**IN THE HIGH COURT OF JUSTICE** **CLAIM NO: FL-2020-000018**

**BUSINESS AND PROPERTY COURTS**

**COMMERCIAL COURT (QBD)**

**FINANCIAL LIST**

**FINANCIAL MARKETS TEST CASE SCHEME**

**Before: the Hon Mr Justice Butcher and Lord Justice Flaux**

**BETWEEN**

**THE FINANCIAL CONDUCT AUTHORITY**

**Claimant**

**- 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**

**Defendants**

**-and-**

**(1) MURRAY & EMILY PULMAN T/A THE POSH PARTRIDGE**

**(2) BLUEBERRY ENTERPRISES LIMITED**

**(3) OTHERS INSURED BY QBE UK LTD OR AVIVA INSURANCE LTD**

**HIGA Interveners**

**(1) COMFOMATIC LTD**

**(2) 368 OTHERS INSURED BY HISCOX INSURANCE COMPANY LTD**

**Hiscox Interveners**

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# SKELETON ARGUMENT FOR THE HISCOX INTERVENERS

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**This Skeleton Argument is designed to be read <u>after</u> reading the Claimant's Skeleton Argument. Where possible, overlap and repetition between this Skeleton and the Claimant's Skeleton has been avoided. Where there is overlap, that is generally because it is necessary in order to make out the Hiscox Interveners' arguments. Where the Claimant's points are not made/adopted below, that is not because they are considered to be wrong – instead, it is simply to minimise overlap.**

## I. INTRODUCTION

1. Given the representation before the Court, the extent of the pleadings, the issues and the submissions, it would be easy to forget what this case actually concerns: each small, individual business' claim under its low-value business interruption insurance in respect of its individual losses. There is a significant risk in Hiscox's approach of over-intellectualising and overcomplicating issues that, in fact, have clear and simple answers.

2. The 369 businesses forming the Hiscox Action Group ("the Hiscox Interveners") are insured by Hiscox ("the Hiscox Policies") in respect of, amongst other things, business interruption insurance. They are businesses that have suffered devastating losses and desperately need the financial support that an indemnity from Hiscox would provide.

3. The Hiscox Interveners will argue below that context is key in various respects, including as to issues of construction. As to context, and as noted in paragraph 4 of the Reply [A/14/12][1], (1) the insureds are generally very small businesses or SMEs,[2] many within the jurisdiction of the FOS, (2) the insureds are generally unsophisticated purchasers of insurance, (3) the policies provide generally low, or very low, limits of indemnity (£50,000 or £100,000)[3] for the relevant section of business interruption cover, (4) the policies are meant to be (either because of their stated terms and/or their nature) readily comprehensible to these purchasers of the insurance and (5) the policies were generally purchased "off the shelf" in standard form written by insurers,[4] whether through brokers or not.

4. To be clear from the outset, the Hiscox Applicants run what is in a sense a "secondary" case against Hiscox, which comes into play if the FCA does not succeed across the board. The Hiscox Interveners focus their claims on the Public Authority Clause (below) in the Hiscox Policies. This Skeleton Argument, therefore, does not address the "Non-damage denial of access" clause. Further, the vast majority of the Hiscox Interveners are on wording with no "1-mile restriction" applicable to sub-clause (b) of the Public Authority Clause, and so the submissions focus on that wording. Those few Hiscox Interveners with the "1-mile

[1] In addition to references to the trial bundle, references are made to documents appended hereto in the form [HI/tab number/page number].
[2] Hiscox acknowledges this in paragraph 32 of its Defence: "the policyholders would be either predominantly, or at least to a material extent include, small and medium enterprises".
[3] In almost all cases, the Hiscox Interveners' business interruption losses far exceed the limit of indemnity. The Hiscox Interveners only seek to recover losses up to the limit of indemnity, as appropriate, and in accordance with the policy terms. Hiscox has indicated to some Hiscox Interveners that they are seeking to recover losses outside the ambit of the policy terms, but that is not correct.
[4] Again, Hiscox acknowledges this in paragraph 32 of its Defence.

restriction" wording can all demonstrate an occurrence of Covid-19 at the relevant time within 1 mile, and the causative link between that occurrence and shut down.

5. It should also be made clear from the outset that, as Interveners, the Hiscox Interveners have not been involved in directly negotiating the List of Issues, Assumed / Agreed Facts etc with Hiscox or other insurers. The Hiscox Interveners expressly reserve their position on the facts. Whilst of course recognising that this is not the forum for factual disputes, by way of one example only, if the Court is given the impression on the facts[5] that all (or even most) relevant businesses suffered a Covid-19-related downturn from 1 March or early March 2020 onwards, that would certainly be wrong in respect to the Hiscox Interveners. Most of the Hiscox Interveners did not suffer a downturn until the end of 23 March (some from 17 March), when they were forced to close or take other action due to the Government-imposed restrictions. Indeed, many of the Hiscox Interveners continued to do well, and better than previous years, right up to the point of ordered closure / restrictions.

## II. SUMMARY

6. The key wording on which the Hiscox Interveners make submissions is as follows ("the Public Authority Clause" [B/6/42 (Hiscox1); B/7/25 (Hiscox2); B/8/30 (Hiscox3)]):

| | |
|---|---|
| "**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**[6] caused by: |
| … | |
| Public authority | 11. **your** inability to use the **insured premises** due to restrictions imposed by a public authority during the **period of insurance** following:<br>a. a murder or suicide;<br>b. an occurrence of any human infectious or human contagious disease, an outbreak of which must be notified to the local authority;<br>c. injury or illness of any person traceable to food or drink consumed on the **insured premises**;<br>d. defects in the drains or other sanitary arrangements;<br>e. vermin or pests at the **insured premises**;<br>…" |

[5] For example, by the Agreed Facts Document 8 [C/14].
[6] Some Policy 1 wordings use the words "**your business**" instead of "**your activities**" here.

7. One simple point needs to be kept in mind throughout when considering this clause; it has two causal requirements which are easy to elide but must be held separate: (1) first, the losses must result from an interruption to the business (First Requirement); and (2) second, that interruption of business must itself have been "*caused by*" the inability to use the Insured Premises due to restrictions imposed by a public authority following (under sub-clause 11(b)) an occurrence of disease (Second Requirement).

8. The words "*solely and directly*" only qualify the First Requirement. They require, therefore, that the interruption to the activities of the business must be the sole and direct cause of the relevant losses, in the particular sense explained below. As also explained below, this would rule out other perils which proximately caused loss but did not involve an interruption to the business itself.

9. The Second Requirement is not so qualified. It requires simply that the inability to use the premises etc must "*cause*" the interruption to the business. This difference in the drafting is striking and significant. Something does not cease to be a "*cause*" simply because there are other causative elements which, of themselves, would be capable of producing the relevant result. If that were so then, in the event of two sufficient causes, neither would be acknowledged as causative, since each would exclude the other. On this reading, there would be no legally recognised cause at all. That is absurd. The correct analysis must, therefore, be that an event which was operative at the relevant time and which was sufficient to produce the relevant result, is a cause, even if there were other concurrent and equally sufficient causes. The existence of those concurrent causes does not rob that event of its causative potency.

10. It follows that losses are recoverable if: (1) they were solely and directly caused by the interruption of the insured business, in the sense explained below; and (2) one cause of that interruption was the inability to use the insured's premises due to public authority restrictions etc.

11. Addressing Hiscox's case, the reality is that much of its case comes down to one issue[7]: can Hiscox avoid indemnifying its insureds in respect of loss that Hiscox seeks to attribute to the "the pandemic", as opposed to what Hiscox would describe as the extremely limited loss

[7] See, for example, Hiscox Defence/16, 22 and 23 [A/10/6 to A/10/8].

attributable to the business interruption/restrictions? That appears to be the commercial reality behind much of Hiscox's case and, no doubt, explains various of its submissions.

12. It does, however, seem to be common ground that at least some of the insureds' losses resulted from interruption to their businesses. The main disputes seem to be as to (1) the cause of the interruption – as to which, properly construed, there may be multiple causes and yet cover will still be triggered; and (2) the "solely and directly" issue.

13. Addressing the clause in more detail, the Hiscox Interveners accept that in the abstract, the words used in the Public Authority Clause are *capable* of various different meanings. However, the way to determine the proper meaning of the Public Authority Clause is to construe the wording in context. That context includes the matters set out above as to the nature of the insureds and the insurance. Further, the "Introduction" section to some Hiscox policies states, amongst other things, *"We hope that the language and layout of this policy wording are clear because we want you to understand the insurance we provide as well as the responsibilities we have to each other"*.

14. The Hiscox Policies in issue before the Court are, and are objectively intended to be, simple policies. It is not meant to be a difficult exercise to apply the insuring clauses or the Policies as a whole. They are meant to be readily operable in the real world and, given the nature of the insureds and the low limits of indemnity, are not meant to require significant time and money to be spent in seeking to apply the Policy terms to the facts of the case. Given the large number of businesses insured under these standard form policies, the insureds, the brokers and Hiscox alike should be readily able to answer these questions in all cases: (1) Is a claim covered? (2) If so, in whole or in part? (3) How much must Hiscox pay? None of the insureds, the brokers nor, indeed, Hiscox itself have the time, money or resources to embark on complex and expensive coverage investigations every time a claim is made under one of its standard form business interruption covers. Hiscox's construction, however, makes it extremely difficult to apply the Public Authority Clause and poses questions on causation which are simply unanswerable by normal insureds, if they are answerable at all[8].

[8] See, for example, paragraphs [400-401] of the Claimant's Skeleton addressing Hiscox's approach to the "but for" test.

15. The Public Authority Clause must also be construed in the context of the Hiscox Policy as a whole. Each section of the various Hiscox Policies has headings "What is covered", "What is not covered" and "How much we will pay". The Public Authority Clause appears in the "What is covered" section. That clause is not, alone, meant to do all the work in defining the scope of cover – instead, the Policy must be read as a whole and read so it is internally consistent, or the Policy will not make commercial sense.

