IN THE SUPREME COURT OF THE UNITED KINGDOM **[2021] UKSC 1**
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)

Appeal No. 2020/0179-0184

BETWEEN:

(1) ARCH INSURANCE (UK) LIMITED
(2) ARGENTA SYNDICATE MANAGEMENT LIMITED
(3) HISCOX INSURANCE COMPANY LIMITED
(4) MS AMLIN UNDERWRITING LIMITED
(5) QBE UK LIMITED
(6) ROYAL & SUN ALLIANCE INSURANCE PLC

Appellants

-and-

THE FINANCIAL CONDUCT AUTHORITY

Respondent

[(1) HOSPITALITY INSURANCE GROUP ACTION]

[Intervener]

-and-

(2) HISCOX ACTION GROUP

Intervener

Appeal No. 2020/0177-0178

AND 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

FCA'S CONSEQUENTIAL SUBMISSIONS

A. INTRODUCTION

1. These are the FCA's written submissions in relation to consequential matters following the hand down of the Supreme Court's judgment on 15 January 2021. The issues to be determined are as follows:

   1.1. Whether, in light of the Supreme Court's decision on the 'force of law' point,[1] the so-called General and/or Specific Measures are within the requirement for "*restrictions imposed*" in Hiscox 1-4 (hybrid), "*closure or restrictions placed*" in RSA1 and "*enforced closure*" in RSA4. This is addressed in Section B below; and

   1.2. The terms of the Declarations Order. The parties have agreed certain of the amendments which are required to the High Court's Declarations Order of 16 October 2020 in light of the Supreme Court's decision, but there remain some outstanding issues. These are addressed in Section C.[2]

B. THE GENERAL AND SPECIFIC MEASURES

The Supreme Court's Judgment

2. The FCA's Appeal Ground 2 sought (among other things) to overturn the High Court's finding that prevention of access and hybrid clauses requiring "*restrictions imposed by a public authority*" (Hiscox1-4 (hybrid)), "*closure or restrictions placed on the premises*" (RSA1) and "*enforced closure of an Insured Location*" (RSA4) were only triggered by instructions or advice of a public authority having the force of law.

3. The Supreme Court allowed the FCA's appeal on this issue, giving its reasoning at Jment 116-123. There the Court explained that, while these terms would be understood as ordinarily meaning mandatory measures imposed by a public authority pursuant to its statutory or other legal powers, a restriction need not always have the force of law to fall within the relevant provisions: Jment 116.

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[1] Jment 106-124

[2] A draft Declarations Order accompanies this Skeleton Argument. Where a dispute remains, the FCA's and Insurers' competing proposals are both shown.

4. The Court made clear that at least two categories of measure, not having the force of law, would satisfy these terms in the relevant wordings:

4.1. A mandatory instruction given by a public authority in the anticipation that legally binding measures will follow shortly afterwards, or will do so if compliance is not obtained: Jment 117-119. An example would be a public health officer who discovers vermin on inspection of a restaurant and who issues an immediate instruction to close the restaurant, although the legal order to do so may only follow later: Jment 118. It is implicit in "*or will do so if compliance is not obtained*" in Jment 117 that it is not necessary for a legally binding measure to actually follow. (This stands to reason given that the parties must know whether or not the policy is triggered at the date of the trigger, rather than the policy being in a Schrodinger's Cat-like state until it becomes clear later whether or not a legally binding measure has actually been imposed.)

4.2. A mandatory instruction without the threat of legal compulsion, which the recipient would reasonably understand had to be complied with without inquiring into its legal basis or anticipated legal basis, and regardless of whether it was legally capable of being enforced: Jment 120-1. Such an instruction would need to be clear enough and in mandatory terms and is only likely to arise in situations of emergency, as in the present case: Jment 121. An example was the Prime Minister's instruction on 20 March 2020 to cafes, pubs, bars and restaurants to close "tonight": Jment 120.

5. Although its analysis of the 'force of law' point was undertaken by reference to the phrase "*restrictions imposed*" in the Hiscox wordings, the Court concluded that, in principle, the same analysis applied to the other wordings in relation to which the FCA appealed, including, RSA1 and RSA4: Jment 122.[3]

6. Subject to two qualifications, the Court (in Jment 124) left over for agreement or further argument the question of whether or not its approach encompasses the so-called General and Specific Measures (as identified in Jment 109-110) which the FCA relied on as triggering the relevant clauses. The first qualification concerned the Prime Minister's instruction to Category 1 and 2 businesses on 20 March 2020, which the Court decided was a "*restriction imposed*" (Jment 120). The second qualification concerned RSA4, in relation to which the Supreme Court agreed with the High Court's conclusion (in paragraph 303 of its judgment) that an "*enforced*

[3] The issue was academic in relation to Hiscox1, 2 and 4 (NDDA), MSA 1 (AOCA), MSAmlin 2 (prevention of access – non damage) and Zurich1-2 (AOCA), so it was unnecessary to address this particular issue separately or specifically in relation to these clauses: Jment 122.

closure of an Insured Location" would not include "*advice or exhortations, or social distancing and stay at home instructions*": Jment 124.

7. The question the Supreme Court is now being asked to determine therefore concerns the character of the measures in issue: whether they have the requisite degree of clarity and mandatoriness. The clauses require the measure to be "*imposed*" (in Hiscox) or "*enforced*" (in RSA4). RSA1 is less clear but is expressed as "*closure or restrictions placed*". The distinction between "*restrictions*" in Hiscox1-4, "*closure or restrictions*" in RSA1 and "*closure*" in RSA4 is therefore immaterial for the purposes of this particular issue, the "same analysis" applying to all (Jment 122) save in one respect as regards RSA4.

8. These submissions address which General and Specific measures should, like the Prime Minister's instruction on 20 March, be held to have the necessary character of clarity and mandatoriness summarised at Jment 117-121. Since the Supreme Court decided that this question was only material for Hiscox1-4 (hybrid), RSA1 and RSA4 (Enforced Closure clause) (because the other policies containing similar wording were not, as regards the ultimate question of coverage, being appealed), the FCA only asks the Supreme Court to rule on those three policies.[4]

9. The Hiscox 1-4 policies were available to businesses in all Categories from 1-7. RSA1 is directed at holiday cottage owners, *i.e.* Category 6 businesses. RSA4 was available to all businesses in Categories 1-6.[5]

The General and Specific Measures

10. The particular public authority actions on which the FCA relies were described as 'General' measures if they applied to all businesses, and as 'Specific' measures if they applied to particular categories of business, although there is no legal significance for present purposes in the classification. These are identified at Jment 109 to 110, largely replicating the FCA's Written Appeal Case at paras 61 to 62.

11. Some of the measures are rolled together in those paragraphs, and can usefully be separated out and listed chronologically, as follows:

[4] In case useful, for ease of reference the key terms of those policies are set out in the Appendix hereto.
[5] See the Categories of Business by Policy table starting at {C/46/1951}, and the Categories summarised in Jment 36.

11.1. General measure: The Prime Minister's speech on 16 March 2020 (*stay at home instruction, prohibition against gatherings*);

11.2. General measure: Guidance on social distancing given on 16 March 2020 (*2-metre instruction*);

11.3. General and Specific measure: The Prime Minister's speech on 18 March 2020 (*stay at home instruction, prohibition against gatherings, instruction to schools to close*);

11.4. Specific measure: The Prime Minister's speech on 20 March 2020 (*instruction to Category 1 and 2 businesses to close*). (This is the measure already found to be mandatory in the relevant sense in Jment 120.);

11.5. General measure: The Prime Minister's speech on 22 March 2020 (*2-metre instructions*);

11.6. General measure: The Prime Minister's speech on 23 March 2020 (*stay at home instruction, prohibition against gatherings*);

11.7. General measure: The Public Health England document "*Keeping away from other people: new rules to follow from 23 March 2020*" (*stay at home instruction, 2-metre instruction, prohibition against gatherings*); and

11.8. Specific measure: The UK Government's "COVID-19 Advice for Accommodation Providers" published on 24 March 2020 (*instruction to Category 6 businesses to close*).

12. The FCA's case is:

12.1. All of these measures are "*restrictions imposed*" within Hiscox1-4 (hybrid).

12.2. Save that no finding is sought in relation to the instructions on 18 and 20 March 2020 to schools and to Category 1 and 2 businesses to close,[6] all of these measures are "*closure or restrictions placed*" within RSA1.

12.3. The 3rd (as to school closures only), 4th and 8th of these measures are "*enforced*" closure within RSA4. In light of the Supreme Court's conclusion in Jment 124 that "*enforced closure of an Insured Location*" would not include "*advice or exhortations, or social distancing*

[6] No finding is sought in relation to these instructions on the understanding that RSA1 only provides cover to Category 6 holiday cottage businesses.

and stay at home instructions", the FCA does not seek findings that the other measures listed above are "*enforced*" closure within RSA4.

13. Before addressing the measures listed above individually, it is important to be clear about what the Supreme Court is and what it is not being asked to decide. Save for certain narrow issues relating to the 21 March and 26 March Regulations (which are addressed in paragraphs 65-67 below), the argument focuses solely on the seven particular Prime Ministerial statements and government publications set out above (i.e. the eight set out, save the fourth which has already been ruled upon[7]). It is not about whether the 2-metre rule in the abstract, or a stay at home order given by a local authority, union or licensing body, or any other UK government action not included among the eight speeches and publications relied upon by the FCA in this case, is capable of being a "*restriction imposed*", "*enforced closure*" or "*closure or restriction placed*". Policyholders may wish to make such arguments (irrespective of the outcome of this case), but this remaining aspect of the present case only concerns the eight particular public authority actions listed above.[8]

14. Further, and even more precisely, the FCA is not inviting the Supreme Court to decide whether every statement in these eight speeches and publications was capable of being a "*restriction imposed*", "*enforced closure*" or "*closure or restriction placed*". For example, in his speech on 23 March 2020, in what has been characterised as a General Measure, the Prime Minister said that in order "*to ensure compliance with the Government's instruction to stay at home, we will immediately… stop all social events, including weddings*".[9] The FCA is not asking the Supreme Court to rule on whether this was a (specific) "*restriction imposed*" (*etc.*) on wedding venues. Nor, similarly, is the Court being asked to rule on whether the Prime Minister's statement in the same speech that "*we will immediately close all shops selling non-essential goods*"[10] qualifies for the purposes of the relevant wordings.[11] These (and other points, whether arising from the eight speeches and publications identified above or any other source) are points which policyholders will be free to take in the future in other cases, but they do not arise for decision in this case. This is for reasons of proportionality and expedition: the FCA has not in this test case sought to ask the Courts to rule on (and the Insurers to argue) every potentially qualifying statement in each of the eight

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[7] And which Hiscox (subject to a qualification addressed below) and RSA have accepted gives rise to a "*restriction imposed*" (Hiscox) and "*enforced closure*" (RSA).

[8] The FCA understands that the Hiscox Action Group is also concerned to emphasise the points made by the FCA in this paragraph and the following paragraph, and will address them in its own submissions to the Supreme Court.

[9] {C/37/1842}

[10] {C/37/1842}

[11] Another example is the Prime Minister's statement in his 16 March 2020 speech: "*And you should avoid pubs, clubs, theatres and other such social venues*": {C/29/1782-1785}. Again, the Supreme Court is not asked to rule on whether this amounted to a restriction imposed (etc.) on the businesses referred to.

speeches and publications relied on applied to every category or sub-category of business. That simply would not have been realistic given the time constraints involved and the enormous burden the Courts and the parties were under even without these matters being raised. Accordingly, the FCA only asks the Court to rule on the specific aspects of the eight speeches/publications which it has identified (that is, the stay-at-home instruction, the prohibition against gatherings, the 2-metre rule instruction, etc).

