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

ROYAL & SUN ALLIANCE INSURANCE PLC'S
ADDITIONAL INFORMATION ABOUT THE DECISION BEING APPEALED

INTRODUCTION

1 This document comprises Royal & Sun Alliance Insurance Plc's ("**RSA's**") additional information about the decision being appealed as set out on page 5 of Form 1.

2 As the Court will be aware, RSA is filing it application for permission to appeal alongside (it is anticipated) five other insurers (collectively "**the Appellant Insurers**"). Accompanying the Appellant Insurers' applications for permission to appeal is a document which sets out, on a common basis, the following information:

A. Introduction;

B. Narrative of the Facts;

C. Statutory Framework;

D. Chronology of Proceedings;

E. Expedition.

3 This document addresses the other information required which is specific to RSA, as follows:

F. The RSA Policies;

G. Relevant orders made in the Court below;

H. Issues before the Court appealed from;

I. Treatment of issues by the Court appealed from;

J. Grounds of Appeal (please see accompanying Annex 1);

K. Reasons why Permission to Appeal should be granted.

F. THE RSA POLICIES

4 RSA's appeal concerns two of the five RSA policies which were considered by the Court below, being:[1]

(a) "Cottagesure" ("**RSA 1**"), a wording designed for owners of holiday cottages; and

[1] No appeal is pursued by RSA in respect of the Court's findings with respect to the Eaton Gate Retail and Pubs & Restaurants policies (respectively RSA 2.1 and RSA 2.2) and Marsh/Jelf 'Resilience' (RSA4).

(b) Eaton Gate Commercial Combined ("**RSA 3**"), a policy wording underwritten by Eaton Gate, a Managing General Underwriter, on RSA's behalf. Other insurers write cover on identical or materially identical wording.[2]

Cottagesure (RSA 1)

5 The relevant extension provides cover for:

"Loss as a result of

A) closure or restrictions placed on the Premises as a result of a notifiable human disease manifesting itself at the Premises or within a radius of 25 miles of the Premises".

Eaton Gate Commercial Combined (RSA 3)

6 The relevant extension provides cover:

"*in respect of interruption of or interference with the Business during the Indemnity Period following:*

a) any:

i. occurrence of a Notifiable Disease (as defined below) at the Premises or attributable to food or drink supplied from the Premises;

ii. ...

iii. occurrence of a Notifiable Disease within a radius of 25 miles of the Premises".

7 This extension was subject to special conditions (mislabelled "*Additional Definitions*") which included:

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[2] One, QIC Europe Limited, applied at the hearing on 2 October 2020 to be joined to the proceedings as a party for the purposes of an appeal; its application was dismissed.

"2. For the purposes of this clause:

Indemnity Period shall mean the period during which the results of the Business shall be affected in consequence of the occurrence discovery or accident…

3. …

4. We shall only be liable for the loss arising at those Premises which are directly affected by the occurrence discovery or accident …"

8 In addition, General Exclusion L of the policy provided that:

"*The insurance by this Policy does not Cover any loss or Damage due to… epidemic and disease".*

G. RELEVANT ORDERS MADE IN THE COURTS BELOW

9 The Court separated the test case policies into three types:[3]

(a) "*Disease clauses*" which provide cover in respect of business interruption in consequence of or following or arising from the occurrence of a notifiable disease within a specified radius of the insured premises [81]. RSA 3 is categorized as a Disease Clause;

(b) "*Hybrid Clauses*" where the cover refers to restrictions (or similar) being placed on the premises and to the occurrence or manifestation of COVID-19 [242]. RSA 1 is a Hybrid Clause; and

(c) "*Prevention of access and similar wordings*" where the cover is against a prevention or hindrance of access to or use of the premises as a consequence of government or local authority action or restriction [306]. None of the RSA policies being appealed fall within this category.

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3 See [8].

10 Having so categorized the policies, the Court then made declarations giving effect to the Judgment which dealt first with issues arising out of policies of the same type compendiously and then policy specific declarations.

