

IN THE HIGH COURT OF JUSTICE

Claim No: FL-2020-000018

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

COMMERCIAL COURT (QBD)

FINANCIAL LIST

FINANCIAL MARKETS TEST SCHEME

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) MURRAY & EMILY PULMAN T/A THE POSH PARTRIDGE**
- (2) BLUEBERRY ENTERPRISES LIMITED**
- (3) OTHERS INSURED BY QBE UK LIMITED OR AVIVA INSURANCE LIMITED**

The 'HIGA' Interveners

- (1) COMFOMATIC LIMITED**
- (2) 368 OTHERS INSURED BY HISCOX INSURANCE COMPANY LIMITED**

The 'HAG' Interveners

EIGHTH DEFENDANT'S SKELETON ARGUMENT
For Consequential Orders Hearing, 2 October 2020

References in bold in square brackets are to the Bundle for the hearing and are in the form {Bundle N – S/Tab} unless otherwise indicated.

A. Introduction and Issues for the Hearing

1. These are Zurich’s submissions for the hearing in relation to consequential orders on 2 October 2020 (“**the hearing**”). The Court handed down Judgment (“**the Judgment**”) on 15 September 2020 {N/1}. The effect of the Judgment is that Zurich has been successful in its defence of the FCA’s claims.
2. Zurich invites the Court to make declarations which reflect its findings in order to provide the “*maximum clarity possible for policyholders....and their insurers*” which Recital I of the Framework Agreement states is the “*mutual objective*” of all parties to it.

Draft Orders

3. The parties have sought to agree a form of Order for these declarations, but, at the time of writing, have been unable to do so.
4. A draft of the Order sought by insurers is at {N/5}. This was circulated on 29 September 2020 at 20:26 and insurers await the FCA’s comments upon it. The specific declarations which Zurich seeks appear at paragraph 33. The latest draft from the FCA is dated 27 September 2020 (“the FCA’s draft Order”) {N/4}. A comparison of the two can be located at {N/6}.
5. The FCA seeks a much more limited form of Order. Zurich does not consider that this accurately, fully or fairly reflects the terms of the Judgment.

Applications for permission to appeal

6. The FCA, the other insurers (apart from Zurich) and the Second Intervener have made applications for Certificates pursuant to section 12 of the Administration of Justice Act 1969 (“**the AJA**”) in relation to a “leapfrog” appeal to the Supreme Court. It may be that they will also make applications in relation to permission to appeal to the Court of Appeal.

7. In its section 12 application, the FCA has included two points of appeal which potentially affect all insurers who provided “prevention of access” wordings (including, in principle, Zurich 1-2). These are:
 - (1) That prevention of access and hybrid wordings are triggered by actions without force of law (i.e. Government actions beyond the 21 and 26 March Regulations) (point 3(b));
 - (2) That prevention of access and hybrid wordings do not require total closure of the business, and a fundamental change by closure of a part of the business for which the premises is used (such as eat-in or shop-in services) or prohibition on a substantial part of the customer base (such as all children other vulnerable children or than those of key workers [*sic*]) can be sufficient (point 3(c))¹.
8. However, the FCA has not applied for a section 12 Certificate (nor, so far as Zurich is aware, does it seek permission to appeal) in relation to (amongst other things) the Court’s key findings as to the proper meaning of “vicinity” in Zurich 1-2.
9. As a result, even if the FCA were to succeed on any of its proposed points of appeal, the outcome so far as Zurich1-2 are concerned would be substantially the same.
10. In light of the Court’s findings, Zurich has not made an application pursuant to section 12, and does not seek permission to appeal the Judgment at the hearing, but otherwise Zurich reserves all rights in relation to any leapfrog application and/or appeal which might in due course be pursued.
11. The remainder of this Skeleton Argument addresses the declarations which Zurich seeks.

B. Declarations sought by Zurich

12. The declarations made by the Court will be referred to and relied upon by policyholders and insurers. Accordingly, it is essential that they accurately, fairly and fully reflect the findings which the Court has made.

¹ Point 3(a) concerns the application of “trends” clauses. No specific findings have been made as to the application of trends clauses in relation to Zurich 1-2, because the Court found that, in light of its conclusions on coverage, the issue did not arise, see [502] of the Judgment. Accordingly, Zurich does not address it. Point 3(d) does not relate to the Zurich wordings.

13. In Zurich’s respectful submission, its proposed declarations provide an accurate, fair and full reflection of the Judgment.
14. The FCA’s more restrictive proposals do not.
15. The points of contention currently appear to be as follows:
 - (1) The FCA’s draft omits the declaration which appears at paragraph 33.1 of insurers’ draft and which addresses “prevention of access”. This reflects paragraphs [494] – [495] of the Judgment and is necessary to confirm the (limited) circumstances in which such prevention might arise;
 - (2) The FCA’s draft does not include any declaration in respect of the type of “action” which would qualify under the Zurich Wordings. This is addressed by paragraphs 33.2 – 33.3 of insurers’ draft which reflect paragraph [497] of the Judgment;
 - (3) The FCA proposes to include a reference to those businesses which continued to operate a takeaway or online service that was more than *de minimis* within a paragraph which otherwise identifies the businesses to which access was prevented by certain of the Regulations (see paragraph 35.1 of the FCA’s draft). It is respectfully submitted that insurers’ draft provides greater clarity by setting out in separate paragraphs the circumstances in which access was prevented (paragraph 33.4) and the circumstances in which it was not (paragraph 33.5);
 - (4) The FCA opposes the inclusion of declarations to the effect of the declarations set out at 33.6 – 33.7 of insurers’ draft (which concern the meaning of “vicinity” and “*a danger or disturbance in the vicinity*”)². However, they reflect paragraphs [499] – [500] of the Judgment, are an integral part of the Court’s decision, and, to promote certainty and clarity, ought to be reflected in declarations;
 - (5) At 35.4 of its draft, the FCA proposes a declaration that: “*There will be cover if, in a particular case the risk of COVID-19 in the vicinity of the premises, as opposed to the country as a whole, led to qualifying public authority action*”. This declaration is incomplete and therefore inaccurate: the Court found that, having regard to

² The FCA has not commented upon these paragraphs in the draft currently under scrutiny, but it opposed equivalent wordings in earlier drafts.

(amongst other things) the meaning of “vicinity” it was “*highly unlikely*” that such requirements for cover could be demonstrated in any particular case: see, in particular (but not only) paragraph [502] of the Judgment. In light of the Court’s finding, the Court considered that “*the wider issues of causation and counterfactuals, do not arise*” (see also, [502] of the Judgment). Insurers’ draft, at paragraph 33.8, provides a fuller and fairer reflection of this;

- (6) Paragraph 35.3 of the FCA’s draft, and paragraph 33.9 of insurers’ draft both address the fact that none of the matters relied upon by the FCA meet the requirements for cover under Zurich 1-2. It is submitted that, having regard to the tenor of the Judgment as a whole, this is better expressed in the negative, as per insurers’ draft;
- (7) The FCA proposes that there should be a declaration to the effect that the pollution and contamination exclusions in Zurich 1-2 are inapplicable. This was not a declaration which was sought in the FCA’s pleadings, it was not the subject of argument at trial, and it forms no part of the Judgment. Accordingly, it should not be made.

ANDREW RIGNEY QC
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30 September 2020