15. The Supreme Court is asked to rule on each of the dates put forward for all of these measures, even if it decides that a measure had mandatory character (in the relevant sense) on the first date on which it was introduced. This is because a later date may matter for some policyholders: for example, in the case of hybrid clauses where COVID-19 was not within the relevant radius at the time when a measure was first introduced, but was within the radius by a later date when the measure was reiterated or extended.

16. It is important to note that the issue here is solely that relating to the mandatoriness of 'restrictions' etc. The relevant policies will still only be triggered if there is the necessary 'inability to use' (Hiscox1-4), 'closure or restrictions' (RSA1), or enforced 'closure' (RSA4). Thus, for example, the question is whether the stay at home instructions without force of law amount to restrictions imposed, even though it would still be rare for such stay at home instructions to give rise to an inability to use within the meaning of Hiscox1-4 (as the Supreme Court found in relation to Regulation 6 of the 26 March Regulations: see Jment 142-144).

17. Finally, a point raised by Hiscox (but not RSA) should be addressed. It seems that Hiscox interprets the Supreme Court's statement in Jment 124 that the question of whether its approach on the 'force of law' point encompasses the General and Specific Measures "*should be left over for agreement or argument*" as meaning that, to the extent not agreed, the points should be left to be argued in future cases. The Supreme Court's intention in that paragraph of the Judgment is of course a matter for the Court. The FCA's interpretation (and, it would appear, RSA's) is that the Supreme Court intended these matters, which were squarely raised in the FCA's Appeal Case (and, earlier, Particulars of Claim), to be resolved in this case, in keeping with the aim of the proceedings to achieve as much clarity as possible for the maximum number of policyholders.

1. Speech on 16 March 2020: stay at home instruction, prohibition against gatherings

18. On Tuesday 16 March 2020, flanked by his Chief Medical Adviser and Chief Scientific Adviser, the Prime Minister gave a televised address to the nation. The speech is quoted at length at Jment, Appendix 1, para 1 and summarised at Jment 17.[12]

19. The speech—the first significant COVID-19 speech by the Government—was given against the background of the increasingly concerning picture relating to the global COVID-19 situation. This included: (i) COVID-19 having been declared a notifiable disease in all parts of the UK, (ii) the Government having enacted Regulations for detaining and screening of persons reasonably suspected to have been infected or contaminated with COVID-19,[13] (iii) the Government having launched nationwide public health campaigns concerning COVID-19,[14] (iv) cases of COVID-19 having been confirmed in all parts of the UK,[15] (v) the Government advising against all but essential travel to Italy, advising those with symptoms to stay at home, and advising the public to avoid close contact with anyone who had symptoms;[16] (vi) the WHO having declared COVID-19 first a Public Health Emergency of International Concern,[17] and then (the previous Thursday 11 March) a Pandemic;[18] and (vi) the Government on the previous Friday 12 March raising the risk level to 'high' and declaring that it was moving to the 'delay' phase of its action plan (from 'contain'). (See further Jment 7-15). The Bank of England had cut interest rates from 0.75% to 0.25% (then the lowest level ever), and nearly 1,400 cases of COVID-19 had been confirmed in the UK[19].

20. The Prime Minister's instructions to the public were against that background, and the 'high' alert level declared just before the previous weekend. He said that now "*we need to go further*" because, according to SAGE, the UK was approaching the fast growth part of the curve of COVID-19 cases, and cases could double every 5 or 6 days "*without drastic action*". The 16 March 2020 instructions were the "*drastic action*" by the Government.

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[12] And it can be found at {C/29/1782-1785}.
[13] The Health Protection (Coronavirus) Regulations 2020, effective from 10 February 2020 and repealed by the Coronavirus Act 2020 on 25 March 2020: {C/43/1867-1869}.
[14] From 3 February 2020: {C/43/1867}.
[15] England on 31 January 2020, Northern Ireland on 27 February 2020, Wales on 28 February 2020, Scotland on 1 March 2020: {C/43/1867-1870.} By 16 March 2020, cases had been confirmed in all but 19 of the 317 Lower Tier Local Authorities in England {C/48/1987-8}
[16] Between 9 and 12 March 2020 {C/43/1873-1874}.
[17] On 30 January 2020: {C/43/1867}.
[18] On 11 March 2020: {C/43/1874}.
[19] By 15 March there had been 1,372 cases: {C/45/1933-1934}.

21. First, anyone with a high temperature or a continuous cough, and the whole of their household, had to stay at home for 14 days. This instruction, while severe, was narrow in its application.

22. Those which followed were not. They were instructions to the public generally to stay at home, and not to gather with others, unless essential. "*Now*", the Prime Minister said, "*is the time for everyone to stop non-essential contact with others and to stop all unnecessary travel. We need people to start working from home where they possibly can. And you should avoid pubs, clubs, theatres and other such social venues*". In a nutshell, people were being asked to avoid "*all unnecessary social contact*". As the Prime Minister acknowledged, the Government's actions were a "*very draconian measure*", "*asking people to do something that is difficult and disruptive of their lives*".

23. Having already addressed the need for everyone to stop non-essential contact and avoid social venues, the Prime Minister returned to gatherings towards the end of his speech. He explained that the logic behind stopping social contact applied equally to "*mass gatherings*". Noting that critical workers would otherwise be deployed at such gatherings rather than supporting the national response to COVID-19, he stated that the UK Government "*will no longer be supporting mass gatherings with emergency workers in the way that we normally do*", concluding: "*So mass gatherings, we are now moving emphatically away from*".

24. Answering those who might feel "*that there is something excessive about these measures*", the Prime Minister emphasised his belief "*that they are overwhelmingly worth it to slow the spread of the disease, to reduce the peak, to save life, minimise suffering and to give our NHS the chance to cope*". The Government was "*asking a lot of everybody… far more now than just washing your hands*". This was a "*campaign to fight back against this disease. To keep the economy growing, to make sure that humanity has access to the drugs and the treatments that we all need, and the UK is also at the front of the effort to back business, to back our economy, to make sure that we get through it*". The Prime Minister concluded by thanking "*everybody for the part that you are playing and are going to play*".

25. The FCA's case is that both the instruction to stay at home and the instruction not to gather in public socially and at mass gatherings were mandatory instructions, given directly by the UK Government in a public health emergency, which the public would reasonably understand had to be complied with without inquiring into their legal basis or anticipated legal basis, and regardless of whether they were legally capable of being enforced. The terms were mandatory: "*now is the time to stop*", "*we need people to*", "*you should avoid*". This was "*a draconian measure*" (a common idiomatic reference to harsh laws or rules); the Government was "*moving emphatically*

away from" mass gatherings. And the terms were quite clear for the public to know with certainty what compliance required: stay at home unless essential; do not gather in public unless essential, and avoid mass gatherings.

26. Both instructions (stay at home, and the prohibition on non-essential public gatherings) were, in this respect, indistinguishable from the Prime Minister's statement on 20 March 2020 (found by the Court to be mandatory in this sense: Jment 120). It is true that the 20 March statement finds Mr Johnson "*telling*" the audience to act, but the substance of "*drastic*" and "*draconian measures*" as to what people "*should do*" and what "*we [the Government] need*" people to do is the same. It would be reasonably understood that the instructions had to be complied with without inquiring into their legal basis or anticipated legal basis. (Moreover, although the public did not know this on 16 March, the stay at home instruction and gatherings prohibition were later given force of law in the 26 March Regulations. This reflects that they were, as was made clear, necessary to "*save life*", and hence ultimately required legislation to ensure compliance.)

27. The Supreme Court should therefore find that these two instructions were "*restrictions imposed*" for the purposes of Hiscox1-4 (hybrid), and a "*closure or restrictions placed*" for the purposes of RSA1, and the FCA seeks declarations to this effect, as set out in its proposed Declarations 17.4A(a) and 27.3(a) in the accompanying draft Declarations Order.

<u>2. Guidance on 16 March 2020: 2-metre instruction</u>

28. Also on 16 March 2020, the UK Government published "*COVID-19: guidance on social distancing and for vulnerable people*".[20] This was said to be "*for everyone*", and advised on "*social distancing measures we should all be taking to reduce social interaction between people in order to reduce the transmission of coronavirus*".[21]

29. The document explained that the social distancing steps to be taken were (i) avoiding contact with those with COVID-19 symptoms, (ii) avoiding non-essential use of public transport, (iii) working from home where possible, (iv) avoiding gatherings in smaller public spaces such as pubs, cinemas, restaurants, theatres, bars and clubs, and avoiding large gatherings; (v) avoiding gatherings with friends and family; and (vi) using telephone or online services to contact GPs

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[20] {C/30/1786-1801}
[21] {C/30/1786}

and other essential services.[22] The document explained: "*Everyone should be trying to follow these measures as much as is pragmatic*".[23]

30. Turning to social distancing outside, the document explained that remaining physically active was important, and there was no prohibition against going for a walk outdoors – "*provided you stay more than 2 metres from others*".[24]

31. The FCA's case, again, is that this satisfies the test set out by the Supreme Court, as regards Hiscox1-4 and RSA1. The context and terms of the statement made clear that compliance with it was required, and would reasonably be understood to be required: this was a statement directly from the UK Government to the whole nation, in the context of the Prime Minister instructing the public to avoid all unnecessary social contact and social gatherings. The terms of the statement were clear: stay 2-metres apart.

32. The FCA asks the Supreme Court to find that the instruction was a "*restriction imposed*" for the purposes of Hiscox1-4 (hybrid), and was a "*closure or restrictions placed*" for the purposes of RSA1. It seeks declarations to this effect, as set out in its proposed Declarations 17.4A(b) and 27.3(b) in the accompanying draft Declarations Order.

3. Speech on 18 March 2020: stay at home instruction, prohibition against gatherings, instruction to close schools

33. On 17 March 2020, NHS England announced the postponement of all non-urgent operations and the urgent discharge of medically fit in-patients.[25] The Chancellor of the Exchequer also announced a huge financial package, including £330 billion of Government-backed and guaranteed loans to businesses, cash grants of up to £25,000 and a business rates holiday for hospitality businesses, and three-month mortgage holidays for those in difficulties due to COVID-19.[26] These measures were said to be responsive to "*a serious and evolving economic situation*".[27]

34. On Wednesday 18 March 2020, the Prime Minister gave a further televised address to the nation, this time alongside the Deputy Chief Medical Officer for England and the Chief Medical Adviser. The main text of the speech is quoted in Appendix 1 of the Supreme Court's

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[22] {C/30/1791}
[23] {C/30/1791}
[24] {C/30/1793}
[25] {C/43/1878}
[26] {C/43/1879-1881}
[27] {C/43/1881}

judgment, and its effect is summarised at Jment 18. At the start of his speech the Prime Minister reiterated his statement about staying at home and social gatherings from two days earlier, now all the more powerful in light of the increasingly bleak national situation, saying: "*I want to repeat that everyone – everyone – must follow the advice to protect themselves and their families, but also – more importantly – to protect the wider public… Avoid all unnecessary gatherings – pubs, clubs, bars, restaurants, theatres and so on and work from home if you can*".[28] He explained that in order to help the NHS cope with the huge and unprecedent influx of COVID-19 patients, the Government was asking healthcare professionals to come out of retirement.

35. Next, the Prime Minister turned to "*the key issue of schools*". While previously the advice had been to keep them open, "*looking at the curve of the disease and looking at where we are now – we think now that we must apply downward pressure, further downward pressure on that upward curve by closing the schools*". So, he said: "*I can announce today and Gavin Williamson [is] making statement now in [the] House of Commons that after schools shut their gates from Friday afternoon, they will remain closed for most pupils – for the vast majority of pupils – until further notice*".[29] Equally, "*we are simultaneously asking nurseries and private schools to do the same*". The Prime Minister also explained that exams planned for May and June would not take place.

