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

WRITTEN CASE OF THE FIFTH RESPONDENT (MS AMLIN)

INTRODUCTION

1. The FCA appeals on four grounds.[1] Only Grounds 1 to 3 are relevant to MSA[2] (the Fifth Respondent).

   1.1 Ground 1 – the pre-trigger peril point – is relevant only to the disease clauses in MSA1 and 2.[3] MSA adopts the submissions of Arch (the First Respondent) at paras 3-20 and Hiscox (the Fourth Respondent) at paras 120-136 and 142-144 on this issue *mutatis mutandis*. While Arch's and Hiscox's submissions are made in the context of prevention of access and hybrid wordings, the points of principle apply equally in a disease clause context. Specifically: (i) if MSA's appeal on the disease clauses is allowed, Ground 1 simply does not arise; (ii) even if MSA's appeal is dismissed, the FCA cannot succeed on Ground 1 because any 'pre-trigger' downturn in turnover which would have continued in any event was not caused by the insured peril and is, therefore, uninsured.[4]

   1.2 Grounds 2 and 3 – the force of law and total closure points – are said by the FCA to be relevant to the "prevention of access" wordings in MSA1 and 2. In a number of respects identified below, MSA adopts the submissions of Arch, Hiscox and Zurich (the Eighth Respondent) on these grounds. Additional matters, not covered in the submissions of other insurers, are addressed below.

2. FCA Grounds 2 and 3 concern the same two MSA policies considered in MSA's appeal: MSA1 and 2. In addition to the disease clauses addressed in MSA's appellant's case, both these policies contain, as "Additional cover" in the BI section of the policy, prevention of access wordings (see Judgment, [419]-[420] **{C/3/150}**).

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1 See its grounds of appeal **{A/1/18}**.

2 Unless otherwise stated, the same definitions are used in this document as appear in MSA's appellant's case dated 3 November 2020.

3 This is because the Court has determined that there is no cover under the prevention of access wordings in MSA1 to 3. As a result, the causation declarations set out at paragraph 11.4 of the declarations Order dated 2 October 2020 **{C/1/7}**, and which are the subject of Ground 1 of the FCA's appeal, are not concerned with the prevention of access wordings in MSA1 to 3.

4 These points are developed further in the Respondent's written case of the Sixth Respondent (QBE) on Ground 1. MSA also adopts paras 20-22 of those submissions.

2.1 The MSA1 "Action of competent authorities" clause ("**MSA1 Clause 1**") is in the following terms:

> "*We will pay you for:*
>
> ***1. Action of competent authorities***
>
> *loss resulting from interruption or interference with the **business** following action by the police or other competent local, civil or military authority following a danger or disturbance in the vicinity of the **premises** where access will be prevented provided always that there will be no liability under this additional cover for loss resulting from interruption of the business during the first 24 hours of the **indemnity period**.*" **{C/10/566}**

2.2 The MSA2 "Prevention of access – non damage" clause ("**MSA2 Clause 8**") provides as follows:

> "*We will pay you for:*
>
> ***…***
>
> ***8. Prevention of access – non damage***
>
> ***your** financial losses and other items specified in the schedule, resulting solely and directly from an interruption to **your business** caused by an incident within a one mile radius of **your premises** which results in a denial of access or hindrance in access to **your premises** during the **period of insurance**, imposed by any civil or statutory authority or by order of the government or any public authority, for more than 24 hours.*" **{C/11/644, 646}**

3. One preliminary point bears mentioning at the outset. The FCA's appeal in relation to MSA1 Clause 1 and MSA2 Clause 8 is, in reality, academic.

4. MSA was successful on both MSA1 Clause 1 and MSA2 Clause 8 at first instance.[5] The FCA is **not**, however, challenging the Court's key findings in relation to these clauses which led it to conclude that there is no pandemic cover.[6] In particular:

4.1 In relation to MSA1 Clause 1, the FCA does not challenge declarations 21.5 to 21.8 of the 2 October Order **{C/1/17}**, including the Court's conclusions (i) that "*cover*

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5 See paragraphs 21 and 22 of the declarations Order dated 2 October 2020 **{C/1/16-19}**.