11 RSA appeals the following compendious declarations:

> "*10. In … RSA 3…and RSA 1… the occurrence of a case of COVID-19 within a Relevant Policy Area is to be treated as part of one indivisible cause, namely the national COVID-19 outbreak and the governmental and public reaction, of any business interruption. Alternatively, each such occurrence of a case is to be treated as a separate, but effective cause of national action and any consequential business interruption.*
>
> *11. In…RSA 3…, RSA 1…:*
>
> *(a) Losses do not fall to be reduced by reason of rules of factual or proximate causation, or under the trends or similar clauses, or otherwise, by reason that but for the insured peril losses would have been suffered (after the date on which cover is triggered) anyway as a result of any one or more elements of the insured peril separately or in combination, including COVID-19 (including outside any Relevant Policy Area), and/or any consequences of it (including via the authorities' and or the public's response thereto).*
>
> *(b) The correct counterfactual when calculating an indemnity is to assume that once cover under the policy is triggered none of the elements of the insured peril were present, which:*
>
> *(i) for disease clauses means after the date on which cover under the policy is triggered there was no COVID-19 in the UK, or any public authority or public response thereto;*
>
> (ii) *… and*
>
> (iii) *for hybrid clauses means (for example) no inability to use the premises, no public authority restrictions and no COVID-19 in the UK."*

12 So far as RSA 1 specifically is concerned:

> "*27.3 There is cover under RSA 1 for Category 6 businesses from 26 March 2020 for any business interruption following COVID-19, by reason of closure or restrictions placed on the Premises, where COVID-19 was "manifested" within 25 miles of the insured premises on or before 26 March 2020".*

13 So far as RSA 3 specifically is concerned:

> "29.2: *There is cover under RSA 3 for any business interruption which an insured can show resulted from COVID-19, including by reason of the actions, measures and advice of the government, and the reaction of the public in response to COVID-19, from the date when the disease occurred in the relevant 25 mile radius of the insured premises"*; and
>
> 29.3 *General Exclusion L does not exclude claims arising out of the COVID-19 epidemic*".

H. ISSUES BEFORE THE COURT APPEALED FROM

14 RSA sets out below only those issues which were before the Court below which are relevant to RSA's appeal.

Cottagesure (RSA 1)

15 Owners of holiday cottages were advised to cease business on 24 March 2020 and required to do so by the 26 March Regulations.

16 The issues relevant to the appeal in respect of RSA 1 were whether the cover provided was for losses consequent upon:

(a) The manifestation of the notifiable human disease within 25 miles; or

(b) The notifiable human disease <u>wherever</u> it occurred provided that it was manifested within 25 miles.

Eaton Gate Commercial Combined (RSA 3)

17 The issues relevant to the appeal in respect of RSA 3 were:

(a) Whether the cover provided was for losses caused by:

(i) The occurrence of the notifiable human disease within 25 miles; or

(ii) The notifiable human disease wherever it occurred provided that it occurred within 25 miles;

(b) Whether General Exclusion L excluded from cover losses caused by epidemics.

I. TREATMENT OF ISSUES BY THE COURT APPEALED FROM

Cottagesure (RSA 1)

18 The relevant "closure or restrictions" had to be mandatory (rather than merely advisory) and, therefore, in the case of holiday cottages commenced on 26 March [294].

19 Cover was not for losses consequent upon the manifestation of the disease within 25 miles. The requirements of the clause would be satisfied: "*if and from the time that there has been a case of the disease within the 25 mile radius, and this can be regarded as having led to (resulted in) the closure or restrictions placed on such premises on 26 March because it was part of one cause of those restrictions, which were imposed by the government as a response to a national picture which was made up of the individual local parts*" [296].

Eaton Gate Commercial Combined (RSA 3)

20 The Court found that:

(a) The word *"following"* does require a causal relationship but of a looser form than proximate causation (albeit the Court would have reached the same overall conclusion if "*following*" did import proximate causation) and was satisfied by the occurrence of the disease being the indirect cause of the interruption/interference with the direct cause being the reaction of the authorities and/or the public [95];

(b) As a consequence, the fortuity covered was not the specific occurrence of the disease within a 25 miles radius of the insured property but was either:

(i) The Notifiable Disease nationally, of which the individual outbreaks form indivisible parts [102-111];

(ii) Alternatively, "*each of the individual occurrences was a separate but effective cause*" such that all cases were "*equal causes of the imposition of national measures*" [112].

