follows is intended by way of summary only and further submissions will be set out in the HAG's Skeleton Argument for the Consequentials Hearing, as appropriate. Draft Grounds of Appeal are attached, which Grounds currently remain draft for the reasons explained above and below.

ISSUE (1): SUFFCIENT CASE FOR APPEAL TO THE SUPREME COURT

11. If necessary, in the above circumstances, the HAG will seek permission to appeal to the Supreme Court on the following grounds, which constitute a "*sufficient case*":

i. *Ground 1: the correct counterfactual*

12. As the HAG understands the Judgment, the correct counterfactual to apply is to "strip out" all elements of the insured peril. For hybrid clauses, this is: (i) the inability to use the insured premises; (ii) the restrictions imposed by a public authority; and (iii) COVID-19. This is clear from the Judgment at paragraphs 278-283 (on Hiscox1-4 (hybrid clauses)) and paragraphs 530-533 (on causation generally). Specifically:

(1) "*In answering the counterfactual question as to what would have been the position of the insured's businesses but for the occurrence of the insured peril, it is accordingly necessary to strip out all three interconnected elements, including in this instance the national outbreak of COVID-19*" (paragraph 278);

(2) "*The composite peril involves (i) inability to use the insured premises (ii) due to restrictions imposed by a public authority (iii) following, here, the occurrence of*

[COVID-19]. To the extent that any insured can show that there was a relevant restriction and an inability to use the premises, in assessing what loss the insured can recover, each of the interconnected elements should be removed from the counterfactual" (paragraph 531).

13. However, Hiscox has indicated that they hold a different view. It is understood that Hiscox believes the Judgment to mean that if there was a measurable downturn in the turnover of a business due to COVID-19 before the insured peril was triggered, then it is in principle appropriate for the counterfactual to take into account the continuation of that measurable downturn and/or increase in expenses or circumstance (under a trends clause or similar) in calculating the indemnity payable in respect of the period during which the insured peril was triggered and remained operative. What it is understood Hiscox actually means by this (as a matter of practical reality) is addressed below.

14. To the extent and in the manner that Hiscox's position is understood, it is apparently of fundamental importance to the HAG. On Hiscox's apparent understanding of the Judgment, an insured business that closed on 16, 20 or 23 March 2020 pursuant to government announcements would not be able to recover any indemnity under the policy, because there had been a downturn in turnover (i.e. if income reduced to zero) which was sustained before the relevant 'restrictions' (the 21 and 26 March Regulations respectively) were imposed. It is believed that Hiscox would (on this understanding) seek to argue that the reduction of income to zero should then be carried into the indemnity period, meaning that nothing could be recovered under the policy. Hiscox would on this approach argue that all businesses in this category would recover nothing under their policies.

15. The HAG respectfully submits that this is obviously inconsistent with the clear meaning of the Judgment (and in particular paragraphs 278-283 and 530-533), and cannot be correct. The correct counterfactual, as identified in the Judgment, is that "*all three interconnected elements"* are stripped out, including COVID-19. Hiscox's approach to the Judgment plainly reintroduces COVID-19 into the counterfactual. Hiscox's

interpretation of the Judgment also renders cover under the Hiscox policies illusory, when this was clearly not intended (see paragraph 283 of the Judgment).

16. In the circumstances, the HAG completely disagrees with Hiscox's interpretation of the Judgment in this regard. However, if the learned Judges determine at the Consequentials Hearing that Hiscox's interpretation is correct, the HAG will seek permission to appeal on the ground that the learned Judges have erred in law because (1) the correct counterfactual is as per Judgment paragraphs 278-283 and 530-533, (2) if Hiscox's approach to the counterfactual in the Judgment is correct, that would mean that the Judgment is internally inconsistent, (3) the reasons why paragraphs 278-283 and 530-533 are *correct* as to the counterfactual mean that (if Hiscox's approach to the Judgment is correct) the Judgment is *incorrect* in the respects asserted by Hiscox on this issue, and (4) the HAG repeats and adopts its and the FCA's written and oral submissions at the hearing on the counterfactual issue.