6 This is acknowledged by the FCA in relation to MSA2 Clause 8 at [121] of the FCA's appellant's case, but not in respect of MSA1 Clause 1.

afforded under MS Amlin 1 (AOCA Clause) is narrow, localised cover"; and (ii) that "*there is no cover under the MSAmlin1 (AOCA clause) in respect of business interruption losses caused by the action of the government taken in response to the national COVID-19 pandemic.*"[7]

4.2 In relation to MSA2 Clause 8, the FCA does not challenge declarations 22.1-22.2, 22.6-22.7 of the 2 October Order **{C/1/17-19}**, including the Court's conclusions (i) that neither the COVID-19 pandemic nor a person with COVID-19 within the one mile radius constituted an "incident"; (ii) that MSA2 Clause 8 only provides narrow, localised cover; and (iii) that "*there is no cover under the MSAmlin 2 (AOCA clause) in respect of business interruption losses caused by the action of the government taken in response to the national COVID-19 pandemic*".[8]

5. Even if, therefore, the FCA were to succeed on Grounds 2 and 3 of its appeal, that would make no difference to the fact that MSA1 Clause 1 and MSA2 Clause 8 do not provide pandemic cover for COVID-19 losses.

6. Mindful that this is a test case, MSA does not go so far as to say that the FCA's appeal should be dismissed for this reason alone.[9] Nonetheless, in MSA's respectful submission, this Court should be particularly slow to interfere with the judges' conclusions at first instance on Grounds 2 and 3 where doing so would not, in substance, alter the outcome in these proceedings but may impact other wordings and/or other facts which are not before this Court.

GROUND 2: THE FORCE OF LAW POINT

MSA1

7. The Court was correct to conclude that "*action by the* [government]*… where access will be prevented*" in MSA1 Clause 1 "*connotes steps taken by the relevant authority which*

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7 See also Judgment, [436]-[437] **{C/3/155}**.

8 See Judgment, [404]-[407], [417]-[418] **{C/3/146, 149}**.

9 Relying, for example, on ***Sun Life Assurance Company of Canada v Jervis*** [1944] AC 111 at 113-114 *per* Viscount Simon LC **{G/83}**.

have the force of law, since it is only something which has the force of law which will prevent access" (Judgment, [434] **{C/3/154}**). Thus, of the myriad government and other measures relied on by the FCA,[10] it was only the 21 and 26 March Regulations that were capable of preventing access (Judgment, [435] **{C/3/155}**).

8. Contrary to the suggestion at [114]-[115] of the FCA's appellant's case, the Court's construction was not based on the meaning of "*action*" *simpliciter*. MSA accepted,[11] and the Court held in the context of other wordings,[12] that "*action*" could, in principle, encompass government advice or guidance as well as the making of Regulations.

9. MSA1 Clause 1, however, required that the action of the government (which was the relevant "*civil… authority*") had to be action "*where access will be prevented*". Reasonably understood, the only government action (putting aside physical measures by such emanations of the state as the military or security services) that is capable of *preventing* access is mandatory government action having the force of law.[13] The words, "*where access will be prevented*", identify the nature, quality and effect that the action must have in order to qualify as "*action*" within the Clause. It has to be action that, by its intrinsic nature and quality and therefore in its effect, will deny the possibility of access.

10. Nothing said by the government short of legislation – no matter how strongly or by whomsoever expressed – was capable of preventing, or did prevent, access to the insured premises. Advice, instructions, guidance and requests did not need to be

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10 See para 46 of the APoC **{G/1/1-3}**.

11 See [422], [441] of the Judgment **{C/3/151, 156}**.

12 See the broader wording in MSA3 at Judgment, [421] **{C/3/150}** and the Court's conclusion at [441], [443] **{C/3/156, 157}**.

13 For the same reason, the other points made by the FCA at [115] of its appellant's case as to the variety of authorities referred to in MSA1 Clause 1 ("*police or other competent local, civil or military authority*") or the nature of the insured event ("*danger or disturbance*") are unpersuasive. They ignore that it is the effect of the government action specified in MSA1 Clause 1 – action whereby "*access will be prevented*" – which dictates that the government action must be mandatory and, therefore, has the force of law. For the avoidance of doubt, there is no question that each of the types of authorities referred to in MSA1 Clause 1 has the power to prevent access to the insured premises.

complied with and could be ignored without sanction. They could not, therefore, have rendered access impossible.