21 General Exclusion L did not apply because the terms of the exclusion were not intended to override express grants of cover [117].

Causation

22 The Court's findings on causation were *obiter* because, where there was cover, the relevant counterfactual excluded the COVID-19 pandemic and all elements of the government and public response to it, meaning that all the losses consequent upon COVID-19 remained and were recoverable. Nevertheless, the Court did go on to find that the first instance decision in ***Orient Express Hotels Ltd v Assicurazioni Generali SpA*** [2010] Lloyd's Rep IR 531 was wrongly decided.

J RSA'S PROPOSED GROUNDS OF APPEAL

23 See Annex 1 – "RSA's Grounds of Appeal"

K REASONS WHY PERMISSION TO APPEAL SHOULD BE GRANTED

24 RSA's appeal raises questions of law of general public importance which should be considered by the Supreme Court at this stage for the reasons set out below. The Court below recognised this both by granting contingent permission for RSA to appeal to the Court of Appeal,[4] and also by the grant of a certificate under section 12 of the AJA.

[4] Although RSA has reordered and refined its draft grounds, they remain – in substance – unaltered from those considered by the Court below save That an appeal is no longer pursued by RSA in relation to RSA 4.

The Construction of the Disease and Hybrid Insuring Provisions (Grounds 1-2)

25 The Court below erred in its primary approach to the construction of the relevant insuring clauses in RSA 1 and 3 by adoption of the novel concept (which did not feature in the FCA's written submissions) of a *"composite"* insured peril which in turn underpinned its conclusion that the requirement for proximate causation codified in section 55(1) of the Marine Insurance Act 1906 applies only to the link between the loss claimed and the *"interruption or interference with the [Insured Business]"*. There is no support for this approach in prior caselaw.

26 The effect of the Court's approach was to treat the proximity/vicinity requirements within the insuring provision as constituting no more than *"adjectival"* (and non-causal) qualifications to the scope of cover (thus relegating the requirements to the status of a provision not relevant to the actual loss).

27 Such an approach is antithetical to the proper construction of an insuring provision in a policy of indemnity insurance, in respect of which there is authority of long-standing to the effect that clear language would be required before a Court could properly conclude that a contract of indemnity was intended to respond upon the occurrence of a contingency irrelevant to the loss.[5]

28 The Court's approach to the construction of the Disease and Hybrid Insuring Provisions creates an unfortunate impression of an *ad hoc* exception to established principles of construction, to the advantage of some businesses impacted by the COVID-19 epidemic but at the expense of any discernible rationale for the exception or any clarity as to its breadth.[6] It is inevitable that the decision will result in uncertainty as to the true state of

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5 ***Becker, Gray v London Assurance Corporation*** [1918] AC 101 at p.113 (Lord Sumner). The HIGA interveners rightly accepted at trial that the construction for which they and the FCA contended, and which was adopted by the Court, *"necessarily gives rise to [a] postcode lottery"* [Day3 p.168 lines3-8].

6 *Cf* ***International Energy Group v Zurich Insurance*** [2016] AC 509 *per* Lords Neuberger and Reed at [193].

the law, and will provoke attempts to cement the exception and invoke it more widely.[7] There is therefore a pressing need for the Supreme Court to review the approach adopted by the Court below, and to confirm the correct approach.

RSA 3, General Exclusion L (Ground 3)

29 As noted above, other insurers provide cover on wording which is the same as, or materially identical to, RSA 3.

30 The Court below concluded that General Exclusion L could not be construed as overriding an express grant of cover [117]. RSA will submit that this reasoning was wrong:

(a) First, the Court's approach begged the question. The disease extension and the exclusion should have been construed alongside each other.[8] If they had been, it would have pointed towards a narrower construction of the insuring provision (whereby cover is provided for local occurrences of disease only) than that adopted by the Court, thereby mitigating the perceived inconsistency between the insuring provision and the general exclusion;

(b) Second, the Court adopted an approach which magnified the perceived inconsistency between the extension and the general exclusion so as to justify an outcome which – in reality – put a red line through the exclusion. The Court should have followed the approach adopted by Lord Goff in ***Yien Yieh Commercial Bank Ltd v Kwai Chung Cold Storage Co Ltd*** [1989] 2 HKLR 639 at p.645G-H and started with a predisposition to resolving any apparent inconsistency. Had it done so, it should have recognised that the specific exclusion for epidemic merely qualifies and does not obliterate any grant of cover for notifiable disease.

