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)

BETWEEN:

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

Appellants

-and-

THE FINANCIAL CONDUCT AUTHORITY

Respondent

(1) HOSPITALITY INSURANCE GROUP ACTION
(2) HISCOX ACTION GROUP

Interveners

APPLICATION FOR PERMISSION TO APPEAL
OF THE FIRST APPELLANT (ARCH)

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1. This document is certain information about the decision being appealed required by page 5 of Form 1 on behalf of Arch Insurance (UK) Limited (**"Arch"**). This document sets out:

   (1) The relevant orders in the Court below.

   (2) The issues before the Court appealed from.

   (3) The treatment of the issues by the Court appealed from.

   (4) The grounds of appeal; and

(5) The reasons why permission should be granted.

2. As the Court will be aware, Arch is filing its application for permission to appeal with five other insurers (collectively, "the Appellants").

3. Accompanying the Appellants' applications for permission to appeal is a document (separate from this one) which sets out, on a common basis, the following information:

(1) A narrative of the facts.

(2) The statutory framework; and

(3) A chronology of the proceedings.

4. It is suggested that the common document concerning the above three matters on behalf of all Appellants be read before this document, which sets out those matters specific to Arch.

5. Arch's application for permission to appeal is made pursuant to section 13(1) of the Administration of Justice Act 1969 and the order of Flaux LJ and Butcher J dated 2 October 2020, which certified that Arch's proposed grounds of appeal (substantially as set out in Appendix 1 hereto) are suitable for a direct ('leapfrog') appeal to the Supreme Court.

F. RELEVANT ORDERS MADE IN THE COURTS BELOW

6. The order made by Flaux LJ and Butcher J dated 2 October 2020 (**"the Order"**) contains declarations reflecting the conclusions reached by the Court in the Judgment.

7. The declarations relevant to the claim against Arch are contained in paragraphs 9, 11 and 14 of the Order.

8. The declaration at paragraph 9 states:

> The UK Government is a government, governmental authority or agency, public authority, competent public authority, civil authority, competent civil authority, competent local authority and/or statutory authority within the

different wording to this effect in Wordings (Arch1, Ecclesiastical1.1-1.2, Hiscox1-4, MSAmlin1-3, RSA2.1-2.2, RSA4, Zurich1-2).

9. The declaration at paragraph 11.2(b) makes it clear that, for the purposes of the Arch1 wording, "*[t]he correct counterfactual when calculating an indemnity is to assume that … after the date on which cover under the policy is triggered there was no prevention [of access]… no government action and no emergency [i.e. COVID-19]*".

10. The declaration at paragraph 14.1 repeats the declaration at paragraph 11.2(b) above and also sets out at paragraph 14.2 that from 3 March 2020 there was an emergency likely to endanger life.

11. The declaration at 14.3 provides that certain matters set out in the Amended Particulars of Claim (i.e. at sub-paragraphs 18.4, 18.6-18.7 (second and third sentences), 18.9-18.10, 18.14-18.24, and 18.26) were actions or advice of government.

12. At paragraph 14.4 it was declared that there was prevention of access to the premises due to the actions or advice of a government due to an emergency which was likely to endanger life (the COVID-19 outbreak):

    (a) For those businesses which were required to close the premises by the 21 March or 26 March Regulations;

    (b) For Category 1 businesses which closed in response to the 20 March statement, 21 March or 26 March Regulations, save where the business continued to operate a takeaway service constituting more than a de minimis part of its pre-existing business which it continued to operate;

    (c) For Category 2 businesses which closed in response to the 20 March statement, 21 March or 26 March Regulations;

    (d) For Category 4 businesses which closed completely pursuant to Regulation 5 of the 26 March Regulations (this being a question of fact in the case of Category 4 businesses which did not close completely pursuant to that Regulation); and

(e) For Category 7 businesses which closed in response to the 23 March statement.

13. At paragraph 14.5 it was declared that there was no prevention of access to the premises due to the actions or advice of a government due to an emergency which was likely to endanger life (the COVID-19 outbreak):

(a) For Category 3 and Category 5 businesses; and

(b) As a result of the advice, instructions and regulations as to social-distancing, self-isolation, lockdown and restricted travel and activities, 'staying-at-home' and home-working given on 16 March 2020 and on many occasions subsequently (including Regulation 6 of the 26 March Regulations and as set out in paragraphs 18.9, 18.14, 18.15(b), 18.16 to 18.24, and 18.26 of the Amended Particulars of Claim.