17. Only because it is understood to be necessary to set out (potential) grounds of appeal when applying for a Judge's certificate in this way, the HAG sets out further potential grounds of appeal below. In light of the result in this case, and the HAG's success, these potential further grounds are not, however, grounds that it is currently intended would be pursued but for Ground 1. Therefore, and subject to the points made in paragraph 7(5) above, the HAG's current intention is that Grounds 2 to 4 below will only be pursued if it is necessary to pursue Ground 1.

ii. *Ground 2: Regulation 6 of the 26 March Regulations*

18. It is respectfully submitted that the learned Judges were wrong to find that "*[they] did not consider that it could be said that Regulation 6 of the 26 March Regulations amounted to a "restriction imposed" which could have led to an "inability to use" the premises of all insureds where that insured's business had relied on the physical presence of customers*" (Judgment, paragraph 270).

19. It is respectfully submitted that (to the extent that this has not already been held in the Judgment) the learned Judges should have gone further and found that:

(1) Regulation 6 is in all cases (albeit subject to the facts) a "restriction imposed" as "*the relevant "restrictions" include both direct requirements to close specific businesses and also other restrictions which on the facts result in the inability to use the Insured Premises normally, because the business owners, employees, workers, customers and other users could not use the Insured Premises normally*" (HAG Skeleton, paragraph 131);

(2) Contrary to [270], the cases in which Regulation 6 would have caused an "inability to use" premises would not be rare. Many businesses (especially Category 5 businesses) were as a matter of practical reality unable to use their premises (properly or at all) because the express direction to employees was to work from home, and customers could not attend businesses, and the exceptions were very limited. Further, the facts of individual cases were, of course, not before the Court and those facts demonstrate that such cases are not rare.

iii. <u>*Ground 3: "Restrictions imposed"*</u>

20. It is respectfully submitted that the learned Judges were wrong to find that "restrictions imposed" refer only to "*legally binding powers… promulgated by statutory instrument*", and that "*guidance, exhortation and advice given by the Government, including by the Prime Minister… do not count as "restrictions imposed" by a public authority*" (Judgment, paragraphs 266-267).

21. The Judges should have found that:

(1) "*If [the Government] tells its citizens to do something then that is mandatory, and it is an 'imposition'… the important thing is whether the core sense is that what the citizen is being told/asked to do is not understood to be optional giving the citizen a genuine choice but rather to be compulsory… this is the case whether or not the instruction is backed by legislation or not*" (FCA Skeleton, paragraph 123);

(2) A "restriction imposed" "*does not require force of law*" (FCA Skeleton, paragraph 375);[5]

(3) "*Properly construed, all of the restrictions pleaded by the FCA at paragraph 18 of the Particulars of Claim… amount to restrictions imposed by a public authority*" (HAG Skeleton, paragraph 131);

(4) In particular, the government announcements made on 16, 20 and 23 March 2020 amount to "restrictions imposed" – the public were "ordered" by the Prime Minister to comply with a set of extreme measures, under threat of Police action and also the background of serious threat to their personal health: these announcements were, in any ordinary use of the words, "restrictions imposed".

iv. *Ground 4: "Inability to use"*

22. To the extent that the grounds below go beyond the terms of the Judgment, the learned Judges were wrong to find that "*[inability to use] means something significantly different from "hindered in using" or similar… there will not be an "inability to use" premises merely because the insured cannot use all of them; and equally there will not be an "inability to use" premises by reason of any and every departure from their normal use*" (Judgment, paragraph 268).

23. Again, to the extent that this goes beyond the terms of the Judgment, the learned Judges should have found that:

(1) "*The meaning of 'your inability to use' is… the inability to utilise or employ the premises for or with its intended aim or purpose, i.e. the insured's business activities… that inability may be partial or total*" (FCA Skeleton Argument, paragraph 360)[6];

[5] See also HAG Skeleton paragraph 129.
[6] See also HAG Skeleton Argument, para 125.

