

IN THE SUPREME COURT OF THE UNITED KINGDOM

Neutral Citation: [2021]UKSC 1

BETWEEN:

- (1) ARCH INSURANCE (UK) LIMITED
(2) ARGENTA SYNDICATE MANAGEMENT LIMITED
(3) HISCOX INSURANCE COMPANY LIMITED
(4) MS AMLIN UNDERWRITING LIMITED
(5) QBE UK LIMITED
(6) ROYAL & SUN ALLIANCE INSURANCE PLC

Appellants

-and-

THE FINANCIAL CONDUCT AUTHORITY

Respondent

-and-

HISCOX ACTION GROUP

Intervener

**SUBMISSIONS ON DECLARATIONS
OF ROYAL & SUN ALLIANCE INSURANCE PLC (“RSA”)**

References to the hearing bundle are in the form {Bundle/Tab/Page}

References to the Supreme Court judgment are in the form of [J/Paragraph].

- 1 The draft declarations are in two sections.
- 2 Declarations 1 to 13 comprise declarations which affect two or more insurers. In relation to these declarations, RSA adopts the joint submissions of Arch, Argenta, Hiscox, MS Amlin, QBE and RSA.
- 3 Declarations 14 to 33 are specific to individual insurers with declarations 27 to 32 relating to RSA. There is a dispute between RSA and the FCA in three areas which are addressed in these submissions:
 - (a) Declarations 27.3 and 27.4: the meaning of “*closure or restrictions placed on the premises*” in RSA1;
 - (b) Declaration 30.2: the geographical ambit of cover in the RSA4 Disease Clause; and
 - (c) Declaration 31.3: the meaning of “*enforced closure*” in the RSA4 Enforced Closure Clause.

Declarations 27.3 and 27.4

- 4 RSA 1 is a wording designed for the owners of holiday cottages and provides cover in respect of “*loss as a result of closure or restrictions placed on the Premises as a result of a notifiable human disease manifesting itself at the Premises or within a radius of 25 miles of the Premises*”.
- 5 It was common ground that the requirement for “*closure or restrictions placed on the Premises*” was satisfied by Regulation 5(3) of the 26 March Regulations which required providers of holiday accommodation to cease business. What was not common ground was whether cover could be triggered by an earlier event and, if so, which event.

6 The FCA argued that cover was triggered on an earlier date by reference to:

(a) General Measures which comprised [J/109]:

“(i) The “stay at home instruction” to stop all unnecessary travel and social contact, to work from home and avoid social venues, initially made by the Prime Minister in his announcements of 16 March 2020 and 18 March 2020, then contained in the document published by PHE on 23 March 2020 called “Keeping away from other people: new rules to follow from 23 March 2020” (see para 26 above), before being given statutory force by regulation 6 of the 26 March Regulations;

(ii) The “2 metre instruction” to stay more than two metres from others, initially contained in guidance dated 16 March 2020 and repeated subsequently, for example in the Prime Minister’s announcement on 22 March 2020 and PHE’s “Keeping away from other people” document; and

(iii) The prohibition against gatherings initially contained in guidance dated 16 March 2020 and repeated by the Prime Minister in his announcement on that day, repeated by PHE’s “Keeping away from other people” document, and given statutory force by regulation 7 of the 26 March Regulations”; and

(b) Specific Measures which comprised [J/110]:

“(i) The instruction to schools to close given by the Prime Minister on 18 March 2020;

ii) *The instruction to Category 1 and Category 2 businesses to close given by the Prime Minister on 20 March 2020; and*

iii) *The instruction to Category 6 businesses on 24 March 2020 that they “should now take steps to close for commercial use as quickly as is safely possible.”*

7 The Court left open “*for agreement or further argument*” whether any of the General or Specific Measures could constitute “*restrictions imposed*” [J/124]. RSA and the FCA have not been able to reach agreement and therefore respectfully ask the Court to determine:

(a) For the purposes of Declaration 27.3, which measures could comprise “*closure or restrictions placed on the Premises*”; and

(b) For the purposes of Declaration 27.4, and as a consequence of the finding on Declaration 27.3, the earliest date upon which such cover could have been triggered.

8 So far as the Specific Measures are concerned, in view of the findings made by the Court,¹ it is common ground that Specific Measure (iii) (the only relevant Specific Measure for RSA 1) constituted a “*restriction imposed*” for the purposes of RSA 1.

