IN THE HIGH COURT OF JUSTICE **Claim No. FL-2020-000018**

BUSINESS AND PROPERTY COURTS

COMMERCIAL COURT (QBD)

FINANCIAL LIST

BETWEEN:

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

(1) HOSPITALITY INSURANCE GROUP ACTION

(2) HISCOX ACTION GROUP

Interveners

NOTE ON BEHALF OF D7 (RSA)
for the consequentials hearing on 2 October 2020 at 10.30am

***Bundle references are in the form*: [bundle/tab(/page)]**

***References to the Judgment are in the form*: [*j*/paragraph]**

INTRODUCTION AND BACKGROUND

1 At this hearing, the Court will need to resolve the following matters consequential on the handing down of judgment on 15 September 2020 (“the Judgment”):

(a) The wording of the declarations following the Judgment; and

(b) The parties' applications for this Court's grant of certificates, under section 12 of the Administration of Justice Act 1969 ("the Act"), allowing leave to appeal directly to the Supreme Court;

(c) In the alternative to (b), applications for permission to appeal to the Court of Appeal.

2 RSA is aware that the Claimant and the First to Sixth Defendants have also made applications under section 12 of the Act for the grant of equivalent certificates **[O/1-22]**. RSA supports those applications.

3 If time permits, RSA asks the Court to read the Third Witness Statement of Mr Christopher Lagar **[O/25]** in support of RSA's application dated 28 September 2020 **[O/23]**.

DECLARATIONS

4 There is a broad measure of agreement in relation to declarations. At the time of writing it is anticipated that the matters below will require determination by the Court. If agreement is reached in relation to RSA specific declarations prior to the hearing, RSA will notify the Court.

5 The submissions below relate to the draft of the Declarations sent by the Defendants to the FCA on 29 September 2020 **[N/5/1]**.

General Sections

6 RSA supports the position of the other Defendant insurers in relation to the general sections.

7 Disease. RSA considers that there could not be an "*occurrence*" of COVID-19 for the purposes of RSA 3 where a person who *no longer had* COVID-19 came within 25 miles of the premises. This follows from the Court's conclusion that the person must be "*suffering*" from the disease (**[*j*/93]**). RSA concurs with other Defendants that the highlighted words should be added to [5]:

There was COVID-19, and COVID-19 was "sustained" or "occurred" within a given radius of the premises in Argenta1, Hiscox4 (hybrid), QBE2-3 and RSA3, wherever a person or persons contracted COVID-19 so that it could be diagnosed, whether or not it was verified by medical testing or a medical professional and/or formally confirmed or reported to the PHE and whether or not it was symptomatic, and was/were within that radius of the premises at a time when they could still be diagnosed as having COVID-19.

8 Prevalence. The word "*reliable*" should be retained in paragraphs 8.2(e)-(f) to qualify "*distribution-based analysis*" and "*undercounting analysis*". There are numerous references in the Judgment to the Defendants' position that the issue was not *admissibility* of distribution or undercounting analysis, but their *reliability* (e.g. **[*j*/560]**, **[*j*/556]**, **[*j*/579]**). The Court did not reject the contention that the issue was reliability. It is therefore appropriate to record it in the declarations.

9 Trends Clause. RSA supports the wording in the Defendants' declarations at 11.3(b) in relation to pre-peril downturns in business. That wording is reflected in the Judgment at:

(a) **[*j*/283]** (particularly the last sentence) in the context of Hiscox 1-4;

(b) **[*j*/350-1]**, in rejecting the FCA's contentions that the clause would "*encompass the emergence*" of the disease;

(c) **[*j*/389]**, in giving the church collection example in the context of the EIO disease clause.

10 There is nothing in the Judgment which suggests this analysis should not apply to RSA (or other the policies before the Court). It arises from the Court's analysis on construction and causation: until all the elements of the peril are in place, there is no cover. Once there is cover, it is necessary to reverse out all of the elements of that peril in considering the counterfactual.. It follows that pre-peril losses are not the subject of the indemnity, and "*the counterfactual can only assume that the insured peril applies from the time*

that the restrictions are imposed, and only for long as they are imposed" ([***j*/283**]).

