Appeal No. 2020/0177-0178

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
Neutral Citation [2020] EWHC 2448 (Comm)
BETWEEN:

THE FINANCIAL CONDUCT AUTHORITY

Appellant

-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

Respondents

-and-

HISCOX ACTION GROUP

Intervener

JOINT SUBMISSIONS OF ARCH, ARGENTA, HISCOX, MS AMLIN, QBE AND RSA IN RELATION TO CERTAIN COMMON DECLARATIONS

Introduction

1. A draft Declarations Document has been filed with the Court that highlights:

   1.1 The FCA's and HAG's proposed text in red; and

   1.2 Insurers' proposed text in blue.

2. In order to assist the Supreme Court in considering the text proposed by insurers, and resisted by the FCA, the following insurers rely on the joint submissions set out below: Arch, Argenta, Hiscox, MS Amlin, QBE and RSA ("**Insurers**").

3. These submissions concern Declarations affecting Insurers generally. Several of the Insurers also wish to make submissions on particular Declarations which concern them specifically; those submissions are served separately alongside this joint document.

Declaration 7A

4. Insurers' proposed text should be included. It is drawn directly from [209] of the Supreme Court Judgment ("**SC J**"), which was not an *obiter* comment but rather was an important element of the Court's reasoning dealing with a particular issue in dispute that was the subject of both written and oral submissions made by the parties. Further, the Court's judgment on this point provides important clarification as to what does not amount to an "*occurrence*" or "*manifestation*" of disease within the relevant policy area when considering when cover might be triggered under a given policy wording.

5. If Declaration 7A is not included, Declarations 5 to 7 may otherwise be read as suggesting that a person with the disease "*who merely passes through*" (SC J, [209]) a relevant policy area might be sufficient to trigger cover, which is contrary to what the Supreme Court decided. As such, Declaration 7A should be included and Declarations 5 to 7 should each be qualified by the addition of the words "*Subject to paragraph 7A below…*"

Declaration 10

6. Insurers' proposed text properly reflects the Supreme Court's conclusions:

    6.1 that there must be a causal connection between the case(s) of COVID-19 which have occurred (or manifested, as the case may be) within the relevant policy area and the Government action (and the consequent business interruption loss suffered): see SC J, [74], [81]-[86], [93]-[95]; and

    6.2 that the relevant causal connection is established by showing that the Government action was in response to cases of COVID-19 which included at least one case of COVID-19 within the relevant policy area at the date of the action. The words "*to which the Government action was a response*" are taken directly from the language of SC J, [212], i.e. "*it is sufficient to prove that the interruption was the result of Government action taken in response*

to cases of disease which included at least one case of COVID-19 within the geographical area", and they are an essential part of the Court's conclusions on causation.

7. On the form of wording proposed by the FCA, which omits the phrase "*and to which the Government action was a response*" in the final sentence, Declaration 10 might be read as suggesting that there will be cover for all measures taken in response to cases of COVID-19 anywhere, provided there is at least one case within the relevant policy area, even if the case within the policy area was not a concurrent proximate cause of the particular measure in question (i.e. the measure was taken in response to cases of COVID-19 which did not include at least one case within the policy area). This would be contrary to the Supreme Court's main conclusions on causation, e.g. in SC J, [207], [212]. Indeed, it would be more reflective of the Divisional Court's conclusion which the Supreme Court has held was wrong: e.g. SC J, [95].

Declaration 10A

8. Insurers' proposed additional sentence starting "*This interpretation depends…*" is taken verbatim from SC J, [244] and should be included. Its inclusion assists in understanding both what precedes it and what follows it in the same paragraph.

9. As for the FCA's proposed additional wording:

    9.1 The addition of paragraph references to the SC J in the first sentence is unnecessary and unhelpful. The paragraph references are also too narrow. The very fact that additional references would have to be included to give a complete picture of the paragraphs of the SC J relevant to this issue (e.g. SC J, [243], [247], [267]) counts strongly against the inclusion of any paragraph references at all.

    9.2 As to the last sentence, there does not appear to be any basis, whether in the SC J or otherwise, for the addition of the word "*exceptionally*". Whether in any given case the insured peril is or is not a proximate cause of the loss is a question of fact to be determined on the particular circumstances of that case.

    9.3 Similarly, there is no basis, whether in the SC J or otherwise, for the additional purported requirement that, in circumstances where "*the insured peril is not a proximate cause of loss*", the "*sole proximate cause of the loss*" must be "*a separate unrelated consequence of*" the COVID-19 pandemic for there to be no indemnity. To the contrary, it is sufficient

that the insured peril is not a proximate cause of the loss in question, whatever the actual proximate cause(s) might be (i.e. whether related or unrelated to the COVID-19 pandemic and, if related, whether a consequence of the pandemic or the pandemic itself). Accordingly, the FCA's proposed additions to the final sentence of Declaration 10A should be rejected and the remaining wording (i.e. "*but the insured peril is not a proximate cause of loss and the sole proximate cause of the loss is the COVID-19 pandemic (see paragraph 244 of the Judgment)*"), which mirrors [244] of the SC J and is otherwise uncontroversial, should be preferred.