9 So far as the General Measures are concerned:

(a) The FCA’s position is that each of the General Measures constituted a “*restriction imposed*” such that cover could be triggered from 16 March 2020; and

(b) RSA’s position is that cover could only be triggered from 24 March 2020. This is because:

¹ [J/116,117 & 120]

- (i) None of the General Measures falls within the Court’s indication of what could constitute a “*restriction imposed*”; and
- (ii) Even if any General Measure did constitute a “*restriction imposed*”, it would not comprise a “*restriction placed on the premises*” as required by the RSA 1 wording .

10 Although the Court declined to make a final determination, it summarized its view in the following terms: “*we consider that an instruction given by a public authority may amount to a “restriction imposed” if, from the terms and context of the instruction, compliance with it is required, and would reasonably be understood to be required, without the need for recourse to legal powers. This is likely to arise only in situations of emergency, as in the present case. Such an instruction would need not only to be in mandatory terms, but also in clear enough terms to enable the addressee to know with reasonable certainty what compliance requires*” [J/121].

11 As set out in paragraph 6(a) above, the FCA characterized a number of announcements by the Prime Minister, or a publication by PHE, as comprising “*restrictions*” imposed because they contained one or more of the following: a “*stay at home instruction*”, a “*2 metre instruction*” and/or a “*prohibition on gatherings*”. RSA addresses, chronologically, each of the General Measures in the context of the view expressed by the Court:

- (a) 16 March 2020: “Guidance on social distancing for everyone in the UK and protecting older people and vulnerable adults”². The document starts (with added emphasis): “*This guidance is for everyone. It advises on social distancing measures we should all be taking...*”. This does not comprise an instruction in mandatory

² Summarised at {C/43/1876}. The text of the announcement is at {D/6/596}.

terms. For it to do so it would need to have given instructions rather than advising and stated that compliance was mandatory (“*must*”) rather than optional/advised (“*should*”).

- (b) 16 March 2020: Prime Minister’s announcement.³ The language used was in advisory rather than mandatory terms: “*we need to ask you*”, “*if possible you should not go out*” and “*we will no longer be supporting mass gatherings*”. Further, there was no reference to these requests being enshrined in law if they were not adhered to.
- (c) 18 March 2020: Prime Minister’s announcement⁴. Some of this guidance was couched in mandatory terms. However, that was the guidance relating to self-isolation and/or household isolation in the context of symptoms. Other aspects were expressed in terms likely to be interpreted as encouragement rather than anything stronger,⁵ especially in the absence of any direction that pubs, restaurants or theatres etc were to close.
- (d) 22 March 2020: Prime Minister’s announcement⁶. In this announcement he thanked people who had not visited their mother on Mother’s Day for their restraint, thereby indicating that the previous announcements were advisory and not mandatory. Further, he urged people to “*follow the advice*” relating to “*the social distancing advice*”. Yet again, therefore, mandatory language was not used and there was no mention of legal measures to enforce the advice.

³ Summarised at {C/43/1876}. The text of the announcement is at {D/6/612}.

⁴ Summarised at {C/43/1884}. The text of the announcement is at {D/6/688}.

⁵ The language used included (with added emphasis) that “*...everyone – must follow the advice*” and “*avoid all unnecessary gatherings*”.

⁶ Summarised at {C/43/1889}. The text of the announcement is at {D/6/731}.

(e) 23 March 2020: Publication by Public Health England entitled “*Keeping away from other people: new rules to follow from 23 March 2020*”.⁷ It is accepted that the language used in this document appears to be in mandatory terms in that it states that “*From 23 March there are 3 important new rules everyone must follow to stop coronavirus spreading*”. However, on closer analysis it is apparent that the “rules” are in fact guidance, alternatively are not in clear enough terms to enable the addressee to know with reasonable certainty what compliance requires, because:

- (i) The “stay at home” instruction was designated “Rule 1”. However, whilst it is right that the guidance stated “*you must stay at home*” it was then left to the individual to decide if they “*really need to*” leave for one of the specified reasons;
- (ii) The “2 metre instruction” was not a stand-alone rule but was an adjunct to Rule 1 in that, if you did have to leave home, it stated “*you must stay at least 3 steps (2 metres) away from other people*”. As guidance (even strong guidance) this makes sense but in practical terms it could not be mandatory not least because one person cannot (or cannot always) stop another coming within 2 metres of them even if they do not wish them to; and
- (iii) The prohibition on gatherings was designated Rule 3. It stated that people “*must*” not meet in a group of more than 2 in public places unless they lived together or their job meant they had to. Again, it was left to the reader to decide whether their job meant they had to gather.

⁷ Summarised at {C/43/1890}. The text of the announcement is at {D/6/749}.