RSA Sections

11 In respect of RSA 1, there is a dispute over the inclusion of the highlighted wording in the below declaration, which the FCA wishes to include but RSA does not:

> *[27.3] Accordingly, there is cover under RSA1 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, including by reason of the actions, measures and advice of the government, and the reaction of the public in response to COVID-19, where COVID-19 was "manifested" within 25 miles of the insured premises on or before 26 March 2020.*

12 The FCA's proposed wording should be rejected:

(a) First, it wrongly seeks to include, within the scope of cover, the consequences of the reaction of the public in response to COVID-19. RSA 1 is a hybrid clause which does not respond to disease per se, but requires closure or restrictions placed on the premises. The Court did not decide that the public response to COVID-19 caused restrictions on the premises;

(b) Second, the wording about 'measures and advice of the government' is contrary to the terms of the judgment: the Court found that for cover to be engaged "*the closure or restrictions must be mandatory*" [***j*/294**]. RSA's formulation is faithful to that finding; the FCA's formulation is contrary to it.

13 In respect of RSA 2.1-2.2 and in common with other POA insurers, RSA considers that coverage declarations are more conveniently set out in the section specific to RSA. It is appropriate to record the Court's finding as to

meaning of "*vicinity*" in the context of these policies (**[*j*/466]**) and causation (**[*j*/467]**):

> "*[28.1] The word "vicinity" connotes neighbourhood, the area surrounding the premises. The UK cannot be described as the "vicinity" of the insured premises.*
>
> *[28.2] There could only be cover if the insured could demonstrate that an emergency by reason of COVID-19 in the vicinity of the insured premises led to the national actions or advice of the government.*"

14 In addition, the FCA objects to the inclusion of the word "*national*". This word is important. The Court was considering causation of the national lockdown measures, as is clear from the cross reference in **[*j*/467]** to MSA AOCA at **[*j*/444]**, where the discussion is couched in terms of the Regulations. The Court was not, in **[*j*/467]**, expressing any view on the question of other actions or advice of the government.

D7'S APPLICATION UNDER SECTION 12 OF THE ACT

Legal Basis

15 S.12(1) of the Act **[S/1/1]** provides that the Court may grant a leapfrog certificate if satisfied:

> "*(a) that … the conditions in subsection (3A) ("the alternative conditions") are satisfied in relation to those proceedings, and*
>
> *(b) that a sufficient case for an appeal to the Supreme Court under this Part of this Act has been made out to justify an application for leave to bring an appeal*".

16 RSA relies on the *"alternative conditions"* under s.12(3A) **[S/1/1-2]**, which provides as follows:

> "*The alternative conditions, in relation to a decision of the judge in any proceedings, are that a point of law of general public importance is involved in the decision and that –*

> (a) *the proceedings entail a decision relating to a matter of national importance or consideration of such a matter,*
>
> (b) *the result of the proceedings is so significant (whether considered on its own or together with other proceedings or likely proceedings) that, in the opinion of the judge, a hearing by the Supreme Court is justified, or*
>
> (c) *the judge is satisfied that the benefits of earlier consideration by the Supreme Court outweigh the benefits of consideration by the Court of Appeal."*

Threshold Condition: Point of Law of General Public Importance

(1) Preliminary

17 The threshold condition should not be overstated: it does not require that every ground of appeal from a first instance decision should raise a point of law of general public importance. Section 12(3A) merely requires that *"a point of law of general public importance is involved in the decision"* (emphasis supplied).

18 So far as it relates to RSA's policy wordings, the Judgment involves a number of points of law of general public importance. These include, by way of example only:

(a) The construction of the insuring clauses, including but not limited to the 'proximity' and 'vicinity' requirements, in the Disease Extensions in the RSA 1, 3, and 4 wordings; and

(b) The correct approach to the causal nexus between the insured perils under the RSA 1, 3, and 4 wordings and loss, including the correct approach to causation counterfactuals involving multiple events, in this case the COVID-19 pandemic, the authorities' response, and the actions of the public;

(c) Whether there is a requirement for an insured to establish causation of loss on a 'but for' basis and the correctness of the decision of Hamblen J in ***Orient Express Hotels v Assicurazioni Generali*** [2010] Lloyd's Rep IR 531.

(2) Construction of the Insuring Clauses

19 Turning to the first of these points, the Judgment concludes that, where wording in the insuring clause imposes conditions that a policy responds to interruption of interference 'following,' 'as a result of,' or 'arising from' occurrence(s) within 25 miles or 'in the vicinity' of the Premises, the link between the occurrence(s) within the relevant radius/vicinity and the interruption/interference measures can be satisfied in two ways:

(a) First, because *'the occurrence was part of a wider picture which dictated the response of the authorities and the public which itself led to the business interruption or interference ... the proximate cause of the business interruption is the Notifiable Disease of which the individual outbreaks form indivisible parts*' **[*j*/111]**.