G. ISSUES BEFORE THE COURT APPEALED FROM

14. The policy wording written by Arch is found in three Arch Policies (the "Arch Policies"):

(1) the Arch OGI Commercial Combined Policy ("Arch CC");

(2) the OGI Retailers Policy ("Arch Retailers"); and

(3) (3) the Powerplace (Offices & Surgeries) Policy ("Arch Offices & Surgeries").

15. The key provisions of the Arch Policies are materially the same and are referred to in the Judgment as the "Arch wording".

16. The GLAA Extension in Arch CC provides:

> *"We will also indemnify You in respect of reduction in Turnover and increase in cost of working as insured under this Section resulting from…*
>
> ***Government or Local Authority Action***
>
> *Prevention of access to The Premises due to the actions or advice of a government or local authority due to an emergency which is likely to endanger life or property.*

We will not indemnify You in respect of

(1) any incident lasting less than 12 hours

(2) any period other than the actual period when the access to The Premises was prevented

(3) a Notifiable Human Infectious or Contagious Disease as defined in the current relevant legislation occurring at The Premises

The maximum We will pay under this Clause is £25,000, or the Business Interruption Sum Insured or limit shown in the Schedule, whichever is the lower, in respect of the total of all losses occurring during the Period of Insurance."

17. Materially identical provisions appear at Clause 8 in Arch Retailers and Arch Offices & Surgeries.

18. This GLAA Extension is an example of what the Court referred to in its Judgment as a 'Prevention of Access' clause (as distinct from 'disease clauses' or 'hybrid clauses').

19. The indemnity under the GLAA Extension is capped by an aggregate limit of £25,000 or the Business Interruption Sum Insured or limit shown in the Schedule (whichever is lower). In the case of Arch CC, the indemnity is in respect of "reduction in Turnover and increase in cost of working *as insured under this section* resulting from … the prevention of access to the Premises" (emphasis added).

20. In Arch CC, there is also a 'trends clause' (referred to also as 'trends language') to be found under the definition of Standard Turnover, as follows:

"Rate of Gross Profit and Standard Turnover may be adjusted to reflect any trends or circumstances which (i) affect The Business before or after the Damage (ii) would have affected The Business had the Damage not occurred.

The adjusted figures will represent, as near as possible, the results which would have been achieved during the same period had the Damage not occurred."

21. There are similar clauses in Arch Retailers and Arch Offices & Surgeries and it is common ground between the parties that these have the same effect.

22. The following matters were common ground as between the FCA and Arch at trial (see Judgment at §310):

    (1) that Covid-19 is an "emergency … likely to endanger life";

    (2) that the Government advice of 20 and 23 March and 21 and 26 March Regulations were the "actions or advice of…government" within the meaning of the wording;

    (3) that where the effect of the actions or advice of government was that businesses had to close completely or cease carrying on the insured business, there was a prevention of access;

    (4) that the effect of the Prime Minister's announcement on 23 March was that there was a prevention of access to the premises of businesses in Category 4 (non-essential shops) and Category 7 (schools and places of worship) if they closed pursuant to the advice.

    (5) that the 'trends' clause in Arch 1 applies to claims under the GLAA Extension, i.e. the word "Damage" must have been intended to relate to non-Damage situations covered by the Extensions (see Judgment §341).

23. The principal issues before the Court, insofar as they related to the claim against Arch and the Arch wording, were as follows:

    (1) Whether a prevention of access is limited to situations where a business is ordered to close completely (as contended by Arch) or whether it also arises where the government actions or advice allows all or part of the premises to remain open (as contended by the FCA). This issue was resolved by the Court in Arch's favour.

    (2) Whether (as contended by the FCA) all policyholders experienced a prevention of access to their premises due to the actions or advice of the government from 16 March 2020, by reason of the government advice,

instructions and/or announcements as to social distancing, self-isolation, lockdown and restricted travel and activities, staying at home and home-working. This issue was also resolved by the Court in Arch's favour.

(3) Whether all policyholders in Categories 1, 4, 6 and 7[1] (and not only those which were ordered to close completely, as contended by Arch) experienced a prevention of access to the premises due to the actions or advice of the government. This issue was also resolved in Arch's favour.

(4) Where premises were required to be closed by government action or advice due to the Covid-19 pandemic, whether the correct counterfactual scenario (for the purposes of quantifying losses) should assume the absence of Covid-19 in the UK and absence of a public and governmental response thereto; and

(5) The true meaning and effect of the trends clause and in particular what should and should not be considered as part of the counterfactual assessment required to assess what would the performance of the business have been had the premises not been required to close.