11. This would be the case even if, contrary to the Court's conclusions and Insurers' submissions on Ground 3, prevention of access is given a broader meaning to encompass partial prevention.[14] Again, there cannot be partial prevention (or more accurately prevention of use of part of an insured's premises) unless the government action is compulsory (i.e. having the force of law) and had to be complied with.

12. This point is not addressed by the FCA in its appellant's written case.

13. Instead, the real thrust of the FCA's case on Ground 2 appears to be that government action can be mandatory even if it does not have the force of law (see, for e.g. [117] of the FCA's appellant's case).[15] This is, however, a contradiction in terms. The FCA's case is unsustainable for a number of reasons.

14. **First**, the FCA's creation of a category of "*mandatory instructions or measures*" falling short of legislation to which MSA1 Clause 1 is said to respond (see e.g. [117] of the FCA's appellant's case) is, with respect, incoherent, amorphous and unworkable.

    14.1 It is impossible to know what falls within this category, and, therefore, would qualify as "*action… where access will be prevented*"; and what falls outside this category and, therefore, would not. For example, if the Prime Minister had said that he was instructing everyone in the country to wash their hands five times every day for 20 seconds each time using soap and water, would that statement amount to "*mandatory instructions or measures*"? Would it make any difference if, when the Prime Minister said it, he was flanked by two scientific advisers? Or if the Prime Minister said it on a train to Liverpool to a journalist? Or if the Prime Minister said it in parliament in answer to a question by the Leader of Her Majesty's Most Loyal Opposition? Or what if the same instruction were given, not by the Prime Minister, but by the Chancellor of the Duchy of Lancaster and Minister for

[14] See the FCA's appellant's case at [102]-[109], [113].

[15] See also the FCA's Reply, para 13.1 **{G/3/8-9}**.

the Cabinet Office in answer to a journalist's question at a Downing Street press conference?

14.2 Even the General and Specific Measures referred to by the FCA at [61]-[62] of its appellant's case as "*instructions*" were frequently referred to as "guidance" or "advice" or "requests".[16] It is therefore entirely unclear why and on what basis such measures have been cherry-picked by the FCA for inclusion as "*mandatory instructions or measures*".

14.3 As for the FCA's suggestion that matters have to be approached by reference to what a "reasonable" person would have understood the government measures to mean, this would introduce yet further uncertainty.[17]

(a) There is no evidence before this court (nor was there at first instance) as to what such a reasonable person would have understood by government action falling short of legislation.

(b) Nor is there any evidence as to whether that purported reasonable person would have complied with the government's non-binding guidance or instructions.[18]

(c) The reality is that different people are likely to have had different views, different reactions and different instincts. None of that, however, can transform something which is not mandatory into something which is.

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16 For example, PHE's "*Keeping away from other people*" document dated 23 March 2020 **{D/6/749}** states "*You should only leave your home if you really need to for one of the reasons listed further down in <u>this guidance</u>*" **{D/6/751}**. In his 22 March 2020 speech, the PM referred to what the FCA has called the "*2-metre instruction*" as "*social distancing advice*". The "*instruction to Category 6 businesses on 24 March 2020*" to close was in fact expressed as "*advice*" and "*guidance*" in the underlying document **{D/6/767}**. As for the alleged "*instruction to schools to close*", the FCA's position contradicts that of the government in ***Dolan v (1) Secretary of State for Health and Social Case and (2) Secretary of State for Education*** [2020] EWHC 1786 (Admin) that it had merely "*requested*" schools to close (see [107]) **{F/24}**. Lewis J agreed holding that "*No order has been made under the Coronavirus Act 2020 to close any school in England. No other power has been identified as having been exercised so as to impose any legal requirement on any school in England to close*" (see [110]).

17 See FCA's appellant's case at [68]-[70], [116].

18 The FCA's assertions to the contrary – e.g. [116] of its appellant's case – are just that, mere assertions.

(d) Such a transformation is achieved only by the law-making process which draws a bright line between that which must be complied with and that which need not be.

14.4 These uncertainties underline that the FCA's approach cannot have been what the parties objectively intended at the time of contracting, when they agreed that MSA1 Clause 1 would only insure government action which will prevent access to the insured premises. All such uncertainties are removed when MSA1 Clause 1 is properly construed as applying only to action by the relevant authority having the force of law.