(b) Second, and alternatively, because *'each of the individual occurrences was a separate but effective cause*' of the actions of authorities at the national level **[*j*/112]**.

20 The Judgment's first reason – that the proximity/vicinity requirement is satisfied where the occurrence is *'part of a wider picture*' – raises overarching points of principle which, it is submitted, are of general public importance. Those points include:

(a) The Court's adoption of the novel concept of a *"composite"* insured peril, led to 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 Business"*. RSA is not aware of any previous decision which has adopted such an approach;

(b) Whether it is appropriate, in the absence of clear wording, to construe an insuring clause in such a way as to reduce an element of that clause to the status of a provision not relevant to the actual loss and/or an *"adjectival"* (and non-causal) qualification to the scope of cover.

21 RSA will submit on any appeal that the approach adopted by the Court in the Judgment is antithetical to the proper construction of an insuring provision in a policy of indemnity insurance, and contrary to the principle 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: see ***Becker, Gray v London Assurance Corporation*** [1918] AC 101 at p.113.

(2) Causal Nexus

22 The Judgment's alternative reasoning is that (for the policies under consideration at **[*j*/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 **[*j*/112]** and **[*j*/165]**, on the one hand, can be reconciled with that expressed in **[*j*/418]**, on the other:

(i) The effect of **[*j*/112]** and **[*j*/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;

(ii) Conversely, **[*j*/418]** concludes 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 **[*j*/112]**;

(c) Third, the conclusion appears to apply a test akin to a *“material contribution to the risk”*, analogous 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) and of potentially far-reaching significance in the field of insurance.

23 ***Orient Express*** was, until now, the leading authority in relation to causation and the construction of trends clauses. Whether Hamblen J was correct to apply a test of ‘but for’ causation to business interruption cover is itself clearly a point of law of general public importance.

The “Alternative Conditions”

24 Grant of a certificate requires satisfaction of at least one of the “alternative conditions” in section 12(3A)(a) to (c). RSA submits that each criterion is met in this case.

25 In the present case the criteria set out in sub-section (3A)(a) (that the Judgment must relate to a *‘matter of national importance*’) and sub-section (3A)(b) (that the *‘significance of the result of the proceedings justifies a hearing by the Supreme Court*’) overlap:

(a) The national importance of the proceedings has consistently been acknowledged by the parties, and was the justification for the parties’ joint application that the case should proceed under the Financial Markets Test Case Scheme as described under paragraph 2 of Practice Direction 51M. By allowing the case to proceed under the Test Case Scheme, the Court has already signaled that paragraph 2.1 of Practice Direction 51M it is satisfied that the case raises *‘issues of general public importance in relation to which immediately relevant authoritative English guidance is needed*’;

(b) Further, in granting the application for the case to proceed under the Test Case Scheme, Mr Justice Butcher noted that 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…*' (see Transcript for the hearing on 16 June 2020 at page 8 lines 19-22 and page 8 line 25 to page 9 line 1 **[F/28/3-4]**);

(c) The general public importance of the Court's decision is equally clear:

(i) The legal issues identified in the preceding paragraphs will not only have an impact on the very large number of policyholders and insurers to which this claim directly relates, but also potentially on the proper approach, in the field of insurance law generally, to (a) the construction of insuring clauses, (b) causation, and (c) the application of 'trends' provisions;[1]

(ii) Practically speaking, the sums which turn on the outcome of the Court's decision are very large for both policyholders and insurers, and the implications extend far beyond those who were insured under the wordings considered in the Judgment. As set out in paragraph 14 of the Third Witness Statement of Mr Lagar **[O/25/5]**, insurers other than RSA provide cover in identical or similar terms to the wordings considered in the Judgment. One such insurer (QIC Europe Limited) has now made an application to intervene: the witness statement in support of that application suggests (at para. 6) that as much as £750m could be riding on the interpretation of the RSA 3 wording.

[1] The Judgment may create considerable uncertainty as to how 'trends' provisions should operate: the Ecclesiastical example at [*j*/389] suggests that loss caused by COVID-19 before the crystallization of all elements of the insured peril should be stripped out. It might, however, be suggested that [*j*/119]-[*j*/122] point to a contrary result in relation to policies such as RSA 3.