36. Commenting on the measures, the Prime Minister said that "*I know that these steps will not be easy for parents or teachers. And for many parents, this will be frustrating, and it will make it harder for them to go out to work*". But: "*I want to thank families for their sacrifice at this difficult time. I want to thank the whole country for the efforts people are making to comply with these measures*". And: "*We believe the steps we have already taken, together with those I am announcing today, are already slowing the spread of the disease. But we will not hesitate to go further, and faster, in the days and weeks ahead. And we will do whatever it takes to so that we beat it together*".

37. Hiscox and RSA have now agreed that the instruction to schools to close falls within (respectively) "*restrictions imposed*" in Hiscox1-4 (hybrid) and "*enforced closure*" in RSA4. Declarations to this effect accordingly appear in the accompanying draft Declarations Order in both the FCA's and Hiscox's proposed Declaration 17.4A (sub-para (c) of the FCA's proposal; sub-para (a) of Hiscox's proposal), and in the FCA's and RSA's agreed Declaration 31.3(a). The instruction appears to be immaterial to RSA1 since it only provides cover in respect of Category 6 businesses (that is, holiday accommodation) and, on that understanding, the FCA does not seek a declaration in relation to RSA1.

[28] {C/32/1807}

[29] The only exceptions were for the children of key workers, such as social care workers and police officers.

38. In addition to his instruction to schools, as noted above the Prime Minister also repeated the instruction to stay at home and to avoid gatherings in his 18 March speech. The Supreme Court is asked to find that the reiteration of these instructions in the 18 March speech were also "*restrictions imposed*" within Hiscox1-4 (hybrid), and "*closure or restrictions placed*" for the purposes of RSA1. Again, the Prime Minister's statements on stay at home/gatherings were clear, mandatory statements with which compliance was required, and in the context, compliance would reasonably be understood to be required. Declarations to this effect are sought by the FCA, as set out in its proposed Declarations 17.4A(c) and 27.3(c) in the accompanying draft Declarations Order.

4. Speech on 20 March 2020: instruction to Category 1 and 2 businesses to close

39. On Friday 20 March 2020 the Prime Minister gave a further televised address, alongside the Chancellor of the Exchequer and the Deputy Chief Medical Officer.[30] The Supreme Court has already decided that the Prime Minister's statement to cafes, pubs, bars and restaurants in this speech was capable of being a restriction "*imposed*" within Hiscox1-4 (hybrid), within the equivalent wording in RSA1 ("*closure or restrictions placed*") and as closure "*enforced*" in RSA4: Jment 120, 122, but it is useful to summarise it nevertheless.

40. Again, the main text of the speech is set out in Appendix 1 of the Supreme Court's Judgment, and is summarised at Jment 19. The Prime Minister reiterated his instructions to avoid pubs, bars, clubs and restaurants, and to work from home if at all possible, and explained that "*people have already made a huge effort to comply with those measures for avoiding unnecessary social contact*". This proves the point: the public had understood the instructions given by the UK Government in the previous few days to be mandatory, and had followed them. The reference to 'compliance' with the earlier measures also reflects their understood mandatoriness. (One cannot 'comply' with advice or suggestions.)

41. The Prime Minister then explained that "*we need now to push down further on that curve of transmission between us*". Following agreement with all the devolved administrations in the UK, "*We are collectively telling, telling cafes, pubs, bars, restaurants to close tonight as soon as they reasonably can, and not to open tomorrow*", though they could continue to provide take-out services. "*We're also telling nightclubs, theatres, cinemas, gyms and leisure centres to close on the same timescale*". The Prime Minister recognised that these were places "*where people come together, and indeed the whole purpose of these*

[30] {C/33/1813-1816}.

businesses is to bring people together. But the sad thing is that today for now, at least physically, we need to keep people apart".

42. Addressing those who might want to not follow these rules, the Prime Minister implored: "*please don't. You may think you are invincible, but there is no guarantee you will get mild symptoms, and you can still be a carrier of the disease and pass it on to others So that's why, as far as possible, we want you to stay at home, that's how we can protect our NHS and save lives*".

43. Hiscox (subject to one qualification) and RSA have accepted that the Prime Minister's instruction to Category 1 and 2 businesses to close in his 20 March speech was, respectively, a "*restriction imposed*" for the purposes of Hiscox1-4 (hybrid), and "*enforced closure of an Insured Location*" for the purpose of RSA4.[31]

44. The qualification in relation to Hiscox is that, in the accompanying draft Declarations Order , Hiscox has proposed (at 17.4A(b)) a declaration in the following form: "*The following amount to 'restrictions imposed': … (b) The instruction to Category 1 and Category 2 businesses to close given by the Prime Minister on 20 March 2020 (paragraph 110(ii) of the Judgment) but only if and insofar as such Category 1 and 2 businesses were subsequently required to close by the 21 March 2020 Regulations."*

45. The words from "*but only if and insofar as*" to the end of the sentence do not reflect the terms of the Judgment and should not be included. In Jment 120, the Supreme Court found the Prime Minister's 20 March instruction to Category 1 and 2 businesses to be an example of the second of the two circumstances identified in paragraph 4 above in which "*restrictions imposed*" need not have the force of law (i.e. a mandatory instruction which the recipient would reasonably understand had to be complied with without inquiring into its legal basis or anticipated legal basis, and regardless of whether it was legally capable of being enforced). On that basis, any subsequent recourse to legal powers is irrelevant: what matters is that the instruction had the requisite mandatory character when it was made on 20 March.

46. Even if the Supreme Court had found the 20 March instruction to Category 1 and 2 businesses to be an example of the first of the two circumstances identified in paragraph 4 above (i.e. a mandatory instruction in the anticipation that legally binding measures will or may follow) the additional words proposed by Hiscox ("*but only if and insofar as*" to the end of the sentence) would still be wrong. As is clear from Jment 117-119, it is not a requirement that a legally

[31] Since RSA1 only provides cover for Category 6 holiday cottage businesses, the FCA's understanding is that the Prime Minister's 20 March instruction to Category 1 and Category 2 businesses has no application to it and on that basis no declaration is sought in respect of RSA1.

binding measure *in fact* follows the mandatory instruction and therefore it cannot be right that the instruction only constitutes a "*restriction imposed*" if such a measure subsequently does follow. As stated in paragraph 4.1 above, the question of whether the policy was triggered by the 20 March statement cannot depend on some subsequent event: the parties must know as at the date of the trigger whether the policy has been triggered. The FCA understands this point to be confirmed in the final sentence of Jment 118 (in the context of the Court's example of the public health inspector instructing the closure of a restaurant immediately on the discovery of vermin, although the legal order to do so may only follow later): "*All concerned would expect such an instruction to be complied with forthwith, regardless of legalities, and would regard the 'restriction' as being 'imposed' there and then*" (underlining added).

47. Accordingly, the Court is asked to make a declaration in respect of Hiscox1-4 (hybrid) in the form proposed by the FCA at 17.4A(d) of the accompanying draft Declarations Order. As regards RSA4, the FCA and RSA have agreed the declaration at 31.3(b).

48. In proposals received by the FCA yesterday afternoon, Hiscox now seeks a further declaration in relation to the 20 March statement: see its proposed Declaration 17.4A(c) to the effect that the instruction to Category 1 and Category 2 businesses to close "*was not a 'restriction imposed' more extensive or less qualified than nor did it have any existence beyond the date of the 21 March Regulations*". This is not a point that has been raised previously. It does not reflect any finding made by the Supreme Court, nor even any submission made to the Court. It is not what the Prime Minister said, nor what the terms of the 21 March Regulations state (and, in any event, for the reasons just stated in relation to Hiscox's proposed Declaration 17.4A(b), the scope and effect of "*restrictions imposed*" on 20 March cannot be determined by reference to further restrictions imposed on a later date). In the FCA's submission, Hiscox's proposed Declaration 17.4A(c) is not an appropriate addition to the Declarations Order.

5. The Prime Minister's speech on 22 March 2020: 2-metre instruction

49. On Sunday 22 March 2020, the Prime Minster made a televised statement, accompanied by the Communities Secretary and the Deputy Chief Medical Officer.[32] One purpose of the speech was to introduce new measures to protect the particularly vulnerable, but in addition the Prime Minister addressed social distancing more generally and in particular interaction outdoors. In that regard the Prime Minister urged the public not to think that "*fresh air in itself automatically provides some immunity*" and instructed them: "*You have to stay two metres apart; you have*

[32] Full text at {C/34/1817-1819}

to follow the social distancing advice", adding "*And I say this now … take this advice seriously, follow it, because it is absolutely crucial. And as I have said throughout this process we will keep the implementation of these measures under constant review and, yes of course, we will bring forward further measures if we think that is necessary*".

50. In terms of its mandatory quality and clarity, this 2-metre instruction had all the requisite characteristics discussed in Jment 121. It is clear from the terms of the instruction that compliance was required (moreover the requirement was backed up with the warning about the possibility of additional measures being introduced). Nor could there be any doubt as to what members of the public had to do in order to comply. Saying "you have to" in this speech is the same as "telling" people to do things in the 20 March speech.

51. In the FCA's submission the instruction constituted a "*restriction imposed*" within Hiscox1-4 (hybrid) and was a "*closure or restriction placed*" within RSA1, and it seeks declarations to this effect, as set out in its proposed Declarations 17.4A(e) and 27.3(d) in the draft Declarations Order.

<u>6. The Prime Minister's speech on 23 March 2020: stay at home instruction, and prohibition against gatherings reiterated</u>

52. On Monday 23 March 2020, the Prime Minister gave a further televised address to the nation (again the main text is set out in Appendix 1 of the Judgment; it is summarised at Jment 24).[33]

53. Referring to the need for "*a huge national effort to halt the growth of this virus*" in order to protect the NHS's "*ability to cope – and save more lives*", the Prime Minister noted that "*huge numbers are complying*" with the existing stay at home instruction, but said that "*the time has now come for us all to do more*". Accordingly, he said: "*From this evening I must give the British people a very simple instruction – you must stay at home*". Thereafter "*people will only by allowed to leave their home*" for very very limited purposes (shopping for basic necessities, limited exercise once a day, for medical or care-giving reasons, and where travel to and from work was essential). He added that "*If you don't follow the rules the police will have the powers to enforce them, including through fines and dispersing gatherings*".

54. To "*ensure compliance with the Government's instruction to stay at home*", the Prime Minister said that "*we will immediately: close all shops selling non-essential goods … and other premises including libraries,*

[33] Full text at {C/37/1841}

playgrounds and outdoor gyms, and places of worship; … stop all gatherings of more than two people in public … and stop all social events, including weddings, baptisms and other ceremonies, but excluding funerals". In relation to gatherings, the Prime Minister also said "*You should not be meeting friends … You should not be meeting any family members who do not live in your home*" and "*Parks will remain open for exercise but gatherings will be dispersed*".

55. The FCA's case on this appeal focuses on two components in these instructions: the further instruction to stay at home, and the further prohibition against gatherings (in almost any form). Both were clearly stated and would reasonably have been understood by the public as carrying immediate, mandatory force, regardless of whether they were legally capable of being enforced at the time - that was the obvious intention behind the Prime Minister's choice of language: "*I must give the British people a very simple instruction*", "*you must*", "*people will only be allowed", "these are the only reasons you should leave your home"*, "*you should not*", "*to ensure compliance*" and so on. Again, this language is equivalent to the "telling you" language of the 20 March speech.

56. Moreover, the immediate, mandatory character of the instructions was further reinforced in this speech by the Prime Minister's express warning that legally binding measures would follow: hence, in particular, the statement that "*If you don't follow the rules the police will have the powers to enforce them, including through fines and dispersing gatherings*", but also the statement that "*No Prime Minister wants to enact measures like this*".

57. The fact that these instructions were intended to be mandatory measures, and interpreted by the public as such, is also evident from the assurance that "*we will keep these restrictions under constant review*", and from the references to this being a fight in which every member of the public "*is directly enlisted*" and that "*Each and every one of us is now obliged to join together*".

