Appeal Nos. 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

Neutral Citation: [2020] EWHC 2448 (Comm)

BETWEEN:

THE FINANCIAL CONDUCT AUTHORITY

Appellant

-and-

(1) ARCH INSURANCE (UK) LIMITED

(2) ARGENTA SYNDICATE MANAGEMENT LIMITED

(3) ECCELESIASTICAL 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

Respondents

-and-

HISCOX ACTION GROUP

Intervener

WRITTEN CASE OF THE SEVENTH RESPONDENT (ROYAL & SUN ALLIANCE INSURANCE PLC)

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*References to the hearing bundle are in the form **{Bundle/Tab/Page}***

*References to the judgment below are in the form of **[j/Paragraph]***

*The judgment itself is to be found at **{C/3/30}***

I. INTRODUCTION

1 This is RSA's written case in response to the FCA's appeal.

2 Of the FCA's four grounds of appeal, two concern RSA: Ground 1, "Pre-Trigger Perils" and Ground 2, the "Force of Law Point". RSA's policies are not the subject of the FCA's appeal on Ground 3, the "Total Closure Point" or Ground 4, which is concerned with QBE 2-3 only.

II. PRE-TRIGGER PERILS (FCA Ground 1)

3 For RSA this issue arises with respect to 'disease' clauses (such as that in RSA 3) and 'hybrid' clauses (such as that in RSA 1 and the 'enforced closure' peril in RSA 4).

4 If RSA succeeds on its appeal as to the proper construction of the relevant extensions in RSA 3 and RSA 1 then the FCA's Ground 1 will be of no relevance and should be rejected.

5 If, however, the Supreme Court were to uphold the approach of the Court below to the construction of the relevant extensions in RSA 3 and RSA 1 then RSA would still invite the Supreme Court to reject the FCA's appeal under Ground 1 and confirm the conclusion of the Court below that any reduction in turnover prior to crystallisation of the insured peril should be taken into account. In such circumstances:

(a) Under RSA 3:

(i) The insured peril would only be 'complete' and cover will only be triggered upon the first occurrence(s) of COVID-19 in the relevant policy area;

(ii) The application of the 'trends' clause (and common law) requires that the insured should be put in the same position as if the insured peril had not occurred. This means that any reduction in turnover which occurred prior to the trigger date as a result of COVID-19 and the government and public response thereto (which is an uninsured event) can and should be taken into account as a 'trend or circumstance' when calculating the indemnity due to the insured.

(b) Under RSA 1:

(i) The insured peril would only be complete upon (1) the first manifestation of COVID-19 in the relevant policy area resulting in (2) closure or restrictions being placed on the premises;

(ii) As noted in RSA's Appellant's written case, RSA did not promise to hold its RSA 1 policyholders harmless from the consequences of a notifiable disease, but only from closure or restrictions placed on the premises as a result of a notifiable disease manifesting itself within the relevant policy area.

(c) Under the 'enforced closure' peril in RSA 4, the insured peril would only be complete upon the enforced closure of the premises *"for"* (i.e. because of) health reasons or concerns **{C/17/1321}**. The peril would, however, only be operative in the event that any interruption or interference to the insured's business was *"as a result of"* the crystallisation of the peril **{C/17/1299}**;

(d) The application of the 'trends' clause (and common law) requires that the insured should be put in the same position as if the insured peril had not occurred, but no better position. This means that any reduction in turnover which occurred prior to the trigger date as result of COVID-19 and the government and public response thereto (which is an uninsured event) can and should be taken into account as a 'trend or circumstance' when calculating any indemnity due to the insured. There is no basis on which to limit the effect of the 'trends' clause to encompassing only '*business vicissitudes*', either in the language of the clause or in the authorities;

(e) The FCA seeks to avoid this basic application of these ordinary principles by the argument that "*the combined peril trigger displaces or absorbs the effects of all the separate elements of that peril*" (§11 of the FCA's Appellant's Written Case). But the concepts of "*displacement*" or "*absorption*" by the insured peril of a causative factor which is already in operation is legally incoherent, entirely novel, and has no place in any principled causation analysis (either on a 'but for' or 'proximate cause' basis);

6 In general, RSA adopts the Respondent's Written Case of Arch Insurance in relation to Ground 1, *mutatis mutandis*.

III. THE FORCE OF LAW POINT (FCA Ground 2)

7 In relation to both RSA 1 and RSA 4 the FCA appeals against the learned judges' finding that the "*closure or restrictions placed on the Premises*" (RSA 1) and "*enforced closure"* (RSA 4) could only be satisfied by the imposition of legally binding measures.

