Appeal Nos. 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

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) HOSPITALITY INSURANCE GROUP ACTION]

[Intervener]

(2) HISCOX ACTION GROUP

Intervener/Appellant

WRITTEN CASE OF THE EIGHTH RESPONDENT (ZURICH INSURANCE PLC)

References in bold in brackets are to the Bundle for the hearing and are in the form ***{Bundle/Tab/Page}*** *unless otherwise indicated.*

A. Introduction

1. This is the Written Case of the Eighth Respondent ("**Zurich**") in response to the appeal brought by the Financial Conduct Authority (the "**FCA**").[1] Only two of the FCA's Grounds of Appeal concern Zurich, namely Grounds 2 and 3 (the force of law and total closure points).

2. The Zurich wordings which are the subject of these proceedings ("**Zurich 1 and 2**", together, the "**Zurich Wordings"**) are "prevention of access" type wordings. They are in materially similar form in each of the Zurich policies, as follows:[2]

> ***"Action of competent authorities***
> *Action by the police or other competent local, civil or military authority following a danger or disturbance in the vicinity of the* ***premises*** *whereby access thereto will be prevented provided there will be no liability under this section of this extension for loss resulting from interruption of the* ***business*** *during the first 3 hours of the* ***indemnity period****…"*

3. The Court below (the "**Court**") found that this wording (known as the "**AOCA Extension**") did not respond to the Government measures introduced in response to the COVID-19 national pandemic. It provided "*narrow localised cover intended to cover dangers occurring in the locality of the insured's premises, of which the paradigm example is a bomb scare*", and not a "*continuing countrywide state of affairs"*.[3] More particularly, the Court found that:[4]

   (1) Access to premises was only prevented where premises had been totally closed for the purposes of carrying on the insured's pre-existing business;

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[1] Except where otherwise stated, the same abbreviations and definitions used in the judgment of the Court below (the "**Judgment**") are adopted in this Written Case.

[2] The Zurich 2 Wording: see **{C/19/1448}**; quoted in the Judgment at §479 **{C/3/165}**. The Zurich 1 Wording is at **{C/19/1448}**.

[3] §499-500 Judgment **{C/3/169}**

[4] Judgment §494-502 **{C/3/168-169}**; and Declarations at §9 **{C/1/6}** and §33.1-33.10 of the Order of the Commercial Court dated 16 October 2020 (the "**Order**") **{C/1/25-27}**.

(2) In the context of the AOCA Extension, the word "*action*" connotes steps taken by the competent authority which have the force of law (the only such action in the present case being the imposition of the 21 and 26 March Regulations);

(3) The word "*following*" connotes (as the FCA accepted) a causal connection;

(4) The word "*vicinity*" connotes "*an immediacy of location*", and the phrase "*a danger or disturbance in the vicinity of the Premises*" contemplates "*an incident specific to the locality of the premises rather than a continuing, countrywide state of affairs*";

(5) It followed that "*the government action in imposing the Regulations in response to the national pandemic cannot be said to be following a danger in the vicinity, in the sense of in the neighbourhood, of the insured premises*".

4. The FCA only appeals the Court's conclusions as to the meaning of "*prevention of access*" and "*action*" (paragraphs 3(1) and 3(2) above). It does not challenge the Court's findings as to the meaning of "*following*", "*vicinity*" or "*danger or disturbance*". Its appeal will therefore not affect the result of the FCA's claim against Zurich.

B. Submissions on the FCA's Appeal

Ground 3: "Prevention of Access"

5. The Court found 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.[5]

6. The Court was correct, for the reasons it gave.

7. The Zurich AOCA Extension is clear and unambiguous. It means what it says: the qualifying action by a competent authority must have prevented access to the insured's premises. If it has not prevented access, there is no cover.

8. This reflects the paradigm situation contemplated by the AOCA Extension: namely, where access to the premises is perceived to be dangerous (such as a bomb scare, a nearby fire or a violent disturbance in the vicinity) or where access is prohibited for

[5] §495 Judgment **{C/3/168}**; §33.1 of the Order **{C/1/26}**

some other reason (such as police investigations following a road traffic accident). As *Riley on Business Interruption Insurance* 10th edition at §10.34 explains, AOCA extensions of this kind arose out of terrorist activity in the UK in the 1980s and 1990s which involved devices that did not explode, not just those that did, so that traditional business interruption cover contingent on property damage did not respond.[6] Such cases give rise to the prevention of access to premises.

