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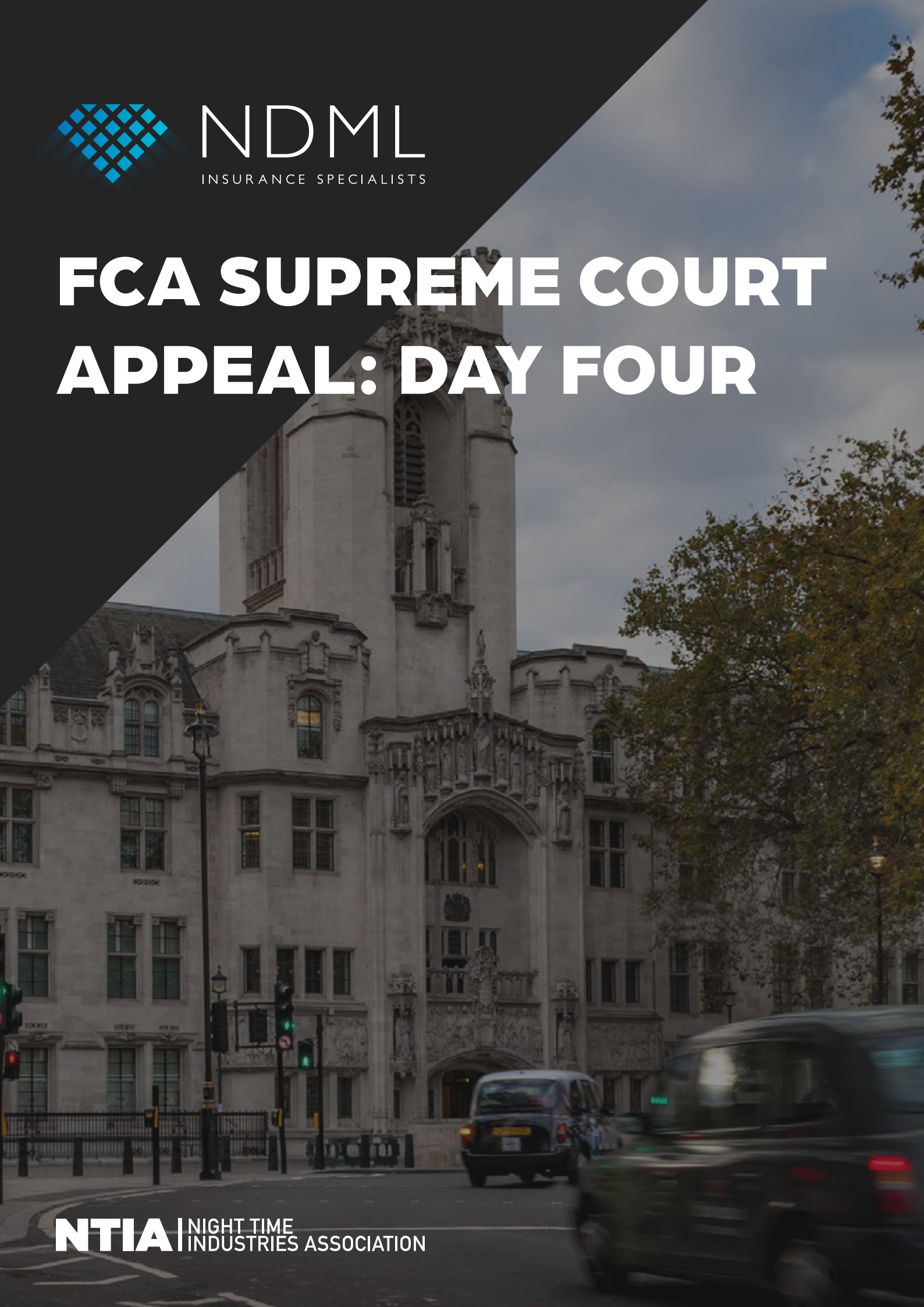
FCA SUPREME COURT APPEAL: DAY FOUR



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The final day of the hearing continued with Mr Edelman presenting submissions on behalf of the FCA.

Mr Edelman began by referring to those clauses within policies which required an 'inability to use' the premises before coverage could respond.