8 In general, RSA adopts the Respondents' Written Cases of Hiscox and MS Amlin in relation to Ground 2, *mutatis mutandis*.

9 Points specific to RSA 1 and RSA 4 are addressed briefly below.

(a) RSA 1

10 RSA 1 provides cover in respect of "*Loss as a result of … closure or restrictions placed on the Premises"* **{C/15/1129}**.

11 The Court found at [j/294]:

> *"While it is not specified who may "close or place restrictions" on the premises, it is in our view clear that this must be by an authority having power to do so. We consider that this clause requires that the closure or restrictions should be mandatory: it is only such mandatory restrictions which would ordinarily be described as "closing" or being restrictions "placed on" the premises. Accordingly, we do not consider that there was any closure or restrictions placed on the relevant type of premises until 26 March.*[1] *It is common ground that at that point there was."*

12 By its appeal, the FCA submits that the Court should have found that "*closures or restrictions"* were in place for the purposes of the policy when (adopting the FCA's nomenclature):

(a) the General Measures, referred to below as the Social Distancing Measures, set out in §61 of the FCA's Appellant's Written Case, were announced; and

[1] RSA 1 provides cover for the owners of holiday cottages. This is, therefore, a reference to regulation 5(3) of the 26 March Regulations which came into force at 1pm on 26 March 2020 **{E/3/19}**.

(b) the Specific Measure concerning Category 6 business (which included holiday cottages) was introduced on 24 March 2020. Namely, that they should "*take steps to close for commercial use as quickly as is safely possible".*

13 The FCA's appeal, therefore, has three aspects: (I) upon whom or what the closures or restrictions must be imposed, (II) from whom the closure or restriction must emanate and (III) the nature of the closure/restrictions imposed.

14 As to the first aspect, the FCA's position is that the "*restrictions*" do not need to be directed at the premises (or even the insured) but can be satisfied by the insured/premises being indirectly affected by restrictions being placed on customers (such as the Government's announcement on 16 March that people should stop all unnecessary travel and social contact). This:

(a) Ignores the wording of the clause which requires there to be *"closure or restrictions placed on the Premises".* "Premises" are defined by reference to a physical location, "*The Risk Address as shown in the Schedule"* **{C/15/1187}**. "*Placed*" in this context being synonymous with imposed;

(b) Wrongly seeks to apply a finding made in relation to a different clause, in Hiscox 1-4, to RSA 1:

(i) The relevant Hiscox wording states that cover is provided in respect of "*your inability to use the insured premises due to restrictions imposed by a public authority"* following five different events. One of the events was "*an occurrence of a notifiable human disease"* and another was "*murder or suicide".* The learned judges found that, unlike the extension in RSA 1, the Hiscox clause did not require that the *"restrictions imposed*" be directed at the insured or the insured premises because they could include a police cordon (consequent upon a murder or suicide) which might prevent access to an insured shop even though it was not directed to the insured or to the insured's use of the premises;

(ii) The suggested analogy between Hiscox 1-4 and RSA 1 is a bad one because in Hiscox 1-4 the inability to use the premises need only be a consequence of "*restrictions*" at large, with no requirement that those

restrictions relate to, or be placed upon *"the premises"*. In RSA 1 the restrictions must be placed specifically "*on the Premises*". This distinction between the different policies is not only obvious but lies at the heart of the approach (rightly) taken by the learned judges in [j/294];

(iii) Thus the FCA's case appears to rest on an implicit, and manifestly wrong, suggestion that the different wording of an insuring clause in a different policy should operate as a guide to the construction of the relevant extension in RSA 1.

15 The FCA's reliance on General Condition 10 (which requires policyholders to "*take all reasonable steps to prevent or minimise any Damage or any Injury to Employees or the public"*) is similarly misplaced: all that General Condition 10 (properly construed) does is reflect the common law principle that an insured may not willfully or deliberately cause the event upon which the insurance money is payable.