(2) An example of this is "*if the business (or part of the business) relies on it being able to invite customers into the premises and it is unable to do so without acting in contravention of Government advice… it is unable to use the premises for the purposes of the clause*" (FCA Skeleton Argument, paragraph 365).

SECTION 12(3A) OF THE ACT

24. It is respectfully submitted that, as required by s.12(3A) of the Act and PD 3.6.3-4, this is a case in which: (1) the decision involves a point of law of general public importance; (2) the proceedings entail a decision relating to a matter of national importance or consideration of such a matter; (3) the result of the proceedings is so significant that a hearing by the Supreme Court is justified; and (4) the benefits of earlier consideration by the Supreme Court outweigh the benefits of consideration by the Court of Appeal.

25. It is indisputable that COVID-19 and the resulting public health controls imposed by the Government have caused vast losses to huge numbers of businesses, many of which are Hiscox policyholders who seek to make claims under Hiscox policies covering business interruption losses.

26. The polices directly addressed in the Judgment cover approximately 370,000 policyholders.[7] The Judgment (unless appealed) is binding on the Defendants. Furthermore, and crucially, the Judgment also provides persuasive guidance for the interpretation of similar policy wordings and claims, that can be taken into account in other cases determined by the Courts, tribunals, Ombudsman, regulators such as the FCA, and other relevant decision-making bodies. It therefore has far-reaching implications.

27. In the circumstances, and taking each of the s 12(3A) requirements in turn:

28. **Point of law of general public importance:** the various points of law raised above concern key questions for any Hiscox policyholder and for Hiscox itself, as well as relevant insureds and insurers more generally. These issues will feature (either directly

[7] Judgment, paragraph 7. See also the FCA's List of Business Interruption Policies (15 July 2020).

or indirectly) in many claims under policies covering business interruption losses. These points of law are clearly of general public importance, as they go to the heart of whether insured businesses can claim under their policies. Most of the insureds are SMEs (or smaller) and recovery under their insurance is a matter of commercial "life or death".

29. **National importance:** the Judgment (and therefore any appeal) is a matter of national importance. The COVID-19 pandemic has of course had a profound and severe impact on the national economy, stemming largely from the distress under which businesses have been placed. Whether or not insured businesses are able to claim under their policies (therefore potentially allowing them to stay afloat, hire/re-hire employees, and so on), and on what grounds, will have significant economic repercussions, and therefore relates to a matter of national importance.

30. **So significant that a hearing by the Supreme Court is justified:** for the same reasons, the decision is so significant that a hearing by the Supreme Court is justified. The Grounds outlined above are also purely points of law, and therefore respectfully submitted to be suitable for an appeal.

31. **Benefits of earlier consideration by the Supreme Court outweigh the benefits of consideration by the Court of Appeal:**

    (1) Clarity and certainty are urgently required by both the HAG and Hiscox. For the HAG policyholders, a protracted wait for a final judgment from the Supreme Court would result in further losses from, for example, being unable to take any steps to relieve the pressure placed on their businesses in the absence of any insurance pay out. Policyholders have also been placed under immense personal hardship as a result of the COVID-19 pandemic and its impact on their businesses.

    (2) It is also likely that a determination by the Court of Appeal would be appealed to the Supreme Court, given the importance of the decision for the stakeholders. This would result in further delay for all concerned.

(3) In the circumstances, an earlier consideration by the Supreme Court would be a beneficial and proportionate way to determine the disputed issues between the parties.

(4) This does not, in any way, detract from the expeditious and efficient manner with which the Judges determined the matter in the High Court. The HAG remains extremely grateful to the Judges (and to the Court staff) for all their time and effort in considering the matter on such an expedited basis.

CONCLUSION

32. In the circumstances, the HAG has submitted this application prior to the Consequentials Hearing in the interests of meeting the Application Deadline. If the HAG seeks to withdraw this application, it will of course inform the learned Judges without delay.

33. For reasons briefly summarised above, the HAG respectfully requests that the Judges grant a certificate under s.12 of the Act, in the terms of the attached draft.

Statement of Truth

I believe that the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Signed: 

Name: Richard Leedham

Position: Partner

Date: 28th September 2020