26 As for sub-section (3A)(c) (situations where the Court *'is satisfied that the benefits of earlier consideration by the Supreme Court outweigh the benefits of consideration by the Court of Appeal*') RSA submits that:

(a) There is an obvious imperative (for both policyholders and the insurance market) for legal certainty to achieved at the earliest possible opportunity;

(b) Given the nature of the points identified above, which relate to fundamental issues of insurance law and have potentially vast economic consequences, it is inevitable that the Supreme Court will ultimately be asked to determine them.

Sufficient Case for Appeal to the Supreme Court (s.12(1)(b) of the Act)

27 For the purposes of its application under s.12 of the Act, RSA relies on the draft grounds of appeal exhibited to the Third Witness Statement of Mr Lagar **[O/26/52-54]**. In summary, RSA will argue that:

(a) The Court erred in its primary approach to the construction of causal wording in the insuring clauses in RSA 1, 3, and 4 (including the 'proximity' and 'vicinity' conditions). RSA respectfully submits that the approach adopted in the Judgment (i) requires impermissible rewriting of the policy wordings (ii) fails to give effect to the policy wordings (iii) fails to give effect to the fundamental test of proximate causation found in insurance law, with irrational results;

(b) The Court erred in its alternative approach – as set out in **[*j*/112]** – which construes causal wording so widely as to abandon any requirement of causation in fact ('but for' causation). RSA respectfully submits that 'but for' causation is a necessary condition of any causative language, and that the contrary conclusion is wrong in law;

(c) In addition to erring in relation to the causal wording *within* the insuring clauses, the Court erred in its approach to causation as between alleged breach of such clauses and loss. In particular, RSA

respectfully submits that the Judgment errs in concluding that, in constructing the relevant causation counterfactual in respect of 'composite' events involving natural phenomena, government response, and public conduct, *'one takes out of the counterfactual the business interruption referable to COVID-19 including via the authorities' and/or the public's response thereto*' **[*j*/122]**. Such an approach wrongly constructs a counterfactual with multiple stages of causation removed, which is contrary to principle.

28 RSA's position as to its grounds of appeal are further amplified below in the context of its alternative application for permission to appeal to the Court of Appeal: RSA submits that the additional (but overlapping) requirement imposed by s.15(3) of the Act (that this would a proper case for an appeal to the Court of Appeal) is plainly satisfied.

Discretion

29 If the Court is satisfied that the conditions under section 12 of the Act are met, there are no further considerations which should prevent the grant of the certificate. RSA notes that Mr Justice Megarry in ***Inland Revenue Commissioners v Church Commissioners for England*** [1975] 1 WLR 251 at 272 contemplated two reasons justifying discretionary refusal of a certificate: (a) where there is utility in an appeal to the Court of Appeal in clarifying the issues where facts have been contested at first instance; and (b) where a case *'is within the letter of section 12 [but not] the spirit*.' Neither applies in this case:

(a) The case has proceeded on (limited) agreed facts and the legal issues have been squarely identified from the outset;

(b) Given the legal and practical significance of this litigation, the case falls squarely within both the letter and the spirit of the leapfrog appeal procedure, reserved as it is for the most significant legal and policy questions.

Practicalities

30 Should the Court grant a certificate, then – as a matter of the proper construction of s.12(1) – the certificate should be in respect of its decision as a whole rather than specific points.

31 Section 13(5) provides that if a certificate were to be granted, no appeal would lie to the Court of Appeal until time for making an application for permission to appeal to the Supreme Court has expired and, where such an application has been made, it has been determined in accordance with s.13(2)-(3).

32 Accordingly, should a certificate be granted and so that the parties are in no doubt as to the applicable timetable for filing an appellant's notice with the Court of Appeal if any application for permission to appeal is refused by the Supreme Court, RSA asks that the Court make the following direction:

> *"Time for filing any Appellant's Notice pursuant to CPR Part 52.12(2) (if applicable) be extended until 14 days after (1) the determination of any application made pursuant to section 13(1) of the Administration of Justice Act 1969 or (2) (where no such application is made) expiry of the period for making any such application"*.

ALTERNATIVE APPLICATION: PERMISSION TO APPEAL

33 If the Court is not minded to certify the case as suitable for a leapfrog appeal, alternatively to make provision for the situation which would arise if the Supreme Court were to refuse any application under s.13 of the Act, RSA asks for permission to appeal to the Court of Appeal.

