15 January 2021

PRESS SUMMARY

The Financial Conduct Authority (Appellant) v Arch Insurance (UK) Ltd and others (Respondents)
Hiscox Action Group (Appellant) v Arch Insurance (UK) Ltd and others (Respondents)
Argenta Syndicate Management Ltd (Appellant) v The Financial Conduct Authority and others (Respondents)
Royal & Sun Alliance Insurance Plc (Appellant) v The Financial Conduct Authority and others (Respondents)
MS Amlin Underwriting Ltd (Appellant) v The Financial Conduct Authority and others (Respondents)
Hiscox Insurance Company Ltd (Appellant) v The Financial Conduct Authority and others (Respondents)
QBE UK Ltd (Appellant) v The Financial Conduct Authority and others (Respondents)
Arch Insurance (UK) Ltd (Appellant) v The Financial Conduct Authority and others (Respondents)
[2021] UKSC 1
On appeal from [2020] EWHC 2448 (Comm)

JUSTICES: Lord Reed (President), Lord Hodge (Deputy President), Lord Briggs, Lord Hamblen, Lord Leggatt

BACKGROUND TO THE APPEAL

These appeals clarify whether a variety of insurance policy wordings cover business interruption losses resulting from the COVID-19 pandemic and public health measures taken by UK authorities in response to the pandemic from March 2020.

The proceedings have been brought by the Financial Conduct Authority (the "**FCA**") under the Financial Markets Test Case Scheme (the "**Scheme**") pursuant to an agreement made with eight insurance companies to resolve issues of general importance on which immediately relevant and authoritative English law guidance is needed. As provided for under the Scheme, the case was heard by a court consisting of a High Court judge, Butcher J, sitting with a Court of Appeal judge, Flaux LJ ("the **Court**"). In the proceedings the FCA has represented the interests of policyholders. Two groups of policyholders have also intervened in the proceedings.

The Court considered 21 sample insurance policy wordings. The Court accepted many of the FCA's arguments about the effect of these wordings but the FCA appeals on certain issues on which it did not succeed, as does the Hiscox Action Group (the "**Hiscox Interveners**"). Six insurance companies (the "**Insurers**") appeal against the decision of the Court on other issues and also respond to the FCA's appeal. These are Arch Insurance (UK) Ltd ("**Arch**"), Argenta Syndicate Management Ltd ("**Argenta**"), Hiscox Insurance Company Ltd ("**Hiscox**"), MS Amlin Underwriting Ltd ("**MS Amlin**"), QBE UK Limited ("**QBE**") and Royal & Sun Alliance Insurance Plc ("**RSA**"). Zurich Insurance Plc is also a respondent to the FCA's appeal, but does not separately appeal from the decision of the Court. Because of the importance and urgency of the issues raised, the appeals have

proceeded directly to the Supreme Court under the "leapfrog" procedure, bypassing the Court of Appeal.

The Supreme Court addressed the issues arising on the appeals as follows:

(i) the interpretation of "**disease clauses**" (which cover business interruption losses resulting from any occurrence of a notifiable disease within a specified distance of insured premises) [**48 – 95**];

(ii) the interpretation of "**prevention of access**" clauses (which cover business interruption losses resulting from public authority intervention preventing access to, or the use of, business premises) and "**hybrid clauses**" (which contain both disease and prevention of access elements) [**96 – 159**];

(iii) the question of what causal link must be shown between business interruption losses and the occurrence of a notifiable disease (or other insured peril specified in the relevant policy wording) [**160 – 250**];

(iv) the effect of "**trends clauses**" (which prescribe a standard method of quantifying business interruption losses by comparing the performance of a business to an earlier period of trading) [**251 – 288**];

(v) the significance in quantifying business interruption losses of effects of the pandemic on the business which occurred before the cover was triggered ("**Pre-Trigger Losses**") [**289 – 296**]; and

(vi) in relation to causation and the interpretation of trends clauses, the status of the decision of the Commercial Court in *Orient-Express Hotels Ltd v Assicurazioni Generali SpA (trading as Generali Global Risk)* [2010] EWHC 1186 (Comm) ("***Orient-Express***") [**297 – 312**].

JUDGMENT

Lord Hamblen and Lord Leggatt give the main judgment with which Lord Reed agrees [**1 – 313**]. This substantially allows the FCA's appeal and dismisses the Insurers' appeals. Lord Briggs gives a separate concurring judgment with which Lord Hodge agrees [**314 – 326**].

REASONS FOR THE JUDGMENT

Disease clauses. The Supreme Court considers the wording in an RSA policy ("**RSA 3**") as an exemplar [**54**]. This clause (like many other disease clause wordings) covers business interruption losses resulting from any occurrence of a notifiable disease within a specified geographical radius (typically 25 miles) of the insured premises. The Court interpreted the clause as covering business interruption losses resulting from COVID-19 (which was made a notifiable disease on 5 March 2020) provided there had been an occurrence (meaning at least one case) of the disease within the geographical radius [**64**]. Although they ultimately reach a similar conclusion to the Court about the scope of the cover (because of their analysis of causation – see below), Lord Hamblen and Lord Leggatt do not accept that this is the meaning of the words used [**61**]. They accept the Insurers' arguments that: (i) each case of illness sustained by a person as a result of COVID-19 is a separate "occurrence" [**67 – 69**]; and (ii) the clause only covers business interruption losses resulting from cases of disease which occur within the radius [**71**]. Other disease clause wordings should be interpreted in a similar way [**81 – 94**]. Lord Briggs and Lord Hodge would also have upheld the Court's interpretation of the clause, but otherwise agree with the main judgment.

