Case No. FL-2020-000018

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

Before: Lord Justice Flaux & Mr Justice Butcher

BETWEEN:

THE FINANCIAL CONDUCT AUTHORITY

Claimant ("FCA")

-and-

(1) ARCH INSURANCE (UK) LTD

(2) ARGENTA SYNDICATE MANAGEMENT LTD

(3) ECCLESIASTICAL INSURANCE OFFICE PLC

(4) HISCOX INSURANCE COMPANY LTD

(5) MS AMLIN UNDERWRITING LTD

(6) QBE UK LTD

(7) ROYAL & SUN ALLIANCE INSURANCE PLC

(8) ZURICH INSURANCE PLC

Defendants ("Insurers")

- and -

(1) HOSPITALITY INSURANCE GROUP ACTION

(2) HISCOX ACTION GROUP

Interveners

SKELETON ARGUMENT ON BEHALF OF THE FIRST INTERVENERS: CONSEQUENTIALS HEARING 2 OCTOBER 2020

Introduction

1. This skeleton argument addresses (i) two short issues on the draft declarations and (ii) the prospects of success of any appeal in relation to RSA4.

Draft Declarations

2. The detailed declarations in relation to the RSA4 wording have been agreed.

3. The detailed declarations relating to QBE1-3 have been largely agreed but one point of contention currently remains. The HIGA Interveners object to the addition of the words *"within and/or"* in Insurers' draft declaration 12.2 which do not reflect what is said in the Judgment (at [223], [231] and [235]), which simply draws a distinction between on the one hand cases within the relevant area, and on the other, cases outside the relevant area; but does not differentiate between different cases within the relevant area.

4. In relation to the other declarations, the FCA's position is adopted, save that the current wording of the FCA's declaration 13.1[1] is not agreed by the HIGA Interveners. However, this issue is currently under discussion and it is hoped that agreement will be reached and that it will not be necessary to trouble the Court on this point.

Appeals

5. The FCA has applied for a leapfrog certificate in relation to QBE2/3 **{O/2/2}**. The relevant HIGA Interveners support that application. It is understood that the FCA do not oppose QBE's application for a leapfrog certificate in relation to QBE1, and the relevant HIGA Interveners do not independently oppose that application.

6. However, the relevant HIGA Interveners do oppose RSA's application for a leapfrog certificate in relation to RSA4[2] for the following reasons.

RSA 4

7. An appeal in relation to RSA4 does not satisfy the applicable tests under s12 AJA 1969. Any application in the alternative for permission to appeal to the Court of Appeal should also be refused.

8. By virtue of s.12(1) of the AJA 1969 **{S/1/1-2}**, a leapfrog certificate can only be granted if the Court is satisfied that (a) one of the conditions set out in either s.12(3) or s.12(3A) is satisfied; (b) a sufficient case for an appeal to the Supreme Court has been made out;

[1] See **{N/4}**. The FCA's declaration 13.1 is re-numbered declaration 10 in the Insurers' latest amendments **{N/5}**.
[2] Application notice at **{O/23}**, see also the draft grounds at **{O/26/52-54}**.

and (c) the case would otherwise be a proper one for the grant of permission to the Court of Appeal (s.15(3)) **{S/1/4}**.

9. Requirements (b) and (c) are not met in relation to RSA4 because the critical threshold issue which RSA has to overcome to put itself into a position where it could, potentially, succeed on an appeal on RSA4 overall (the "Vicinity" issue) is an issue on which RSA has no real prospect of success.

(i) The Vicinity Issue Is A Threshold Issue

10. The Judgment held that RSA4 policyholders have cover in respect of (1) notifiable disease, (2) enforced closure and (3) prevention of access.

11. Looking first at (1), the RSA4 notifiable disease cover, RSA would, as a starting point, need to overturn the Court's conclusion as regards the scope of the "Vicinity" for the purposes of that clause.

12. In particular, in relation to RSA's Draft Grounds of Appeal at **{O/26/52-54}**:

    (1) paragraphs 1, 2 , 4 and 7 would, even if right (which they are not[3]), be irrelevant in relation to the disease cover in RSA4 if RSA does not overturn the Court's conclusion on "Vicinity", since they are all addressed to the Court's alternative conclusions on the hypothesis that the Court was wrong as regards "Vicinity" (see [141] of the Judgment **{N/1/150}**);

    (2) paragraphs 3 and 5 relate only to RSA3;

    (3) paragraph 6 is the threshold "Vicinity" issue;

    (4) paragraphs 8 and 9 relate to the RSA4 enforced closure cover and prevention of access cover but (even if they were good points, which they are not) are irrelevant in relation to the RSA4 disease cover; and

[3] The first point raised by RSA, at §1 of the Draft Grounds of Appeal, is as to the correct identification of the insured peril and in particular as to whether *"interruption or interference to the Insured's Business"* is part of the insured peril. It is remarkable that RSA seeks to challenge the Court's conclusion that those words are part of the insured peril given RSA's still pleaded case, supported by a Statement of Truth signed by its CEO, UK and International, positively avers that the insured peril under RSA4 is exactly as the Court has held it to be: Amended Defence, §86 and §88 **{A/12/29}**.

(5) paragraphs 10-11 again raise points that are of no relevance to the RSA4 disease cover on the hypothesis that the "Vicinity" is as the Court held it to be for the purposes of that clause (particularly given the retrospective deeming provision in RSA4: Judgment at [136] **{N/1/48}**).

13. Whatever points of law RSA claims arise on enforced closure and prevention of access, those aspects of an appeal are pointless unless RSA succeeds on notifiable disease.

14. It follows that unless the "Vicinity" issue meets the relevant tests a certificate must or should be refused in relation to RSA4.

(ii) No Real Prospect Of Success

15. There is no real prospect of RSA persuading the Supreme Court (or Court of Appeal) that this Court's conclusion (at [137]-[140]) as to what the "Vicinity" (as defined) here comprised was wrong. Indeed, in truth, RSA has never had any viable argument to the contrary. As the Judgment notes at [139] **{N/1/50}**:

"As we see it, a weakness of RSA's case is that it is unable to provide any criteria for determining how large the "area surrounding or adjacent to an ***Insured Location****" may be before it ceases, on RSA's case, to be "the Vicinity", notwithstanding that it may still be an area in which particular events that occur would reasonably be expected to have an impact on the Insured or its business and which therefore qualifies under the second part of the definition."*

16. For this reason, in relation to RSA4 a leapfrog certificate and any alternative application for permission to appeal to the Court of Appeal should be refused.

Conclusion

17. For the reasons set out above, the Court is asked to delete the words "within and/or" from draft declaration 13.2 and refuse RSA's applications in relation to any appeal on RSA4.

PHILIP EDEY Q.C.

SUSANNAH JONES

Twenty Essex

JOSEPHINE HIGGS

7 KBW

30th September 2020