16. Turning to the wording, the first key point as to the proper construction of sub-clause 11(b) of the Public Authority Clause is that the "insured peril" is made up of the entirety of the wording *"**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** caused by … **your** inability to use the **insured premises** due to restrictions imposed by a public authority during the **period of insurance** following: … an occurrence of any human infectious or human contagious disease, an outbreak of which must be notified to the local authority;"*.

17. What this means is that, taking the clause in stages, there must be (1) an occurrence of a human infectious or human contagious disease, an outbreak of which must be notified to the local authority, (2) following which restrictions must be imposed by a public authority during the period of insurance, (3) due to those restrictions there must be an (i.e. "your", addressed below) inability to use the insured premises, (4) being a cause of an interruption to the business activities and (5) losses result solely and directly from the interruption, in the sense explained below.

18. If the insured meets those requirements, Hiscox must indemnify the insured in respect of its (business interruption) losses. Properly construed and understood in this way, this answers both the "but for" causation question and the counterfactual posed by Hiscox. Thus, if "but for" causation is required at all, the question is "but for" all elements of the above insured peril, what would the insured's position have been and what was the cause of the loss? This does not mean asking "but for" the interruption, or "but for" the restrictions imposed by the public authority, but instead "but for" the entire chain of events, which chain of events must of course include the occurrence of the disease (i.e. the pandemic, on the facts of the present case).

19. This also answers the "counterfactual" question posed by Hiscox – i.e. the counterfactual is not to consider a world where there were, for example, no restrictions. Instead, the proper

counterfactual must be to consider a world where all of the elements of the insured peril did not occur. Otherwise, the counterfactual uses against the policyholder one of the key elements (the occurrence of disease) of the insured peril (against which the policyholder is insured).

20. Therefore, Hiscox is wrong when it argues that the "but for" causation question is answered by looking at a world where there would still be the pandemic and the losses caused thereby (which, allegedly, are most if not all of the losses suffered by the insured). Instead, the "but for" must include the entire insured peril. Hiscox's approach artificially draws a line through the Public Authority clause before the word "following" and, therefore, cuts off the occurrence of disease as part of the insured peril.

21. Hiscox did[9] this by inadvertently misconstruing the word "following" (paragraph 101 Hiscox Defence [A/10/31]): "… the word "*following*" … has a temporal meaning only, and connotes an event which is "*part of the factual background*". The flaw in this construction is easily tested with a simple example: consider an insured that is closed down by public authority restrictions for HSE, licensing or asbestos-related reasons entirely unrelated to the occurrence of disease, but chronologically following an outbreak of Legionnaires' disease or the Covid-19 pandemic. Obviously, there must be both some temporal and some (relatively loose) causal connection between the occurrence of the human disease and the restrictions imposed by the public authority.

22. However, as soon as that causal link is recognised, it is obvious that the occurrence of the human disease must be part of the insured peril and, therefore, part of what must be excluded in both the "but for" causation analysis and in the counterfactual analysis. If the occurrence of disease were not excluded in the counterfactual analysis, this would (as above) be to use as part of the counterfactual, part of the insured peril itself, which is of course antithetical to the concept of a counterfactual. Perhaps recognising that its previously pleaded position was untenable, Hiscox has served an Amended Defence, deleting the above plea at paragraph 101 of its Defence and, instead, admitting paragraph 60 of the FCA's Amended Particulars of Claim [A/2/40]. How this new pleaded case fits with Hiscox's approach to the insured peril remains to be seen.

[9] At 15.58 on 10 July 2020, Hiscox served an Amended Defence on the Hiscox Interveners. The sole amendment is to paragraph 101, amending Hiscox's case on the "following" issue and admitting the FCA's case at paragraph 60: i.e. admitting that "Further or alternatively, the word 'following' deliberately connotes an event which is part of the factual background and represents a looser causal connection than 'resulting from' and similar."

23. Whilst waiting to see how Hiscox now puts its new case on this issue, the point can readily be tested by considering sub-clause 11(b) in the context of the Public Authority Clause as a whole. All of sub-clauses 11(a) to 11(e) describe the various events or situations following (in the above sense) which the restrictions must be imposed by the public authority in order for the clause to be triggered. Contrary to Hiscox's approach, it would be wrong to include any of these (a) to (e) matters in the counterfactual or in the "but for" analysis. To give one obvious example:

(1) Sub-clause (d) addresses "defects in the drains or other sanitary arrangements".

(2) If an insured café-owner arrived at work in the morning and found that there was a serious defect with the drains / sanitary arrangements, they would call a plumber. If the plumber said that the issue was serious enough, they would have to call the local council. In the meantime, the owner would of course close the café and no customers could attend – i.e. interruption to the business, causing loss.

(3) By the time the plumber had attended and decided that the issue needed to be referred to the council, at least a day or two may have passed. By the time the council had arrived, inspected and decided to close the café, at least another day or two may have passed. All the time, the café would have been closed. By the time the repairs had been done to the café, a week or two may have passed and the café could reopen.

(4) All that time, the café would have been closed for two reasons – at first, the serious defects in the drains / sanitary arrangements and then, later[10], that same cause as a background cause, and the closure by the council as the proximate cause. If the council had not closed the café, it would have been closed anyway because of the defective drains / sanitation.

(5) If the correct "but for" approach to causation, and the correct counterfactual, were to ask "If the council had not closed the café, there would still have been the defects in the drains / sanitation, so it would still have been closed", then the clause would never respond. Further, this approach would artificially draw a line through the insuring clause / insured peril before the word "following", thereby ignoring the key first step in the clause applying at all – i.e. the event following which the restrictions were

[10] Without wanting to tilt at windmills, there is a point here that Hiscox might take, but which can readily be answered. The event in sub-clause (a) to (e) must always come first. There will always, in this sense, be an earlier, pre-existing cause of the restrictions etc and then when the restrictions are imposed, they will "take over" as the proximate cause at that stage. But nothing can be made of this sequence by Hiscox because that is obviously how the clause works and plainly must have been objectively intended by the parties.

imposed by the council. If the counterfactual were premised on a world where that element of the insured peril still operated, then that would be to use against the insured business part of the insured peril itself.

24. Further, the Hiscox Interveners' approach to "but for" causation and the counterfactual makes sense across the rest of the Hiscox Policy wording, giving the Business Trends clause wordings their own meaning. Hiscox's construction is directly contradictory to the proper construction of the Business Trends clause wordings, however.

25. Turning to the words "solely and directly", these must also be construed in context. In reality, these words do little more than emphasise that the interruption must be the proximate cause of the loss (which, on the facts, it was). In summary of further points:

26. First, as above, the words "resulting solely and directly" apply only to the interruption – i.e. the loss must result solely and directly from the interruption. The words "solely and directly" do not apply to the cause of the interruption – i.e. the inability to use, the restrictions or the disease. There might be many proximate causes of the interruption, but that does not matter. As long as there is one proximate cause of the interruption that is insured, the clause responds (provided its other requirements are met). As set out above, the "but for" test cannot apply to any necessary part of the insuring clause / insured peril. That includes the occurrence of disease – i.e. the pandemic.

27. Second, practically, what the words "solely and directly" do is exclude other perils which caused loss but did not involve an interruption to the business itself. That is helpful in the context of a combined first party and third party insurance policy, which is the case in respect to all the Hiscox Policies in issue for the Hiscox Interveners. Thus, what the wording "solely and directly" means, read in context, is that the insured only recovers loss solely and directly resulting from the business interruption (caused, in the above sense, by the inability to use the insured premises, due to the restrictions following the occurrence of disease). Thus, loss caused by something else, i.e. a separate, equally proximate cause of that same loss (and not falling within the ambit of the insured peril), would not be recoverable. The words "solely

and directly" work in this way and exclude equal[11], separate proximate causes of the loss, which causes must be outside the insuring clause / insured peril, in the above sense.

28. Third, if Hiscox had wanted to apply the words "resulting solely and directly" to the public authority restrictions, or any other part of the wording, it could of course have done so by putting those words in a different place in the clause. However, Hiscox chose not to do so and the issue for the Court is to construe the words as they appear in the clause.

29. Fourth, trying to separate the interruption (as a cause of loss) entirely from the cause(s) of the interruption is futile. There must always be a cause of the interruption because interruptions do not happen on their own. So there will always be another cause of the loss (to a greater or lesser degree), depending on the nexus between the cause of the interruption and the cause of the loss. The words "solely and directly" cannot, therefore, draw a bright line in the manner apparently envisaged by Hiscox without destroying this fundamental element of the clause.

30. Fifth, on one level, there is not in fact much between Hiscox and the Hiscox Interveners on the causation issues – Hiscox argues that the insured peril must be the cause of the loss. As set out above and below, the Hiscox Interveners would agree with this. The problem is that Hiscox defines the insured peril incorrectly[12].

31. The remainder of Hiscox's case as to the proper construction of the Public Authority Clause essentially boils down to Hiscox arguing that various words have narrow and restrictive meanings. The Hiscox Interveners readily accept that in the abstract the relevant words are *capable* of having those restrictive meanings. However, in reality, and read in context, the relevant words should be construed as follows:

    (1) "Interruption": is *capable* of an extremely narrow and restrictive meaning, but that is not realistic in context. It is unlikely that the objectively correct and reasonable construction of the word "interruption", in the "Property – business interruption" section of the Hiscox Policies, should be given the narrow meaning of "stopping completely and starting again". The natural and obvious meaning of the word

[11] References below to this same point (i.e. equal, separate proximate causes) are to be read as including the word "equal" wherever relevant because otherwise one cause predominates over the other and there would not be two (or more) proximate causes.
[12] See, for example, Hiscox Defence/17 and 18 [A/10/7].

