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

CLAIM NO: FL-2020-000018
Neutral Citation: [2020] EWHC 2448 (Comm)

BETWEEN:

THE FINANCIAL CONDUCT AUTHORITY

Appellant

-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

Respondents

-and-

(1) HISCOX ACTION GROUP

Interveners

ADDITIONAL WRITTEN SUBMISSIONS OF MS AMLIN AND ECCLESIASTICAL ON THE FORM OF DECLARATIONS

INTRODUCTION

1. As regards MS Amlin, there are disputed issues relating to:

   1.1 Certain declarations common to all Insurers: declarations 7A, 10, 10A, 11.1, 11.2 and 11.4.[1] These are mostly concerned with causation.

[1] Insurers' proposed text is shown in blue, and the FCA's in red.

1.2 The FCA's proposed deletion of a declaration specific to the prevention of access clause in MSA 2: declaration 22.3(c).

2. The common declarations are addressed in the joint document produced on behalf of all Insurers. Declaration 22.3(c) is addressed below.

3. As regards Ecclesiastical (being Respondents to the appeal who did not advance submissions on the issues argued before the Court), there is a disputed issue as to the FCA's proposed deletion of declaration 16.3, which specifically affects Ecclesiastical. This is also addressed below.

MS AMLIN

Declaration 22.3(c)

4. This declaration concerns the prevention of access clause in MSA 2[2] - referred to in the declaration as the "AOCA clause". The FCA proposes deleting this declaration. MS Amlin opposes this deletion.

5. The FCA appealed to the Supreme Court in relation to the meaning of "imposed" (i.e. the 'force of law' point) and the meaning of "denial of access" (see Supreme Court Judgment ("**SC J**"), [106]-[107], [156]) in the MSA 2 (AOCA) clause.

6. This was, however, one of the clauses where the Supreme Court held that it was unnecessary to address the 'force of law' issue and the meaning of 'denial of access' separately as the issue was academic, where the court below had held, for "*other reasons*", that the clause does not cover COVID-19 losses and where there was no challenge by the FCA to that decision on appeal: see SC J, [122], [156].

7. In relation to the MSA 2 (AOCA) clause, one of the "*other reasons*" was the conclusion of the Divisional Court on causation: see DC J, [417]-[418], [439]. This conclusion is recorded in declaration 22.3.

[2] The clause is quoted in the Divisional Court Judgment ("**DC J**") at [420].

8. The FCA now proposes deleting declaration 22.3(c). There is no basis for this proposed deletion:

8.1 The SC J does not address or determine any issues of causation arising under the MSA 2 (AOCA) clause. This was precisely because the FCA chose not to appeal the issue. This declaration is, therefore, unaffected by anything in the SC Judgment and must remain.

8.2 This is implicitly accepted by the FCA in not challenging declarations 22.3(a) and (b) which also address issues of causation arising under the MSA 2 (AOCA) clause. It is also notable that the FCA does not propose deleting similar causation declarations in relation to the prevention of access clauses in MSA 1 and 3: see declarations 21.3-21.4, 23.2(c), 23.5.

8.3 The only explanation provided by the FCA for proposing deletion of this declaration is that "*This paragraph is an obiter declaration that does not affect cover under the AOCA clause ("which it cannot").*"[3] This does not, however, provide any justification for the FCA's proposal. The present exercise is intended to reflect the effect of the SC J on the declarations made by the court below by amending those declarations to the extent necessary to reflect the Supreme Court's conclusions. It cannot provide an excuse for revisiting declarations made by the court below which were not appealed and are unaffected by the SC J. If the FCA had wanted to take this point, it should have raised it with the court below at the consequentials hearing in October 2020. It is now too late.

ECCLESIASTICAL

Declaration 16.3

9. Ecclesiastical took no part in the appeal to the Supreme Court (though it was named by the FCA as a respondent to its appeal). It was wholly successful at first instance in relation to an exclusion (see declaration 16.1) and the FCA chose not to appeal the

[3] This quote is taken from *inter partes* correspondence on the form of declarations preceding these written submissions.

Divisional Court's conclusions on any aspect of the prevention of access clauses in the Ecclesiastical policies.

10. In spite of this, the FCA now proposes deleting declaration 16.3 concerning Ecclesiastical. It says the declaration is no longer accurate as the correct date specified therein should be 16 March 2020 and not 23 March 2020.

11. This deletion is opposed by Ecclesiastical for the following reasons:

11.1 Declaration 16.3 was not the subject of an appeal by the FCA.

11.2 The FCA's grounds of appeal in relation to other policies and other clauses do not impact the factual conclusion reached by the Divisional Court and recorded in declaration 16.3. In particular:

(a) The prevention of access clauses in the Ecclesiastical policies provide cover not just for action of Government preventing access to the insured premises, but also for access to or use of the insured premises "*being… hindered by*" any action of Government (see clause at DC J, [354]).

(b) In light of the "*hindered*" language, Ecclesiastical has never taken the position (i) that it was only Government action which was expressed in mandatory terms and/or which had the force of law which would trigger cover; and (ii) that cover would only be triggered by a complete closure of the insured premises (see DC J, [360]-[361], [371]). This is reflected in the Divisional Court's conclusions on this issue: see DC J, [377].

(c) The Supreme Court's conclusions on the FCA's appeals on the 'force of law' point and the meaning of "prevention of access" are, therefore, irrelevant to the Ecclesiastical policies (see SC J, [106]-[124], [146]-[156]).

11.3 Declaration 16.3 reflects the Divisional Court's <u>factual</u> conclusions as to when access to or use of <u>churches and schools</u> was hindered by Government action taken in response to the COVID-19 pandemic. They are unaffected by the SC J. Specifically:

(a) Churches. The SC J does not address churches. The Court has not held, for example, that "prevention" of access to or use of churches occurred on 16 March 2020 (or any earlier than 23 March) such that it would make no sense for "hindrance" to have occurred at the later date of 23 March 2020. By contrast, the Divisional Court considered the factual content of the PM's announcement of 16 March 2020 (see DC J, [361], [371], [377]) and concluded that access to or use of churches was not hindered by that announcement. This factual conclusion remains unaffected by the SC J.[4]

(b) Schools. Again, the SC J does not address the position of schools. The PM's 18 March 2020 instruction to schools to close is referred to at [110(i)], but nothing further is said about when cover for schools would be triggered. The Divisional Court had well in mind the 18 March 2020 instruction. It was relied upon by both parties – see DC J, [360], [371] – with the FCA taking the position that the school closure announced on 18 March took effect on 20 March, and Ecclesiastical advocating instead for 23 March on the basis of a Department of Education press release. The Divisional Court concluded on the evidence that Ecclesiastical was right. This factual conclusion as to when school closure took effect causing hindrance in access to or use of insured premises is again unaffected by the SC Judgment.

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12 FEBRUARY 2021

[4] It is noted that in relation to the Arch GLAA wording, declaration 14.4(e) provides that there was prevention of access to the premises due to the actions or advice of Government for places of worship from 23 March. This is consistent with declaration 16.3.