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)

Appeal No. 2020/0177-0178

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 -

HISCOX ACTION GROUP

Intervener / Appellant

WRITTEN CASE OF THE SIXTH RESPONDENT (QBE)

A INTRODUCTION

1. The FCA has raised four Grounds of Appeal.

2. Ground 4 of the FCA's appeal concerns the proper construction of the QBE2-3 disease clauses. QBE resists this ground of appeal, and submits that the Court was correct in its consideration and interpretation of the QBE2-3 disease clauses. Indeed, as set out

in its Appellant's Case, QBE contends that the Court erred in not taking a similar approach to the construction of the QBE1 disease clauses.

3. Ground 1 of the FCA's appeal is also resisted by QBE. It is submitted that the Court was correct in its conclusion that a reduction in turnover caused by COVID-19 prior to the trigger of cover should be taken into account when calculating the indemnity payable in respect of the period during which the insured peril was triggered and remained operative. However, the issue only arises in relation to the QBE disease clauses if, contrary to the submissions below and in QBE's Appellant's Written Case, the Supreme Court dismisses QBE's appeal on QBE1 and allows the FCA's appeal on QBE2 and/or QBE3.

4. Grounds 2 and 3 do not concern clauses within the QBE Wordings.

5. Accordingly, in this Written Case QBE deals first with Ground 4 of FCA's appeal before making very brief submissions in respect of Ground 1 of the FCA's appeal.

B GROUND 4 OF THE FCA'S APPEAL: QBE2-3

B.1 QBE2

The proper construction of the QBE2 disease clauses

6. Other than as regards their territorial scope, the QBE2 and QBE3 disease clauses provide cover in substantially the same terms.

7. Both clauses provide cover for loss resulting from interruption to or interference with the business ("**BI**") in consequence of a series of named events. The only material difference is that, whereas QBE2 covers the consequences of any occurrence of a notifiable disease at or within a radius of 25 miles of the insured premises, the territorial scope of QBE3 is the area within a radius of one mile of the premises.

8. The QBE2 disease clauses provide cover as follows:[1]

> *"3.2.4* ***Infectious disease, murder or suicide, food or drink or poisoning***
>
> *Loss resulting from interruption of or interference with the* ***business*** *in consequence of any of the following events:*
>
> *a) any occurrence of a* ***notifiable disease*** *at the* ***premises*** *or attributable to food or drink supplied from the* ***premises****;*

[1] {C/13/852}.

*b) any discovery of any organism at the **premises** likely to result in the occurrence of a **notifiable disease**;*

*c) any occurrence of a **notifiable disease** within a radius of 25 miles of the **premises**;*

*d) the discovery of vermin or pests at the **premises** which cause restrictions on the use of the **premises** on the order or advice of the competent local authority;*

*e) any accident causing defects in the drains or other sanitary arrangements at the **premises** which causes restrictions on the use of the **premises** on the order or advice of the competent local authority;*

*f) any occurrence of murder or suicide at the **premises**;*

provided that the

*g) **insurer** shall not be liable for any costs incurred in cleaning, repair, replacement, recall or checking of property except as stated below;*

*h) **insurer** shall only be liable for loss arising at those **premises** which are directly subject to the incident;*

*i) **insurer's** maximum liability under this cover extension clause in respect of any one incident shall not exceed GBP100,000 or 15% of the total **sum insured** (or **limit of liability**) for this **insured section B**, whichever is the lesser, any one claim and GBP 250,000 any one **period of insurance**."*

9. By clause 18.67,[2] "*notifiable disease*" is defined as follows:

"Notifiable disease means illness sustained by any person resulting from:

18.67.1 food or drink poisoning, or

18.67.2 any human infectious or human contagious disease, an outbreak of which the competent local authority has stipulated shall be notified to them excluding Acquired Immune Deficiency Syndrome (AIDS), an AIDS related condition or avian influenza".

10. The Court's conclusion that this wording was "*intended to be confined to the results of specific (relatively) local cases*"[3] was the inevitable outcome of an application to the wording of orthodox principles of construction. In summary, under this wording:

[2] {C/13/923}.
[3] Paragraph 231 of the judgment {C/3/103}.

10.1. The BI must be *"in consequence of*" any one or more of the named "*events*". The phrase *"in consequence of"* is habitually deployed to indicate a proximate cause – it is synonymous with *"arising from*" or "*caused by*".[4] The FCA does not appear to contend otherwise.