"interruption" in this context is simply interruption in the sense of the business not being able to operate normally and properly, with one or more elements of the business being interrupted. Notably, the wording is "interruption to your activities [or your business]". Read in context, it makes less commercial, grammatical and syntactical sense to construe "interruption" here as meaning "stopping and then restarting", as opposed to the above construction;

(2) "your inability to use the insured premises": read in context, this means your inability (in the sense of the inability) to use the insured premises normally. It does not mean "your" (as in nobody else's at all, including customers') inability to use the premises (in the sense of complete physical and/or legal inability). Again, while Hiscox is right that these words are *capable* of various meanings, including an extremely restrictive and limited meaning, there is no reason to read them that way in the present context, and every reason to read them commercially and properly as meaning the inability to use the insured premises normally. It must be remembered that those words form part of the fuller wording "… an interruption to your activities caused by … your inability to use the insured premises …". That wording makes clear that the narrower reading is unrealistic, in context.

(3) "due to restrictions imposed by a public authority": again, Hiscox is right that the word "imposed" could, in a different context, mean "having the force of law". But (a) that is not what the clause says, (b) if Hiscox had wanted to say that, they could have done so and (c) Hiscox did say that in the "Non-damage denial of access" wording "… by order of the government or any public authority …".

32. To be clear, the Hiscox Interveners strongly argue against breaking down the clause into parts, or even single words, because divorced from their proper context, words lose their proper meaning. However, it is necessary to address the above wording in this compartmentalised way in order to respond to Hiscox's case.

33. Turning to the "localisation issue" in sub-clause 11(b), Hiscox argues that the *"occurrence"* following which the restriction had been imposed must be one that is specific to the insured or the Insured Premises / its locality. This is not, however, what the Public Authority Clause says. The proper meaning of the word "occurrence" in this context is simply an "occurrence" in the sense of an event or happening, not the restricted sense argued by

Hiscox. Further, unlike other sub-sections in the Public Authority Clause which require "localisation" to the Insured Premises, there is no such requirement under sub-clause (b). Further still, a comparison between clauses 3 and 13 in Hiscox1 [B/6/41 and B/6/42] is particularly helpful: there is clear and express wording "localising" clause 3, when compared to clause 11(b); and there could be inappropriate potential overlap between clauses 3 and 11(b) if "localisation" were to be read into clause 11(b).

34. Further and in any event, Hiscox4 [B/9] expressly includes the wording *"… within one mile of the insured premises"*, restricting the Public Authority Clause. The fact that it has been included in some Hiscox Policy wordings and not the others is obviously striking and must be presumed to have been deliberate. Such wording was readily available to Hiscox, and openly available in market, which is relevant to the factual matrix in which the Public Authority Clause is to be construed.

35. There is no reason why any "localisation" wording should be implied into the Public Authority clause. However, the reality of Hiscox's construction is that this is in effect what Hiscox's approach achieves. The strict requirements of the test for the implication of terms are not met. This is particularly the case where not only was express "localisation" wording available, but it was expressly included in Hiscox4.

36. A further oddity in Hiscox's construction is that if it is correct that the true meaning of sub-clause 11(b) in Hiscox1 is that the *"occurrence"* following which the restriction had been imposed must be one that is specific to the insured or the Insured Premises / its locality, then this would be narrower than the Hiscox4 wording that expressly includes the 1-mile restriction. That is, with respect, a wholly unrealistic construction. Further still, Hiscox has not (as far as the Claimants are aware) specified what it means by the "locality" around the Insured or the Insured Premises and whether (and if so, why) this is more or less than 1 mile (or any other distance).

37. For these summarised reasons, the Hiscox Interveners respectfully invite the Court to find in favour of their approach to construction of the Public Authority Clause and to reject Hiscox's approach.

## III. THE POLICIES

38. The four lead Hiscox policies appear at: Hiscox1 [B/6], Hiscox2 B/7], Hiscox3 [B/8] and Hiscox4 [B/9]. The key variations amongst those wordings, as far as concerns the Hiscox Interveners, are: Hiscox1 [B/6/42]: contains the "standard" Public Authority Clause wording set out at paragraph 6 above and the standard form of "Business Trends" clause wording:

> "Business trends — Provided that **you** advise **us** of **your** estimated annual **income**, or estimated annual **gross profit** if applicable, at the beginning of each **period of insurance**, the **amount insured** will automatically be increased to reflect any special circumstances or business trends affecting **your activities**, either before or after the loss. The amount that **we** will pay will reflect as near as possible the result that would have been achieved if the **insured damage** had not occurred.
>
> **Your** schedule will show if Business trends cover applies and the additional percentage amount."

39. Hiscox2 [B/7/26]: contains a differently worded Business Trends clause:

> "The amount **we** pay for loss or **income** or loss of **gross profit** will be amended to reflect any special circumstances or business trends affecting **your business**, either before or after the loss, in order that the amount paid reflects as near as possible the result that would have been achieved if **the insured damage, insured failure** or restriction had not occurred".

40. Hiscox4 [B/9/36]: contains a differently worded Public Authority Clause with a "one mile restriction" in the wording at sub-paragraph (b):

> "**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 business** caused by:
>
> …
>
> Public authority — 7. **your** inability to use the **insured premises** due to restrictions imposed by a public authority during the **period of insurance** following:
>
> a. a murder or suicide;
>
> b. an occurrence of a notifiable human disease <u>within one mile of the business premises</u>;
>
> c. injury or illness of any person traceable to food or drink consumed on the **premises**;
>
> d. defects in the drains or other sanitary arrangements;
>
> e. vermin or pests at the **premises**;
>
> …" <u>(emphasis added)</u>

## IV. RELEVANT BACKGROUND

41. In order to assist the Court by bringing the Factual Scenarios [xxx] to life, to add colour and to illustrates the real-life impact of Hiscox's refusals to provide indemnity, some factual background is set out below.

42. The Hiscox Interveners, of course, recognise that this case proceeds on the basis of Agreed and Assumed Facts and, therefore, obviously do not ask the Court to make any findings on the basis of the following facts. However, it is believed that the following will assist the Court in its task, particularly given the potential for the matter otherwise to become somewhat arid and academic. Further, it is hoped that it will assist the Court to note the differences amongst the Hiscox Interveners and, for example, the fact that the majority of them felt no business interruption whatsoever until expressly closed down or otherwise affected (in terms of inability to use the Insured Premises) by the relevant Regulations / restrictions[13] – please see the graph at Annexe 1[14] showing the striking spike at the end of 23 March 2020. Further still, the examples given are linked to the Factual Scenarios [xxx] and so do not go beyond the ambit of these proceedings.

43. The Hiscox Interveners are mostly located across England and operate across many different sectors:

    a. Size of the business: of the 369 businesses, 297 meet the FCA criteria for small businesses, i.e. an annual turnover of less than £6.5 million, and (i) employs fewer than 50 persons or (ii) has a balance sheet total of less than £5 million.[15] The rest of the insureds, while not falling under the FCA's definition, can generally be described as small to medium-sized businesses: i.e. SMEs.

    b. Range of sectors: a diverse range of sectors, including (but not limited to): 28 cafes and restaurants; 46 salons, spas, and beauty parlours; 24 retail stores; 22 equipment hire and events businesses; 19 estate agents; 24 recruitment agencies; 19 tech

[13] Based on the information available to date (which is incomplete, based on a sample of 308 of the Hiscox Interveners, and subject to review), the majority of the Hiscox Interveners were *not* financially impacted prior to their "inability to use the Insured Premises due to restrictions imposed by a public authority …". Of the 369, the significant majority were only unable to use their Insured Premises (in the relevant sense) from the end of 23 March 2020 onwards.
[14] This graph is also based on the incomplete information available to date (a sample of 308 of the Hiscox Interveners) and subject to review. For the avoidance of doubt, the graph simply shows the answer to the question "On what date did you become unable to use your insured premises?" The date 23 March 2020 represents the end of that day (i.e. generally closure after announcement / guidance).
[15] See the definition of 'small business' in Glossary Terms, FCA Handbook.

companies; 16 photography and videography companies; 8 medical companies; 27 training and educational companies; 39 gyms and sports clubs; 22 marketing companies; and 13 companies providing entertainment and culture e.g. theatres, cinemas, museums, and heritage sites.

c. Geographical spread: the 369 businesses are operated out of 571 insured premises (taking into account singled insureds with multiple addresses and multiple insureds operating out of a single address). These premises are well spread out across the United Kingdom. Specifically, of these 571 premises, 329 are located in urban areas (big cities such as London), 153 are located in semi-urban areas such as towns, and 89 are located in rural areas. Furthermore, of the 571 premises, 499 are located in England, 35 in Wales, 22 in Scotland, 7 in Northern Ireland, 7 in Ireland, and 1 in Berlin.

44. These 369 businesses have all incurred heavy losses as a result of their inability to use their insured premises due to restrictions imposed by a public authority. While this figure is subject to further amendment, it is estimated that current total losses amount to around £47 million (when applying the relevant limits of indemnity; their actual losses are significantly higher). This sum represents, for each individual insured, the severe hardship resulting from Hiscox's refusal to make payments under their policies.

45. The following examples of insured businesses were selected to assist the Court, as above, and to aid the Court's understanding of the genuine financial, emotional, and physical cost of Hiscox's denial of coverage. The common thread running through each of these (non-exhaustive) examples, as well as the rest of the Hiscox Interveners, is that Hiscox's denials have caused a significant amount of distress and suffering. The Court is encouraged to view the insureds as distinct and individual, each with its own business and livelihood on the line.