9. Many of these paradigm situations involve the erection of a police cordon. As the Court correctly found, such a cordon has the force of law: individuals other than those permitted to go through a cordon, such as emergency workers, would break the law if they went through a cordon.[7] They would be obstructing a constable in the execution of his duty, contrary to s.89 of the Police Act 1996;[8] they would be liable to be held on remand for breach of the peace at common law; and if the cordon had been erected for the purposes of a terrorism investigation, they could be detained for committing an offence contrary to s.36(2) of the Terrorism Act 2000.[9]

10. "*Prevention*" is an ordinary English word, defined by the Shorter Oxford English Dictionary as meaning:

> "*the action of **stopping** something from happening or **making impossible** an anticipated event or intended act*" (emphasis added).[10]

11. Preventing certain people using the premises may amount to a restriction in the use of premises, or hindrance in the use of or access to premises, but it does not amount to prevention of access to the premises. The Zurich Wordings do not contemplate "*partial*" prevention of access (being a contradiction in terms) or prevention only in respect of certain people. Zurich relies on the submissions made by Arch at §26 of its Written Case in response to the FCA's appeal ("**Arch's Case**").

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6 §489 Judgment **{C/3/167}**; *Riley* §10.34 at {**G/114/2215**}.
7 §434 Judgment **{C/3/154}**.
8 {**G/38/301-302**}.
9 **{G/39/305}**. Cordons erected by other emergency responders also have the force of law: for example, s.44 of the Fire and Rescue Services Act 2004 empowers a fire and rescue service to close highways and restrict access to premises. See further Zurich's Skeleton Argument for trial, at §88-89 **{G/15/140-143}**.
10 **{G/129/2373}**. In contrast to this, the shorter OED defines "*hindrance*" as "*an obstruction, an obstacle, an impediment"* **{G/126/2370}**.

12. The Court was right to draw and focus on a distinction between the terms "*prevention*" of access and "*hindrance*" of access or of use, which is a distinction that is found in each of the Zurich policies, and notably within:

    (1) The Prevention of Access ("**POA**") Extension, which requires damage to property in the vicinity of the premises which "*prevent[s] or hinder[s] the use of the Premises or access thereto*";[11] and

    (2) The Notifiable Diseases Extension, which requires "*restrictions on the use of the Premises*".[12]

13. The Zurich policies therefore draw a clear distinction between:

    (1) "*access to*" the premises (in the AOCA Extension) and "*use of*" the Premises (in the POA and Notifiable Diseases Extensions); and

    (2) Access to the premises being "*prevented*" (in the AOCA Extension) and use of the premises being "*hinder[ed]*" or subject to "*restrictions*" (in the POA and Notifiable Diseases Extensions).

14. If "*prevention*" and "*hindrance*" are elided, the clear differences between these insuring provisions have no meaning.

15. The analysis of the Court, which adopted impossibility as "*the touchstone of prevention*", gives effect to this distinction. It is also supported by authority, notably, *Tennants (Lancashire) Ltd v CS Wilson & Co Ltd* [1917] AC 495, per Lord Atkinson at 518,[13] and *Westfalische Central-Genossenschaft GmbH v Seabright Chemicals Limited* (22 July 1980) (unreported)), to which the Court, properly, had regard.[14] The Court was (rightly) "*unimpressed*" with the FCA's argument, repeated at §106 of its Written Case on its appeal, that those authorities should be limited to their particular commercial context.[15]

[11] Zurich 1 at **{C/18/1405}**; Zurich 2 at **{C/19/1450}**.
[12] Zurich 1 at **{C/18/1406}**; Zurich 2 at **{C/19/1449}**.
[13] {**G/87/1779**}.
[14] §325 Judgment **{C/3/126}**; **{G/94/1924**}.
[15] §325 Judgment {**C/3/126}**; FCA Written Case §106 {**B/2/64-65**}.

16. The fact that there is a reference to "*interference*" in the stem to the BI extensions in the Zurich Policies does not mean that "*partial*" prevention of access can trigger cover.[16] Such general words do not alter the specific words of the individual insuring provisions that follow. The AOCA Extension itself refers only to "*interruption*" to the business. It is other Extensions, not the AOCA Extension, which provide cover for an "*interference*" as opposed to an "*interruption*" (to the extent they are different): for example, the POA Extension[17] which is triggered by, *inter alia*, hindrance in the use of premises, and the Notifiable Diseases Extension[18] which is triggered by, *inter alia*, restrictions on the use of premises.