58. For the above reasons, it is submitted that the Supreme Court should find that the stay at home instruction and the prohibition against gatherings in the Prime Minister's 23 March speech had the requisite mandatory quality, and clarity, to amount to "*restrictions imposed*" within Hiscox1-4 (hybrid), and "*closure or restrictions placed*" in RSA1. The FCA seeks declarations accordingly, as set out in its proposed Declarations 17.4A(f) and 27.3(e) in the accompanying draft Declarations Order.

7. Public Health England document "Keeping away from other people: new rules to follow from 23 March 2020": 2-metre instruction, stay at home instruction, prohibition against gatherings reiterated

59. Also on 23 March 2020, Public Health England issued a publication titled "*Keeping away from other people: new rules to follow from 23 March 2020*".[34]

60. This stated that, from that date, "*there are 3 important new rules everyone must follow to stop coronavirus spreading*". The first "*rule*" was "*you must stay at home. You should only leave* **if you really need to** *for one of the reasons listed further down in this guidance*" (the listed reasons reflected those given by the Prime Minister in his speech on the same day). The second rule was that non-essential shops and other places in the community should stay closed. The third was that "*people must not meet in groups of more than 2 in public places unless they live together or their job means that they have to*". In addition, the reader was instructed: "*If you leave your home, you must stay at least 3 steps (2 metres) away from other people*".

61. Again, in terms of their mandatory quality and clarity, the instruction to stay at home, the prohibition against gatherings and the 2-metre instruction in this PHE publication all had the characteristics identified in Jment 121. They were 'rules' as to what people 'must' do from a Government agency. There could be no doubt that compliance was required, nor as to what was required in order to comply. The Supreme Court is asked to find that these instructions constituted "*restrictions imposed*" for the purposes of Hiscox1-4 (hybrid) and a "*closure or restrictions placed*" for the purposes of RSA1. It seeks declarations to this effect, as set out in its proposed Declarations 17.4A(g) and 27.3(f) in the accompanying draft Declarations Order.

8. The UK Government's "COVID-19 advice for accommodation providers" published on 24 March 2020: instruction to Category 6 businesses to close

62. On Tuesday 24 March 2020, the UK Government issued "*COVID-19 advice for accommodation providers*" (referred to at Jment 27) addressed to providers of hotel and other accommodation in the UK, instructing them that "*Businesses providing holiday accommodation (including hotels, hostels, B&Bs, campsites, caravan parks, boarding houses and short term lets) should now take steps to close for commercial use as quickly as is safely possible*", and that only those providing accommodation for limited prescribed purposes (such as to support key workers, vulnerable groups or homeless people) should remain open.[35]

[34] {C/35/1829}
[35] {C/39/1851}

63. This was a mandatory instruction to those providing hotel and other accommodation to close for commercial purposes. There can be no doubt that those to whom the instruction was addressed (and their customers) would reasonably have understood that it had to be complied with, regardless of whether it was legally capable of being enforced: that was plain from the terms of the publication itself, but the fact that it was published the day after the Prime Minister's speech on 23 March would no doubt have reinforced that understanding. This is the equivalent for Category 6 businesses to the 20 March speech for Categories 1 and 2 businesses.

64. RSA have accepted that the instruction was a "*closure or restrictions placed on the premises*" for the purposes of RSA1, and "*enforced closure of an Insured Location*" for the purposes of RSA 4. This common ground is reflected in the FCA's and RSA's (otherwise competing) proposals for Declaration 27.3 in the draft Declarations Order (see sub-para (g) of the FCA's proposal), and in the agreed Declaration 31.3(c). Hiscox have not accepted that the instruction was a restriction "*imposed*" for the purposes of Hiscox1-4 (hybrid). The Supreme Court is asked to find that it was, and a declaration to this effect is sought in the FCA's proposed Declaration 17.4A(h) in the draft Declarations Order.

The 21 March and 26 March Regulations

65. Most of the above measures (in addition to others) were given statutory force in the 21 March and/or 26 March Regulations, including the stay at home instruction and the prohibition against gatherings which were given force of law in (respectively) Regulations 6 and 7 of the 26 March Regulations. There should be no dispute that the 21 March and 26 March Regulations had the requisite mandatory force for the purposes of Hiscox1-4 (hybrid), RSA 1 and RSA4,[36] nor that the position should be clearly reflected in the Declarations Order. The FCA has proposed declarations in relation to Hiscox1-4 (hybrid) and RSA1: see the FCA's proposed Declarations 17.4A(i) and 27.3(g) (no change is required to the existing Declaration 31.2 in respect of RSA4). Surprisingly, it appears that there may be some resistance to the FCA's proposal (at least from Hiscox), although no explanation has been given either by Hiscox or (if it is objecting) RSA.

66. The position in relation to Hiscox1-4 (hybrid) is as follows:

[36] As noted in paragraph 16 above, the question of whether there was also the necessary 'inability to use' (Hiscox1-4), 'closure or restrictions' (RSA1), or enforced 'closure' (RSA4) to trigger cover is a separate issue.

66.1. The High Court found (its Jment 267) that "*restrictions promulgated by statutory instrument and in particular Regulation 2 of the 21 March Regulations and Regulations 4 and 5 of the 26 March Regulations*" were "*restrictions imposed*" for the purposes of Hiscox1-4 (hybrid). That finding was reflected in Declaration 17.4 of the High Court Declarations Order.[37] In revising Declaration 17.4 to reflect the Supreme Court's findings on the 'force of law' point, the parties have taken that language out of the declaration because it is not required in order to state the Supreme Court's findings in Jment 116-121.[38] Nevertheless, the Declarations Order should continue to reflect the finding that the restrictions promulgated by these statutory instruments constituted "*restrictions imposed*". That is (part of) the purpose of the FCA's proposed Declaration 17.4A(i). Hiscox has not accepted that proposal, but nor has it given any reason for objecting to it.

66.2. The Supreme Court rejected Hiscox's appeal from the High Court's finding that Regulation 6 of the 26 March Regulations was capable of being a "*restriction imposed*" (Jment 125-128). That result is reflected in Declaration 17.4. For completeness, the FCA has also included Regulation 6 in its proposed list in Declaration 17.4A(i).

66.3. Finally, the FCA has included Regulation 7 of the 26 March Regulations (the prohibition on gatherings) in its proposed list in Declaration 17.4A(i), reflecting paragraphs 61.3 and 74 of its Appeal Case. It appears from Hiscox's proposed Declaration 17.4B(h) that Hiscox will resist this, and indeed will ask the Court to declare that Regulation 7 cannot amount to a "*restriction imposed*". However, it has given no explanation of its position. If the Supreme Court accepts the FCA's submissions in the paragraphs above that the prohibitions on gatherings in the Prime Minister's statements of 16, 18 and 23 March and/or the PHE publication of 23 March 2020 had the requisite mandatory character to constitute a "*restriction imposed*", it must follow that Regulation 7 did too. But even if the Court were against the FCA in relation to those statements and publications, it is submitted that, as a restriction promulgated by statutory instrument, Regulation 7 plainly has the requisite mandatory force and is correctly included in its proposed Declaration 17.4A(i).

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[37] {C/1/1}

[38] Please note that the remaining differences between the FCA and Hiscox as to the content of Declaration 17.4 are addressed in Section C below.

66.4. For the above reasons, the Court is asked to make Declaration 17.4A(i) as proposed by the FCA.

67. As regards RSA1, it is common ground between the FCA and RSA that the Declarations Order should record that Regulation 5(3) of the 26 March Regulations was a "*closure or restrictions placed on the premises*" for the purposes of RSA1.[39] This is reflected in the agreed Declaration 27.2 in the draft Declarations Order. In the FCA's submission, the order should also state that Regulations 6 and 7 of the 26 March Regulations amounted to "*closure or restrictions placed*" for the purposes of RSA1: see the FCA's proposed Declaration 27.3(h) (reflecting paragraphs 61.1, 61.3 and 93 of its Appeal Case).[40] This has not been agreed by RSA, but nor has it given any reasons for objecting (and it seeks no contrary declaration in its proposed Declaration 27.3A). Again (similarly to the point made above in respect of Hiscox1-4), if the Supreme Court accepts the FCA's submissions in the paragraphs above that the stay at home instructions and prohibitions against gatherings in the various Prime Ministerial statements and/or the PHE publication had the requisite mandatory force to constitute "*closure or restrictions placed*", then it must follow that Regulations 6 and 7 did too. But, as measures promulgated by statutory instrument, it is submitted that Regulations 6 and 7 have the required mandatory character even if the Supreme Court were against the FCA on those other measures. Accordingly, the Court is asked to make Declaration 27.3(h) as proposed by the FCA.

C. <u>THE TERMS OF THE DECLARATIONS ORDER</u>

68. In addition to the discussions reflected in Section B above regarding Declarations 17.4A, 27.3 and 31.3, the parties have discussed what other amendments should be made to the High Court's Declarations Order dated 16 October 2020.[41] Many of those amendments have been agreed, but there remain outstanding issues, which this section addresses. The draft Declarations Order included with this Skeleton Argument reflects the agreed position in relation to those declarations which have been agreed, and identifies the parties' competing proposals in relation to disputed declarations. The disputed declarations are addressed below.

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[39] Regulation 5(3) provided that, subject to certain qualifications, "*a person responsible for carrying on a business consisting of the provision of holiday accommodation … must cease to carry on that business during the emergency period*".

[40] On the understanding that RSA1 only provided cover for Category 6 holiday cottage businesses, the FCA has not sought a declaration that Regulation 2 of the 21 March Regulations or Regulations 4 and 5 of the 26 March Regulations constituted "*closure or restrictions placed*" for the purposes of RSA1.

[41] {C/1/1}

69. By way of an introductory point, it is worth highlighting the form that the Declarations take and the preamble paragraph at the start of the Declarations. The parties agree that, rather than merely list variations to the High Court Order, it is preferable to produce a single Order (i.e. the Schedule containing the Declarations) replacing the High Court Order, so that all of the hundreds of thousands of stakeholders need only refer to a single document as containing the rulings made in this test case. The agreed approach is to list at the start of the order which paragraphs were made by the High Court but not appealed to or varied by the Supreme Court, i.e. are orders made by the High Court but not the Supreme Court and included only for convenience so that they are all in one place, and which paragraphs have been appealed and upheld or varied by the Supreme Court and so have the force of being orders of the Supreme Court. This distinction may be important if a policyholder or insurer wishes to seek to bring similar points before the courts or the Financial Ombudsman Service in the future.[42]

70. The disputed declarations are addressed under the following broad headings:

70.1. Declarations that the FCA proposes to delete: 16.3, 22.3(c);

70.2. Causation declarations: 10, 10A, 10B, 11;

70.3. Declarations relating to the General and Specific Measures: 17.4A, 27.3, 31.3;

70.4. Other declarations: 5, 6, 7, 7A; 17.3 & 17.4; 19; 30.2.

<u>1. Declarations that the FCA proposes to delete: 16.3, 22.3(c)</u>

#	FCA position	Insurers' position
16.3	~~Access to or use of the premises, for churches and schools, was hindered by action of government due to an emergency which could endanger human life (the COVID-19 outbreak) from 23 March 2020 and not before~~ [*i.e. declaration should be deleted in full*]	No change [*i.e. declaration should be retained in full*]
22.3(c)	~~Even if the presence of a person with COVID-19 within the radius or in the vicinity could be said to be "an incident", which it cannot, it cannot be said that any such localised incident of~~	No change [*i.e. declaration should be retained in full*]

[42] The minor disputes as to which paragraphs fall within which category merely result from the disputes set out below (e.g. if the Supreme Court rejects the Insurers proposed new paragraph 7A then paragraphs 5 and 6 are untouched unappealed paragraphs, whereas if the Insurers accept the Insurers' proposal then paragraph 5 and 6, to which Insurers propose consequential changes, will have been varied by the Supreme Court).