46. Factual Scenario Category 4 [xxx] – Mulberry Events:

a. The insured runs a company providing wedding decorations. The business is family-run, and she employs her husband and daughter alongside two other employees. The insured has, in her own words, "*invested everything into the business the past two years*": she put in £400,000 of her own life savings, as well as the entire proceeds from the sale of another business that she built. It remains the only source of income for the entire

family. Business was doing notably well prior to closure. The insured had booked a high volume of weddings, and was due to make her largest profit to date.

b. The business has since ceased operations entirely: the insured was not able to travel or operate from the premises (due to social distancing requirements), and all her bookings after 21 March 2020 were cancelled. Since then, the insured has had zero income, and the family "*haven't earned a penny since lockdown in mid-March*".

c. The insured and her family are keeping the business running using their life savings. Apart from the continued overhead costs, she tops up the 20% for her staff's furlough pay from her own pocket. However, these life savings are being rapidly depleted, and the insured is currently considering a loan to keep her business going. Hiscox's refusal has put her and her family under "*unbelievable stress*", given the amount of money and hard work the family has put into the business.

47. Factual Scenario Category 1 [xxx] – Bramleys Coffee House Ltd:

a. The insured is a café located in Ormskirk. It was established 26 years ago, and is the oldest coffee house in Ormskirk. The café is family-owned, through and through: GT, the owner, purchased the business from its previous owners on 6 September 2017. GT's family made a collective decision to purchase it, and it is owned by him, his wife, and one of his sons (who is disabled). His other son is also employed by the business. His disabled son has put his entire life savings into funding the purchase of the business, and it is his only source of income.

b. Prior to being forced to close, the business was doing well, with year to date figures exceeding those in 2017/18 and 2018/19. In GT's view, business was "*still strong, and had not tailed off prior to closure*". The business closed on 20 March 2020 pursuant to the requirement to isolate staff (as one of its customers tested positive for COVID-19 and so they had to close to isolate exposed staff), coincidentally just before the 21 March Regulations would have otherwise forced it to close in any case.

c. Following closure, it has had zero revenue. The terms of the insured's lease also disallow the running of any takeaway service. GT and his family still have to pay rent (£8,500 a month), standing bills, and overheads. They also pay all their staff a 20%

top up on their furlough payments, from their own pockets. His wife and son, who co-own the business, have also had to put their entire salaries back into the business, in a bid to keep it afloat.

48. Factual Scenario Category 2 [xxx] – Appearance Based Medicine:

a. The insured is a sole trader, who provides aesthetic treatments. Prior to the closure of her clinic, the business was doing well and seeing steady growth. There were, in her own words, "*no obvious differences until [she] actually closed the clinic*" on 23 March 2020, pursuant to the government announcement. After this closure, she has been unable to perform any procedures, and has had no revenue apart from a few isolated online consultations.

b. Hiscox's refusal has had a colossal impact on her business and her personal life. It has hurt her business in the long term, as she now lacks sufficient funds to engage in online marketing (e.g. building a website), which would have allowed her to maintain her presence in the market. The insured suspects that this has lost her a substantial number of customers.

c. The insured is also a single mother with a 10-year-old son, and has struggled to make ends meet following the closure of her business. She has completely depleted her savings accounts and assets in order to keep the business afloat and provide for her family. At the moment, she is subsisting on hardship payments from her church and universal credit. She is under a significant amount of emotional, physical, and financial pressure – having previously trusted that Hiscox's policy would respond, she now feels like this has "*knocked her sideways*", making "*everything… a real struggle*".

49. Factual Scenario Category 2 [xxx] – Pinnacle Climbing Centre:

a. The insured runs an indoor climbing centre in Northampton, which provides climbing facilities for both groups and individual members. Prior to the closure of his premises on 17 March 2020, the insured's business was doing exceedingly well. He reports that there was "*zero negative impact and trading was going well despite COVID*". On the weekend of the 14/15 March 2020, for example, he sold multiple full annual passes (for £495

each) and monthly memberships. It was clear to the insured that "*consumer confidence was there*" as the centre continued to be extremely busy.

b. Following the government announcements on 16 March 2020, the insured (in conjunction with many other climbing wall businesses) decided to close, as he viewed it to be the socially responsible thing to do. He immediately called his broker (Sports Insure), who informed him that Hiscox's policy would respond to the closures resulting from government restrictions. Since then, the insured has received zero income, other than donations from members and very minimal online sales.

c. Hiscox's refusal has meant that the insured has had to put off repaying some of his business loans, in order to keep the money in the business. He is also considering making staff redundant, as he does not have sufficient funds to take them off furlough. Furthermore, he has been unable to engage in any online marketing, and has cancelled several planned purchases of new equipment. This is a severe impediment to the insured's plans for reopening, and has thrown a wrench in his plans to expand the business. The immense stress has also hurt his family life, and his relationship with his two young children.

50. Factual Scenario Category 1 [xxx] – Lazy Claire Patisserie:

a. The insured runs a patisserie in Belfast, specialising in handmade cakes and desserts. Prior to its closure it could seat 14 customers within the shop, where it also sold teas and coffees etc. It is a small business, set up by the insured after his training as a patisserie chef in Paris, and currently employs 7 staff.

b. The business was doing extremely well prior to closure of the premises. In 2019, the insured was selected by Food and Wine Ireland as one of the Top 10 pastry chefs. In January 2020, he managed to pay off some of his cash loans. In the insureds own words, "*business was doing very well up till closure*" on the 18 March 2020: for example, profits on 17 March (a public holiday) were up 300% compared to 2019, and profits on 18 March were up 29% compared to 2019.

c. The business closed on 18 March. The insured has received zero income since then, and has been unable to run a takeaway service due to financial constraints (because

the costs of the overheads required, lease of machinery and gas/electric costs would have made it financially unviable).

d. Hiscox's refusal has had a long term impact on his business: the insured was forced to take out an additional small business loan on top of his multiple other loans, in order to pay living costs (as the owner of the business he did not receive a regular salary so did not qualify for government assistance), as well as several other overhead costs (such as topping up 20% of his staff's furlough payments). He has been unable to afford to prepare for reopening as fully as he would have otherwise and despite now being partially reopen is not taking as much as he otherwise could have been. Hiscox's refusal has also meant that the insured will remain in debt for the next several years. This is distressing as, prior to this, he was on the path to being debt-free, following the success of his business.

51. There are various other factual matters which the Hiscox Interveners also highlight to assist the Court, but in respect to which they of course seek no determination from the Court, and are presented subject to the approach at paragraphs 41-42 above:

a. First, Hiscox Underwriting Services Ltd underwrote various insurance policies on behalf of another Defendant, Arch Insurance Company (Europe) Limited ("Arch"), on Hiscox3 terms. So far as the Hiscox Interveners are aware, in respect to all policyholders suffering business interruption losses in the above circumstances, Arch has agreed to provide at least some indemnity to the policyholders on the same terms pursuant to which Hiscox has wrongfully refused to provide any indemnity. Although Arch has reduced the indemnity (apparently on the basis that this reflects the loss that it alleges would have occurred anyway) Arch's response on liability strongly implies that it agrees with the views of the Hiscox Interveners, i.e. that the Hiscox policy wording responds (although there is obvious disagreement as to the alleged reduction).

b. Second, the Hiscox Interveners have identified several worrying examples of Hiscox informing its insureds that they would be covered in the circumstances which have now arisen, and subsequently reneging on those statements. For example:

i. Throughout the period 10 to 16 March 2020, Hiscox informed Communion Coffee Limited, on multiple occasions, that: "*if the Government were to deem that it*

*was unsafe to trade from [his] premises, then the Business Interruption cover in the Policy would respond… the Policy would assist if the Government ordered that businesses in the area in which [his] premises were located, were not to trade… the Policy would respond in the event that the Government imposed a lock down, or if there was an incident within 1 mile of [his] premises, which denied [him] access to them*".[16] Hiscox subsequently reneged on these statements, and instead offered the insured compensation.

ii. Similar statements were made to Sevenoaks Tutoring. Specifically, during the course of telephone conversations on 4 and 12 March 2020, Hiscox informed the insured that it would be covered under his policy if its business closed due to COVID-19. Hiscox subsequently sought to deny coverage, and instead offered the insured £1,000 in compensation.

iii. The same thing happened to Soho Square Studios. Hiscox informed it, in telephone conversations on 5, 9 and 10 March 2020, that its policy would respond "*if the Government, or some other public authority, were to order the closure of [his] business, so that [he] couldn't access [his] premises*".[17] Again, Hiscox subsequently denied coverage and offered the insured £1,500 in compensation.

iv. Various brokers have also informed insureds that Hiscox would make payments under the policies. For example, Chapati Café contacted its insurance broker on 17 March 2020. When asked if Hiscox provided cover in the event of Chapati Café's closure, the broker stated that "*you do… [you] should have cover. You have business interruption. That should give you cover*". It is believed that the brokers making these kinds of comments based them on what they were told by Hiscox.

c. These examples demonstrate, at the very least, Hiscox's own confused initial response, from which it now seeks to distance itself. Needless to say, Hiscox's backtracking has also caused the above insureds a considerable amount of distress.

[16] By Hiscox's own admission, in a letter dated 15 June 2020 from Hiscox to the insured, addressing the insured's complaint against Hiscox [HI/xxx].
[17] By Hiscox's own admission, in a letter dated 8 June 2020 from Hiscox to the insured, addressing the insured's complaint against Hiscox [HI/xxx].

52. The above examples also raise concerns as to Hiscox's regulatory obligation to treat customer fairly[18]. Further, Hiscox has pleaded that there is (on their case, extremely limited) cover for certain losses[19], yet they have denied all claims in their entirety. This is incomprehensible and apparently inconsistent.

53. Lastly, and as mentioned above, the Hiscox Interveners of course recognise that this test case proceeds on the basis of Agreed and Assumed Facts. However, having not been directly involved in agreeing the Agreed Facts, the Assumed Facts, the evidence as to Sweden and/or past pandemics, and so on, the Hiscox Interveners are not in a position to agree those facts, nor have they been invited to do so, and must therefore reserve their position entirely.

## V. APPROACH TO CONSTRUCTION

54. The general principles relating to construction of insurance contracts are well-known,[20] and will not be rehearsed at length here. Instead, the Hiscox Interveners outline only the following short points, in addition to those made by the FCA at paragraphs [xxx] of its Skeleton Argument.