10.2. In an insurance context "*event*" has a well-established meaning: it means something which happens at a particular time, at a particular place, in a particular way and is to be distinguished from the wider concept of an *"originating cause*" from which one or more relevant events may be seen as having arisen.[5]

10.3. In this respect, the Court correctly observed[6] that the "*Accumulation limit*" wording applicable to other sections of QBE2 (see clause 18.2)[7] indicated that the draftsmen were alive to these distinctions. Irrespective of this, however, when a professionally drawn insurance contract refers to a word the meaning of which has been determined by authority, the probability, all other things being equal, is that the word is intended to have the meaning so explained.[8]

10.4. The presumption that "*event*" is intended to bear its usual meaning and import the usual implications in an insurance setting is strengthened by the cross-reference to "*incident"* or "*any one incident*" in sub-clauses h) and i). The two words are evidently to be treated as synonyms, the inference being therefore, that each of the events named in sub-clauses a) to f) is to be treated as an insured "*incident*" for the purpose of applying policy limits. The 'event' in question, namely the occurrence of a notifiable disease within a specified radius of the insured premises is, therefore, to be distinguished from the remoter origins or causes of the local outbreak.

10.5. Under sub-clause a) of clause 3.2.4 in the QBE2 disease clauses, an 'event' or 'incident' of notifiable disease will give rise to cover only if it occurs at the premises or is attributable to food or drink supplied at the premises and the BI is sustained in consequence.

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4 See *MacGillivray,* 14th Edn (2018) at paragraph 21-004 {E/44/1210}, *Ionides v. The Universal Marine Insurance Company* (1863) 143 ER 445, at 455-6 (*"in consequence of")* {E/20/466-467}, and *Coxe v. Employers' Liability Assurance Company Ltd* [1916] 2 KB 629 at 634-634 ("*caused by*" and "*arising from*") {F/19/318-319}.

5 See *Axa Reinsurance v. Field* [1996] 1 WLR 1026, per Lord Mustill at 1035G {E/8/120}. See also paragraphs 74 to 78 of QBE's Appellant's Written Case {B/8/276-277}.

6 Paragraph 233 of the judgment {C/3/104}.

7 {C/13/912}.

8 See *The "Kleovoulous of Rhodes"* [2003] 1 Lloyd's Rep 138 per Clarke LJ at paragraphs 25 to 28 {G/84/1668-1669}.

10.6. Equally, under sub-clause c) an 'event' or 'incident' of notifiable disease will trigger cover only if it occurs within 25 miles of the premises and the BI is sustained in consequence thereof.

10.7. There is no reason why the geographical limits delineating the scope of the peril insured under sub-clause c) should be treated any differently from those delineating the scope of cover under sub-clause a). The scope of a) is, of course, much narrower than that of c) but the territorial limits perform the same function in both clauses. In both sub-clauses a) and c) the insured event is qualified or limited by the place of its occurrence – the territorial limits are, therefore, intrinsic to the description of the insured peril.

10.8. The words "*occurrence*" and "*event*" are often used interchangeably in an insurance context and, depending on the nature of the occurrence, may bear the same meaning. See, by way of example, *Countrywide Assured Group plc v. Marshall*,[9] in which Morison J held at paragraph 15:

> *"… an event, occurrence or claim is 'something which happens at a particular time, at a particular place in a particular way'… The word 'event', 'occurrence' or 'claim' describes what has happened…"*

10.9. It is no surprise therefore, that each of the occurrences referred to in sub-clauses a), c) and f) have previously been described collectively as "*events*". Accordingly, the wording of the QBE2 disease clauses tells the reader unequivocally that an occurrence of disease within 25 miles of the premises is an event which will trigger cover if it is shown that BI was sustained in consequence thereof.

10.10. It is impossible to regard the 25 mile radius as anything other than the method by which territorial limits are placed on the cover, that is to say, as limiting by reference to a defined area those occurrences of notifiable disease that will be treated as insured events.

10.11. In its Appellant's Written Case the FCA describes the radius limit as an *"adjectival qualification, limiting the class of notifiable diseases which, if they interfere with the business, will lead to coverage."*[10] This is a hopeless contention which ignores two crucial aspects of the wording, namely (a) that under this wording an occurrence of notifiable disease within the designated

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9 [2003] Lloyd's Law Rep 195 at {E/13/208-209}. See also *Kuwait Airways Corporation v Kuwait Insurance Co* [1996] 1 Lloyd's Rep 664 per Rix J at 685 to 686 {E/26/861-862}.