Declaration 11.1

10. The words proposed by Insurers are based upon and accurately reflect the reasoning in SC J, [237]. Their inclusion is appropriate.

Declaration 11.2

11. Insurers' proposed text is appropriate because:

    11.1 it clarifies that this declaration is dealing solely with the counterfactual at the quantification stage when the relevant losses have already been found to have been proximately caused by the insured peril; and

    11.2 it is based upon and accurately reflects what the SC J says about the approach to the counterfactual at the quantification stage: see SC J, [268].

12. In particular, it is important that the "*underlying or originating cause (namely the COVID-19 pandemic)*" should only be removed from the counterfactual for the purposes of quantification <u>where the insured peril is also a concurrent proximate cause</u> of the policyholder's loss. Otherwise, the effect of 'trends' clause provisions might be to expand the scope of cover so as to include loss which could not be said to have been caused – in any sense, whether concurrently or otherwise – by the insured peril.

13. By contrast, the FCA's proposed wording removes from the counterfactual "*all the elements of the insured peril and… its underlying or originating cause <u>(namely the COVID-19 pandemic) and all its consequences.</u>*" The effect of the underlined wording might be to suggest that the policyholder's indemnity should be calculated so as to include loss resulting from Government actions or measures, etc., <u>which had nothing to do with the insured peril</u>, i.e. where the insured peril

was not in any sense a concurrent proximate cause of the loss in question. As such, a disease clause policyholder, for example, might be led to understand that they are entitled to claim for loss caused by measures that were not taken in response to cases which included at least one case within the relevant policy area. The words "*all the elements of the insured peril*" (underlining added) and the FCA's second sentence are to the same effect.

14. The FCA's proposed wording therefore has no basis in the SC J; indeed, it is entirely contrary to the Supreme Court's central conclusions on causation, e.g. SC J, [212]-[213], [219]-[220], [243]-[244], and its conclusions on the application of the counterfactual, see SC J, [265]-[268].

15. To illustrate this point, a disease clause policyholder may be entitled to cover for loss caused by measure A (e.g. a UK-wide lockdown) when that measure is taken in response to cases of COVID-19 which included at least one case within the relevant policy area (applying SC J, [212]). In line with the SC J, all effects of measure A should be stripped out of the counterfactual for quantification purposes, even if the same effects would have resulted from an entirely different measure taken in response to the underlying pandemic.

16. However, if the policyholder in question has suffered separate or *additional* loss as the result of measure B (e.g. a travel ban imposed by a foreign government in a foreign country), which resulted from the same "*underlying or originating cause (namely the COVID-19) pandemic)*" but which was *not* concurrently and/or proximately caused by any case within the relevant policy area (i.e. the insured peril), then the policyholder should not effectively acquire cover for that *additional* loss by reason of 'trends' clause provisions on quantification of loss. That would be inconsistent with the SC J, e.g. [212], [244].

17. Contrary to the SC J, the FCA's proposed form of wording would potentially suggest that the correct approach is to strip out all the effects of measure B as well as those of measure A, on the basis that the counterfactual excludes "*the COVID-19 pandemic… and all its consequences*." The policyholder might therefore be led to believe that the indemnity should be calculated so as to include losses caused by measure B, which had absolutely nothing to do with the insured peril. That cannot be right.

18. Accordingly, the reference to the "*underlying or originating cause*" when considering the correct counterfactual for quantification purposes must be qualified by the addition of the words "*where this operates concurrently with the insured peril*" in order to give proper effect to the Supreme

Court's conclusions on causation and quantification of loss. The Insurers' proposed wording properly reflects the SC J, and should therefore be preferred to the FCA's alternative.

Declaration 11.4

19. Insurers repeat their submissions made at paragraphs 11 to 18 above in relation to Declaration 11.2. The words "*where these operate concurrently with the insured peril*" must be added to the phrase "*circumstances arising out of the same underlying or originating cause*" in order to give proper effect to the Supreme Court's conclusions on causation and quantification of loss.

Conclusion

20. For the reasons set out above, the Supreme Court is respectfully requested to make the 'common' Declarations referred to in the form proposed by the Insurers.

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John Lockey QC
Jeremy Brier

Argenta Syndicate Management Ltd

Simon Salzedo QC
Michael Bolding

Hiscox Insurance Company Ltd

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12 February 2021