55. The relevant Policy wording must, of course, be construed objectively and as a whole, not compartmentalised. The wording should be given its commercially realistic, ordinary and plain meaning. In various correspondence, Hiscox has stated that it is content that its construction is not only consistent with Hiscox's underwriting intention but also consistent with a proper reading of the Policy wording. Hiscox's alleged underwriting intention is irrelevant – the parties' subjective intentions are no part of the proper approach to the construction of the Policies: the Hiscox Interveners adopt paragraphs [xxx] of the FCA's Skeleton Argument in this regard.

56. Furthermore, insurance policies should be interpreted in accordance with their commercial purpose and in a manner that does not render coverage illusory. As set out in more detail in

[18] See the FCA Handbook, Principle 6 of the Principles for Business (PRIN 2.1.1): "*A firm must pay due regard to the interests of its customers and treat them fairly*." (i.e. the duty to Treat Customers Fairly or 'TCF').
[19] See, for example, Hiscox Defence/16 [A/10/6].
[20] They are outlined in, *inter alia*: *Colinvaux & Merkin's Insurance Contract Law* (Sweet & Maxwell 2019) B-0270 to B-0289/7; M Merkin et al, *Colinvaux's Law of Insurance* (12th edn, Sweet & Maxwell 2019) 3-001 to 3-075; J Birds et al, *MacGillivray on Insurance Law* (14th edn, Sweet & Maxwell 2019) 11-001 to 11-040; J Mance et al, Insurance Disputes (3rd edn, Informa 2011) 6.1 to 6.91; *Chitty on Contracts* (33rd edn, Sweet & Maxwell 2019) 13-041 to 13-107; and K Lewison, *The Interpretation of Contracts* (6th edn, Sweet & Maxwell 2019).

*MacGillivray: "The literal meaning of words must not be permitted to prevail where it would produce an unrealistic and generally unanticipated result, as, for example, where it would unwarrantably reduce the cover which it was the purpose of the policy to afford."*[21] The principle outlined by the editors of *MacGillivray* is robustly supported by authority.[22]

57. In particular, the judgment of Lindley LJ in *Cornish v Accident Insurance Co* affirms that: "*the object of the contract is to insure against [the insured peril], and the contract must not be construed so as to defeat that object, nor as to render it practically illusory*".[23] The Courts should, of course, reject constructions which defeat the commercial purpose of policies, in the sense that it would severely restrict the scope of cover and render it practically illusory or worthless.[24] Further, "*in interpreting any clause of a policy, it is correct to bear in mind… the commercial object or purpose of the contract*".[25]

## VI. SUBMISSIONS

## (1) THE HISCOX POLICIES

58. The Hiscox Policies all provide combined first party and third party covers. A standard policy under which the many of the Hiscox Interveners are insured [G/8/1-54] provides PPL, EL, Property – buildings, Property – contents, Property – business interruption, Property – equipment breakdown, Property – money, Legal protection, and Crisis containment cover. The Hiscox Policies provided to the Hiscox Interveners were common forms of combined cover, suitable for small to SME-sized businesses of a wide variety. All the Hiscox Policies under which the Hiscox Interveners are insured follow the same broad format: an (1) Introduction (normally with wording as set out at paragraph 13 above), (2) General terms and conditions, (3) the various sections of cover, all with headings (a) Special

[21] J Birds et al, *MacGillivray on Insurance Law* (14th edn, Sweet & Maxwell 2019) 11-007
[22] See, for example, *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191, 201 ("*if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense*"); *Wickman Machine Tool Sales Ltd v Schuler AG* [1974] AC 235, 251 ("*the fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear*"); *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd* [2001] EWCA Civ 1047 [17]; when a construction produces an unfair result, the court will require clear words to support the construction in question (*Lewison*, 7.18).
[23] (1889) 23 QBD 453, 465
[24] *Morley v United Friendly Insurance* [1993] 1 WLR 996, 1003; *Fraser v Furman* [1967] 1 WLR 898, 905-6; *Kausar v Eagle Star Insurance Co Ltd* [1997] CLC 129, 132.
[25] J Birds et al, *MacGillivray on Insurance Law* (14th edn, Sweet & Maxwell 2019) 11-007

definitions for this section, (b) What is covered, (c) What is not covered, (d) How much we will pay, (e) Your obligations and (f) in some cases, Special conditions.

59. As set out above, the Hiscox Policies must be construed in context and taking account of their nature (basic), intended insureds (small and unsophisticated) and purpose (simple cover with low or very low limits of indemnity). In the context of combined cover of this kind, the wording "solely and directly" in the "Property – business interruption" section assists by making clear that Hiscox insures the relevant business for its losses identified in the schedule resulting solely and directly from business interruption caused by the list of matters set out.

60. It is also relevant to the factual matrix in which the Policies fall to be construed that at all material times there has been a wide variety of other business interruption wordings available in the market, any of which were available to Hiscox to consider and/or to use when drafting their own Policy terms. Indeed, there are variations in the wordings used by Hiscox in Hiscox1 to 4.

61. For example, on renewal following the outbreak of COVID-19, Hiscox has now amended its Business Interruption policy wording, that change being summarised by Hiscox as follows [HI/xxx]: *"In respect of Contents and Business interruption please note the Communicable Disease exclusion which has been added to the policy. For Business interruption, this restricts the types of diseases covered to Specified Diseases. In light of the current Covid-19 threat, note that this is not a Specified Disease."* The following wording (in clause 3) has been added to the exclusion wording "What is not covered" [HI/xxx]:

> "**We** will not make any payment:
>
> …
>
> 3. for any interruption or loss directly or indirectly caused by, contributed to by, resulting from or in connection with any **communicable disease** or the fear or threat of any **communicable disease**. However, this exclusion does not apply to **What is covered**, Public authority 13b in respect of any **specified diseases**."

62. The relevant elements of the Public Authority Clause are: (1) Hiscox insures Company A for its financial losses (2) resulting solely and directly from (3) an interruption to Company A's activities (4) caused by Company A's inability to use the insured premises (5) due to restrictions imposed by a public authority during the period of insurance (6) following an

occurrence of any human infectious or human contagious disease, an outbreak of which must be notified to the local authority.

63. Point (1) is understood to be uncontentious, but depends in each case on what is specified in each insured's schedule. The analysis therefore starts from point (2):

**(2) RESULTING SOLELY AND DIRECTLY**

64. The Hiscox Interveners recognise that there is some overlap here with the FCA Skeleton. However, given the extent of Hiscox's reliance on the "solely and directly" wording, it has inevitably been necessary to address the following issues in some detail: (1) the meaning of the words "resulting solely and directly from an interruption", and (2) how, if applying that wording requires 'but for' causation to be established by applying a counterfactual, the counterfactual is to be built.

65. The Hiscox Interveners agree with the FCA's position regarding the "solely and directly" requirement, set out paragraphs [364-371] of its Skeleton. Another route to the same destination is explored below. The Hiscox Interveners also agree with the FCA's position regarding the application and disapplication of "but for" causation and counterfactuals, set out in paragraphs [222-248] of the FCA's skeleton.

66. That position flows from the structure and language of the Public Authority Clause, read in the context of the policy as a whole, and two fundamental points:

    (1) First, parties generally do not intend to have matters which they have agreed are necessary to establish cover then negate cover.

    (2) Second, the Hiscox Policies must work in the real world, and a reasonable reader of the Hiscox Policies would not readily conclude that the parties meant to ask each other to do things that are practically impossible, or unworkable, or force them to apply unrealistic or unfair counterfactuals, or render cover illusory. That is particularly true given the background: these are standard-form policies with low limits for the relevant cover sold to SMEs.

67. The language and structure and those fundamental points lead inexorably to the FCA and Hiscox Interveners' position being right, and Hiscox's position being wrong for the summarised reasons, addressed under the headings below:

    (a) The effect of "resulting solely and directly from an interruption…";

(i) Matters referred to in the relevant part of the Public Authority Clause;

(ii) Matters outside the relevant part of the Public Authority Clause; and

(iii) What "resulting solely and directly" does.

(b) Do the words 'resulting solely and directly' require a counterfactual to be applied to determine 'but for' causation of the loss by the interruption, and if so how should the counterfactual be built?

(c) A brief worked example of the application of the causation analysis follows.

**(a) The effect of "resulting solely and directly from an interruption…"**

68. The FCA is right to note that "resulting solely and directly…" applies only to the "interruption"; nothing else.[26] That is precisely what the Public Authority Clause says. The Hiscox Interveners also support the FCA's argument that: (i) "solely and directly" negates cover where there is another proximate cause of the loss, beyond the "interruption"; but (ii) the various competing causes of loss identified by Hiscox are either not separate causes of loss to the interruption or, even if they are, do not rise to the level of being proximate causes.[27]

69. There is, however, another route to the same destination that the losses (or more accurately here, assumed losses; though for the Hiscox Interveners they are rather more real) resulted "solely and directly" from the interruption. To explain, the words "solely and directly" mean that the loss must be proximately caused by the interruption, and aside from matters in the Public Authority Clause, there must be no separate, equal proximate cause. Put another way, "solely and directly" must be the proximate cause of the loss, and there must be no equal proximate cause outside of Public Authority Clause. Alternatively, the interruption must be the only proximate cause of the loss, and matters referred to in the Public Authority Clause cannot be read back in as being separate proximate causes.

70. Below, the Hiscox Interveners explain first why matters within the relevant part of the Public Authority Clause cannot stop losses resulting "solely and directly" from the interruption. They then address why matters outside of the insuring clause falling short of being a proximate cause cannot do so either, before setting out their overall conclusion.