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7 ibid at [207].

8 ***Impact Funding v Barrington Support Services*** [2017] AC 73 at [32] (Lord Hodge) and [35] (Lord Toulson).

31 The treatment of General Exclusion L by the Court below – in particular by failing to respect the exclusion in respect of "epidemic" – is likely to lead to uncertainty both as to whether (1) general exclusions within a policy can live alongside express grants of cover (and, if so, how) and (2) Lord Goff's approach in ***Yien Yieh Commercial Bank*** is subject to some form of limitation (unidentified by the Court below and therefore potentially to be applied on an uncertain basis).[9] The question is therefore one which would, by itself, merit consideration by the Supreme Court.

Causation (Grounds 4-7)

32 Although its consideration of ***Orient Express Hotels*** was ostensibly *obiter*, the Court below had elsewhere adopted an approach to causation which runs directly contrary to the views of Hamblen J that an insured must, in principle, establish causation in fact. In particular, the Court below adopted alternative reasoning to the effect that (for the policies under consideration at [112] and in subsequent similar paragraphs) any individual occurrence of the disease was a separate but effective cause of the nationwide measures adopted. The Judgment adopts the causal standard that *'it is not unrealistic to say that all the [COVID-19] cases were equal causes of the imposition of national measures*.' This conclusion involves questions of law which are clearly of general public importance:

(a) First, it is not clear whether, and if so how, the Court's approach to causation in [112] and [165], on the one hand, can be reconciled with that expressed in [418], on the other:

(i) The effect of [112] and [165] is that, once there has been an occurrence within the relevant radius/vicinity, the nationwide response can be taken to have been a response to that occurrence just as much as it can be taken to respond to any other;

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9 Lord Goff's opinion in ***Yien Yieh Commercial Bank Ltd*** has been cited with approval in at least two decisions of the Court of Appeal. It has not, to RSA's knowledge, hitherto been cited or approved at the level of the House of Lords or Supreme Court.

(ii) Conversely, [418] concludes – RSA would say rightly – that *'it simply cannot be said that any ... localised incident of the disease caused the imposition by the government of the restrictions*;'

(b) Second, it is not clear what role factual causation (that is, the 'but for' test) plays in the Judgment's conclusion and the use of the *'not unrealistic cause*' standard in [112];

(c) Third, the conclusion appears to apply a test akin to a *"material contribution to the risk"*, analogous to a *"causa causans"* or to the approach adopted by the House of Lords in ***Bonnington Castings v Wardlaw*** [1956] 1 All ER 615. On any view this is a novel approach to the satisfaction of the requirement for proximate causation (or even to 'but for' causation) in the field of indemnity insurance and of potentially far-reaching significance.

33 The Court's general approach was that anything to do with COVID-19 should be excluded from the relevant counterfactual. Thus losses which would have been sustained by an insured on account of the general pandemic even if the insured event had not crystalised would – on the Court's analysis – become recoverable. This approach involves a departure from conventional principles, pursuant to which an insured is to be put in the same position in which it would have been in if the insured event had not occurred *"but in no better position"*.[10]

34 The Court's criticism of ***Orient Express*** on the ground that Hamblen J had incorrectly identified the insured peril was wrong and reflects the Court's own erroneous approach to the identification of the insured peril in the policies before it. ***Orient Express*** was, until now, the leading authority in relation to causation and the construction of trends clauses. Whether Hamblen J was correct in his identification of the insured peril and to apply a test of 'but for' causation to business interruption cover are themselves clearly points of law of general public importance.

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10 See *Callaghan v Dominion Insurance* [1997] 2 Lloyd's Rep 541 at p.544 col. 2 (Sir Peter Webster).

