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FCA SUPREME COURT APPEAL: DAY TWO

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Hiscox

Mr Gaisman commenced the appeal submission on behalf of Hiscox by suggesting that the FCA (and in turn, the High Court) had reduced the reference to 'public authority' in the operating clause to an 'adjectival status'. In the view of Mr Gaisman the issue at hand is whether the governmental regulations imposed in March 2020 were objectively intended by the contracting parties as the risk that was being insured against when the policy was incepted.

Mr Gaisman elaborated this point by stating that, in his view, contracting parties could not have conceived of the unprecedented government measures at the time that cover was incepted. As such, these parties could not have expected restrictions by a 'public authority' to have stretched to include those put in place by HM Government in March. Whether these governmental powers were technically available is immaterial – a reasonable signatory to the contract could not have imagined that these types of action could and would be used in the event of the manifestation of a notifiable disease. Furthermore, Mr Gaisman insisted that the extension in question was worded in such a way as to reflect its intention – ie. if Hiscox had wanted to cover a pandemic, they would have said so:

> *"It is easy to imagine a PA's [public authority's] reaction to legionnaires disease in the waterworks of a property being a covered risk. Lockdown in the wake of a worldwide pandemic is totally different."*

Mr Gaisman pointed out that the generally-understood legal definition of the term 'occurrence' was one that was synonymous with 'incident' or 'event' but *not* 'danger' or 'emergency'. In AXA v Field the meaning of the term 'occurrence' was viewed as:

> *"Typically contrasted with a general state of affairs."*

In this sense, Mr Gaisman averred, the word 'occurrence' implies a specificity of location and time and not therefore a national states of affairs.

Based on the above reasoning, Mr Gaisman sought to assert that an individual 'occurrence' of COVID-19 did not cause the actions of the Public Authority in closing down each client's premises. In his view:

> *"Where the contract requires one to decide whether X caused A, you do not ask whether X is part of Y and whether Y caused A."*

Mr Gaisman then went on to the issues of causation and the counterfactual, asserting that the counterfactual should be the mirror image of the insured peril. In his view, loss caused by the consequences of COVID-19 *which did not involve restrictions* is not covered because the entire causal combination represented by the insured peril is not in place. As such, the insurance provided is for the stated consequences of public authority action provided that the reason for this action is an occurrence of a notifiable disease. In this way, the notifiable disease is not the 'insured peril', but rather the public authority action – the notifiable disease is merely a qualifier as to what types of public authority action are covered under the policy. In Mr Gaisman's view, the notifiable disease is not therefore a peril in its own right and can not therefore be reversed as part of the counterfactual. Indeed, Mr Gaisman suggested that each client would be 'over-indemnified' if COVID-19 were to be removed from the counterfactual, no doubt on the basis that each business had government support during the lockdown period as a result of *COVID-19*.

Mr Gaisman then addressed the issue of how one might calculate a client's loss during the lockdown period. The FCA had previously suggested that the impossibility of establishing the correct method of calculation for a reduction in turnover meant that the policy should reimburse 100% of a policyholder's lost revenue. However, in his view, if one is able to establish that a business had a 30% reduction in takings in March and a 24% reduction when they reopened in July, it should be entirely possible to consider a reasonable value for the loss. Regardless, in his opinion, the claim can not justifiably be settled at 100% for losses that fall within the 'unknown' period between closure and reopening.

Mr Gaisman further elaborated on the application of the counterfactual with regards restrictions imposed that produce an inability to use a policyholder's premises. In his view, the relevant March regulations, where appropriate, are the appropriate restrictions on which to focus, but these must be 'reversed out' in their entirety – ie. one can not postulate a scenario wherein a company is the only business open, and therefore able to enjoy a windfall of custom and turnover.

The FCA

Mr Edelman began by showing the court a series of maps demonstrating the spread of COVID-19 over time in March 2020. The fact that, by the of March, the entire country was covered in individual cases of the disease meant, in his view, that there was in fact *"one indivisible national epidemic"*, with each case representing a roughly equal contribution to the overall picture. Mr Edelman was keen to emphasise that this only represented 'reported' cases, with the likelihood being that there were many more unreported cases across the country at the time.

Mr Edelman then presented a map which divided the UK into 25-mile circles, demonstrating the sheer size of the area produced by an application of this radius. Mr Edelman followed this by postulating a hypothetical scenario wherein the country has no cases of COVID-19. Someone travelling back to the UK from abroad then brings the disease into the country, *and local measures are incepted immediately*. In this scenario, the 25-mile radius condition would be fulfilled and the insurance company would provide coverage. However the insurer's argument, in Mr Edelman's view, was that once the disease spreads outside the 25-mile radius and wider lockdown measures are imposed, their coverage ceases because the 'but for' test is apparently no longer satisfied. According to Mr Edelman, insurers were therefore *"trying to escape liability by reference to the underlying cause of that government intervention which the policies themselves contemplated and required"*. In effect, if one takes the view of the insurers, the more serious the cause of the government action, the less cover there is likely to be.

Mr Edelman then took on the issues raised by the *Orient Express* case, acknowledging that members of the court had been involved in the same. Indeed, he began by setting out the parameters in which the *Orient Express* case was decided in order to establish the extent to which it could be said to influence the current submissions. In his view, the case was itself limited by virtue of the fact that it was required to establish any errors of law that may have been pronounced in a lower court – the judges in the final case could only react to the reasoning put forward by earlier hearings and therefore they were constrained in the subjects on which they could articulate a judgement.