[26] FCA Skeleton/364 et seq.
[27] Ibid

(i) Matters referred to in the relevant part of the Public Authority Clause

71. The words "solely and directly" cannot mean that if matters other than the "interruption" inside the relevant part of the Public Authority Clause (i.e. dealing with disease) can be said also to be a cause of the loss, then there is no cover, as Hiscox appears to suggest.[28]

72. Parties do not intend to force the insured to establish matters for cover, but then have the same matters remove cover. That is an obvious enough proposition, and one borne out by the Court of Appeal's approach in *If P&C Insurance Ltd (Publ) v Silversea Cruises Ltd*. The FCA deals with *Silversea* at length,[29] and the Hiscox Interveners do not intend to repeat its analysis. They would add, however, that if anything their case is stronger than Silversea's was under the relevant part of its cover (A.ii). Silversea's cover for loss due to government warnings about actual or threatened terrorist activities was premised on there being actual or threatened terrorist activities: otherwise, what would generate warnings?[30] But it did not actually require Silversea to prove such activities happened. Here, the Public Authority Clause requires the policyholders to prove the existence of the occurrence of disease. Thus, if anything, the case that the parties here did not intend the occurrence of disease to lead to a lack of cover is stronger than the case which the Court of Appeal accepted: i.e. that Silversea and its insurers did not intend terrorist activities to negate cover.

73. Even without *Silversea*, the proposition that parties generally do not intend matters necessary to establish cover to also remove it makes sense. It would create a 'heads I win, tails you lose' situation for insurers. If the insured cannot establish event "X" happened, then there is no cover; but if they do establish "X" happened, then the insurer says "X" (or its consequences) mean there is no cover; that would be an impossible construction.

74. Part of the reason why parties do not intend for matters necessary to establish cover to remove it is that it would make cover illusory – it would simply not work in the real world. The point can be made using the examples in Hiscox's own Defence:

75. Suppose there is an outbreak of legionnaire's disease at the insured's premises, which causes a public authority to impose restrictions causing inability to use the premises.[31] Suppose also that interrupts the insured's activities, which causes loss. Hiscox suggests there will be cover

[28] See e.g. Hiscox Def/19, 98.5, 99.2.
[29] [2004] 1 Lloyd's Rep I.R. 696.
[30] At [104]
[31] Hiscox Def/111.3.

for that loss.[32] It also suggests the same is true if the legionnaire's disease is replaced with a rat infestation, or a murder at the premises.[33]

76. But that is not correct on a strict reading of "*solely*", applying Hiscox' case:

a. In the legionnaire's disease example, the outbreak of disease is a necessary, 'but for' cause of the loss ultimately suffered. So too the murder in the murder example and the infestation in the rat example.

b. The ensuing restrictions are another 'but for' cause of the loss, as is the 'inability to use the insured premises'.

c. Equally, in those particular examples it is likely that there would be at least some period when the outbreak, rat infestation, restrictions and/or inability to use the premises and the interruption existed, and took effect, side by side. It is inherently unlikely that a public authority would impose restrictions only after any outbreak of legionnaire's disease had ceased or the rat infestation ended. And it is inherently unlikely that any interruption would happen only after any restrictions had ended and only after inability to use the premises had ceased.

d. Notably, Hiscox does not suggest that whether the outbreak, rat infestation, restrictions or inability to use the premises are ongoing at the same time as the interruption makes any difference to cover.[34]

e. Even if Hiscox were only concerned with concurrent *proximate* causes, the problem remains that Hiscox requires the insured to establish matters that may become concurrent proximate causes if their causal relationship to the loss is strong enough[35].

77. The parties have required the event (the outbreak or the infestation) under the insuring clause, and Hiscox has drafted the clause, so that there must be (or is highly likely to be) a causal relationship between that underlying event and the loss. In those circumstances, a reasonable person reading the clause in context would consider it most unlikely that they intended the outbreak or infestation to negate cover. It would amount to using part of the

[32] Ibid.
[33] Ibid.
[34] In addition, on Hiscox's own pleading, two causes need not be in effect simultaneously to be concurrent (see e.g. Hiscox Def/98.4 and the lack of any suggestion to that effect there). Nor could it sensibly suggest that: there are cases where the rules regarding two proximate causes have been applied where the causes were sequential: e.g. *Silversea,* where the sequence ran: (i) 9/11; (ii) warnings; (iii) loss.
[35] The only way to avoid that for Hiscox would be to say that matters in the Public Authority Clause other than the interruption are not intended to be taken to be proximate causes of the loss. In which case, that makes the Hiscox Interveners' point: those matters cannot stop the interruption being the sole proximate cause of the loss.

insuring clause – matters the insured *must* establish – to deny cover. It would also have the odd consequence that the worse the outbreak of legionnaire's disease or the more and bigger the rats, the less likely there is to be cover.

78. Thus, on the proper interpretation of the relevant words here, events which the insured must establish under the insuring clause cannot, even if they appear to rise to the level of a proximate cause of the loss, negate cover because of the word "*solely*" in this clause. Another way to reach the same result would be to hold that where the insured must establish events under the insuring clause, they *cannot* be, in addition to or instead of the interruption, a proximate cause of the loss thereby negating cover. The identification of a cause as proximate or not is a matter of judgment.[36] Here, that judgment must be informed by the parties' (express or implied) intentions.[37] The fact that they have demanded that the insured must establish the occurrence of disease in order to establish cover in the first place, conclusively points away from them intending that such occurrence could ever be a proximate cause which would negate cover.[38]

79. The significance of this interpretation is that it precludes Hiscox from relying on the outbreak of disease as another cause of loss which prevents the ensuing interruption from being the sole proximate cause of loss, and thus negates cover.

(ii) Matters outside the relevant part of the Public Authority Clause

80. The parties did not, objectively, intend events outside of those referred to in the relevant part of the Public Authority Clause, with a causal relationship to the loss falling short of proximate causation, to negate cover. So, events outside of the relevant part of the Public Authority Clause only stop a loss resulting solely and directly from an interruption if they are a proximate cause of the loss. This flows from two things.

81. First, almost no loss has only one cause.[39] So even setting aside matters referred to in the relevant part of the Public Authority Clause, a literal reading of "solely" results in cover being illusory or largely illusory. And as set out above, that is unlikely to be a result which the parties intended.

[36] See the discussion in FCA Skeleton/208 -214. Also *Insurance Disputes* at 7.21.
[37] See the discussion in FCA Skeleton/210 – 212. See also *Insurance Disputes* at 7.16.
[38] See also FCA Skeleton/317.2 and 317.3.
[39] The Law of Insurance Contracts at 25-9C2 ("*No cause operates in total isolation and there will always be the temptation to argue that it was not therefore exclusive*").

82. Second, the courts have interpreted similar wording so that only a second proximate cause negates cover. The FCA is right to draw attention[40] to *The Miss Jay Jay*,[41] the passage of *MacGillivray* supporting this point,[42] and the decisions in *Mardorf v Accident Insurance Co*[43] and *Smith v Cornhill Insurance Co Ltd*[44]. They all are consistent with "solely" and variations of it being interpreted as only ruling out cover where there is another proximate cause of loss; not just another cause of loss. That is consistent with the point that at trial in *Blackburn Rovers Football & Athletic Club plc v Avon Insurance plc*, when faced with wording covering disablement occasioned "*solely and independently of any other cause*" by accidental bodily injury, the Court defined the issue before it as "*whether the accidental bodily injury suffered … was the sole and independent cause so that no other proximate cause was operative*".[45] It is also consistent with a series of Canadian cases where in addition to the event insured against other causes (or what were said to be other causes) were in play, and a sole causation requirement was met, with the Court's reasoning turning on the rival cause not being an effective cause of the loss.[46]

(iii) What "resulting solely and directly" does

83. The first answer to what solely and directly does is explained by the FCA. But in the alternative the Hiscox Interveners invite the Court to find that the effect of "solely and directly" is to rule out cover where loss proximately caused by an interruption is also (equally) proximately caused by one or more matters outside of the relevant part of the Public Authority Clause. Put another way, there must be no separate, proximate cause of loss outside the relevant part of the Public Authority Clause.

84. The qualification of "outside of the relevant part of the Public Authority Clause" gives effect to two points set out above: (1) parties do not, generally intend to have matters necessary to

[40] FCA Skeleton/366.
[41] [1985] 1 Lloyd's Rep 264 at 273 (aff'd [1987] 1 Lloyd's Rep 32).
[42] Paragraph 27-045.
[43] [1903] 1 K.B. 584.
[44] [1938] 61 Lloyd's Rep 122.
[45] [2006] EWHC 840 (QB) at [7].
[46] See, for example *Shea v Halifax Insurance Co* (the clause concerned damage caused "solely by"; fire caused an explosion, damaging truck; there was cover because fire is the proximate cause and the explosion is not an intervening cause), *Meyer v Allstate Insurance Company of Canada* 1980 CanLII 2455 (MB CA) (the clause concerned loss caused by accidental bodily injury "directly and independently of all other causes"; pre-existing conditions are followed by a toe injury, which because of the pre-existing conditions leads to the leg being amputated; there is cover, as the injury is an effective cause, and the pre-existing conditions were not); *Voison v Royal Insurance Company of Canada* 66 OR. (2d) 45,[46] cited at B-0432 of *Colinvaux & Merkin's Insurance Contract Law* (the clause covered loss "resulting directly and independently of all other causes from accidental bodily injuries"; the claimant had a protruding disc, and suffered an occlusion of the spine and was disabled; the protrusion may have contributed to that result alongside the occlusion; there was cover as the protrusion was not "an independent cause", while the occlusion was the "proximate" cause).

establish cover then remove it; (2) parties do not ordinarily intend to put in place illusory or unworkable cover (which would be the effect of allowing matters necessary to establish cover to mean loss does not result solely and directly from an interruption).

85. The requirement that the other cause be equally proximate in order to rule out causation reflects how similar wording has been interpreted by the courts in various contexts. It is unsurprising the Courts have read the wording that way. Reading wording demanding an event be the sole cause of a particular loss literally would mean there was virtually no cover. That is because virtually nothing is really caused by one cause and so it would almost always be possible to find at least one other cause. View through this lens, the words "solely and directly" are just a limited contracting out of the principles surrounding concurrent insured and uninsured causes from (among other cases) *The Miss Jay Jay* and subsequent cases,[47] which leaves those principles in place in relation to matters "inside" the relevant part of the Public Authority Clause.