15. **Secondly**, legislative acts[19] are the only government actions that are mandatory, i.e. that had to be complied with. This is clear from the very fact that the 21 March and 26 March Regulations had to be made in response to the COVID-19 pandemic. On the FCA's case, such Regulations were entirely unnecessary.

16. **Thirdly**, and on the flipside, non-legislative measures are, by their very nature, not compulsory. Contrary to what is said by the FCA,[20] the purpose of such non-binding government guidance or instruction can only be to encourage compliance with what the government advises. It is not to require such compliance – that is only achievable through legislation.

17. **Fourthly**, the FCA's position strikes at the heart of the rule of law on which the UK constitution is based. The FCA appears to contend with all seriousness that the government can prohibit personal freedoms and direct the public and businesses through announcements and guidance, and do so without legislation. Apparently all that is required is that the government expresses itself in mandatory terms.[21] But:

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19 Including, obviously, secondary legislation.

20 See FCA's appellant's case at [67]-[68].

21 See the FCA's appellant's case at [67]-[68], [70]-[71], [116].

17.1 No government statement, instruction, guidance or advice – no matter how peremptorily expressed – can impinge upon the liberty of the subject.[22] In our democracy, citizens are entitled to listen (or not) to what the government says and, if they so choose, dismiss it. Or they can take to heart what the government says and follow the advice scrupulously and to the letter. Which approach they adopt is entirely a matter of personal choice.

17.2 There is simply no basis for the FCA's assertion that "*it is to be expected that, in a healthy democracy… businesses <u>will</u> comply with the instructions of a competent public authority expressed in mandatory terms*" ([116(1)][23] of the FCA's appellant's case; underlining added). Much to the contrary, in a democracy the citizens are <u>not required</u> to comply with the so-called instructions of a so-called competent public authority unless the public authority has and exercises a legal power to issue, and compel compliance with, legally binding instructions.

17.3 The position changes when the UK Government or the UK Parliament legislates, whether by primary or secondary legislation, or (in the case of the government) otherwise exercises some legal power by which members of the public can be compelled to act in a certain way or not to act in a certain way. It is only then that the government or Parliament has a proper legal basis for making anything mandatory and demanding compliance by its citizens.[24]

17.4 This distinction between mandatory and non-mandatory action has been addressed in the context of the government's response to the COVID-19 pandemic.

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22 For the avoidance of doubt, there is no statute in relation to public health and the control of disease (including the Public Health (Control of Disease) Act 1984, the Civil Contingencies Act 2004 or the newly enacted Coronavirus Act 2020) which empowers the government to bind the people in relation to their freedoms (including freedoms of movement) simply by way of public statement, guidance, advice, or request, whether at a press conference or in any other setting. The FCA does not suggest otherwise.

23 See also [70].

24 See ***R (on the application of Miller and another) (Respondents) v. Secretary of State for Exiting the European Union*** [2018] AC 61 at [45] – [46] **{G/74}** (and the citation at [45] of ***The Zamora*** [1916] 2 AC 77, 90 **{G/90}**). The legal principle which the FCA's position ignores is no less fundamental than ***Entick v. Carrington*** (1765) 2 Wils. KB 275; 95 ER 807 at 817 **{G/52}**.

(a) The House of Lords and House of Commons Joint Committee on Human Rights Chair's Briefing Paper dated 8 April 2020 in relation to the 26 March 2020 Regulations included the following passage, at paragraph 6 **{G/115/2218}**:

> "The Regulations put the new measures announced by the Prime Minister on 23 March on a statutory footing, making them legally enforceable from 1pm on Thursday 26 March. **It is important to note that prior to this, there was no legal basis for the announced restrictions on movement and gatherings. We have more general concerns about the recent disconnect between laws that are in force and therefore binding, and "announcements", "directions" or "instructions"[5] from Government which have no legal force, but which are communicated in such a way as to appear binding**. It is crucial that enforcement authorities are clear on the law. Otherwise there are real risks in respect of the rule of law and potentially also Article 7 ECHR (no punishment without law)." (Emphasis added)

Footnote 5 read as follows **{G/115/2218}**:

> "[5] For example, on 10 April the Health Secretary Matt Hancock said at the daily Government press conference: "This advice is not a request – it is an instruction. Stay at home, protect lives and then you will be doing your part."