> *"Are they intended to require a total prevention of access or inability to use for pre–existing activities or is some partial prevention or inability to use sufficient?"*

Insurers thus far have suggested that, if a restaurant reduced its operation merely to a take–away business, they would not consider the policyholder 'unable to use' their premises *if they had previously operated some form of take–away business before lockdown*. Mr Edelman countered this position, suggesting that one should instead look at the constituent parts of the business and assess which of those were prevented from operating as a result of the lockdown. In effect, if a policy schedule listed the client's business activities as 'restaurant and takeaway' the establishment should be able to claim for the 'inability to use' the restaurant even while they might still have been able to operate their takeaway service.

Mr Edelman continued by addressing the meaning of the word 'imposed', as in the clause *"inability to use due to restrictions imposed"*. In the view of Mr Edelman, the word 'imposed' does not require legal force, but simply the assertion of HM Government, as in their pronouncements in March.

Mr Edelman drew the court's attention to the covers for 'increased cost of working' which implicitly encourage policyholders to mitigate their losses. Mr Edelman asserted that it would be unreasonable for policy coverage to suggest that a client, in diversifying as much as possible given the current crisis, would then be told that in doing so they had in fact rendered their coverage void because they were apparently able to 'use' part of their premises.

There then followed submissions from Mr Lynch, representing the Hiscox Action Group (*"with the perhaps regrettable acronym HAG"*). Mr Lynch began by discussing the question of 'foreseeability' with regards to what the contracting parties may have understood as the potential coverage afforded by the policy at the time of its inception. Hiscox and other insurers have previously argued that the (allegedly) unique scenario of the pandemic was not one which would have been contemplated by these parties, although Mr Lynch insisted that this assertion was incorrect for five reasons:

1. Under coverage for 'cancellation and abandonment' the Hiscox policy makes reference to *exclusions* for the actions of *"any national or international body or agency directly or indirectly to control, prevent or suppress any infectious disease"*. Clearly therefore the insurers were able to conceive of a pandemic, as well as the potential governmental response to the same.
2. By allowing coverage simply for 'notifiable diseases' Hiscox are implicitly allowing coverage for 'new' diseases with unforeseeable levels of dissemination or virulence.
3. Previous case law holds, in the opinion of Mr Lynch, that the attitude of Hiscox is fundamentally mistaken. In the *Equitas* case, Lord Leggatt (one of the current Supreme Court judges) stated:

"True it is that the question whether a term must be applied is to be judged at the date when the contract was made … and that when the relevant reinsurance contracts were made the parties could not have foreseen the situation that has arisen as result of the law's response to mesothelioma claims. The court's task is nevertheless to consider how reasonable parties should have been taken to have intended the contract to work in the circumstances which have in fact arisen."

4. Insurance contracts, in the view of Mr Lynch, are never going to describe the events that trigger coverage with perfect specificity. An insurance policy is successful in its operation often because of its flexible approach to the unforeseen manifestations of risks that they have chosen to cover
5. There is a difference between the concepts of 'what is covered' and 'the method by which the incident giving rise to the loss occurred'. In effect, unless there is an express exclusion, it does not matter whether the principle by which something is covered was foreseeable to the contracting parties.

Mr Lynch then elaborated on the principle of what could be described as the 'reasonable expectations' of policyholders when they took out their insurance coverage. Mr Lynch pointed out that most of the policyholders involved in the current case are 'SMEs' (Small/Medium Enterprises) with low levels of indemnity. Furthermore, the majority of these policyholders are 'public-facing' and therefore inclined to comply with government statements, regardless of whether at the time of their utterance they carried the full force of law. In effect, policyholders will often take a 'purposive' (as opposed to a 'literalist') approach to the construction of their policy, with expectations of its responsiveness that may differ from the strict understandings applied by insurers well-versed in industry terminology.

Furthermore, Mr Lynch averred that the arcana of insurance jargon and policy construction has made it possible for insurers such as Hiscox to impose complicated interpretations of their wording on their customers, for whom the inclination is to interpret the words simply as they see them within the contract. In the words of Mr Lynch:

"These are meant to be commercially realistic and readily applicable policies capable of straightforward application in everyday scenarios with low limits of indemnity and not much time or money being spent in their mundane application."