H. TREATMENT OF ISSUES BY THE COURT APPEALED FROM

24. The Judgment ([2020] EWHC 2448 (Comm)) includes the following passages, which are relevant to the FCA's claim against Arch:

(1) At §309, the Court accepted that the insured risk is not the "emergency."

(2) As to coverage, at §330, the Court held that "there was only a prevention of access to the premises within the meaning of the GLAA Extension where the government actions or advice required or recommended complete, not partial, closure of the premises. Anything short of complete closure will not constitute prevention of access."

(3) At §§331-336, the Court set out the implications of its construction of the GLAA Extension in respect of each Category of business. As to Category 1 businesses (pubs, cafes, restaurants), the Court held at §331 "where those businesses closed completely in response to the 20 March advice or the 21

[1] The categories of business are set out at §53 of the Judgment and summarised below herein.

March Regulations, there was a qualifying prevention of access from the moment of closure. If the business then set up a takeaway service which it had not carried on before, there was still a qualifying prevention of access, since that takeaway business was fundamentally different from the Business described in the policy schedule. However, if the business had an existing takeaway service which it continued to operate from the premises, then … there was no prevention of access, save possibly… where the existing takeaway service was a *de minimis* part of the Business, which will depend on an analysis of the particular facts".

(4) As to Category 2 businesses (leisure, cinemas, theatres), the Court held at §332, that where those businesses closed completely in response to the 20 March advice or the 21 March Regulations, there was a qualifying prevention of access from the moment of closure.

(5) As to Category 3 businesses (essential shops and businesses such as food retailers and pharmacies), the Court held at §333 that they were permitted to carry on business by Regulation 5 and there was therefore no qualifying prevention of access.

(6) As to Category 4 (non-essential shops and businesses), under Regulation 5 of the 26 March Regulations those shops and businesses had to cease trading and close their premises save for the purpose of making deliveries in response to orders received online, by telephone or by post (§334). Where a business in this category closed completely pursuant to Regulation 5, there was a qualifying prevention of access from the moment of closure. In other cases, "the question of whether coverage is triggered is fact sensitive".

(7) As to Category 5 businesses (e.g. lawyers, accountants, construction) those businesses were not ordered to close and permitted to remain open. There was not a prevention of access in relation to those businesses (§335).

(8) There were no Arch policyholders in Category 6 (holiday accommodation) and only two in Category 7 (religious/educational). Arch accepted that in the case of places of worship, if the place of worship closed in response to the 23 March advice, there was a qualifying prevention of access. In relation to

nurseries and educational establishments, they were permitted to remain open for the education and care of vulnerable children or the children of critical workers, so there cannot have been any prevention of access in relation to nurseries and schools which did remain open (§336).

25. As to the 'trends clause' in the Arch wording, the FCA accepted and the Court held at §341 that this applies to claims under the Extensions, such as the GLAA Extensions and that by the word "Damage", the parties must have intended that the quantification machinery wording be adapted to the non-Damage situations covered by the Extensions.

26. The Court proceeded to substitute for the word "Damage" in the trends provision the "composite peril" which the Court had identified. Based on its finding as to what the insured peril was, the Court held that the trends clause "as manipulated" read as follows (at §346, with emphasis added):

> "*Rate of Gross Profit and Standard Turnover may be adjusted to reflect any trends or circumstances which*
> (i) *affect The Business before or after the Prevention of access to The Premises due to the actions or advice of government due to an emergency which is likely to endanger life…*
> (ii) *would have affected The Business had the Prevention of access to The Premises due to the actions or advice of government due to an emergency which is likely to endanger life not occurred.*
> *The adjusted figures will represent, as near as possible, the results which would have been achieved during the same period had the Prevention of access to The Premises due to the actions or advice of government due to an emergency which is likely to endanger life not occurred*."

27. The Court then held at §347 that upon the true construction of the Arch trends clause: "the comparison required for the assessment or adjustment of the business interruption loss is between the performance of the business as a consequence of the prevention of access to the premises due to the actions or advice of the government due to the emergency and what the performance would have been had there been no emergency and thus no government actions or advice and no prevention of access to the premises. Of course, other trends of the business which would have operated had the insured peril not occurred will be taken into account."

28. On a matter concerning all Appellants, the Court held that the decision in *Orient-Express Hotels Ltd v Assicurazioni Generali SpA* [2010] Lloyd's Rep. I.R. 531 ("*Orient-Express*") should not be followed as it was distinguishable from the present case (§529) but stated that it was also the Court's view that it was wrongly decided (§529).