(b) The foregoing points are reinforced by the article written by Lord Sumption in The Times on 26 March 2020, entitled "*There is a difference between the law and official instructions*" **{G/116}**: see Judgment, [428] **{C/3/152}**. The same point has been made by Lord Sumption in his Cambridge Freshfields Annual Law Lecture, delivered on 27 October 2020, entitled "Government by decree: Covid-19 and the Constitution" **{G/117}**.[25]

18. **Fifthly**, there is nothing uncommercial or unrealistic about "*action*" being construed as action which has the force of law, compliance with which is therefore mandatory.[26]

18.1 Far from being uncommercial or unrealistic, MSA's position respects both

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25 "*Until 26 March the government's statements were not rules, but advice, which every citizen was at liberty to ignore.*" **{G/117/2239}**

26 See FCA's assertions to this effect at [117] of its appellant's case (see also [66] and ff.).

(a) the distinction that the policy wording draws between (i) action which, by virtue of having the force of law and therefore being mandatory, is capable of preventing access, and (ii) action that is not; **and**

(b) the distinction that the law draws between government action which is binding and action which is merely advisory.

18.2 The fact that a business owner may choose to comply with non-binding government guidance or instruction, prior to (or in the absence of) the implementation of legislation, is irrelevant.[27] It does not magically transform non-binding action into that which, by definition, it is not; nor does it alter the fact that, in the absence of legislation, there is no cover under MSA1 Clause 1 because access to the insured's premises has not been prevented. A differently minded restauratrice (for example) may, in response to the same guidance / instruction, have chosen to keep the doors open to dine-in customers. Nothing prevented her from doing so – she could freely ignore the government advice without sanction.

18.3 Several of the FCA's points as to the alleged unrealistic and/or uncommercial nature of the Court's construction assume that there ought to be cover for the pre-legislation period – see for e.g. [71], [117] of the FCA's appellant's case. That assumption has no basis in the words of MSA1 Clause 1. Moreover, it is self-evidently inappropriate to approach the issue of construction with a pre-conceived, hindsight-suffused bias in favour of coverage. Such an approach will not yield the right result (in the sense of the result determined by the true construction of the wording agreed at the time of contracting). If an insured wanted insurance for a public authority's non-mandatory actions in response to a danger or emergency, it ought to have purchased the different cover available in the market.[28]

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27 See FCA's appellant's case at [116(2)].

28 See for e.g. the Arch GLAA extension and the prevention of access wording in MSA3 which both cover non-mandatory government action: Judgment, [308], [310], [421], [443] **{C/3/121, 122, 150, 157}**.

19. MSA also adopts the additional points made by Zurich in its Respondent's written case on Ground 2 at paras 20-23. Zurich's "Action of competent authorities" clause in its Zurich 1-2 policies is materially identical to MSA1 Clause 1.

MSA2

20. MSA2 Clause 8 is materially identical to the Hiscox NDDA clause. In relation to the latter, the Court held that both "*"imposed" and "by order" convey a restriction which is mandatory, not merely advisory, in other words a restriction which has the force of law*" and that, therefore, only the "*restrictions imposed by the 21 and 26 March Regulations qualified*" (see Judgment, [407]-[408] **{C/3/146-147}**). This conclusion was repeated in relation to MSA2 Clause 8 (Judgment, [439] **{C/3/156}**).

21. This conclusion was undoubtedly correct. The FCA's appeal on the meaning of "*imposed*"[29] is without merit. To avoid unnecessary duplication, MSA adopts the submissions of Hiscox on Ground 2 at paras 16-64 (addressed in the context of the similar phrase "*restrictions imposed*" in its hybrid clause), and repeats what is said above in relation to MSA1 Clause 1.

22. Only two further points are made:

    22.1 First, that "*imposed*" connotes something compulsory, having the force of law, is also evident from other uses of the word in MSA2. The Court is referred to the following: see the "Sanction limitation" provision under "Important Information" on page 10;[30] the "Maintenance and reasonable precautions" general condition on page 19;[31] the "Hired or rented premises" cover under the public and products

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[29] The FCA does not challenge the Court's conclusion that "*by order of*" only applies to mandatory government action that has the force of law: FCA's appellant's case at [123].