	~~COVID-19 caused the imposition by the government of national restrictions in response to COVID-19.~~ [*i.e. declaration should be deleted in full*]	

71. A number of declarations in the High Court's Declarations Order are no longer accurate in light of the Supreme Court's Judgment, because they rest on reasoning which the Supreme Court has overturned. For example, the original Declarations 21.1 and 33.1 stated that access to an insured's premises in the MSAmlin1 (AOCA) and Zurich 1-2 clauses "*is only prevented where the premises have been totally closed for the purposes of carrying on the insured's pre-existing business*". These declarations were appealed by the FCA, and while the Supreme Court decided not to rule on the point expressly, insurers have correctly recognised that the declarations should no longer stand.

72. The FCA and insurers have agreed that many of these declarations should be deleted, but there remain two declarations which insurers do not agree should be deleted, but the FCA says should be: Declarations 16.3 and 22.3(c).

<u>Declaration 16.3</u>

73. This concerns the Ecclesiastical 1.1-1.2 policy, which the Supreme Court may not have read before.[43] The relevant clause provides cover for "*access to or use of the premises being prevented or hindered by… any action of Government Police or Local Authority due to an emergency which could endanger human life or neighbouring property*".[44] The policyholders are mainly Category 7 places of worship or educational establishments.[45] The clause has an infectious diseases exclusion, which the High Court ruled meant that there was no cover, which the FCA did not appeal: High Court Jment 373-376.

74. *Obiter*, and if they were wrong about the exclusion, the High Court also commented on whether the clause would have been triggered. The High Court's conclusion at Jment 377 is reflected in Declaration 16.3: "*Access to or use of the premises, for churches and schools, <u>was hindered</u> by action of government due to an emergency which could endanger human life (the COVID-19 outbreak) <u>from 23 March 2020 and not before</u>*" (emphasis added).

[43] It is at {D/1/45} and {D/2/162}.
[44] Set out in the High Court's Jment 354.
[45] See the Categories of Business by Policy table at {C/46/1952-1953}.

75. The FCA invites deletion of this declaration because it no longer sits sensibly with the Supreme Court's conclusion regarding prevention of access to schools and nurseries, or places of worship. The effect of the Jment is that the Prime Minister's instruction on 18 March 2020 that schools should close at the end of the day on 20 March 2020 would constitute a hindrance of access or use of schools from <u>20</u> March 2020 (if, for example, they would have been open over the weekend of 21/22 March). This is common ground between the FCA and Arch, which has agreed in Declaration 14.4(f) that nurseries and educational establishments did suffer a prevention of access if they were completely stopped by the 18 March statement from accessing a whole or a discrete part of their premises for all or a discrete part of its business activities.

76. The Ecclesiastical declaration is therefore wrong, or at least confusing, to record that there could only be a <u>hindrance</u> of access or use from <u>23</u> March 2020, when (as Arch accept) there could be a <u>prevention or hindrance</u> from <u>20</u> March 2020. The declaration should thus be deleted.

77. That approach avoids the need positively to rule on the precise dates of hindrance for Ecclesiastical 1.1-1.2, while avoiding leaving a declaration that is in tension with other declarations on other policies, noting that many policyholders have wordings not tested in this case and will be looking to these declarations by analogy. It makes no ultimate difference to Ecclesiastical, which has the benefit of a declaration that there is no liability on the test case issues on Ecclesiastical 1.1-1.2 for other reasons (*i.e.* the exclusion clause) so it is not at all clear why it should be retained.

78. Ecclesiastical have claimed that "*None of the issues appealed by the FCA have even an indirect impact on this declaration*", and that the FCA's Appeal on Ground 3 (force of law) was irrelevant to Ecclesiastical. This is not correct: as explained above, the FCA's appeal on Ground 2 (meaning of 'prevention') has a direct impact on the declaration.

79. Ecclesiastical's current position is particularly surprising because (i) it chose not to engage in the appeal, despite being a Respondent to it (unlike Zurich, which made written and oral submissions to the Supreme Court); and (ii) the FCA engaged it in correspondence before the Supreme Court appeal hearing precisely on the potential variation of Declaration 16.3 in light of the Supreme Court's judgments.[46]

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[46] The relevant correspondence relating to this issue is: (i) HSF to DACB 21.10.20; (ii) DACB to HSF 23.10.20; (iii) HSF to DACB 27.10.20; (iv) DACB to HSF 4.11.20; (v) HSF to DACB 19.11.20. Copies of these letters are attached.

80. The Supreme Court is invited to delete this declaration reflecting *obiter* reasoning of the High Court, which will have no impact on the result for Ecclesiastical 1.1-1.2 policyholders, but will avoid confusion for others and internal inconsistency within the Declarations as a whole.

Declaration 22.3(c).

81. Declarations 18.4 and 22.3(c) in the High Court Declarations Order were identical and concern the Hiscox (NDDA) and MSAmlin2 (AOCA) clauses, which require proof of an "*incident*". The FCA argued that either the COVID-19 pandemic, or the presence of a person with COVID-19, constituted an "*incident*". The High Court ruled against both those arguments (and the FCA did not appeal against those conclusions). However, the High Court also held *obiter* that: "*Even if the presence of someone with COVID-19 within the radius or in the vicinity could be said to be an incident (which it cannot) it cannot be said that any such localised incident of the disease caused the imposition by the government of the national restrictions*" (emphasis added). That it was obiter is clear from the words "*(which it cannot)*".

82. The declaration therefore suggests that no local case of disease "*caused*" the UK Government action. That is contrary to the Supreme Court's reasoning on causation, and should no longer stand.

83. Hiscox agrees with this position and has agreed to the deletion of Declaration 18.4. MSAmlin has not agreed to the deletion of the identical Declaration 22.3(c). It is difficult to see why MSAmlin considers that the declaration should be retained, since it reflects *obiter* reasoning overturned by the Supreme Court. The Court is invited to delete the declaration.

2. Causation declarations: 10, 10A, 10B, 11

84. The causation declarations 10, 10A and 11 are among the most important because they deal with the central points that provided some of the key obstacles to payment. They will be looked at very carefully by insurers, policyholders, claims handlers and others, and it is important that they are clear and—so far as is possible given the subject matter—easily understandable by policyholders as well as other interested parties. Failure to achieve this aim in these declarations could lead to confusion and delay in the loss adjustment and payment of claims, despite the clarity of the lengthy Judgment that sits behind and explains the declarations.

85. It should also be noted that for many of the points below, Insurers have not explained their reasoning for their proposed drafting. The FCA can surmise in most cases what that reasoning is, but it reserves the right to request permission to file further submissions to better assist the Court if it has failed to anticipate the Insurers' arguments and reasoning.

Declaration 10

86. Declaration 10 deals with disease clauses and what causation is required. There is little dispute in relation to this declaration. The parties agree that it should be based upon Jment 212.

87. The competing positions are shown here, copied from the draft Declarations Order which accompanies this Skeleton Argument:

> In Argenta1, MSAmlin1-2 (disease), QBE1-3, RSA1, RSA3, and RSA4 (disease clause) in order to show that loss from interruption of the insured business was proximately caused by one or more occurrences (or, in the case of QBE1 and RSA1, manifestations) of COVID-19 within the relevant policy area covered by the clause, it is sufficient to prove that the interruption was a result of Government action taken or continued in response to cases of COVID-19, which included at least one case of COVID-19 within the relevant policy area covered by the clause and which had occurred by the date of such Government action. This is because each of the individual cases of COVID-19 which had occurred (or in the case of QBE1 and RSA1, which had become manifest) by the date of the Government action[, and to which the Government action was a response,] was a separate and equally effective cause of that action (and of the response of the public to it).

88. The first sentence closely tracks the first sentence of Jment 212 (save that the term 'relevant policy area' has been used instead of 'geographical area' because the former is the term used throughout the Declarations, dating back to the High Court Order) and is agreed.

89. The second sentence closely tracks the second sentence of Jment 212.[47] The only dispute is that the Insurers propose and the FCA opposes the inclusion of the words "*and to which the Government action was a response*" which are not in Jment 212. This sentence without those words—i.e. reflecting the phrasing of Jment 212—declares the Supreme Court's ruling (agreeing with the High Court) that all individual cases of COVID-19 were effective causes of the Government action. The introduction of the Insurers' words is ambiguous and may be

[47] "212. We conclude that, on the proper interpretation of the disease clauses, in order to show that loss from interruption of the insured business was proximately caused by one or more occurrences of illness resulting from COVID-19, it is sufficient to prove that the interruption was a result of Government action taken in response to cases of disease which included at least one case of COVID-19 within the geographical area covered by the clause. The basis for this conclusion is the analysis of the court below, which in our opinion is correct, that each of the individual cases of illness resulting from COVID-19 which had occurred by the date of any Government action was a separate and equally effective cause of that action (and of the response of the public to it). 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."

read as adding a further qualification or hurdle—only those cases to which the Government action was a response were a separate and equally effective cause of that action, requiring policyholders to show that the Government was responding to those cases. This would not reflect the final determination in this action that the Government action was a response to all COVID-19 cases which therefore does not need further to be demonstrated, which this declaration records.

Declaration 10A

90. Declaration 10A deals with prevention of access and hybrid clauses and what causation is required. The competing positions are shown here, again copied from the draft Declarations Order:

> The prevention of access and hybrid clauses in Arch1, Hiscox 1-4 and RSA1, indemnify the policyholder against the risk (and only against the risk) of all the elements of the insured peril acting in causal combination to cause business interruption loss, regardless of whether the loss was concurrently caused by other (uninsured but non-excluded) consequences of the COVID-19 pandemic which was the underlying or originating cause of the insured peril [(see paragraphs 229, 237 and 296 of the Judgment)]. [This interpretation depends upon a finding of concurrent causation involving causes of approximately equal efficacy.] If all the elements of the insured peril are present, but[, exceptionally,] the insured peril is not a proximate cause of loss and the sole proximate cause of the loss is [a separate unrelated consequence of] the COVID-19 pandemic (see paragraph 244 of the Judgment), then there is no indemnity.

91. The first sentence closely reflects the core reasoning as to concurrent consequences of COVID-19 in Jment 243 and is agreed save for the FCA's proposed parenthesised examples. These are proposed to assist readers in understanding the core case set out in the lengthy judgment, to wit that cover is triggered regardless of whether losses were concurrently caused by the prohibition on leaving home without reasonable excuse (Jment 229) or other consequences of COVID-19 that would have had adverse effects/a downturn in turnover (Jment 237 and 296).

92. The final sentence reflects Jment 244[48] and is also broadly agreed, although the FCA proposes certain additions disputed by the Insurers. As the Court will recall, the exception in Jment 244 arose in the Court's discussion of Hiscox1-4 and was explained by the Court as being "*for*

[48] "244. This interpretation, in our opinion, gives effect to the public authority clause as it would reasonably be understood and intended to operate. For completeness, we would point out that this interpretation depends on a finding of concurrent causation involving causes of approximately equal efficacy. If it was found that, although all the elements of the insured peril were present, it could not be regarded as a proximate cause of loss and the sole proximate cause of the loss was the COVID-19 pandemic, then there would be no indemnity. An example might be a travel agency which lost almost all its business because of the travel restrictions imposed as a result of the pandemic. Although customer access to its premises might have become impossible, if it was found that the sole proximate cause of the loss of its walk-in customer business was the travel restrictions and not the inability of customers to enter the agency, then the loss would not be covered."

completeness", the example given being of a travel agency that lost "*almost all its business*" as a result of travel restrictions, in which case there would be no recovery of the loss due to walk-in customers "*if it was found that the sole proximate cause of*" that loss was the travel restrictions not the prevention of access. As the FCA's agreement to the inclusion of last sentence indicates, the FCA is content to include a sentence reflecting this exception (although a case could be made for treating it as a detail to be found in the Judgment that does not need to be recorded in the declarations).

