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FCA SUPREME COURT APPEAL: DAY ONE

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The first two days of the hearing addressed the submissions from the insurers who are seeking to appeal the judgements passed down by the High Court.

QBE

The first submission was from QBE, represented by Michael Crane QC. Mr Crane submitted an appeal regarding the policy wording known as 'QBE1', whilst also responding to the FCA appeal in respect of the policy wordings known as 'QBE2' and 'QBE3'.

For the sake of maximising the time available, QBE advised that they would adopt the arguments submitted by Mr Kealey on behalf of MS Amlin with respect to 'but for' causation issues.

Furthermore, QBE advised that they would adopt the arguments submitted by Mr Lockey on behalf of Arch with respect to 'pre-trigger' losses.

Mr Crane commenced by setting out the various terms within the QBE1 policy, emphasising that, in his view, the specific limits on the territorial scope of the risk are intrinsic to the definition of the insured peril. This is important for all QBE policies, as the High Court took the view (as elaborated by Mr Crane) that:

> *"Once the insured peril is correctly identified, and that is purely a matter of policy construction, causation largely answers itself and once you have identified the insured peril, you know what it is that has to be removed or reversed out for the purpose of the hypothesis demanded by the policy disease trends clauses."*

In short, if you treat the catchment radius within which COVID-19 must manifest itself as intrinsic to the insured peril, then one must remove this geographical area when considering the 'but for' test – ie. 'But for' the disease within the 25-mile radius, would the business still have experienced closure and/or reduction in turnover?

Mr Crane sought to link the conditions relating to coverage manifesting 'at the premises' and 'manifesting within 25 miles of the premises'. In his view, the FCA have accepted that any claim that draws on the coverage for disease manifesting itself at the premises must be circumscribed by the boundary limits of those premises. As such, by implication any claim that seeks coverage under the '25-mile radius' condition must also be circumscribed by this geographical area.

Mr Crane also sought to define the term 'manifestation' for the purposes of understanding when the policy could be triggered. In his view, the occurrence of a disease that is asymptomatic or unobservable is not a manifestation of said disease. In turn, Mr Crane asserted that the manifestation of a disease is an 'event' for the purposes of understanding the response of an insurance contract, meaning that it is 'observable', that it happens 'at a particular time', in 'a particular place', 'in a particular way' and (crucially) *"is not too remote from the cause of loss"*.

In essence, Mr Crane's argument was constructed in such a way as to suggest that the observable manifestation of the disease must be directly causative of a policyholder's business interruption. In his view, once one has established the above proximate cause *"you do not search for its remoter origins"*. By way of elaboration, Mr Crane described the 25-mile radius as a *"geographical sub-limit."*

Mr Crane then addressed the issue of what the 'notional reasonable man' would have understood to be the various implications of a contagious disease and the powers available to the relevant authorities prior to the pandemic. In his view:

1. A broker, underwriter or 'well-informed citizen' could reasonably have conceived of local authorities being able to quarantine, confine or close specific premises. They would not, in his opinion, have been able to anticipate of the wide-ranging powers exercised by HM Government as part of their response to the current pandemic.
2. The 31 diseases that are 'notifiable' under the 2010 Public Health Protection Notification Regulation are, aside from COVID-19 and SARS, all those which one would reasonably have conceived of affecting a specific locality. They are not, however, diseases which the reasonable person would have expected to affect a nationwide area. They may have affected a 'wider locality', but this provision is included within the QBE policy by virtue of the extension of the geographical area to a radius of 25 miles. A year ago, nobody reasonably well-informed would have anticipated the entire indiscriminate closure of the entire country.
3. Even had a pandemic scenario been able to be conceived, this does not mean that the underwriter agreed to cover that particular contingency without limits. Indeed, Mr Crane suggested that the setting of limits to the geographical radius was an explicit attempt by the insurers to stipulate the parameters of coverage.
4. The FCA are seeking to interpret implied terms with the benefit of hindsight. If the national lockdown could not have been imagined prior to its occurrence then it is unreasonable to expect the terms within the insurance contract to imply an extension of coverage to include this eventuality. In the words of the Master of the Rolls in the case of Philips Electronics v BskyB: *"The question of whether a term should be implied and if so what, almost inevitably arises after a crisis has been reached in the performance of the contract. So the court comes to the task of implication with the benefit of hindsight and it's tempting for the court then to fashion a term which will reflect the merits of the situation as they then appear. Tempting but wrong."*

Mr Crane then elaborated on five points in relation to the principle of geographical radius when it is used as a limit to cover.

1. There is no reason to treat a radius clause as in any way different to any other within the policy that seeks to place a limit on the risk. Mr Crane asserted that it was perfectly reasonable, in his view, to infer that instances of the risk occurring outside of the geographical area are not covered.
2. Geographical limits are just one of the tools by which insurers seek to limit the potential for an accumulation of loss.
3. There is no reason to assume that, simply because the area produced by application of the 25-mile radius is extensive, that it was inherently intended to cover cases that occurred outside the same area.
4. QBE are not seeking to exclude cover entirely if a case of COVID-19 occurs outside the 25-mile radius – they are merely seeking to exclude cover for that particular instance of COVID-19, and in turn would disregard it for the purposes of establishing if it were a proximate cause of the business interruption.
5. Where cases exist both within and outside the specified radius, it is incumbent on the insurers to establish whether the cases within the area of coverage were the 'efficient or dominant' cause of the loss. Lord Leggatt sought to query this point, suggesting that a claimant in this case is not required to establish the 'dominant' cause. Mr Crane suggested that all he was seeking was to establish the relative contributions of the cases inside and outside the permitted radius towards the business interruption loss.