Mr Edelman then began a complex argument beginning with the history of business interruption coverage. The main points of this argument are below:

1. In the nineteenth century there were several cases brought wherein claimants sought to claim for consequential financial losses as a result of property damage. However the coverage at that time was solely concerned with the value of the property and therefore these claims were rejected by the courts.
2. As a result, a market developed for insuring these consequential losses separately, a cover that eventually came to be called 'business interruption' insurance.
3. The problem with this separation of 'property damage' and 'business interruption' was that these two coverages came to be viewed independently from one another. This separation led to errors developing in the establishment of causal connections between the two areas of cover.
4. This was most apparent in the Orient Express case wherein the judges suggested that 'damage' was the trigger for the policy, as opposed to the hurricane itself.
5. Mr Edelman pointed out that the definition of 'damage' within the *Orient Express* case actually included a qualification as to the *cause* of this damage. The policy was, in effect, not covering *all* damage but rather only damage deriving from particular causes. Consequently the insured peril in the *Orient Express* case was the damage *and* its cause – likewise, in the current situation the insured peril under the various insurance policies tested must be the 'damage' (ie. the reduction in income) and its 'cause' (ie. COVID-19).

It was clear that Mr Edelman was intent on pulling down the foundations of Orient Express, despite the fact that two of the Supreme Court judges had pronounced on this case. Mr Edelman even went so far as to state explicitly that Orient Express was 'wrong'.

Mr Edelman revisited a number of his arguments from the High Court hearing regarding the Orient Express case, but also brought in further legal authorities to justify his approach. As an example, Mr Edelman drew the court's attention to an extract from a 1990 book by Hickmott, stating that:

> *"It is well known that they [ie. the English courts] do not accept technical frustration of policy cover by an unintended exclusion especially if this is not apparent at the time the contract was arranged. The principle of 'good faith' applies equally to the insurers as well to the insured."*

Mr Edelman went on to contrast the approach of insurers to the floods in Cockermouth to those in the *Orient Express* case. In the former scenario, the insurers did not seek to settle claims on the basis that all other surrounding businesses to the insured premises would have been closed and that the area would have been, in effect, a building site for many months. In the view of Mr Edelman, the *Orient Express* case interpreted the trends clause without regard to its commercial purpose and subsequently blurred its relationship to the issue of causation.

In the words of Mr Edelman:

> *"Standing back, the correct analysis in Orient Express would be that a proximate cause of the business interruption was the damage to the hotel. I say "a proximate cause" because it's quite obvious that there was a concurrent proximate cause of the wide area damage, but the concurrent proximate cause that is covered is sufficient to pass the primary causation test and then the trends clause isn't interested in things that are associated with the peril that has caused the damage to the hotel."*

In effect, Mr Edelman argued that once the proximate cause of any claim becomes sufficient to pass the primary causation test then any application of the trends clause would be in isolation from any other consideration. Furthermore, he insisted that the principle of 'proximate cause' did not require

the introduction of a 'but for' test – once the proximate cause is satisfied, there is no obligation to introduce a qualifying 'but for' scenario in order to modify or exclude the coverage.

By contrast, Mr Edelman argued that the standard interpretation of coverage in respect of concurrent causes is to establish whether the proximate cause is insured – if the other causes are uninsured *but not specifically excluded* then a policyholder is entitled to an indemnity.

In response to Mr Kealey's previous assertion that there are no cases in English law where the proximate cause does not also include a 'but for' test, Mr Edelman advised that in cases involving defence costs it is entirely usual for these to be settled without recourse to a 'but for' argument (ie. where some are insured and others are not).

Lord Briggs interjected to suggest that 'but for' tests may be *"good servants but occasionally poor masters"* – in effect, that this type of test can be useful if being applied under the control of the policy's intentions, but not when it seeks to override the same.

Mr Edelman then addressed trends clauses and how one should approach these for the purposes of the quantification of the claim. In effect, the argument ran that the trends clauses were obliged to contemplate 'normal world' circumstances as a yardstick by which to measure a policyholder's loss. Mr Edelman suggested that the trends clause was designed to take into account external events during a business' indemnity period, such as a competitor opening up nearby or a key employee leaving. However, in his view, the trends clause should not seek to modify a business interruption loss by virtue of the very things that caused the business to have the loss in the first place.

Mr Edelman concluded by elaborating on the nature of infectious diseases. In his view, any policy that provides coverage for the manifestation of a disease within a 25-mile radius must have been contemplating a situation wherein a business premises was not itself *directly* affected by said disease. Instead, the policy must have carried the intention of providing coverage for a scenario which had a wide effect on an area, most obviously through the reaction of the public authorities. This impact is therefore *indirect*, albeit still in keeping with the tenets of the policy coverage. Furthermore, none of the policies offer any direction on events that breach the geographical radius stipulated within the policy, nor do they seek to make the area limits absolute for the purposes of the reaction by the public authorities. In short, how would a '25-mile radius' policy react if a public authority imposed a 26-mile radius lockdown?

Furthermore, Mr Edelman noted that the nature of notifiable diseases is that they are:

> *"singled out for special treatment in the public health legislation and in the policies because of the health risks they pose, and because action by the authorities which could impact the business may be necessary to deal with the impact of the disease and prevent or minimise its further spread"*

In effect, therefore, it is clear by the very nature of these notifiable diseases that they are likely to require public authority intervention as a result of their propensity to be both severe and widespread in their manifestation. Mr Edelman asserted that an epidemic/pandemic is the most catastrophic form of any disease but is still within the range of the peril that is contemplated by the policies in question.