COMBAR Talk on *FCA v Arch*

1 March 2021

Adam Kramer

Financial Conduct Authority v Arch Insurance (UK) Ltd, Argenta Syndicate Management Ltd, Ecclesiastical Insurance Office plc, Hiscox Insurance Company Ltd, MS Amlin Underwriting Ltd, QBE Ltd, Royal & Sun Alliance Insurance plc, Zurich Insurance plc [2020] EWHC 2448 (Comm) (Butcher J and Flaux LJ), [2021] UKSC 1 [2021] 2 WLR 123

The core causal link in insurance cases is between the insured peril and the harm:

E.g. between a fire/hurricane/flood/sea storm and physical damage to property

E.g. (in this case) between occurrence of a notifiable disease within 25 miles and business interruption. Argenta's 'disease clause' non-damage BI extension:

> "The COMPANY will also indemnify the INSURED as provided in The Insurance of this Section for such interruption as a result of… (d) any occurrence of a NOTIFIABLE HUMAN DISEASE within a radius of 25 miles of the PREMISES"

Core approach to this causal question is to apply a test called 'proximate cause'. S55 Marine Insurance Act 1906:

> "… unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against."

Other causal connections that can arise in insurance, as highlighted by *FCA v Arch*:

(a) Within the insured peril where a 'composite' peril. See Jment 216 re: Hiscox hybrid clause:

> "In the Hiscox clause quoted above the first causal link is therefore concerned with the pecuniary measure of the interruption caused by an insured peril. Nevertheless, the peril covered by the clause is itself a composite one comprising elements that are required to occur in a causal sequence in order to give rise to a right of indemnity. Setting out the elements of the insured peril in their correct causal sequence, they are: (A) an occurrence of a notifiable disease *[in the case of Hiscox 4: within one mile of the premises]*, which causes (B) restrictions imposed by a public authority, which cause (C) an inability to use the insured premises, which causes (D) an interruption to the policyholder's activities that is the sole and direct cause of

> financial loss. Counsel for Hiscox in their submissions on this issue usefully represented the structure of the clause in a symbolic form as A→B→C→D, where each arrow represents a causal connection."

(Note analogy with *Orient-Express Hotels Ltd v Assicurazioni Generali SpA* [2010] EWHC 1186)

(b) Between the harm (damage/interruption) and loss.

> e.g. BI quantification machinery, often compare actual turnover/revenue with that in the calendar year proceeding, and apply a rate of gross profit derived from prior actual profits, but then adjust by 'trends or circumstances' clause such as that quoted at Jment 255 for Hiscox:
>
> "The amount we pay for loss of gross profit will be amended to reflect any special circumstances or business trends affecting your business, either before or after the loss, in order that the amount paid reflects as near as possible, the result that would have been achieved if the damage *[read as 'the insured peril': Jment 257]* had not occurred."

Reminder of the Court's answer

Disease within radius is not a 'but for' cause, yet there is still cover as it is a sufficient contributing cause for the purposes of this cover, properly construed. Jment 195:

> "the parties could not reasonably be supposed to have intended that cases of disease outside the radius could be set up as a countervailing cause which displaces the causal impact of the disease inside the radius."

The occurrences within radius are some of thousands/more than a million concurrent causes none of which satisfy or need to satisfy the but for test (Jment 319, 189-191).

Likewise the prevention/inability to use is a concurrent cause with the wider 'stay at home' etc effects of COVID-19, and does not (vis-à-vis those concurrent causes) need to satisfy the but for test, otherwise cover illusory: Jment 229 (also230, 237-9):

> "We do not consider that it would be consistent with the intended scope of the cover for the insurer to reject a claim for the resulting loss on the basis that the turnover would have been reduced anyway because of other

> consequences of national measures taken in response to COVID-19, such as the prohibition on leaving home without reasonable excuse. Such matters might have been sufficient to cause business interruption loss in the absence of the insured peril. **To that extent, the losses covered by the public authority clause include losses which would have occurred even without the public authority restrictions.** But it does not follow that the losses are irrecoverable."

In these cases, no consequences of the "*underlying fortuity*" or "*originating cause*" (global COVID-19 pandemic) can be rival causes, and the counterfactual for quantification does not include any of it: Jment 237, 240, 247, 284, 294-5, 309-310. So the question under the cover becomes: what interruption/loss would have happened if there had been no COVID-19 pandemic at all?

The legal approach

Uncontroversial that the approach to causation depends upon express terms: s55 MIA 1906 says 'unless the Policy otherwise provides'.

The first contribution of the SC is to confirm that the causation question is a creature of the parties' intentions and the approach to causation is a matter of construction more generally.

> Jment 163: "The requirement of "proximate" causation is **based on the presumed intention of the contracting parties**… But it is a presumption capable of being displaced if, on its proper **interpretation**, the policy provides for some other connection between loss and the occurrence of an insured peril."
>
> Jment 190: "All that matters is what risks the insurers have agreed to cover. This is **a question of contractual interpretation** which must accordingly be answered by identifying (objectively) the intended effect of the policy as applied to the relevant factual situation."
>
> Jment 320 (*minority*): That is not to say that the majority have insulated policyholders from the unfortunate consequences of a bad bargain (properly construed) by the healing balm of purely legal rules of causation. On the contrary, and again rightly in my view, the majority ground their treatment of concurrent causation firmly within the process of construction. **The question whether particular consequential harm to a policyholder is subject to indemnity is as much a part of the process of interpreting their bargain as is the identification of the insured peril**. It is therefore a quite distinct process from, for example, applying the law about causation and remoteness of loss for the purpose of identifying the harm liable to be made good by tortfeasors to their victims. In terms intelligible to non-

> lawyers, the question is: for what loss have the parties agreed that the insurers should compensate the policyholders as the result of the occurrence of the insured peril? **Both the insured peril and the covered loss lie at the very heart of the contract of insurance, and the process of construction requires that they be addressed together**.