10 Paragraph 138 of the FCA's Appellant's Written Case {B/2/72}.

territory is itself the event, that is to say it is one of the named perils qualifying for cover; and (b) it is that event which must cause the BI if the cover is to respond (not some occurrence of disease elsewhere).

10.12. Further, the Court's construction of sub-clause c) recognises that each of the named perils concerns events occurring at or attributable to something happening at the premises or, in the case of sub-clause c), limited to events occurring within 25 miles of the premises. These are all events physically linked to the premises or occurring within their locality. To construe sub-clause c) as responding to the consequences of notifiable disease occurring anywhere in the UK, provided only that there is at least one occurrence within the designated locality, would be to create cover out of all proportion to its contractual context and with a disproportionate potential for accumulation of loss.

10.13. The FCA's reading would also require the re-drafting of the wording. Clause 3.2.4 does **not** include as one of the insured events "an occurrence of a notifiable disease in the United Kingdom[11] provided that there is one such occurrence within a radius of 25 miles of the premises".

Other clauses within QBE2

11. The Court's construction needs no support from other parts of the policy but there are, nevertheless, other indicators in the QBE2 wording which suggest that the Court was right.

12. Clause 3.2.5 b)[12] covers the costs of removal and disposal of contaminated stock in trade when the use of the premises has been restricted on the order or advice of the competent local authority solely in consequence of "*an incident*" as defined in clause 3.2.4. Such wording contemplates a response by the competent local authority to the *"incidents"* insured under clause 3.2.4. The effect is to reinforce the focus on local events and the local response. The reference to "*event*" in clause 3.2.5 c) again shows that the words 'event' and 'incident' are used interchangeably.

[11] The QBE2 general territorial limit is the United Kingdom (clause 18.111) {C/13/929}. The specified radius establishes a specific territorial limit as regards the peril described in 3.2.4 c) {C/13/852}).

[12] {C/13/853}.

13. Clause 18.47.2 provides that the "*Indemnity period*" for the purpose of clause 3.2.4:[13]

> *"... shall mean the period during which the results of the* ***business*** *shall be affected in consequence of the an* [sic] *event beginning in the case of:*
>
> *3.2.4 a) and d) with the occurrence or discovery of the incident,*
>
> *3.2.4 b) and c) above with the date from which the restrictions on the* ***premises*** *are applied,*
>
> *and ending not later than twelve (12) months thereafter."*

14. No one disputes that clause 18.47.2 is ineptly drafted, but it seems that one mistake in the drafting is to use the date of restrictions as the commencement of the indemnity period in the case of perils b) and c) when it is only the perils insured under d) and e) that necessarily involve restrictions. The *"occurrence or discovery of the incident"* appears to have been mistakenly identified as the beginning of the indemnity period for a) and d) but makes sense only if applied to a) to c), and f), those being the perils that do not include a reference to restrictions but do include references to an *"occurrence"* or *"discovery"*. But be that as it may, the reference once again to 'incidents' underlines the nature of the events insured under clause 3.2.4.

15. Finally, the FCA maintains[14] that the potential length of the indemnity period (12 months) suggests that the parties contemplated a long-lasting epidemic or pandemic: "*it contemplates that the covered disease might lead to interruption or interference of a whole year, which points to cover for severe and widespread outbreaks*." This is a false point which confuses the duration of the disease (i.e. the insured event) with the duration of its financial impact on the business. A peril insured under clause 3.2.4 might be short in duration but long in its impact on the financial fortunes of the business. This is inherent in the often 'long-tail' nature of BI cover; an insured peril might occur in only a matter of seconds (as with a murder on the insured premises or damage to property, etc.) but result in long-term interruption or interference to the insured's business (e.g. due to reputational harm). The potential length of the indemnity period is entirely neutral.

Nature of the 'occurrence' contemplated by sub-clauses (a) and (c)

16. The Court correctly observed in light of the definition of notifiable disease in QBE2, that while the sustaining of illness from a notifiable disease by a person within the radius could amount to an occurrence within the meaning of the disease clauses, the

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13 {C/13/920}.

14 Paragraph 147 of the FCA's Appellant's Written Case {B/2/75}.

wording of clause 3.2.4 refers to occurrences in the nature of events; and such occurrences could only be relevant in so far as they were capable of giving rise to interference with the business.[15] As the Court also explained, it is difficult to conceive of an occurrence having the necessary causative potential while the instance of disease remains asymptomatic or undiagnosed.[16] The QBE2 disease clauses are, accordingly, an example of the words "*occurrence*" and "*event*" being used interchangeably. The occurrences contemplated by clause 3.2.4 are events capable of causing interference with the business.