93. However, the FCA does propose certain additional words (although they do not appear in Jment 244):

   93.1. "*exceptionally*" is intended to make clear the exceptionality of the point raised in paragraph 244—where 'for completeness' a single example was given by the Court of a situation where there 'may' not be cover—so that readers well understand that in the typical situation this will not arise and cover will obtain without adjustment for any effects of COVID-19.

   93.2. the phrase "*a separate unrelated consequence of*" is intended (i) by the words "*separate unrelated*" to explain and clarify that the distinction is between the effects of prevention (as part of the causal combination that comprises the insured peril) and things that are not "*anything to do with the closure of the premises*" (to quote Jment 244), and (ii) by the reference to "*consequence*" to seek to clarify that the proximate cause competition or comparison is between the insured peril and some other consequence of the underlying fortuity COVID-19 that is unconnected with the prevention element of the insured peril, rather than between the insured peril (the prevention, a consequence of COVID-19) and COVID-19 per se. This is what is understood to be intended by Jment 244 and the points reflected there.

94. Further, Insurers propose to add an additional middle sentence "*This interpretation depends upon a finding of concurrent causation involving causes of approximately equal efficacy*". This is a quotation from Jment 244 but the FCA's position is that this should not be included for the following reasons.

95. First, while clear as an explanation of law in a court's judgment, it is overly abstract for a declaration in a court order—it describes the underlying principle or reasoning but does not refer to the insured peril or COVID-19 or any particular elements of it arising in this case—and will accordingly be very difficult for policyholders to understand (and so expeditiously apply) for the purposes of the Declarations Order.

96. Second, it is entirely unnecessary and repetitive given that Declaration 10A already sets out in the agreed final sentence that there is no cover where the insured peril is not a proximate cause and COVID-19 is the sole proximate cause, which is the ruling that justifies a declaration in this Order.

97. Third, there is a question of proportion, emphasis and tone. As noted in paragraph 93.1 above, the drafting of these declarations should reflect the exceptionality of the point raised in paragraph 244. Having Insurers' proposed additional sentence, on top of the remainder of Declaration 10A including the final sentence, gives rise to a real risk of this being understood and applied by insurers as if there were some additional substantive causation hurdle for policyholders to overcome in a standard case of the application of a prevention of access clause to walk-in losses. That would reinstate a major roadblock to cover that would not be justified by the Judgment. The ordinary position is as recorded in, e.g., Jment 229, 237, 296: in the general case of prevention of access, uninsured adverse COVID-19 consequences will not be the sole proximate cause of walk-in losses and those other COVID-19 consequences are merely concurrent uninsured causes to be disregarded.

Declaration 10B

98. This is an additional declaration proposed by Arch, although not supported by any other Insurer, and opposed by the FCA. Arch's proposal is in the following terms:

> Where access to a discrete part of the premises, or where access to the premises for a discrete part of the policyholder's business, has been completely stopped from happening or made impossible, there is only cover for the loss which such prevention of access has caused.

99. This appears to comprise a combination of parts of Jment 141 (in the Hiscox section) and 151 (in the Arch section), but Arch's drafting is unsatisfactory. However, as the declaration is also unnecessary because Declaration 10A (the drafting of which has been negotiated with all the Insurers) already declares that loss is irrecoverable where the insured peril is not a proximate cause and so covers this point by precisely formulating the causation principles, the FCA's preferred position is that Arch's proposal be rejected.

100. If the Supreme Court did prefer to include a declaration on this topic, then the Arch declaration requires some work. It purports to apply to all clauses despite not being accurate as regards disease clauses. It refers to access being 'completely stopped' but, while that is the wording used in the Jment per Jment 151, that is not the way the test was formulated for Hiscox1-4(hybrid) (an 'inability to use' clause for which the test is simply whether it is able to

be used: Jment 137) or RSA1 (a 'closure or restrictions placed on' clause). Further, it specifies that the cover is for loss which prevention of access has "*caused*" without reference to the more complex causation issues set out in the other declarations, and this is not what the Judgment says.

101. If the Supreme Court does prefer a declaration on this topic, the FCA would therefore contend for the following:

> As regards prevention of access and hybrid clauses, in calculating the amount which the insurer is liable to pay, the calculation must be confined to those activities of the business which were interrupted by the operation of the insured peril. Where a discrete part of the business was not interrupted by the insured peril, the relevant comparison is therefore between the actual turnover and the adjusted standard turnover only of the interrupted activities.

102. The explanation for this wording is as follows:

102.1. "*As regards prevention of access and hybrid clauses*" explains that this issue does not arise for disease clauses (for which prevention of access is not a part of the insured peril).

102.2. "*in calculating the amount which the insurer is liable to pay, the calculation must be confined to those activities of the business which were interrupted by the operation of the insured peril. Where a discrete part of the business was not interrupted by the insured peril, the relevant comparison is therefore between the actual turnover and the adjusted standard turnover only of the interrupted activities*" is Jment 281 verbatim, and is useful clarification of how this works in practice.

102.3. This achieves any appropriate goal without needing more clumsily to deal with the fact that this Declaration must apply to the different prevention and hybrid clauses (not only Hiscox as in Jment 141 or Arch as in its proposed wording of 'completely stopped'), as well as avoiding Arch's proposed and unnecessary problematic reintroduction of the concept of 'causation' (that word not being used in Jment 141 or 281). (The concept of interruption can be taken here for the general impact of the prevention etc. as applicable in each clause.) If it were desired to include wording more closely reflecting Jment 141, as Arch proposes, and despite the first sentence of Jment 281 making the point adequately, then it should be something like: "*As regards prevention of access and hybrid clauses, where there has been the required prevention etc in relation to a discrete part of the business or premises, there is only cover for that part of the business. In calculating the amount…*"

Declaration 11

103. Declaration 11 deals with the counterfactual (principally) and the irrelevance of concurrent COVID-19-related consequences once cover is triggered.

104. Declaration 11.1 is an adaptation of a declaration in the High Court order and engages with whether competing causes lead to a reduction in the indemnity. The competing positions as to declaration 11.1 are shown here, copied from the draft Declarations Order:

> 11.1 Once cover under the policy is triggered, losses do not fall to be reduced by reason of rules of factual or proximate causation, or under the trends or similar clauses, or otherwise, by reason that but for the insured peril losses would have been suffered (after the date on which cover is triggered) anyway as a result of COVID-19 (including outside any relevant policy area), and/or any consequences of it (including via the authorities' and or the public's response thereto), including any one or more elements of the insured peril acting separately or in combination [that are inextricably linked to the same original cause, COVID-19].

105. The declaration is largely agreed, save for the extra wording proposed by the Insurers at the end. The Insurers' proposed wording explains the rationale behind the conclusion that is recorded in the agreed body of the draft declaration (the Court's reasoning that COVID-19 is the underlying or originating cause, the Insurers apparently paraphrasing, although not very closely, Jment 237 or maybe 287), but is unnecessary and undesirable because it is not needed. In the present context, the key ruling to be recorded is the conclusion that COVID-19 has been found to be an originating cause and so all of its consequences are to be removed. The declaration does not need to record the reasoning behind that conclusion.

106. Further, this wording could be read as providing an additional qualification that the elements of the insured peril are only disqualified from being competing causes preventing recoverable loss if they are shown in each case to be inextricably linked, whereas in fact it has been found that they are (e.g. Jment 237) so there is no further test to apply and this would be contrary to the Judgment.

107. Declaration 11.2 deals more directly with the counterfactual, again adapting a High Court declaration. The competing positions as to Declaration 11.2 are shown here, copied from the draft Declarations:

> 11.2 The correct counterfactual when calculating [the quantum of those losses proximately caused by the insured peril is to assume the absence of both (i) the insured peril and (ii) the circumstances arising out of the same underlying or originating cause (namely the COVID-19 pandemic) where these operate concurrently with the insured peril.] [an indemnity is to assume, once cover under the policy is triggered, the absence of both (i) all the elements of the insured peril and (ii) its underlying or originating cause (namely the COVID-19 pandemic) and all its consequences.

This means, for disease, prevention of access and hybrid clauses, that once cover is triggered one assumes for the counterfactual no COVID-19 pandemic, no government or public response to it (including any prevention of access or inability to use the premises), and no other consequences of COVID-19.]

108. As to the rival blue (Insurer) and red (FCA) text shows, the parties disagree about the first sentence:

108.1. The FCA adopts the original purpose and wording of the High Court Order of providing the measure of the indemnity. (The High Court Order was "*The correct counterfactual when calculating an indemnity is to assume that once cover under the policy is triggered none of the elements of the insured peril were present, which…*") The Insurers' unexplained introduction of "*the quantum of the losses proximately caused by the insured peril*" is an unnecessary complication where the proximate cause issue is dealt with in detail in Declarations 10 and 10A and, to an extent, 11.1, and may also suggest that proximate cause must be further addressed and at large here beyond what is set out in those Declarations.

108.2. As to the two elements of the counterfactual which are absent, the FCA contends for "*all the elements of the insured peril*" rather than the Insurers' "*the insured peril*", to make clear that there is no need when operating the counterfactual to attempt to formulate the insured peril in causal combination but that (as it was caused by COVID-19) all of the elements of the peril are removed separately and in combination, thereby adopting and so echoing the same agreed language as appears in the final sentence of Declaration 11.1.

108.3. Further, the FCA's formulation of the second element of the counterfactual which is absent refers to removing "*all [the] consequences*" of COVID-19, whereas the Insurers prefer "*the circumstances arising out of*" COVID-19. The FCA's wording is clearer and better reflects Jment 243. (The term 'circumstances' is appropriate when considering the 'trends or circumstances' clause, as in Jment 268, and is already recorded in Declaration 11.4(a), but Declaration 11.2 is not confined to trends clauses and 'consequences' is the preferable and more typical wording in the Jment e.g. 227, 229, 232, 239, 243, 249.)

108.4. Further, Insurers propose that this first sentence of Declaration 11.2 includes words at the end "*where these* [i.e. the circumstances arising out of COVID-19] *operate concurrently with the insured peril*". It is not clear what the Insurers intend by this—the

premise of this Declaration is that cover is triggered and proximate cause satisfied, and Declarations 10 and 10A obviously also must be satisfied, but in those circumstances it is not correct or helpful to seek to introduce a further test of concurrence. For disease clauses, COVID-19 will always be concurrent with the effects of the disease within the relevant policy area. For prevention of access resulting from COVID-19, COVID-19 will always be concurrent. Concurrence is therefore a given, whereas this paragraph confusingly and unjustifiably introduces an apparently additional test of concurrence.

109. Further, the FCA proposes an extra second sentence. The High Court Order included a useful summary for the holders of wordings in the three different categories as follows:

> "which:
>
> (a) for disease clauses means after the date on which cover under the policy is triggered there was no COVID-19 in the UK, or any public authority or public response thereto;
>
> (b) for prevention of access clauses, means (for example) no prevention or hindrance, no government action and no emergency; and
>
> (c) for hybrid clauses means (for example) no inability to use the premises, no public authority restrictions and no COVID-19 in the UK."

110. The Supreme Court's reasoning (where all consequences of COVID-19 are to be removed from the counterfactual for all types of wording, as they all have the same underlying contemplated fortuity or originating cause) means that (as the parties all agree) three separate sub-paragraphs are unnecessary, but the FCA nevertheless proposes a single summary sentence to make clear to policyholders how the indemnity is to be calculated:

> This means, for disease, prevention of access and hybrid clauses, that once cover is triggered one assumes for the counterfactual no COVID-19 pandemic, no government or public response to it (including any prevention of access or inability to use the premises), and no other consequences of COVID-19.