[30] "*This policy will not provide any insurance cover or benefit and we will not pay any sum if doing so would mean that we are in breach of any sanction, prohibition or restriction imposed by any law or regulation applicable to us*." (Underlining added). **{C/11/608}**

[31] "*comply with all statutory requirements and other safety regulations imposed by any authority*" **{C/11/617}**

liability part of the policy on page 65;[32] and the "Tax protection" cover under the legal expenses part of the policy on page 105.[33]

22.2 Secondly, the attempted distinction that the FCA seeks to draw between the words "*by order*" and "*imposed*" in MSA2 Clause 8[34] is bad. As the Court held, both "*by order*" and "*imposed*" speak with one voice: they require that only action of the relevant authority which is compulsory and has the force of law qualifies. Indeed there is no reason (and none has been identified by the FCA) why the parties should have intended to treat the different types of authorities specified in MSA2 Clause 8 differently, with something less than action which has the force of law sufficing for civil or statutory authorities, but only legislation sufficing for the government or any public authority. That distinction makes even less sense when the clear overlap between the different types of authority is appreciated – for example the government could be a civil or statutory authority, and all the other three identified authorities could fall under "*any public authority*". It cannot have been intended that MSA2 Clause 8 be construed in such an unworkable manner.

GROUND 3: THE TOTAL CLOSURE POINT

MSA1

23. The Court rightly concluded in relation to MSA1 Clause 1 that access to an insured's premises is only prevented where the premises have been totally closed for the purposes of carrying on the insured's pre-existing business: see Judgment, [431]-[433] **{C/3/154}**. The Court's conclusion in this regard was based on its analysis of the meaning of "*prevention of access*" in the Arch 1 GLAA extension.[35] As a result, and to avoid unnecessary duplication, MSA adopts Arch's submissions on Ground 3 at paras 21-38. It

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32 "*liability imposed on **you** solely by reason of the terms of any hiring or renting agreement*" **{C/11/663}**

33 "***We** will not cover any claim arising from or relating to… tax returns which result in HM Revenue and Customs imposing a penalty…*" **{C/11/703}**

34 See FCA's appellant's case at [123].

35 See also FCA's appellant's case at [113].

also adopts the submissions made by Zurich in its Respondent's written case on Ground 3 at paras 5-16.

24. It suffices for present purposes to emphasise one point. Like with the Arch 1 and Zurich 1-2 policies, the MSA1 policy draws a distinction (i) between prevention and hindrance and (ii) between access to the premises and use of the premises. Specifically, MSA1 Clause 7 provides that "***Consequential loss*** *as a result of damage to property near the* ***premises*** *which prevents or hinders the use of the* ***premises*** *or access to them will be deemed to be damage.*" **{C/10/568}** (Underlining added). The FCA's appeal on Ground 3 loses sight of these distinctions – in particular, it wrongly equates prevention of access in MSA1 Clause 1 with prevention or hindrance of use.

MSA2

25. It is not understood why the FCA has included MSA2 Clause 8 in its appeal on Ground 3.

26. The FCA says it has done so because "*the Court construed the phrase "denial of access" in the Hiscox NDDA (and the same interpretation must apply to the identical phrase in MS Amlin 2 AOCA clause) as requiring a complete closure of the insured premises.*"[36]

27. While this may be right so far as it goes, it ignores the fact that unlike the Arch GLAA extension or MSA1 Clause 1, MSA2 Clause 8 (and the Hiscox NDDA clause) provides cover in relation to "*denial of access or hindrance in access to* ***your premises***" (underlining added) **{C/11/646}**.

28. Consequently, the Court did not limit cover under MSA2 Clause 8 to total closure. It also said that there would be a hindrance in access under the Regulations where "*people were only allowed to access the premises for limited purposes, such as to run a takeaway service in a pub or restaurant and to collect the takeaway food or drink from that pub or restaurant… since no-one was allowed to access those parts of the premises which would normally be used for in-house dining or drinking*" (Judgment, [414] **{C/3/148}**).

[36] FCA's appellant's case at [124].

29. The purpose of the FCA's appeal on Ground 3 in relation to MSA2 Clause 8 is, therefore, unclear. MSA's concerns as to the academic nature of the FCA's appeal – see paragraphs 3 to 6 above – are, accordingly, heightened in respect of MSA2 Clause 8.