Mr Crane took issue with the High Court's stipulation regarding QBE1 that, in effect, the presence of COVID-19 within the 25-mile radius is merely *"a tick-box covering sets when someone with symptoms strays into the specified area presumably with the insured being oblivious"*. Mr Crane's counter to the High Court's judgement was that the construction of the policy is one which requires a proximate cause to exist between the insured peril and the business interruption itself. Whilst accepting that the QBE coverage could potentially respond if it were proven that cases within the 25-mile radius were an equally efficient cause of loss as those outside the 25-mile radius, by implication Mr Crane's argument reached the obvious conclusion that the vast number of cases outside the 25-mile radius would have been the far greater cause of the relevant national measures imposed by HM Government.

MS Amlin

Mr Kealey took over submissions on behalf of MS Amlin and their appeal against the High Court judgement. He began by noting that Lord Hamblen and Lord Leggatt had both been involved in reaching the decision in Orient Express, a fact that may become crucial in the assessment of the principle of 'but for' causation.

Mr Kealey raised four initial points to reflect his understanding of the policy construction:

1. MS Amlin's policy is contingent upon 'illness sustained by any person'. In Mr Kealey's view this narrows the focus of the insured peril to something specific to an individual. In his words, regarding the disease: *"It is something that that person has had, as it were, befallen upon him. It's not a state. It's not a situation. It's not a state of affairs. It's not the existence of something."*
2. The MS Amlin policy has imposed a limit on the geographical area in which this illness can occur for coverage to be triggered: *"What the parties have done is to have drawn a line. The insured takes the risk of illness outside the line, and the insurer takes the risk of illness within the line. It's as simple as that. That which is outside the line, is uninsured; that which is inside the line, is insured."*
3. The word 'following' has the facility of a 'causal connector', albeit a loose one. The implication is that the word 'following' implies causation between the two terms that it is linking.
4. The term 'consequential loss' implies a further causal connection between the insured peril and its adverse effect on a client's turnover.
5. The part of the policy that provides cover for a manifestation of disease on the premises seems, in the view of Mr Kealey, to provide a clear limitation for the response of the policy. Mr Kealey illustrated this point by reference to another section of this extension, wherein coverage is provided for illness sustained by food and drink at the premises. Using a *reductio ad absurdum* argument, he asked whether we would be able to argue coverage based on food poisoning happening anywhere in the country, as long as an instance of the same also occurred on the premises? In essence I believe that Mr Kealey was seeking to suggest that the manifestation of any event specified must be both within the geographical limits as well as a direct cause of the loss, although his argument seems not to take into account the prevalence and virulence of COVID-19. If 1.43m people suffered food poisoning nationwide, with 53,274 deaths, I suspect that the government would have taken significant steps to deal with the matter and therefore his argument would have to be viewed in a very different light.

In the same manner as Mr Crane, Mr Kealey sought to emphasise that, in his view, the policy requires a causal link between a person having sustained COVID-19 and the business interruption experienced by the policyholder.

Mr Kealey sought to differentiate between two questions, which appear superficially similar:

1. *What is the cause of the business interruption losses?*
2. *Did the insured peril cause the business interruption losses within the meaning and application of the causal requirements of the insurance contracts?*

In the opinion of Mr Kealey, the first question is the wrong one to be asked, whereas the second question is the correct query in respect of coverage under the MS Amlin policy. To illustrate, Mr Kealey used an example of twenty people pushing a bus over a cliff, but only one of them having insurance for 'pushing a bus off a cliff'. Did this single person cause the bus to be pushed off a cliff? In Mr Kealey's view, he did not. 'But for' that single person's efforts, the bus would still have gone off the cliff. In his words:

> *"We say, as a matter of simplicity, X cannot in any sense be a cause of Y, whether proximate or not, if Y would have happened irrespective of X. In other words, but for X."*

Lord Leggatt queried whether this construction would mean that, in effect, nobody caused the bus to go over the cliff. Mr Kealey responded to state that this query demonstrates the difference in the two questions raised above: twenty people may have caused the bus to go over the cliff, but what we want to know is whether that single, insured person was alone the proximate cause of the event.

In Mr Kealey's pithy assertion, the FCA have *"conflated what was covered but not causative with what was causative but not covered".*

Mr Kealey advised that he had not found any authoritative legal cases wherein a proximate cause had not also satisfied the 'but for' test. In essence this means that the proximate cause, if removed from a particular scenario, would also have erased the subsequent events of this scenario. To use the example above, the one 'insured' individual would only have been a proximate cause of the bus going over the cliff if, in a counter-factual scenario in which that person had ceased pushing the bus, it had failed to drop over the edge into the sea.

Mr Kealey spent significant time on the issue of the 'but for' test as it is both crucial to an understanding of the application of the Orient Express ruling as well as pertinent to the respective legal backgrounds of Lord Hamblen and Lord Leggatt. In Mr Kealey's view, the 'but for' test also counters the assertions made previously by the High Court, in that any 'reversing out' of COVID-19 from a counter-factual scenario must be limited solely to those cases that occurred within the 25-mile radius. Mr Kealey insisted that it is incorrect to try and 'reverse out' the nationwide occurrences of COVID-19 merely because the policy may have been triggered by those cases within the applicable radius:

> *"Reversing more than the insured peril impermissibly expands the scope of the insuring clause and provides an indemnity for something that's not insured."*

Mr Kealey, continuing to rely on the judgement in Orient Express, noted that in that case the peril was not the hurricane but rather the damage sustained to the hotel. In the same way, for the current situation the peril was *each case of COVID-19 within the 25-mile radius*, not COVID-19 itself (ie. the pandemic in its wider form).