17. In addition, Zurich relies on the submissions made by Arch at §32 to 38 of Arch's Case. Like Arch, Category 5 businesses are significant for Zurich, accounting for 84% of all Zurich policyholders (§477 Judgment).[19]

Ground 2: "Action"

18. The Court found that in the context of the AOCA Extension, the word "*action*" connotes "*steps taken by the relevant authority which have the force of law, since it is only something which has the force of law which can prevent access*" and that "*if it had been intended to encompass advice in this clause, the parties could and would have said so expressly, as they did in the disease clause*". Accordingly, the only qualifying Government "*action*" under this clause was "*the imposition of the 21 and 26 March Regulations and any subsequent Regulations or legislation with the force of law*".[20]

19. The Court was correct, for the reasons it gave. The Court reached the same conclusion (for the same reasons) as to the meaning of "*action*" in MSA1 Clause 1, which is in very similar terms.[21] With a view to avoiding unnecessary duplication, Zurich adopts MS Amlin's submissions on Ground 2, in addition to the limited specific points below.

20. The narrow meaning of "*action*" in the context of the AOCA Extension is made plain when it is read within the Zurich policies as a whole. The AOCA Extension does not refer to "*advice*", in contrast to the phrase "*order or advice of the competent local*

[16] Zurich 1 at **{C/18/1404}**; Zurich 2 at **{C/19/1448}**.
[17] Zurich 1 at **{C/18/1405}**; Zurich 2 at **{C/19/1450}**.
[18] Zurich 1 at **{C/18/1406}**; Zurich 2 at **{C/19/1449}**.
[19] §477 Judgment **{C/3/164}**.
[20] §497 Judgment **{C/3/168}**.
[21] §497 Judgment **{C/3/168}**.

authority" which is the trigger for cover under the Notifiable Diseases Extension (in both of the Zurich policies).[22] The draftsman's choice of words should be taken to be deliberate. If the parties had intended cover to attach to guidance or advice, they could readily have said so. They did not.

21. Action does not (by definition) prevent access to premises where the insured has the option of complying. The word "*action*" should therefore be taken only to encompass measures which are compulsory, i.e. have the force of law.

22. This construction promotes commercial certainty. It identifies with clarity both what kind of measures taken by a competent authority qualify to trigger cover under the clause and when such cover is triggered. The FCA's contention that "*action*" encompasses instructions and measures that are not enforceable by law would be a recipe for uncertainty and dispute. Whether cover is triggered should not be dependent on the exercise by an insured of a choice as to whether to comply with non-binding instructions, guidance or advice. The position may be different where the parties expressly stipulate for such cover, but they did not do so in the case of the Zurich Wordings.

23. The FCA posits a somewhat fanciful scenario at §70 footnote 86 of its Case as to what might be the result if a public authority restriction with the force of law was subsequently found to be ultra vires.[23] In that scenario, if the action at the time had the force of law and prevented access, the clause would be triggered not because of how the action was "*felt*" or "*presented*", but because it had legal effect at the time it prevented access to the insured's premises. Public authority action is presumed to be valid unless and until declared ultra vires; in the interim it remains "*effective for its ostensible purpose*".[24] On the Court's approach, the AOCA Extension requires a straightforward factual analysis of whether action by a competent authority having the force of law has prevented access to premises. Contrary to the FCA's argument, this is neither unrealistic nor uncommercial.

C. Conclusions

[22] Zurich 1 at **{C/18/1406}**; Zurich 2 at **{C/19/1449}** and see §497 Judgment **{C/3/168}**.
[23] {**B/2/54**}.
[24] *Hoffmann La Roche & Co v Trade Secretary of State for Trade and Industry* [1975] AC 295 at 366G, Lord Diplock (citing *Smith v East Elloe Rural District Council* [1956] AC 735 at 769-770, Lord Radcliffe) {**G/56/690**}.

24. For all of these reasons, Grounds 2 and 3 of the FCA's appeal should be dismissed and the Judgment upheld. In summary:

(1) In respect of Ground 2, the Court rightly held that "*action*" will only be "*action ... whereby access thereto shall be prevented*" if such action has the force of law;[25] and

(2) In respect of Ground 3, the Court rightly held 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.[26]

ANDREW RIGNEY QC **CRAIG ORR QC**

CAROLINE MCCOLGAN **MICHELLE MENASHY**

Crown Office Chambers **One Essex Court**

9 November 2020

[25] §33.2 of the Order **{C/1/26}**.
[26] §33.1 of the Order **{C/1/26}**.