The second contribution of the SC is to confirm that this encompasses how the 'but for' test is applied

> But for test is necessarily part of the damages compensation measure in contract and tort. It is also a part of what we (including in insurance policies) normally mean by causation. Jment 181:
>
> > "We agree with counsel for the insurers that in the vast majority of insurance cases, indeed in the vast majority of cases in any field of law or ordinary life, if event Y would still have occurred anyway irrespective of the occurrence of a prior event X, then X cannot be said to have caused Y."
>
> But in concurrent independent cause cases the test can fail to reflect common sense, and then whether there is sufficient causal link becomes a question of construction.
>
> > Jment 185: "each individual contribution is reasonably capable of being regarded as a cause of the harm that occurs, even though it was neither necessary nor sufficient to cause the harm by itself."
> >
> > Jment 191: "For these reasons there is nothing in principle or in the concept of causation which precludes an insured peril that in combination with **many other similar uninsured events** brings about a loss with a sufficient degree of inevitability from being regarded as a cause - indeed as a proximate cause - of the loss, **even if the occurrence of the insured peril is neither necessary nor sufficient to bring about the loss by itself**. It seems incontrovertible that in the examples we have given there is **a causal connection** between the event and the loss. **Whether that causal connection is sufficient to trigger the insurer's obligation to indemnify the policyholder depends on what has been agreed between them**."

So it is all question of construction: the requisite causal link is whatever the parties intended it to be. Any contribution of a specified event (or none) *can* satisfy, if that is what was intended.

Is this insurance law's *Achilleas* moment? (Cf *The Achilleas (Transfield Shipping v Mercator Shipping Inc* [2008] UKHL 48 [2009] 1 AC 61)*, Stansbie v Troman Stansbie v Troman* [1948] 2 KB 48, *Siemens Building Technologies FE Ltd v Supershield Ltd* [2010] EWCA Civ 7 etc.)

What causation test is left on these wordings?

COVID (the underlying fortuity) must still satisfy but for test: Non-COVID concurrent causes can still prevent causation being satisfied (chef, licence, fire): Jment 231-2, *Hyper Trust* paras 205 and 221.

For prevention/hybrid clauses, the prevention (as opposed to other COVID consequences) still needs to be at least equally effective/co-dominant (even though not but for): Jment 244. (Thus for prevention/hybrid clauses you only claim in relation to the part of a business that closed, not e.g. the website or takeaway business: Jment 141, 283-6.)

Court's reasoning in the present case (Jment 194-7, 206, 315-6)

Each case of COVID was an equal and effective cause of Government action and public response to it: Jment 212.

For radius clauses: nature of notifiable diseases means would contemplate that would be outbreaks beyond the radius. Accordingly, even though disease within radius is not a 'but for' cause, there is still cover. Jment 195.

This conclusion is reinforced by failure to provide that cover for prevention caused 'only' by cases within the radius, or interruption 'only' caused by prevention of access.

So the occurrences within radius are some of thousands/more than a million concurrent causes none of which satisfy or need to satisfy the but for test (Jment 319, 189-191).

Likewise the prevention/inability to use is a concurrent cause with the wider 'stay at home' etc effects of COVID-19, and does not (vis-à-vis those concurrent causes) need to satisfy the but for test, otherwise illusory: Jment 229 (also230, 237-9).

In these cases, no consequences of the "*underlying fortuity*" or "*originating cause*" (global COVID-19 pandemic) can be rival causes and the counterfactual for quantification involves removing all of it: Jment 237, 240, 247, 284, 294-5, 309-310.

Other matters

Some queries as to this construction process:

SC did not explain its construction process re: overruling *Orient-Express*. Jment 309-310:

> "In such a case when both the insured peril and the uninsured peril which operates concurrently with it arise from the same underlying fortuity (the hurricanes), then provided that damage proximately caused by the uninsured peril (ie in the Orient-Express case, damage to the rest of the city) is not excluded, loss resulting from both causes operating concurrently is covered. In the Orient-Express case the tribunal and the court were therefore wrong to hold that the business interruption loss was not covered by the insuring clause to the extent that it did not satisfy the "but for" test."

And cf Jment 238:

> We agree and consider the underlying explanation to be that, where insurance is restricted to particular consequences of an adverse event (such as in this example the discovery of vermin in the premises) the parties do not generally intend other consequences of that event, which are inherently likely to arise, to restrict the scope of the indemnity.

Is this really about construing the insured peril itself? Lords Briggs and Hodge minority in *FCA v Arch* at Jment 322 and 324, echoing High Court approach.

Odd comment at Jment 212:

> "Our conclusion does not depend on the particular terminology used in the clause to describe the required causal connection between the loss and the insured peril and applies equally whether the term used is "following" or

> some other formula such as "arising from" or "as a result of". **It is a conclusion about the legal effect of the insurance contracts as they apply to the facts of this case**."

How does this apply to clauses requiring disease 'at the premises'? Is doubt cast on the unappealed High Court conclusions as to there being no cover for clauses requiring public action following 'danger or disturbance in the vicinity' or 'emergency likely to endanger life in the vicinity'?