30. To the extent that it matters, MSA's position is that the Court below was entirely right to conclude as it did on the meaning of "*denial of access or hindrance in access*": see [414]-[416] of the Judgment **{C/3/148-149}**. It will again adopt the submissions of Arch at paras 21-38 as to the meaning of "prevention of access" (which it accepts is materially the same as "*denial of access*"). As with MSA1, it is emphasised that MSA2 is a policy which draws distinctions (i) between prevention and hindrance and (ii) between access to the premises and use of the premises: see MSA2 Clause 7 **{C/11/646}**.

31. A further point is taken by the FCA in relation to MSA2 Clause 8.[37] It is said that the Court was wrong to conclude that "*interruption*" means total cessation of the business: see Judgment, [439] **{C/3/156}**. The FCA says that what is instead required "*is an element of cessation to the business's normal operations.*" [38] The FCA is wrong about this:

    31.1 The FCA's position as to the meaning of "*interruption*" is unclear. It is not at all apparent what is meant by "*an element of cessation to the business's normal operations*".

    31.2 It appears, however, from the examples given at [125] of the FCA's appellant's case that the FCA is merely equating interruption with disruption to or interference with the insured's business.

    31.3 If that is right, it is contrary to the wording of the MSA2 policies, addressed by the Court at [438]-[439] of the Judgment **{C/3/155-156}**. The Court there rightly pointed out that, in the MSA2 policies, "*interruption*" is being used in contradistinction to, and did not therefore encompass, "*interference*" with the business. See, for example, MSA2 Clause 4, Clause 6 and Clause 7**:** these are all

[37] See the FCA's appellant's case at [125].

[38] See the FCA's appellant's case at [125].

prefaced by "***consequential loss*** *as a result of*" or "***consequential loss*** *following*", where "**consequential loss**" is defined as "*loss resulting from interruption of or interference with the* ***business****…*" **{C/11/645-646}**. "Interruption", therefore, obviously means something other or more than interference.

31.4 MSA2 Clause 8 does not refer to "**consequential loss**" and omits reference to "*interference*" **{C/11/646}**. It refers only to "interruption". That can only have been deliberate. It is obvious that "*interruption*" in MSA2 Clause 8 is not mere interference: it means cessation.

31.5 Surprisingly, given that this is the key basis on which the Court reached its conclusion on the meaning of "*interruption*" in MSA2 Clause 8, the Court's reasoning at [438]-[439] **{C/3/155-156}** is not addressed by the FCA in its written case.

31.6 To the extent necessary, MSA will also adopt the submissions of Hiscox as to the meaning of "*interruption*" made in Ground 7 of its appeal in relation to the Hiscox hybrid clauses: see its appellant's case at paragraph 164 and ff.

31.7 As for the FCA's argument that, because the clause envisages the possibility of interruption of business resulting from a hindrance in access to the premises, interruption should not mean complete cessation, that is a *non sequitur*. It is entirely fact sensitive. Hindrance in access by fish suppliers to a fresh fish restaurant which is open only at weekends, meaning a delay in the arrival of any fresh fish until after the weekend, could mean that the restaurant cannot do any business at all on the days when it is open to business. The hindrance in access will have resulted in a complete cessation of business over the weekend in question.

CONCLUSION

32. MSA respectfully submits that the FCA's appeal should be dismissed and that this Court should affirm the declarations made by the Court below accordingly, for the following among other

REASONS

32.1 BECAUSE (Ground 1) the Court rightly held that the continuation of a measurable downturn in the turnover of a business due to COVID-19 before the insured peril was triggered could in principle be taken into account in the counterfactual as a trend or circumstance (under a trends clause or similar) in calculating the indemnity payable in respect of the period during which the insured peril was triggered and remained operative.

32.2 BECAUSE (Ground 2) the Court rightly held that only action which had the force of law could amount to "*action… where access will be prevented*" in MSA1 Clause 1 and a denial or hindrance in access "*imposed by any civil or statutory authority or by order of the government or any public authority*" in MSA2 Clause 8.

32.3 BECAUSE (Ground 3) the Court rightly held that access to an insured's premises is only prevented (in MSA1 Clause 1) or denied (in MSA2 Clause 8) where the premises has been totally closed for the purposes of carrying on the insured's pre-existing business. It also rightly held that there was "*interruption*" in MSA2 Clause 8 only where there was complete cessation of business.

Gavin Kealey Q.C.
Andrew Wales Q.C.
Sushma Ananda
Henry Moore

9 NOVEMBER 2020[39]

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[39] Updated on 10 November 2020 to insert references.