Prevention of access and hybrid clauses. Prevention of access and hybrid clauses specify a series of requirements which must all be met before the insurer is liable to pay. Some clauses apply only where there are "restrictions imposed" by a public authority following an occurrence of a notifiable disease. The Court held that this requirement is satisfied only by a measure expressed in mandatory terms which has the force of law [**106**]. The Supreme Court rejects this interpretation as too narrow and holds that an instruction given by a public authority may amount to a "restriction imposed" if it

carries the imminent threat of legal compulsion or is in mandatory and clear terms and indicates that compliance is required without recourse to legal powers [**121**]. The Supreme Court does not rule on whether individual measures satisfy this test but indicates that the argument is stronger in relation to some general measures, such as certain instructions in mandatory terms from the Prime Minister [**110, 124**]. The Hiscox wordings provide cover only where business interruption loss is caused by the policyholder's "inability to use" the insured premises. The Court held that this means complete and not merely partial inability to use the premises. The Supreme Court agrees that inability rather than hindrance of use must be established but holds that this requirement may be satisfied where a policyholder is unable to use the premises for a discrete business activity or is unable to use a discrete part of the premises for its business activities [**137**]. The Supreme Court interprets wording requiring "prevention of access" to the premises in a similar manner [**146 – 156**].

Causation. As the majority of the Supreme Court interprets the disease clauses (see above), a key question is whether business interruption losses consequent on public health measures taken in response to COVID-19 were, in law, caused by cases of the disease that occurred within the specified radius of the insured premises [**161**]. The Court found that the relevant measures were taken in response to information about all the cases of COVID-19 in the country as a whole; and the Supreme Court holds, in agreement with the Court, that all the individual cases of COVID-19 which had occurred by the date of any Government measure were equally effective "proximate" causes of that measure (and of the public response to it). It is therefore sufficient for a policyholder to show that at the time of any relevant Government measure there was at least one case of COVID-19 within the geographical area covered by the clause [**212**]. In reaching this conclusion, the Supreme Court rejects the Insurers' arguments: (i) that one event cannot in law be a cause of another unless it can be said that the second event would not have occurred in the absence of ("but for") the first [**177 – 185**]; and (ii) that cases of disease occurring inside and outside the specified radius should be viewed in aggregate, so that the overwhelmingly dominant cause of any Government measure will inevitably have been cases of COVID-19 occurring outside the geographical area covered by the clause [**198 – 200**]. The Supreme Court explains why the "but for" test of causation is sometimes inadequate and that there can be situations (of which the present case is one) where a series of events all cause a result although none of them was individually either necessary or sufficient to cause the result by itself [**182 – 185**]. The Supreme Court rejects the "weighing" approach as unworkable and unreasonable [**202 – 205**]. In relation to the prevention of access and hybrid clauses, the Supreme Court holds that business interruption losses are covered only if they result from all the elements of the risk covered by the clause operating in the required causal sequence. However, the fact that such losses were also caused by other (uninsured) effects of the COVID-19 pandemic does not exclude them from cover under such clauses [**221 – 242**].

Trends clauses. Almost all the policy wordings contain "trends clauses" which provide for business interruption losses to be calculated by adjusting the results of the business in the previous year to take account of trends or other circumstances affecting the business in order to estimate as nearly as possible what results would have been achieved if the insured peril had not occurred. The Supreme Court holds that these clauses should not be construed so as to take away cover provided by the insuring clauses [**264**] and that the trends and circumstances for which the clauses require adjustments to be made do not include circumstances arising out of the same underlying or originating cause as the insured peril (i.e. in the present case effects of the COVID-19 pandemic [**268, 287 – 288**].

Pre-Trigger Losses. The Court, subject to qualifications, permitted adjustments to be made under the trends clauses to reflect a measurable downturn in the turnover of a business due to COVID-19 before the insured peril was triggered [**289**]. The Supreme Court rejects this approach. In accordance with its interpretation of the trends clauses, adjustments should only be made to reflect circumstances affecting the business which are unconnected with COVID-19 [**294**].

Status of Orient-Express. The *Orient-Express* case concerned a claim for business interruption loss arising from hurricane damage to a hotel in New Orleans. The policy contained a trends clause with similar wording to those in the present case. A panel of three arbitrators (who included Mr George Leggatt QC) and subsequently Hamblen J (on an appeal to the Commercial Court) accepted the insurer's argument that the cover did not extend to business interruption losses which would have been sustained anyway as a result of damage to the city of New Orleans even if the hotel itself had not been damaged [**299 – 300**]. The Insurers have relied on this decision to support their arguments on causation of loss and the effect of the trends clauses in the present case. The Supreme Court concludes that the *Orient-Express* case was wrongly decided and should be overruled [**304 – 312**].

References in square brackets are to paragraphs in the judgment.