111. This follows from Jment 243, 288, and elsewhere. It is not known why Insurers object to this drafting but the FCA contends that it is correct and useful as a declaration of the indemnity measure, and gives a very clear guide as to how the counterfactual is to be drawn. (This additional clarity is necessary, but would become all the more important if the Insurers' drafting of the first sentence is preferred by the Court.)

Declaration 11.4

112. The dispute in relation to Declaration 11.4 is a very similar point to that in relation to 11.3 explained at paragraph 106.4 above. There is no need for, and it would be confusing to introduce, a reference to concurrent causes—which is believed to intend a reference to

concurrent proximate causation and the point in Declaration 10A—in a declaration as to the measure of indemnity under trends clauses, and no such qualification can be found in the Judgment paragraphs dealing with trends clauses (esp Jment 287). The concurrence issues are dealt with in Declarations 10 to 10A to the extent necessary.

3. Declarations relating to the General and Specific Measures: 17.4A, 27.3 and 31.3

113. Section B above sets out the findings the FCA asks the Supreme Court to make on the General and Specific Measures in relation to Hiscox1-4 (hybrid), RSA1 and RSA4. Those proposed findings are reflected in the FCA's proposals for Declarations 17.4A, 27.3 and 31.3 in the draft Declarations Order. Three further matters relating to these Declarations are addressed here.

114. First, as set out in the draft Declarations Order, the FCA has proposed that each of Declarations 17.4A, 27.3 and 31.3 should contain: (1) introductory language describing the sub-paragraphs which follow as "*non-exhaustive examples*" of matters which amount to "*restrictions imposed*", "*closure or restrictions placed on the premises*" or "*enforced closure*"; and (2) a concluding paragraph the purpose of which is to make clear that the preceding list of examples is not a closed list and the question of whether any other public authority announcements, statements, instructions etc. may qualify for the purposes of the relevant wording will be a matter for agreement or determination in future cases, applying the approach set out in (respectively) Declarations 17.4, 27.2 and 31.1.

115. As will be apparent, the purpose of these proposals is to reflect in the Declarations Order the points explained in paragraphs 13 and 14 above regarding the specific and focused nature of the rulings the Supreme Court has been asked to make in relation to the General and Specific Measures, and the fact that policyholders are not precluded from taking other points. In the spirit of ensuring maximum clarity it is important that this is made expressly clear on the face of the Declarations Order so that no one is left in any doubt as to the correct position. It is hard to see what principled objection Hiscox and RSA could have to this. It is notable that although they have not agreed to the inclusion of the proposed language, neither of them has given any reason at all for objecting to it being included. The overarching point here is the one also made in paragraph 84 above in relation to the causation declarations, which applies equally to the declarations in respect of the General and Specific Measures: the FCA's concern is to ensure clarity and to avoid confusion and delay in the adjustment and payment of claims.

116. The second matter concerns the RSA's proposed Declarations 27.3A (in respect of RSA1) and 31.3A (in respect of RSA4) in the draft Declarations Order. As far as 27.3A is concerned, the

declarations sought are simply the mirror image of the declarations sought by the FCA in its proposed Declaration 27.3(a)-(g): in other words, whereas the FCA seeks positive declarations that the measures identified amounted to "*closure or restrictions placed*" for the purposes of RSA1, RSA seeks negative declarations in respect of the same measures. The FCA of course has no objection to the Declarations Order declaring that a particular measure in issue does *not* amount to a "*closure or restrictions placed on the premises*" for the purposes of RSA1 if that is a finding the Supreme Court makes (contrary to the FCA's case on that measure set out in Section B above).

117. As far as RSA's proposed Declaration 31.3A is concerned, the position is a little different because: (1) the FCA does not seek any declaration in respect of the measures which RSA has included in its proposed declaration, and (2) RSA has not explained the basis on which it will seek the declaration or identified the matters on which it will rely. Nevertheless, the FCA does not oppose a declaration in the terms proposed by RSA in its Declaration 31.3A, provided that it is understood that this should not be taken as acceptance of any matter RSA may rely on in its Skeleton Argument in support of the declaration, given that the FCA has received no notice whatsoever of what RSA may say.

118. Third, in proposals received yesterday afternoon, Hiscox has indicated that, if it is wrong in its contention that the Supreme Court (in Jment 124) intended the question of whether the General and Specific Measures come within the Court's approach to the force of law point to be left over for agreement or further argument in future cases (see paragraph 17 above), then it too would wish to seek a negative declaration along the lines sought by RSA in its proposed Declaration 27.3A in respect of any measure which the Court may find (contrary to the FCA's case) does *not* amount to a "*restriction imposed*" for the purposes of the Hiscox1-4 (hybrid) clauses. As in relation to RSA's proposed Declaration 27.3A, the FCA has no objection to the Declarations Order declaring that a particular measure in issue does *not* amount to a "*restriction imposed*" for the purposes of the Hiscox clauses if that is a finding the Supreme Court makes (contrary to the FCA's case on that measure set out in Section B above).

4. Other declarations

Insurers' proposals as to the meaning of 'sustained', 'occurred', 'manifested' and 'illness' etc: Decls 5, 6, 7, and new 7A

#	FCA position	Insurers' position

5	No change	Subject to paragraph 7A below, there was COVID-19…
6	No change	Subject to paragraph 7A below, there was COVID-19…
7	No change	Subject to paragraph 7A below, there was COVID-19…
7A	No declaration should be inserted	There was no "occurrence" or "manifestation" of COVID-19, and COVID-19 was not "sustained", within a given radius of the premises for the purposes of Argenta1, Hiscox4 (hybrid), MSAmlin1-2 (disease clauses), QBE1-3 and RSA1 and 3 merely by reason of the fact that a person travelled through that geographical area and had no contact with anyone living in the area.

119. Insurers' seek to caveat each of the High Court's existing declarations 5, 6 and 7 by the insertion of a new Declaration 7A, which would say that there was no 'occurrence' or 'manifestation' of COVID-19, and COVID-19 was not 'sustained', within the meaning of the disease and hybrid clauses "*merely by reason of the fact that a person travelled through that geographical area and had no contact with anyone living in the area*". These changes should not be made.

120. The relevant section of the Judgment is [208-209]. The Supreme Court discussed MSAmlin's argument that if it adopted the FCA's case, then a policyholder insured under an MSAmlin1-2 disease clause based on the Isles of Scilly could claim for all the business interruption consequences of COVID-19 "*upon mere proof that a trawler sailed within 25 miles of the insured premises and, aboard the trawler, was a single fisherperson with COVID-19 even if undiagnosed*".[49] Argenta relied on similar examples of infected people driving near to or flying over a policyholder's premises.[50] MSAmlin and Argenta argued that these examples would lead to cover on the FCA's case, but not on their own case. The FCA does not recall Hiscox, QBE or RSA making this argument.

121. The Supreme Court rejected the underlying premise of MSAmlin and Argenta's argument: the question of whether transient passage triggers a disease clause arises as much on insurers' case as it does on the FCA's case. It sheds no light on whose interpretation should be adopted.

[49] MSAmlin's Written Appeal Case para 41.4.
[50] Argenta Written Appeal Case para 74.

122. Insurers now seek to caveat the meaning of the words "*occurrence*" and "*sustained*" in Argenta1, Hiscox4, QBE2-3 and RSA3, the words "*illness sustained by any person resulting from*" in MSAmlin1-2, and "*manifested*" in QBE1 and RSA1, with the Supreme Court's remark.

123. Whether transitory passage through the radius would trigger these clauses was not addressed by the High Court, and so was not on appeal to the Supreme Court. Accordingly, this comment was not a finding of the Supreme Court on the meaning of those words requiring a declaration, nor was such a declaration ever sought by Argenta or MSAmlin (let alone Hiscox, QBE or RSA); it was the Supreme Court commenting in passing, dealing with and rejecting an example posited by two insurers. The precise boundaries of when a case of COVID-19 satisfies the term "*occurrence*" or "*sustained*" or "*manifested*" or "*illness sustained by any person resulting from*" were not explored in argument, nor in the Judgment. For example, as the reasoning in Jment 208-9 suggests, one would have to explore whether the true boundary of the principle—if it were a principle—were that there must be a risk of transmission, rather than whether there was contact. But this was not explored and it would not be appropriate to do so now when neither party sought a declaration along these lines or to appeal on this issue. These are matters which should be left to be determined in other cases based on concrete evidence and full argument.

124. Insurers' proposed changes should not be made.

Hiscox: Declarations 17.3 and 17.4

125. The FCA and Hiscox have been unable to agree the final terms of declarations reflecting the Supreme Court's decision as to the meaning of the phrases "*inability to use*" and "*restrictions imposed*" in the Hiscox 1-4 (hybrid) wordings. The relevant declarations are Declarations 17.3 and 17.4.[51] The parties' proposals are set out in the table below. For ease of reference, relevant passages in the proposals are highlighted, and the contentious passages in the Hiscox proposed additions to Declaration 17.4 are numbered.

#	**FCA position**	**Hiscox's position**
17.3	As regards Hiscox1-4, and "inability to use", inability to use has to be established; an impairment or hindrance in use is not sufficient. The requirement for an "inability	As regards Hiscox1-4, and "inability to use", inability is not a matter of the extent to which someone is able or unable to do something, it means they cannot do it at all. Inability to use

[51] In proposals received by the FCA yesterday afternoon, Hiscox proposed the addition of the following words shown underlined in the penultimate sentence of Declaration 17.4: "Whether such restrictions, including any falling within 17.4A, caused an inability to use is a question of fact.". The FCA has no objection to this addition.

	to use" is satisfied if the policyholder is unable to use the whole or a discrete part of its premises for either the whole or a discrete part of its business activities. There is only cover for that part of the business for which the premises or relevant part cannot be used. Whether there has been an "inability to use" in any given case is a question of fact.	has to be established; an impairment or hindrance in use is not sufficient. The requirement for an "inability to use" is satisfied if the policyholder is unable to use the whole or a discrete part of its premises for either the whole or a discrete part of its business activities. There is only cover for that part of the business for which the premises or relevant part cannot be used. Whether there has been an "inability to use" in any given case is a question of fact.
17.4	As regards Hiscox 1-4 (hybrid), "restrictions imposed" by a public authority would be understood as ordinarily meaning mandatory measures "imposed" by the authority pursuant to its statutory or other legal powers. A restriction does not always have to have the force of law for it to come within the meaning of "restrictions imposed". An instruction given by a public authority may amount to a "restriction imposed" if, from the terms and context of the instruction, compliance with it is required, and would reasonably be understood to be required, without the need for recourse to legal powers. For such an instruction to amount to a "restriction imposed" it would need to be in mandatory terms and in clear enough terms to enable the addressee to know with reasonable certainty what compliance requires. A mandatory instruction given by a public authority in the anticipation that legally binding measures will follow shortly afterwards, or will do so if compliance is not obtained, is also capable of being a "restriction imposed". "Restrictions imposed" do not necessarily have to be directed to the insured or the insured's use of premises. Regulation 6 is capable of being a "restriction imposed". Whether such restrictions, including any falling within 17.4A, caused an inability to use is a question of fact. Cases in which Regulation 6 would have caused an "inability to use" the insured's premises would be rare; whether there were such cases is a question of fact.	As regards Hiscox 1-4 (hybrid), "Restrictions imposed" by a public authority would be understood as ordinarily meaning mandatory measures "imposed" by the authority pursuant to its statutory or other legal powers. A restriction does not always have to have the force of law for it to come within the meaning of "restrictions imposed" **[1]** and does not need to do so in the limited circumstances set out below. An instruction given by a public authority may amount to a "restriction imposed" if, from the terms and context of the instruction, compliance with it is required, and would reasonably be understood to be required, without the need for recourse to legal powers. For such an instruction to amount to a "restriction imposed" it would need to be in mandatory terms and in clear enough terms to enable the addressee to know with reasonable certainty what compliance requires. A mandatory instruction given by a public authority in the anticipation that legally binding measures will follow shortly afterwards, or will do so if compliance is not obtained, **[2]** is capable of being a "restriction imposed". "Restrictions imposed" do not necessarily have to be directed to the insured or the insured's use of premises, **[3]** although in most cases they would be. Regulation 6 is capable of being a "restriction imposed". Whether such restrictions, including any falling within 17.4A, caused an inability to use is a question of fact. Cases in which Regulation 6 would have caused an "inability to use" the insured's premises would be rare; whether there were such cases is a question of fact, **[4]** but it is likely that it will be difficult for Category 3 and Category 5 business which were allowed to remain open to demonstrate the requisite inability to use.