Mr Lynch set out five reasons why the Hiscox policy should be interpreted in a manner that gave precedence to common-sense applications of coverage:

1. The submissions on behalf of Hiscox had already insisted that their policies were *"comprehensible, clear and readily applicable in the real world."*
2. The introductory wording of the Hiscox policy states: *"We hope that the language and layout… are clear … we want you to understand the insurance we provide."*
3. The case law of *Wood v Capita* states that the interpretation of a policy wording is not a 'literalist' exercise, but rather one contingent on the understandings of the parties at the time of the inception of coverage.
4. Lord Steyn's analysis of reasonable expectations of parties to a policy contract suggests that there should be due emphasis placed on:
    a. What the words of the contract mean to an ordinary speaker of English;
    b. The role of community values in understanding the reasonable expectations of the contract; and
    c. The importance of the nature of the transaction in giving those reasonable expectations their *"distinctive colour"*.

5. In *Harris v Poland,* the presiding judge ruled that any assessment of coverage must be based on the simple meaning of the words of the policy, as understood by the 'ordinary man', without seeking to introduce limitations that were not present.

Lord Leggatt, taking up the issue of when one could reasonably state that a business was 'unable to use' its premises, queried with Mr Lynch whether there was a point at which the levels of social distancing and other measures meant that the business in question was 'unable to use' their premises in its 'normal' way. Mr Lynch responded to suggest that assessments on this point would be on the basis of degree, but that it would be wrong to say outright that a severe reduction in turnover due to post-COVID safeguarding was *not* an 'inability to use'.

Submissions then continued from Mr Gaisman, on behalf of Hiscox themselves. Taking issue with Mr Edelman's previous assertions regarding the correct policy response to 'concurrent' causes (ie. causes that both factor into an event), Mr Gaisman drew the court's attention to the case law of McCann's Executors v Great Lakes, wherein it was deemed that *"where a loss is concurrently caused by two proximate clauses A and B but the policy only insures against loss caused solely by A, there is no cover"*. In his view, this case supported his earlier argument that the 'but for' test is inextricably linked to considerations of proximate cause.

Mr Gaisman turned his attention to Mr Edelman's previous contentions on the subject of when it could be said that 'restrictions' had been 'imposed' on a particular policyholder. Mr Gaisman insisted that one had to view this question through the prism of the intentions of the contracting parties at the inception of the policy. In his view, these parties would only have understood 'restrictions' to have meant edicts with the force of law, and not simply governmental advice or suggestion. By the same turn, Mr Gaisman suggested that the requisite 'inability to use' the premises could only be achieved by a restriction that carried the force of law.

Lord Leggatt took issue with the arguments posited by Mr Gaisman, suggesting that, whilst a policyholder might not have considered these kinds of events at the inception of the policy, it would be unrealistic to expect them to watch the Prime Minister broadcasting to the country and to say:

> *"Oh well, it's all very well for you to say that, Prime Minister, but unless and until the law is changed, I'm going to carry on business as usual."*

Mr Gaisman once again sought to bring the focus onto what the contracting parties may have understood at the time of the policy inception, but Lord Leggatt gave no quarter to this position:

> *"You have to take the situation that has happened, the broadcast that is made, and say: what should the parties be taken to have intended the words to mean when applied to this situation, which has occurred?"*

Mr Kealey then took over submissions on behalf of insurers, beginning with a continuation of his arguments on the issue of the 'but for' test. In essence, Mr Kealey's assertion was that the insured peril had simply not caused the loss: in essence, 'but for' the disease within the specified radius, the business interruption would still have occurred.

Furthermore, Mr Kealey insisted that it would be dangerous for the Supreme Court to start modifying (or indeed overriding) settled principles regarding the 'but for' test in relation to proximate causes in an insurance case. In the opinion of Mr Kealey, the potential for unintended consequences of pronouncements on 'expedited' hearings was considerable and could lead to unforeseen problems in future cases in which the 'but for' test was a crucial yardstick by which to assess policy liability.