16 Aspects (II) and (III) of the FCA's appeal are inextricably linked. Only an entity which could impose *mandatory* closure/restrictions upon property could impose closure/restriction requirements within the meaning of the clause. If it is accepted that the closures/restrictions must be imposed <u>on the Premises</u> (which is the only possible construction of the language used), then the only relevant date is 26 March when the 26 March Regulations came into force. In short, "*guidance"* (however persuasive and authoritative its source) cannot and does not amount to "*closure*" of the Premises or "*restrictions placed on the Premises".*

(b) RSA 4

17 RSA 4 provides cover in respect of "*...enforced closure of an Insured Location by any governmental authority or agency or a competent local authority for health reasons or concerns"* **{C/17/1321}**.

18 The Court found at [j/303]:

> *"In our judgment, there will only have been an "enforced closure" of premises, if all or a part of the premises was closed under legal compulsion. We agree with RSA that this would extend to closure which either is or is legally capable of being*

enforced. By "legally capable of being enforced" we include a case of where a governmental authority or agency or local authority directs that particular premises should be closed, and states that if they are not closed then a compulsory order for their closure will be obtained. But we consider that in that type of situation, there would have to be a clear direction by an authority which has the power to close premises that they should be shut failing which a compulsory order will be obtained. In the present case, we consider that the only "enforced closures" resulting from the actions of the government about which we have been addressed would be the closures of all or part of premises pursuant to the 21 and 26 March Regulations. To the extent that they required the closure of all or part of the premises of insureds under RSA 4, there will have been "enforced closure". We do not, however, consider that advice or exhortations, or social distancing and stay at home instructions constitute "enforced closures"."

19 The FCA's case is that the learned judges should have interpreted "enforced closure" as having commenced on 16 March 2020 when the General/Social Distancing Measures were put in place. The FCA's appeal on this point should be rejected, and the learned judges' findings preferred, because:

(a) RSA 4 requires the "*enforced closure*" to be "*of the Insured Location"*. The closure measure must therefore relate to the premises themselves and not merely to its users.[2] The fact that a business might close as a consequence of measures directed at its users (a scenario posited by the FCA in paragraph 97 of its Appellant's Written Case) is nothing to the point;

(b) There is no such thing as a government instruction to do something "*in mandatory (albeit not legal binding) terms"* as the FCA oxymoronically suggests in §96 of its Case. Further, the verb "*enforce"* has as its object the underlying obligation which is to be enforced. One does not "*enforce"* people or things. Rather, one enforces rules and laws. The expression "*enforced closure"* therefore presupposes a law or obligation (to close the premises) capable of enforcement;

[2] See definition of "Insured Location" at **{C/17/1319}.**

(c) The FCA's error is that it seeks to conflate "*enforced closure"* of premises (i.e.: an "*Insured Location*"), with a business which is "*forced*" – for commercial reasons – to close. The word "*enforced"* is not apt to cover a situation where measures or advice which do not involve legal obligations on the business or policyholder nevertheless have the consequence that the business as a matter of *fact* closes (or more accurately chooses to do so for commercial or practical reasons). The FCA's approach fails to give effect to the use of the word "*enforced"*, and treats the '*enforced closure*' peril as if it responds to mere government advice or exhortation;[3]

(d) A further fallacy is that the FCA seeks to conflate something which has the force of law with something which *purports to be mandatory*; see e.g. its reference to occasions when (it is said) "*a UK Government speaks directly to the public to issue mandatory instructions, those instructions are intended to be and, generally speaking are, understood to be compulsory"* (§98 Appellant's Written Case). To extend "*enforced closure"* in this way not only contradicts the clear language of the words, but introduces vagueness and uncertainty into the cover.

IV. CONCLUSION

20 The FCA's appeal in respect of Ground 1 should be rejected because:

1. The Court should uphold RSA's appeal as to the proper construction of the relevant extensions in RSA 3 and RSA 1, thereby rendering Ground 1 of the FCA's appeal irrelevant so far as those policies are concerned;

2. In any event:

   a. A reduction in turnover which occurred prior to the trigger date as result of COVID-19 and the government and public response thereto (which is an uninsured event) can and should be taken into account as a 'trend or circumstance' when calculating the indemnity due to the insured;

[3] Had the parties intended that the cover should respond to mere government advice then they would have used appropriate language, as they did with the 'Prevention of Access – Non Damage' peril **{C/17/1322}**.

b. The FCA's appeal seeks to increase the scope of the contractual promise made by RSA.

21 The FCA's appeal in respect of Ground 2 should be rejected because:

1. The relevant extension in RSA 1 was triggered, if at all, only by the regulations coming into force on 26 March 2020;

2. The "*enforced closure*" peril within RSA 4 was triggered, if at all, only by a closure of the premises under legal compulsion.

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