**(b) Do the words 'resulting solely and directly' require a counterfactual to be applied to determine 'but for' causation of the loss by the interruption, and if so how should the counterfactual be built?**

86. The Hiscox Interveners agree with the FCA's analysis of these questions.[48] Ultimately: (i) in cases of two sufficient causes of loss the parties must be taken to intend that the "but for" test be disapplied; (ii) where "but for" causation does apply, and it is necessary to construct a counterfactual, the right approach is to remove not just the interruption, inability to use the premises and restriction, but also the underlying occurrence of disease. The FCA has covered these points, and so below the Hiscox Interveners address only how any counterfactual is to be built.

87. Constructing the counterfactual by removing everything necessary to establish cover under the relevant part of the Public Authority Clause is consistent with orthodox principles, and the way Hiscox has drafted the insuring clause. Generally, subject to the specific wording and context, the Court would demand that the insured peril be a 'but for' cause of the loss. Here, the insured peril comprises all the matters in the insuring clause which the insured must establish in order to achieve cover in principle. Those are: (i) the interruption; (ii) the inability to use the premises; (iii) the restrictions causing the same; (iv) the occurrence of

[47] [1987] 1 Lloyd's Rep 32
[48] FCA Skeleton/222 – 248, 391 - 401

notifiable disease which the restrictions follow.[49] Thus, when determining whether the loss would have happened 'but for' the insured peril the Court strips away all of those elements, and compares the resulting hypothetical world with the real world.

88. This makes sense as an approach, looking at the language and structure of the insuring clause. The Public Authority Clause demands (so far as relevant) that loss result "*solely and directly from an interruption to* [the insured's] *activities caused by … your inability to use the insured premises due to restrictions imposed by a public authority during the period of insurance following an occurrence of any human infectious or human contagious disease, an outbreak of which must be notified to the local authority*". The clause ties together all these elements, and requires that the insured establish them all to obtain cover.

89. The point can also be put another way: there is no indemnity for loss resulting solely and directly from an interruption to the insured's activities caused by their inability to use the insured premises due to restrictions imposed by a public authority during the period of insurance *per se*. The existence of those facts alone does not entitle the insured to an indemnity; they are not, without more, something the policy insures against. They are, in this respect, like the underlying terrorist activities in *Silversea* – without more, not perils. The insured peril thus captures everything in the relevant part of the Public Authority Clause, and so the Court should remove all those elements when constructing the counterfactual.

90. That is the trade-off the insurer must make (setting aside any appropriately worded Business Trends clause) in return for forcing the insured to prove a long chain of matters, and the causal relationship between each of them. The insurer can ask the insured to prove many things, but then, when considering whether "but for" causation is established, those matters must all be stripped away in the counterfactual.

91. Further, even if Hiscox was right that the insured peril in the strict sense extended only to "interruption to [the insured's] activities caused by inability to use the insured premises due to restrictions imposed by a public authority during the period of insurance" and not to any of the underlying events set out in the sub-clauses to the 'stem' of the clause (e.g. (a) - murder or suicide), then all of the points set out above (in addition to those below) would lead to the conclusion that despite that, the parties intended the underlying event to be removed when building the counterfactual.

[49] A useful contrast can be drawn with *Orient-Express Hotels Limited v Assicurazioni General S.p.A. (UK Branch) Trading as Generali Global Risk* [2010] Lloyd's Rep. I.R. 531. There, as the summary of the clause in paragraph [12] of Hamblen J's judgment shows, the underlying event giving rise to the damage was not drafted into the insuring clause; here the underlying event which the restriction follows (the occurrence of a notifiable disease) is so drafted.

92. Hiscox disagrees. It says that the right approach to building the hypothetical world for deciding on 'but for' causation is to remove the matters comprising the insured peril, but they include only the interruption, the inability to use the premises, and the restriction. In short, the end of the 'stem' of the relevant part of the insuring clause is the outer bound of the insured peril; the murder, rat infestation, or disease is not part of it. Thus, when constructing the counterfactual, they remain in place. But Hiscox's approach is wrong for six reasons.

93. **First**, restricting the insured peril in the manner Hiscox does is unprincipled and unsustainable. There is no good reason to draw a sharp line after the 'stem' of the relevant part of the insuring clause. The rest of the words that follow, and which are elements the insured must prove for there to be cover, are just as much part of the clause as those preceding them. As the FCA notes,[50] Hiscox has simply drawn an arbitrary line partway through the insuring clause apparently because doing so produces, on its case, a convenient counterfactual. Here, Hiscox's pleading is telling: in paragraph 29 of its Defence is refers to the "*incidents and occurrences which* [the policies] *in fact cover*". Thus, on Hiscox's own pleading, the underlying "*occurrence*" (tracking the wording of the relevant part of the insuring clause) is what the relevant part of the insuring clause covers against: i.e., part of the insured peril. That changes when it produces an inconvenient counterfactual for Hiscox, at which point the "*occurrence*" (here, of disease) is not what the policy covers, with the insured peril comprising solely the matters following after it.

94. Whilst Hiscox's new case on the word "*following*" remains to be seen, the correct approach can be demonstrated as follows. Suppose that there was an outbreak of COVID-19 in the insured's premises on day 1, but the authorities for one reason or another thought nothing of it. Then on day 2 the authorities shut down the premises because they were full of (say) something toxic in the walls, so that the insured was unable to use the premises. Their activities are interrupted as a result. They would be covered on Hiscox's previous approach to "following". Indeed, the policyholder would be covered because they suffered loss resulting solely and directly from an interruption to their activities caused by inability to use the insured premises due to restrictions imposed by a public authority during the period of insurance following an occurrence of disease. That cannot be right. Thus "*following*" must require more than simply a temporal link (which is, presumably, why Hiscox has amended its case in this regard); instead, there must be some (relatively weak) causal connection

[50] FCA Skeleton/[399].

between the event and the restrictions. That reinforces the point that the underlying event – here, the occurrence of disease – forms part of the insured peril as much as (say) the restrictions do.

95. **Second**, Hiscox's approach produces absurd and unfair counterfactuals, which are relevant to whether a reasonable person reading the policies would consider Hiscox's approach to be what the parties intended. As set out above, the reasonable person will investigate the commercial consequences of the competing interpretations of the contract, and shy away from interpretations which flout business common sense, or lack commercial sense.[51]

96. The FCA has carefully explained why on one version of Hiscox's approach (which injects the most likely events to happen once the elements to be removed to create the counterfactual are removed into the counterfactual), it results in matters the insured must prove to establish cover then negating cover, and produces unfair counterfactuals that mean the policy does not work in the real world.[52]

97. The problem becomes even more acute on a strict reading of Hiscox's counterfactual whereby only the interruption, inability to use the premises and restrictions are removed, without likely further acts of the insured being added in. Suppose that due to a defect in its drains, sewage fills insured A's café. The local authority orders A to shut. A's customers cannot attend the café, and A's income drops. On Hiscox's approach to the counterfactual, the Court must remove the local authority's order, and the ensuing legal prohibition on using the premises, and that is all. The Court must then ask whether the insured would have suffered the loss in income. In short, the Court must assume that the café remains open, but filled with sewage, and ask whether the insured would still have suffered the same loss. The answer is inevitably 'of course': no-one wants to sit down to drink a coffee and eat a pastry surrounded by sewage. Much the same point can be made by replacing this example with an infestation of rats. These consequences of Hiscox's interpretation show why it is wrong.

98. **Third**, Hiscox's approach is unworkable in the real world and, as set out above, that is relevant to whether that approach is, as a matter of interpretation, wrong. Hiscox's approach is all the more unworkable in the circumstances of the relevant background, which includes that the policyholders under the policies (which are standard form) are typically SMEs, buying cover with – under the relevant part of the insuring clause – low or very low limits.

[51] *Wood v Capita Insurance Services Ltd* [2017] A.C. 1173.
[52] FCA Skeleton/[396 – 397].

As the FCA notes[53] it will be very difficult for an insured, particularly a typical insured under the Hiscox Policies, to prove what they need to in order to establish cover or recover any sum that would make the cost of the exercise of doing so worthwhile (if that was even possible given what Hiscox's approach requires of the insured and the limits in play, which is most unlikely).

99. The FCA's focus in this respect is on the type and expense of the evidence needed to establish cover on Hiscox's approach. But the point extends further to the very exercise required of the insured.

100. Suppose insured A's business must close under one or more of the various pieces of COVID-19-related legislation. The insured has suffered some loss of income (and possibly other losses besides) throughout closure. They write to Hiscox, seeking an indemnity. Hiscox then sends a letter of the type quoted in Schedule 4 of the FCA's Particulars of Claim declining cover.[54] It says that the insured's losses were caused by non-binding advice, legislation affecting the movement of others, a fall in economic activity generally and a loss of consumer confidence. It also says that in any event the effect of government advice and restrictions on others, and the general impact COVID-19 has had on the economy and consumer confidence means A would have made no money anyway. How is the insured to respond to that? Or indeed to respond to it at any sort of cost that would not dwarf the indemnity at stake, given the low limit of indemnity?

101. The onus is thrown onto the insured to prove a very difficult negative: on Hiscox's approach, insured A must prove that all but one of many interrelated matters, all operating in tandem, did *not* cause its losses. If it can surmount that hurdle, it must then overcome another: proving that, in hypothetical circumstances, a whole range of factors (essentially, with respect, whichever Hiscox can think up) would not have made a difference. Indeed, on Hiscox's approach the onus falls on the insured to predict and, indeed, to prove what customers it may have never met would have done in circumstances that never happened. That cannot be what the parties objectively intended.

102. Hiscox's riposte to this is to say that focuses too much on the situation now in play. Essentially, the clause works perfectly well in the small-scale scenarios in which it is (on Hiscox's case) intended to work and which the parties would have contemplated on inception. But that is, with respect, a bad point.