126. Declaration 17.3 should reflect the key findings (and only the key findings) of the Supreme Court in relation to "*inability to use*". The relevant section of the Judgment is at 129-145. The passage which Hiscox wishes to insert comes from Jment 135. As the FCA reads that paragraph of the Judgment it is intended to summarise Hiscox's submissions on the point and is not a part of the Court's reasoning at all. If that is right, the passage is obviously not appropriately included. If the FCA is wrong to read the paragraph that way then, in any event, the sentences Hiscox relies on are not key findings of the sort which should be included the declaration. They are essentially a stage in the reasoning, not a conclusion. The reader has the Judgment itself to refer to to follow the Court's reasoning: the passage Hiscox has inserted is not a necessary or appropriate addition to the declaration and should not be included.

127. Declaration 17.4 should reflect the Court's key findings in relation to "*restrictions imposed*". The relevant section of the Judgment is at 106-128. As to the disputed passages in Hiscox's proposal, [1] and [2] overlap and are addressed together:

127.1. The starting point is that, as set out in paragraph 4 above, the Supreme Court identified two examples of circumstances in which "*restrictions imposed*" need not have the force of law: one is described in Jment 117-118 (mandatory instruction in the anticipation that legally binding measures will or may follow), and the other is described in Jment 120-121 (mandatory instruction which the recipient would reasonably understand had to be complied with without inquiring into its legal basis or anticipated legal basis, and regardless of whether it was legally capable of being enforced). Both of these are reflected in the FCA's proposed Declaration 17.4 (albeit in reverse order, because the second is perceived to be generally broader than the first). The fact that they are examples of two different situations, and are not just two different facets of a single example, is reflected in the FCA's use of the word "*also*" (as highlighted above) in its proposed declaration.

127.2. Hiscox has objected to "*also*" and omits it from its proposed declaration (see [2] in the table above). It has contended that the situation envisaged in Jment 117-118 is merely an example of something falling within "the test" (as it has described it) in Jment 121, and not a separate category of circumstance satisfying "*restrictions imposed*". In addition, in seeking to add the words highlighted in [1] in the above table it effectively seeks to limit the Supreme Court's finding to this single 'test'.

127.3. In the FCA's submission, Hiscox's changes [1] and [2] to the FCA's proposal should both be rejected. They are based on, and seek to convey through the declaration, an inaccurate interpretation of this aspect of the Judgment – the correct interpretation being as summarised in the first sub-paragraph above. It is notable that Hiscox's interpretation is not shared by RSA. The counterpart declaration for RSA4 is Declaration 31.1. RSA has accepted the FCA's original drafting of that declaration (which reflects the FCA's drafting of Declaration 17.4), without being tempted to join Hiscox in contending either that the Supreme Court set a single test for qualifying non-legally binding measures or that the two examples (still less, one of them) amount to a closed list.

128. Hiscox proposals [3] and [4] are both essentially commentary, not statements of principle or key findings. In the FCA's submission, neither is appropriate for inclusion in the declaration. Again, for anyone curious to look beyond the key findings, the Judgment is available. Proposal [4] is particularly unnecessary, since the immediately preceding sentence already contains all that needs to be said about rarity.

129. For the above reasons, the Supreme Court is asked to make Declarations 17.3 and 17.4 in the form proposed by the FCA.

<u>Hiscox: Declaration 19</u>

#	**FCA position**	**Insurers' position**
19	As regards Hiscox 1-4 (hybrid), subject to any terms of the policy that permit recovery after restrictions have ceased, e.g. as to the definition of the indemnity period, an insured cannot claim in respect of loss sustained before the commencement or after the cessation of insured peril ~~and the correct counterfactual can only assume that the insured peril applies from the time that the restrictions are imposed and only for as long as they are imposed~~	No change [*i.e. declaration should be retained in full*]

130. This declaration concerns the Hiscox (hybrid) clauses, which were the subject of appeal. The declaration states that, subject to policy terms, "*an insured cannot claim in respect of loss sustained before the commencement or after the cessation of insured peril, <u>and the correct counterfactual can only assume that the insured peril applies from the time that the restrictions are imposed and only for as long as they are imposed</u>*". The FCA seeks the deletion of the underlined part. The words suggest that only the

insured peril is removed in the counterfactual; that was declared by the High Court given its reasoning as to a broad insured peril, but the Supreme Court has taken a different approach to insured perils (narrowed) and causation (an approach removing the underlying fortuity), and so the reasoning cannot stand. In any case, it is difficult to see why Hiscox is persisting with this declaration: all necessary declarations dealing with causation and the counterfactual should be set out in the earlier declarations (10-11) which apply equally to all policies, so there is no need for this declaration, specific to Hiscox (hybrid), and now incorrect, to remain.

RSA4 (Disease clause): Declaration 30.2

#	FCA position	Insurers' position
30.2	There is cover for losses caused by interruption of or interference with the insured business as a result of COVID-19 (including the governmental reaction thereto pleaded at APoC sub-paragraphs 18.9, 18.14, 18.15(d), 18.16 to 18.24 and 18.26 and the public reaction thereto) ~~occurring in the UK.~~	There is cover for losses caused by interruption of or interference with the insured business as a result of COVID-19 (including the governmental reaction thereto pleaded at APoC sub-paragraphs 18.9, 18.14, 18.15(d), 18.16 to 18.24 and 18.26 and the public reaction thereto) occurring in England and Wales.

131. Declaration 30.2 previously stated that there would only be cover under RSA4 "*as a result of COVID-19… occurring in the UK*". The FCA wishes to delete the words "*occurring in the UK*" altogether; RSA wishes to narrow them to "*occurring in England and Wales*".

132. It is common ground that the RSA4 disease clause was triggered on 31 January 2020: Declaration 4. The slight problem arises because Declaration 30.2 does not distinguish between proximate causation and counterfactual causation. Proximate causation is dealt with by Declaration 10 and it is accepted by the FCA that only UK cases of COVID-19 led to the relevant national measures, although it is declared that the national measures were indeed caused by such cases and so there is no remaining issue to determine there. There is therefore no need to mention the 'in the UK' issue here in the RSA4 declaration, the point having been determined in Declaration 10 as agreed by the parties.

133. However, as to counterfactual causation, which is dealt with by Declaration 11, once cover is triggered under the RSA4 disease clause, the policyholder has cover for interruption caused by the entire underlying fortuity which is "*the global COVID-19 pandemic*" (Jment 240), not just COVID-19 in the UK, and not just COVID-19 in England and Wales. The words "*occurring in the UK*" or "*occurring in England and Wales*" in the Declaration could be wrongly read as

narrowing the scope of cover under this clause, such that for example cases of COVID-19 outside the UK must be retained in any counterfactual, contrary to Jment 240.

134. The preferable approach is to simply exclude these words, since the proximate cause issues is dealt with satisfactorily in Declaration 10 (the operative part of which is agreed with all Insurers).[52]

135. RSA has sought to justify its to change because the clause "*makes express reference to the Territorial Limit of the policy*".[53] To the best of the FCA's recollection, this appeal to the territorial scope of the clause is the first time this argument has ever been raised, by any party, in this test case. It is too late, and wrong. There is no suggestion that the term "*Territorial Limits*" in RSA4 prescribes a different causation test to that which the Supreme Court found applied to every other clause in every other policy. RSA has never argued this, and the Supreme Court did not find it. Indeed, the insertion would make cover *narrower* than it was at first instance (reducing "*in the UK*" to "*in England and Wales*"), even though all insurers' appeals on causation were refused.

136. The relevant clause provides cover "*as a result of [COVID-19] occurring within the Vicinity of an Insured Location, during the Period of Insurance… within the Territorial Limits*", those limits being defined by the policy as "*those territories nominated as such and as specified in Item 1 of the Schedule*". The word "*Vicinity*" was defined in very broad terms and was held by the High Court to be capable of extending to the whole of the United Kingdom,[54] a decision which was not appealed by RSA. The "*Territorial Limits*" provision simply sets a territorial scope on the <u>trigger</u> within clause 2.3: for example, clause 2.3(v) "*Injury to Essential Personnel*" would not be triggered if an employee was injured whilst outside the Territorial Limits. Once triggered, the underlying or originating cause should be subtracted in its entirety, just like under every other clause. (And, in any event, the Territorial Limits for a particular policy depends upon the Schedule to that policy and may well be broader than the UK or England and Wales.)

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[52] If they were to be included, one would need, rather inelegantly, to include something like the following, to make clear that the territorial restriction does not affect the counterfactual: "*There is cover for losses caused <u>(in the sense set out in declaration 10 above)</u> by interruption of or interference with the insured business as a result of COVID-19 <u>occurring in the UK</u> (including the governmental reaction thereto pleaded at APoC sub-paragraphs 18.9, 18.14, 18.15(d), 18.16 to 18.24 and 18.26 and the public reaction thereto), <u>the counterfactual then to be determined as per declaration 11 above</u>*".

[53] RSA's comments in support of this amendment.

[54] High Court Jment 137-140

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12 February 2021

APPENDIX

Hiscox 1-4 (Hybrid)

The Hiscox1-4 (hybrid) cover clauses (quoted at Jment **insert**) are in the following terms (ignoring immaterial differences; the only material variation is the inclusion of a one-mile requirement in Hiscox4[55]):

"**What is covered**	**We** will insure **you** for **your** financial losses and other items specified in the schedule, resulting solely and directly from an interruption to **your activities**[56] caused by:…
Public authority	13. your inability to use the **insured premises** due to restrictions imposed by a public authority during the **period of insurance** following:… b. an occurrence of any human infectious or human contagious disease, an outbreak of which must be notified to the local authority"

RSA 1

RSA1 includes an Extension 2 ('Disease, Murder, Suicide, Vermin and Pests') which (quoted at Jment **insert**) provides cover for:

"Loss as a result of

A)	closure or restrictions placed on the **Premises** as a result of a notifiable human disease manifesting itself at the **Premises** or within a radius of 25 miles of the **Premises**."

RSA 4

RSA4 includes at clause 2.3 the following clause (quoted at Jment **insert**):

"In the event of interruption or interference to the **Insured's Business** as a result of:

[55] Sub-paragraph b therefore reads: "*an occurrence of a* ***notifiable human disease*** *within one mile of the business premises*".
[56] This phrase is used in Hiscox1. In Hiscox2-4, the phrase is "**your business**".

viii. **Notifiable Diseases & Other Incidents**:

d. occurring within the **Vicinity** of an **Insured Location** during the **Period of Insurance**;

within the **Territorial Limits**, the **Insurer** agrees to pay the **Insured** the resulting **Business Interruption Loss**.

"**Notifiable Diseases & Other Incidents**" is defined at Definition 69 to include:

"v. defective sanitation or any other enforced closure of an **Insured Location** by any governmental authority or agency or a competent local authority for health reasons or concerns"

The clause therefore reads: "*interruption or interference to the Insured's Business… as a result of enforced closure of an Insured Location by any governmental authority or agency or a competent local authority for health reasons or concerns… occurring within the Vicinity of an Insured Location…*".