34 The points identified above would amount to *"a compelling reason for the appeal to be heard"* (CPR Part 52.6(b)).

35 Further, it is clear that any appeal would have a real prospect of success. Addressing each of the draft grounds of appeal [**O/26/52-54**] in turn:

(a) Grounds 1 and 2: for the reasons set out above, the Court's approach to the construction of the disease clauses in RSA 1, 3 and 4 is open to real

doubt. Indeed, the Court accepted that RSA's submission on the scope of the insuring clause was *"undoubtedly a significant argument"* [102];

(b) Further, the Court's approach to the construction of the disease clause in RSA 3 gives no effect to the use of the word "*occurrence*", a term which authority of long-standing has consistently treated as being synonymous with "*event*": see, by way of example, ***Kuwait Airways Corporation v Kuwait Insurance Co*** [1996] 1 Lloyd's Rep 664 at pp.685-6 (Rix J), and ***Countryside v Marshall*** [2003] Lloyd's Rep IR 195 at [15] (Morison J). It is trite that the term *"event"* means something happening *"at a particular time, at a particular place, in a particular way"* (***Axa Reinsurance v Field*** [1996] 1 WLR 1026 at p.1035G (Lord Mustill), a dictum applied by the Court with respect to QBE 2 at [231] of the Judgment);

(c) Ground 3: in the light of the Court's conclusion at [418], and the matters set out above (under the sub-heading 'Causal Nexus'), there must again be a real prospect that the Court's conclusion with respect to both proximate causation (under the disease clauses in all of RSA 1, 3 and 4) and the causal relationship required by the word "*following*" in RSA 3 would be overturned on appeal. It is properly arguable, with a real prospect of success, that the approach adopted by the Court effectively negated any requirement for any causal relationship between the peril and the loss;

(d) Ground 4: the approach taken by the Court to the identification of the appropriate counterfactual is at odds with that taken by Hamblen J in ***Orient Express***: there is plainly a real prospect that an appeal court would follow ***Orient Express*** on this point;

(e) Ground 5: the following points arise in relation to General Exclusion L, and have a real prospect of success:

(i) First, the Court failed to construe the insuring clause and exclusion clause together to ascertain the scope of the cover granted under the disease extension;

(ii) Second, and contrary to binding authority cited at trial, the Court did not attempt to reconcile the extension and the exclusion but instead treated the latter as repugnant to the former. In particular, the Court's decision effectively disregarded the presence of the word "epidemic" within the exclusion;

(f) Ground 6: the Court's approach to the construction of the word "Vicinity" failed to address the ordinary meaning of the word, despite Lord Hoffmann's dictum in ***Birmingham City Council v Walker*** [2007] 2 WLR 1057 at [11]. RSA will argue that, for the reasons set out at paragraph 26 and following of Appendix 4 to RSA's submissions at trial **[I/18/79]**, the Court should have rejected the FCA's and HIGA Interveners' approach to the construction of "Vicinity"; instead of doing so, it effectively (and, RSA will submit, wrongly) used hindsight to guide its identification of the "Vicinity". Such an argument would plainly have a real prospect of success;

(g) Ground 7: the dismissal of the use of the word "events" within the definition of *"Covered Events"* as being no more than *"shorthand"* is inconsistent with the emphasis placed on the word "events" in, by way of example, QBE 2. It is plainly arguable, with a real prospect of success, that:

(i) "Events" and "causes" are not mutually exclusive;

(ii) The parties to an insurance contract can be taken to have understood the ordinary meaning of the words they used and intended that effect should be given to them;

(h) Ground 8: is parasitic on Grounds 6 and 7;

(i) Ground 9: raises the same issue of principle as Ground 4, but in the context of RSA 4;

(j) Ground 10: again engages the question of 'but for' causation. Given the approach adopted by the Court at [351] with respect to Arch and [389] with respect to Ecclesiastical, there is plainly a real prospect that an appeal on this ground would succeed;

(k) Ground 11: embraces the 'umbrella' point relating to 'but for' causation and 'trends' clauses, namely the treatment of the decision in ***Orient Express***. The submissions in relation to Ground 4 are repeated.

CONCLUSION

36 For the reasons set out above, RSA respectfully invites this Court to:

(a) Make the declarations in the form proposed by RSA;

(b) Grant RSA's application dated 28 September 2020;

(c) Alternatively grant permission to RSA to appeal to the Court of Appeal.

DAVID TURNER QC

CLARE DIXON

SHAIL PATEL

ANTHONY JONES

4 New Square
LONDON WC2

30 September 2020