35 In conclusion, therefore, the causation issues which would arise on any appeal are fundamental to the concept of indemnity insurance and merit consideration by the Supreme Court.

Conclusion

36 Quite apart from the importance of the legal issues when considered individually:

(a) The proceedings as a whole were commenced because of a shared view (endorsed by Mr Justice Butcher at the first Case Management Conference) that the case raised *'issues of general public importance in relation to which immediately relevant authoritative English guidance is needed'* (being the threshold criterion for allowing the case to proceed under the Financial Markets Test Case Scheme);[11]

(b) By the FCA's estimate (see the judgment at [7]) some 700 different types of policy, written by 60 different insurers for 370,000 policyholders could potentially be affected;

(c) As Mr Justice Butcher noted at the first Case Management Conference, not only are the issues in the case of *'relevance to widely used policy wordings*' but also *'the issues which will be decided are relevant to a considerable number of reinsurances…*'.

37 It is, RSA submits, inevitable that the Supreme Court will – at some point – need to resolve the legal issues raised by the judgment of the Court below. It is of pressing public importance that those issues be resolved authoritatively and at the earliest possible date. RSA respectfully asks the Supreme Court to grant permission for it to appeal.

DAVID TURNER QC

CLARE DIXON

[11] Paragraph 2.1 of Practice Direction 51M.

SHAIL PATEL

ANTHONY JONES

Enclosure: Annex 1: RSA's Proposed Grounds of Appeal

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ROYAL & SUN ALLIANCE INSURANCE PLC'S
ADDITIONAL INFORMATION ABOUT THE DECISION BEING APPEALED
ANNEX 1: RSA'S PROPOSED GROUNDS OF APPEAL

References to [x] are to paragraphs in the Judgment

RSA 1 and 3 – Disease/Hybrid Clauses

1 The Court wrongly construed the insured peril as a "*composite peril*" of interruption or interference with the Business during the Indemnity Period following / due to a disease

event, as opposed to the disease event.[1] Having done so, the Court wrongly dispensed with the requirement that the peril, alternatively the disease event, must be the (or a) proximate/effective cause of the loss [94], [296].

2 The Court wrongly concluded that any proximity requirement in the disease/hybrid clauses in RSA 1 and 3 was no more than an adjectival qualification with the consequence that, provided there was at least one case of the disease in the relevant geographical area, the policies would respond to the national pandemic [108], [296].

RSA 3 – General Exclusion L

3 The Court was wrong to conclude that General Exclusion L did not exclude claims arising from an epidemic (namely the COVID-19 epidemic/pandemic) [116].

Causation

4 The Court wrongly found that proximate causation (or, for RSA 3 and if different from proximate causation, the causal relationship specifically required by the word *"following"*) was established by the occurrence (or, for RSA 1, the manifestation) of a case of COVID-19 within a radius of 25 miles from the insured premises [111], [112], [296]. The Court should have concluded that an occurrence (or, for RSA 1, the manifestation) of COVID-19 within 25 miles of the premises was neither a factual (i.e. 'but for') nor legal (i.e. effective/proximate) cause of the loss.

5 The Court adopted the wrong counterfactual (including as a consequence of the foregoing errors) by concluding that it was necessary to 'strip out' the entirety of the COVID-19 pandemic and/or the authorities' and/or public's response thereto, from the counterfactual [122] (RSA 3) and [298] (RSA 1).

6 The Court was wrong to conclude that the relevant counterfactual for the purpose of RSA's policies should exclude consideration of any business interruption referable to COVID-19 within the UK after the indemnity period began [122], [298]. Instead, the Court should have concluded that losses which would have been suffered in the absence

[1] For these purposes a "disease event" is an occurrence of disease at a specified place or within a specified proximity of the insured premises.

of the peril insured against, even if related to the COVID-19 pandemic, could not be recovered under RSA's policies, whether by reason of the application of a conventional approach to causation or by reason of the trends and/or quantification provisions in RSA 1 and RSA 3.

7 The Court was wrong to conclude that ***Orient-Express Hotels Ltd v Assicurazioni Generali SpA*** [2010] EWHC 1186 (Comm) could be distinguished and/or was wrongly decided and/or wrongly declined to follow it [529].