- 12 Further, RSA 1 requires that the “*restrictions*” be “*placed on the premises*”. None of the General Measures satisfy this requirement. They are all restrictions placed upon people which might impact upon their use of holiday cottages but, unlike Special Measure (iii), they do not comprise a restriction upon the premises themselves.
- 13 In addition to the above, an issue has arisen between the parties as to how the Court’s findings in relation to General/Specific Measures should be expressed in the declarations. The FCA seek the declaration of what is included to be on a “non-exhaustive” basis and for no declaration to be included as to what is not included. By contrast, RSA seeks declarations setting out specifically what is and is not included. The FCA’s proposed wording gives rise to the unsatisfactory possibility that matters rejected by the Supreme Court as being “*closure or restrictions placed on the premises*” could subsequently be reintroduced or sought to be reintroduced. Given this possibility, it is plainly desirable (in the interests of achieving the maximum clarity and certainty in the market) that when clarifying what is included the Supreme Court also identifies what is not included.
- 14 Accordingly, RSA seeks:
- (a) at 27.3, a declaration that only Specific Measure (iii) can comprise a “*closure or restrictions placed on the Premises*” for the purposes of RSA 1; and
 - (b) at 27.3A, a declaration that the General Measures did not comprise a “*closure or restrictions placed on the Premises*” for the purposes of RSA 1; and
 - (c) at 27.4 (and as a consequence of declarations 27.3 and 27.3A) a declaration that 24 March 2020 is the first date upon which the policy could be triggered.

Declaration 30.2

15 Declaration 30.2 provides: “*There is cover for losses caused by interruption of or interference with the insured business as a result of COVID-19 (including the governmental reaction thereto pleaded at APoC sub-paragraphs 18.9, 18.14, 18.15(d), 18.16 to 18.24 and 18.26 and the public reaction thereto) occurring in England and Wales*”. RSA seeks the inclusion of the underlined words, while the FCA seeks their exclusion.

16 The Disease Clause in RSA 4 provides:

*“In the event of interruption or interference to the **Insured’s Business** as a result of:...*

*viii. **Notifiable Diseases & Other Incidents:***

...

*d. occurring within the **Vicinity of an Insured Location,**
during the **Period of Insurance**...*

...

*within the **Territorial Limits**, the **Insurer** agrees to pay the **Insured** the resulting **Business Interruption Loss.**”*

17 The cover is therefore limited geographically in two ways. First, by reference to “the Vicinity” and, second, by the “Territorial Limits”. The Court below found that “the Vicinity” in RSA 4 was a reference to England and Wales.⁸ Given this finding (which was not challenged on appeal), these words should be reflected in the declaration. If they were removed then it would wrongly create the impression that there is cover for occurrences of COVID-19 outside England and Wales.

18 To the extent to which the FCA maintains any objection to the inclusion of these words, it is understood that it will do so on the basis that “*The Supreme Court reasoning provides*

⁸ Divisional Court Judgment paragraph 140.

cover for losses concurrently caused by other consequences of the underlying fortuity COVID-19 ...". The FCA's formulation is inapt to give effect to such reasoning and is therefore wrong:

- (a) The FCA's formulation conflates (1) the availability of cover for losses caused by COVID-19 within England and Wales which were also concurrently caused by COVID-19 elsewhere with (2) the existence of cover for losses caused by COVID-19 elsewhere;
- (b) By way of example, if a manufacturing facility in England suffered interruption to its business caused not by COVID-19 in England and Wales but because an Italian customer cancelled an order due to COVID-19 in Italy, it should be common ground that the resultant losses would not be covered. However, the FCA's formulation of the declaration would suggest otherwise;
- (c) Where losses are concurrently caused by *both* COVID-19 within England and Wales (which is covered) *and also* COVID-19 elsewhere (which is not covered), RSA's formulation of the proposed declaration would correctly record the position and not prevent recovery under the terms of the policy.

Declaration 31.3

19 RSA 4 (Enforced Closure Clause) provided cover for "*any other enforced closure of an Insured Location by any governmental authority or agency or a competent local authority for health reasons or concerns*". This clause is not, therefore, concerned with "restrictions".

20 Having declined to make findings in respect of the other policies, the Court did say that it agreed with the Divisional Court's conclusion in relation to RSA 4 that "*an "enforced*

closure of an Insured Location” would not include “advice or exhortations, or social distancing and stay at home instructions” (para 303)” [J/124].

21 Given this, and for the reasons set out above in relation to RSA 1, it is submitted that:

- (a) Declaration 31.3(a) to (c) should not have the additional wording sought by the FCA included at the end; and
- (b) Declaration 31.3A should be included, to identify what does not fall within the ambit of RSA 4 (Enforced Closure Clause).

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12 February 2021

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