I. ARCH'S PROPOSED GROUNDS OF APPEAL

29. Arch's proposed grounds of appeal are set out in **Appendix 1** hereto. They concern the Court's conclusions as to the applicable rules of causation which apply, generally and by reason of the trends clause, where the GLAA Extension has been triggered by a qualifying prevention of access.

30. As noted above, on 2 October 2020, the Court granted a 'leapfrog' certificate to, *inter alios*, Arch (pursuant to section 12(1) and (3A) of the Administration of Justice Act 1969), on the basis that its proposed grounds of appeal (substantially in the form set out in Appendix 1) raise points of law of general public importance and satisfy each of the three 'alternative conditions' set out in section 12(3A) of the 1969 Act.

31. In addition, the Court granted Arch permission to appeal to the Court of Appeal on those grounds (if required).

J. REASONS WHY PERMISSION TO APPEAL SHOULD BE GRANTED

32. Each of Arch's proposed grounds of appeal (in Appendix 1) raises a point of law of general public importance. Flaux LJ and Butcher J accepted this when they granted a 'leapfrog' certificate to Arch on 2 October 2020.

33. Arch's grounds of appeal concern whether the Court was right to conclude that the Covid-19 pandemic and the government responses thereto form part of the insured peril in the Arch wording (the 'composite peril', to use the Court's description), even though they were not insured perils, and whether the Court was right to conclude that the counterfactual, and the trends clause, required an assumption not just that the premises had not been required to close, but also that there had been no government action and no Covid-19.

34. Arch contends that the Court's construction of the insured peril, and conclusion as to the effect of the trends clause, were incorrect, that there was no basis for distinguishing the analysis of the Tribunal and of the Court in *Orient-Express*, and that the analysis in *Orient-Express* was correct and reflects orthodox principles of causation.

35. These are points of law of general public importance because they affect thousands of Arch (and other) policyholders in terms of both coverage and quantification of any losses, in addition to thousands of other policyholders who have purchased cover provided by other insurers. The same issue applies to numerous other policy wordings in this test case, including RSA 3.

36. Those policy wordings were selected by the FCA for inclusion in this test case specifically because they are representative of many other policy wordings in the market. Moreover, the Court's decision as to the construction of the insured peril in these policies raises broader issues that will affect most other (if not all) types of business interruption insurance. This is a matter of general public importance; as noted above, it directly affects thousands of policyholders and has important implications for general principles of causation in the context of insurance law.

K. EXPEDITION

37. It is common ground between all parties to these proceedings that any appeal should be heard on an expedited basis as a result of the exceptional public importance and urgency of this case. This is addressed in the Appellant's joint document.

16 October 2020

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Appendix 1: **Arch's proposed grounds of appeal**

Ground 1

1. The Court erred in holding that the insured peril in the GLAA Extension in the Arch wording was a "composite peril" which included (1) the prevention of access; (2) the action of government and (3) the emergency or incident.

2. Neither the actions or advice, nor the emergency, are insured perils under the Policy. They serve to identify the only circumstances in which insurers have agreed that losses caused by a prevention of access to the Premises are to be covered by the GLAA Extension. The Court erred by incorrectly identifying those circumstances, which are not themselves insured perils, as being part of a "composite peril" (a hitherto unknown concept in insurance law). The Court's treatment of the qualifying causes of the prevention of access as (in effect) insured perils, in the event that premises are required to close, is novel and unprincipled.

3. The Court was, therefore, wrong in holding at §347 that the comparison required for the assessment of the business interruption loss, of a business which was required to close by the relevant government actions or advice, was with what the performance of that business would have been had there been no emergency and thus no government actions or advice and no prevention of access to the premises. The correct counterfactual, to reflect what it was that Arch agreed to indemnify, was to assume only that the premises had not been required to close.

4. The Court engaged in impermissible "reverse engineering" in §348. The correct exercise consists of applying the contract in accordance with the parties' intentions as objectively expressed. There is no lack of commercial or practical reality in Arch's position that the correct counterfactual is to assume only that the premises had not been required to close. Many businesses whose premises were not required to close suffered a reduction in turnover (compared to earlier years) because of the emergency, Regulation 6 of the 26 March 2020 Regulations, social distancing rules and guidelines, etc. (see §369). Many businesses whose premises were required to close but which reopened when the rules changed in June 2020 suffered reduced turnover in

subsequent months (compared to previous years) because of the continuing emergency, social distancing rules, reduced consumer confidence etc. (see §344).