Other points made by the FCA

17. The extensions to the core BI cover set out in clause 3.2.4 would be a surprising place in which to find insurance directed to covering a pandemic. It is a fallacy to describe the cover afforded by clause 3.2.4 as "*illusory*"[17] simply because it responds, as the FCA would have it, unsatisfactorily in the current, wholly unprecedented circumstances. However, once the QBE2 disease clause is interpreted, not with hindsight, but from the viewpoint of a reasonable person in the position of the contracting parties when they contracted, it becomes clear that this cover was aimed at affording protection against the consequences of local events, including the impact on the insured business of notifiable disease breaking out in or within a designated distance of the premises. There is no justification for describing such cover as illusory.

18. It is also fallacious to infer from the relatively generous ambit of the radius, that the insurer intended to provide (or the policyholder to pay for) cover for the consequences of an unpredictable, potentially widespread disease occurring outside the designated area. In fact the inference is the opposite – if the parties at the time of contracting did contemplate the possibility of a widespread disease with the potential for unpredictable patterns of transmission, the fact that they agreed a special territorial limit suggests that the underwriter did not accept the risk of exposure to disease at large i.e. occurring anywhere in the UK outside the designated perimeter.

B.2 QBE3

19. The QBE3 disease clause is in substantially the same terms as the QBE2 disease clauses.[18] QBE3 therefore repeats its submissions at paragraph 10 above. The

[15] Paragraph 234 of the judgment {C/3/104}.
[16] Paragraph 234 of the judgment {C/3/104}.
[17] As the FCA does in paragraph 134 of its Appellant's Written Case {B/2/71}.
[18] The QBE3 disease clause does not contain a sub-clause in the terms of sub-clause i) of the QBE2 disease clauses limiting liability in respect of any one 'incident'. However, sub-clause ii) of the QBE3 disease clause {C/14/956} is in

significant difference between the disease clause in QBE3 and the disease clauses in QBE2 is that in QBE3 the cover provided under sub-clause c) is *"an occurrence of a notifiable disease within a radius of one (1) mile"*.[19] As the Court correctly found,[20] the smaller radius reinforces the view that cover was provided by the QBE3 disease clause for *"specific and localised events".* To construe QBE3 as responding to the consequences of notifiable disease occurring anywhere in the UK, provided only that there is at least one occurrence within the one mile radius, is even less logical, and even more counter-intuitive, than the equivalent reading of QBE2.

C. GROUND 1 OF THE FCA'S APPEAL: THE PRE-TRIGGER PERIL POINT

20. If QBE succeeds on its appeal and successfully resists the FCA's appeal on the proper construction of the QBE disease clauses, Ground 1 will be of no relevance.

21. However, in the event the Supreme Court concludes, contrary to QBE's case, that the QBE disease clauses provide cover for BI caused by the manifestation or occurrence of notifiable disease anywhere in the UK provided that there is one such manifestation or occurrence within the relevant policy area, QBE supports the Court's conclusion that a reduction in turnover caused by COVID-19 prior to the trigger of cover (i.e. prior to the first manifestation or occurrence of the disease within the designated perimeter) should be taken into account when adjusting a claim.

22. In those circumstances, the insured peril will only be 'complete' and cover will only be triggered upon the first manifestation(s) or occurrence(s) of COVID-19 in the relevant policy area. 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 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.

23. On this issue QBE adopts *mutatis mutandis* the submissions of Arch.

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[19] identical terms to sub-clause h) in the QBE2 disease clauses which cross refers to 'incident' {C/13/852}. The submissions made in paragraph 10.4 apply to QBE3 but by reference only to sub-clause ii) of QBE3 only {C/14/956}. {C/14/955}.

[20] Paragraph 237 of the judgment {C/3/104-105}.

D. CONCLUSION

24. In summary, Grounds 1 and 4 of the FCA's appeal should be dismissed for the following reasons:

    24.1. The Court was correct in its findings on the QBE2-3 disease clauses, which, properly construed in their correct contractual context, provide cover only for BI loss caused by occurrences of notifiable disease within the designated policy area; and

    24.2. The Court was also correct to find that 'pre-trigger' effects of notifiable disease on the insured business should be taken into account when quantifying the amount of any indemnity due to the policyholder.

25. QBE makes no comment on Grounds 2 and 3 which do not concern the QBE1-3 disease clauses.

9 November 2020

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