Mr Crane then began submissions in response to points raised regarding the QBE policies. Once again, his emphasis was on what the contracting parties may have assumed to be the intended response of the policy at the time of its inception. In his view, these parties would only have assumed cover would apply in the event of a direct causative relationship between the cases within a 25-mile radius and the subsequent business interruption. He then continued:

> *"Now, assume the same person was asked a second question, which goes like this: How about a disease like SARS, which might spread unpredictably and have widespread effects? To that question he [ie. the contracting party] would have replied "Well, if that's a risk they had in mind, it looks like the radius limitation was intended to ensure that it was only the impact on the business of an outbreak of disease within the specified area which was covered. Otherwise the radius provision wouldn't have made much sense."*

Needless to say, the above is implying an understanding of insurance principles that may or may not be held by the concept of the 'ordinary man' frequently invoked by the parties in this case.

Mr Crane countered Mr Edelman's assertion that QBE's understanding of coverage was one which viewed each single manifestation of COVID-19 as a single 'occurrence'. Instead, he insisted, QBE's conception of cover had always been one that allowed for multiple, aggregated instances of COVID-19 to be an 'occurrence', as long as they occurred within the specified 25-mile radius.

On the issue of cases that may fall outside the 25-mile radius, Mr Crane asserted that the question to be addressed was whether these 'external' occurrences of the disease were more of less causative of the interruption to the business than those within the 25-mile radius:

> *"The fact that there are just a few cases outside the perimeter, you can infer that any measures taken in response to the outbreak were prompted by cases within the insured area. Conversely, if there's one case within the insured area and a multiplicity of cases outside, the reverse assumption or the reverse conclusion will be the case."*

Mr Crane then turned his attention to the issue of concurrent causes, and in particular Mr Edelman's previous assertion that if there are two proximate causes, one insured and the other uninsured but not excluded, cover is able in response to the 'insured' proximate cause. In the view of Mr Crane, this construction could only be sufficient if the two competing causes were of equal efficiency. In the current scenario therefore, one would have to establish if the cases within the 25-mile radius had equal causative weight for the imposition of the national lockdown as those that manifested themselves outside this area. In his opinion, this can not be the case.

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Mr Edelman then completed his submissions on behalf of the FCA. Drawing directly on the arguments posited by Mr Crane regarding QBE2, Mr Edelman advised that the insurers had constructed an argument that seemed to defeat itself. To begin with, by virtue of the fact that the policy construction states that it responds to 'an illness sustained', the insurers had initially argued that their policy responded to *individual* cases of the disease. However, upon further pressing QBE seem to have accepted that their coverage is sufficiently elastic to respond to a collection of cases all within the prescribed radius. If this is indeed the case, then, according to Mr Edelman, you have a policy that is apparently designed to respond to an *indivisible* outbreak, built up of multiple cases. The logical inference from the conception of a disease whose indivisible outbreak can spread over a 25-mile radius is that it is also going to spread *outside* this area as well. In the words of Mr Edelman:

> *"And you do then ask the question...was it really intended that you should then get this arbitrary response of the policy depending on the precise shape of the outbreak and whether it does or doesn't straddle the boundaries? Is that really what the parties intended when they are insuring this type of risk?"*

Mr Edelman suggested that, in essence, the High Court's previous ruling in respect of QBE2 was one that seemed to disregard conclusions that they had drawn elsewhere within the judgement.

The case concluded with Lord Reed advising that he was aware of the importance of the judgement for all policyholders and that the Court would seek to provide a decision as quickly as possible. However, he suggested that he was unable to say whether this was likely to be before Xmas or at some point in January.

CONCLUSION

It is always difficult to draw authoritative conclusions as to how a case has gone based purely on the submissions, but it is clear that the FCA's case remains compelling in the face of the insurers' arguments. The Supreme Court hearing was characterised by a great deal of high-level argument with both sides making salient points in support of their positions. However we are secure in the knowledge that the efforts of Mr Edelman and his team presented our policyholders' case(s) as forcefully and persuasively as possible. To use a sporting phrase, the FCA 'left it all on the field' – all we can do now is wait.

Keep up with the latest information on the appeal from the FCA here.

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