Ground 2

5. Having held (correctly) that the emergency was not an insured peril under the Arch wording and that social distancing advice and Regulation 6 of the 26 March 2020 Regulations did not prevent access to insured premises, the Court was wrong to hold that where insured premises were required to be closed, the losses which could be recovered would include losses which the policyholder would have suffered in any event, ie if it had remained open, by reason of the emergency and by the social distancing advice and Regulation 6, none of which were insured perils.

6. An insurer is not obliged to hold the insured harmless against losses which it would have suffered in any event if the insured peril had not occurred: see *Endurance Corporate Capital v Sartex Quilts* [2020] EWCA Civ 308 at [35] and [36]. The general object of an award of damages for breach of contract is to put the claimant in the same position so far as money can do it as if the breach had not occurred (at [36]). At the very least therefore, the emergency, social distancing advice and Regulation 6 need to be clearly delineated from the insured peril (or even some sort of "composite peril") and accordingly are not to be reversed-out of any counterfactual.

Ground 3

7. The Court's erroneous construction of the insured peril led the Court to misconstrue or misapply the Arch trends clause.

8. The Court's conclusion as to the effect of the Arch trends clause at §347 commences with a non sequitur ("It follows that…"). The Court's conclusion in §347 does not follow from the manipulated language set out in §346. The language of the Arch trends clause, as manipulated, does not require any assumption that there is no emergency and no government action or advice taken in response.

9. Having recognised that the emergency was not an insured peril, and having held that Regulation 6 and social distancing advice did not in themselves prevent access to premises, the Court erred in reading the trends language as requiring an assumption

that there was no emergency and no government action or advice. The Court should have held that the trends clause, when applied to a business whose premises had been required to close by government action or advice, required loss to be calculated by reference to what the position would have been if the premises had not been required to close, with everything else remaining equal. It is the Court's counterfactual, not Arch's, which is unrealistic (no emergency, no government action or advice) as well as contrary to the parties' bargain.

10. The FCA's proposed appeal seeks to challenge §351 of the Judgment and Declaration 11.4(c). On Arch's case, the final sentence of §351 is correct, because the Arch trends clause requires loss to be calculated by reference to what the position would have been if the premises had not been required to close. A measurable downturn in turnover, as a result of the pandemic, before the business was required to close by government action or advice, is a trend which the Arch trends clause requires to be taken into account. In particular, it is evidence that the business would have continued to suffer a loss of turnover if, contrary to the fact, it had not been required to close its premises.

11. The Court's reasoning at §351 (reflected in Declaration 11.4(c)) means that one does not completely reverse out the emergency and the government actions and advice in calculating the indemnity once the "composite peril" has operated, notwithstanding the Court's conclusion at §347. The position is anomalous. The FCA's proposed appeal suggests that §351 final sentence is incorrect. Arch's case is that the Court's conclusion in the final sentence of §351, and the Court's treatment of the example at §389, are in principle correct, indicating that it is the Court's reasoning leading to the conclusion in §347 which is incorrect.

Ground 4

12. The Court's concept of a "composite peril" and misconstruction or misapplication of the trends clauses meant that the Court felt able to distinguish the decision in *Orient-Express* (see §§504 and 529). The Court held in any event that the reasoning of the tribunal, and of the Court, in that case should not be followed and that the case was wrongly decided (§529).

13. The Court erred in at least the following respects:

(1) The reasoning of the tribunal (correctly described as "distinguished" at §509) and of the Court in *Orient-Express*, both as to the requirement of but for causation generally and as a result of the language of the trends clause, was directly applicable and correct as a matter of principle.

(2) The Court was wrong to conclude that the tribunal, and the Court, in *Orient-Express* had incorrectly identified the relevant peril (see §523). The relevant peril was not the hurricane. The hurricane was not "an integral part of the insured peril" (a concept which seems similar to the Court's notion of a "composite peril"). The relevant peril was the occurrence of accidental damage to the hotel. See §504. The Policy did not insure all business interruption losses suffered by the policyholder and caused by the hurricane. The Court, and the tribunal, in *Orient-Express* were right to identify the relevant insured peril as the damage and not as, or including, the cause of the damage.

(3) If (as it clearly does in the case of the Arch trends clause) the trends language compels the conclusion that but for causation is required, then the Court's duty is to give effect to the parties' bargain (cf §526).