[53] FCA Skeleton/400.
[54] At p.76ff.

103. Taking Hiscox's examples of legionnaire's disease, or rat infestation, how is the insured meant to establish what made customers in those scenarios stay away? The FCA's analysis explains why expert evidence is not a realistic route. It may be able to ask some repeat customers after re-opening, or if it can contact them, and they are willing and able to answer, why they have not visited the premises. But for many businesses that seems unlikely to be a large proportion of its customers. There is also no way to know why those who would otherwise be one-time customers who did not visit during (say) the period of closure did not visit. The same applies to those who would otherwise be first-time customers, and who then for one reason or another do not visit after reopening. Or first-time customers generally: the indemnity may be being sought while the insured's business is still closed. Those customers exist only as numbers; a difference between the expected income and the actual income for the business over the period it is affected. They cannot be interrogated.

104. Hiscox's approach is therefore unworkable in the real world. Under it, the cover said to be provided by the insuring clause is, in large part illusory. The consequences, however, are very real for Hiscox's policyholders.

105. **Fourth**, Hiscox's approach is inconsistent with the trends clauses used in some of its policies, and the fact it has not used them in others.

106. The business trends clause in the lead wording of Hiscox1 [B/6/44] does not support Hiscox's approach and in fact suggests it is wrong. The first sentence makes it clear that the clause only revises damage upwards. That leaves the second sentence which Hiscox relies on in isolation, ignoring the inconvenient first sentence, to support its approach. But on its own terms that either: (i) only applies; or (ii) makes it clear the clause only applies when cover is triggered by insured damage. Thus it does not support Hiscox's approach to 'but for' causation in the context of the relevant part of the insuring clause, which is not triggered by damage. Thus, this Business Trends clause does not support Hiscox's approach to 'but for' causation in the context of the relevant part of the insuring clause, which is not triggered by damage.

107. In fact, it suggests Hiscox's approach is wrong. If Hiscox's approach to the construction of the Business Trends clause were right, the second sentence would be redundant. Everything it does (on Hiscox's case) would be inherent in the words "*resulting solely and directly from an interruption to your activities* …" which appear in the insuring clause, and in the clause providing cover for business interruption caused by property damage. Hiscox also has inserted this clause, the second sentence of which is limited in its application to cases in which cover is

triggered by insured damage, instead of the other clauses it uses (discussed below) which are not so limited. That would suggest to a reasonable person reading the policy that Hiscox chose to *omit* wording which would on its case apply its approach to 'but for' causation in the context of the Public Authority Clause. The Hiscox3 lead wording's trends clause is similarly restricted in application to cases in which damage triggers cover, and so the same points arise in relation to Hiscox3.

108. In contrast, the Hiscox2 lead wording [B/7/26] does on its face permit adjustment of the sum paid down as well as up, and refers to the result that would have been achieved if the insured restriction had not occurred (rather than just insured damage). But that does not support Hiscox's approach either. First, as the FCA's submissions explain,[55] even this apparently more generous trends clause, properly understood, compares the position as it is with a no-COVID-19 world, not just a no-restriction world.

109. Second, if Hiscox's approach to 'but for' causation is correct then this provision does nothing. It is redundant. That suggests Hiscox's approach to causation is wrong. Additionally, as set out above, the existence of this Business Trends wording, and non-deployment in Hiscox1 and indeed Hiscox3, suggests that Hiscox's approach to 'but for' causation under those policies is wrong. If it was what Hiscox intended, why not deploy the clause from Hiscox2 which it says most clearly gives effect to that approach? The same points apply in relation to the very similar business trends clause in the Hiscox4 lead wording.

110. **Fifth**, Hiscox relies on the start of the definition of "*loss of income*" which reads "*the difference between your actual income during the indemnity period and the income it is estimated you would have earned during that period*". That reliance is misplaced. That section of the policy concerns the quantification of the amount Hiscox must pay, not establishing causation of loss to establish cover in principle in the first place. It operates at a later stage. What is more, while "*would have earned*" suggests a counterfactual, it does not tell the reader how that counterfactual is to be built.[56] To answer that, the Court has to look at the provisions what have already been addressed, above.

111. **Sixth**, to seek to answer arguments that its counterfactual is unrealistic, Hiscox suggests its counterfactual, where there is COVID-19, and government advice, but no binding restrictions (or consequent inability to use premises or interruption to activities) is realistic.

[55] FCA Skeleton/[xxx]
[56] See FCA Skeleton/376 to similar effect.

It points to historic pandemics, the pre- and post-lockdown period here, and Sweden's approach to COVID-19.[57] But:

a. that is no answer to the analysis above which shows that Hiscox's approach is wrong in principle.

b. It is no answer to the points in paragraph 97 above, which show that Hiscox's approach does not always, or even usually, generate realistic counterfactuals; instead, generating open cafes full of rats and sewage.

c. And it is no answer to the point that while it is possible to point to times and places where there is a large-scale outbreak of disease, but no binding restrictions imposed in response, turning the UK into one for the purposes of constructing a counterfactual is much more difficult. It involves disentangling binding restrictions, and their effect, from COVID-19, its impact on the economy, and non-binding guidance when all have existed side-by-side, and interacted[58] within the UK for a substantial period. Pointing to somewhere with wide-spread disease (including COVID-19) and no binding restrictions is one thing; transmuting the UK into such a place after it has been subject to binding restrictions for some time is quite another.

112. The Hiscox Interveners invite the Court accept their approach to the counterfactual. Hiscox's approach ignores the language and structure of the insuring clause, and seeks inappropriately to cut down the insured peril, producing an incorrectly more favorable counterfactual for Hiscox. It also produces absurd and unfair counterfactuals and is unworkable in the real world. It is also inconsistent with what Hiscox has and has not done in terms Business Trends clauses in the relevant policies.

[57] Hiscox Def/119.

[58] For example, the very fact that severe binding restrictions were put in place may well have fed consumer anxiety in some consumers (by sending a message as to the seriousness of the disease) or reduced it in others (by creating a sense that the government had 'done something' following a period when there were, from some quarters, calls for binding restrictions sooner). Equally, it is inherently likely that the scope and content of non-binding measures (which on Hiscox's case are not removed to create the counterfactual) was influenced by the binding restrictions in place. Similarly, while Hiscox refers to "the impact COVID-19 had" on economic activity (Hiscox Def/16.1) as "distinct" (Hiscox Def/16.4) from the matters insured, it seems unlikely that binding restrictions had no wider effect on economic activity, beyond the direct effects of compliance with them. Building a counterfactual without binding restrictions, inability to use the insured premises and the consequent interruption is not as simple as just removing those matters.

**(c) A worked example of causation in this context**

113. The application of the right approach to causation of loss, and the contrast between the rival approaches, can be demonstrated through a worked example.

The factually most common case

114. A simple starting point would be a shop, selling non-essential items, which experiences no downturn throughout the period to 23 March 2020. Then, following the government announcing that it would close all non-essential retail stores and issuing guidance stating such stores must close,[59] it closed. As a 'category 4' business it would, of course, have had to close anyway on 26 March 2020 under the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 ("**the 26 March 2020 Regulations**").[60] Throughout the period of closure, it made no sales. Although simple on its face, this is a scenario which arises in practice, and is a useful one to consider. It is very similar to [will insert cross-reference to Promiss here if we keep them] and Assumed Fact scenario 4, with two additions (in the form of carrying out some online trading during the period of closure and experiencing supply chain issues during that).

115. For the sake of the analysis, the following can be assumed. First, that the insured is on Hiscox1 – 3 (for ease of analysis). Second, that the FCA's and the Hiscox Interveners' case is otherwise accepted – in short, (i) there was an occurrence of disease; then (ii) the announcements and guidance of 23 March 2020 were a restriction; (iii) they caused an inability to use the premises; and (iv) that caused an interruption to the insured's business activities. On those assumptions, causation of loss works as follows.

    a. What was the loss? The lost income during the period of closure.

    b. Was the interruption a cause in fact of it? Yes. Without more, on the face of things the loss flows from the interruption, as the insured could not make income on what it could not sell because it was closed. It made sales as normal until the interruption and did not thereafter, and the interruption presents a clear explanation for the loss of sales. In such circumstances, so far as a 'but for' test falls to be applied, in the first instance that test is met – one can readily infer that without the interruption the

[59] See FCA PoC/18.17 – 18.18, and Hiscox Def/50 and 59. What was said was put in mandatory terms, e.g. "All non-essential premises must now close", "Non-essential businesses and premises must now shut", "These premises and other venues must close", "must remain closed" ('Further Businesses and Premises to Close: Guidance, 23 March 2020); "To ensure compliance with the Government's instruction to stay at home, we will immediately close all shops selling non-essential goods" (Prime Minister's announcement 23 March 2020).
[60] FCA PoC/19.4; Hiscox Def/61.4

previous sales performance would have continued. Hiscox could try to raise the competing causes it has referred to in correspondence and in its pleadings[61] to say that even if the insured was open and trading they would have lost some or all of the same sales. But for the reasons set out above, and in the FCA's submissions,[62] the appropriate counterfactual is one removing not just the interruption, inability to use the premises and restriction, but the occurrence of COVID-19 (and so its consequences): so all the factors which Hiscox says would cause the loss in any event disappear. Further, whichever approach is applied, for the reasons given by the FCA[63] the burden of proving that the losses would have happened in any event lies on Hiscox. This means that even if Hiscox were right about how the counterfactual was to be built, simply asserting e.g. an economic downturn and consequent reduced footfall, and saying that the insured must establish they would not have caused the same loss of sales, would generally not be good enough.

c. Is the interruption a proximate cause? Yes. On the face of things there is no other effective or dominant cause.

d. Is there any other proximate cause? No. It is difficult to see how anything else could have been the effective or dominant cause of the reduced income: nothing could be sold while the shop was shut. But in any event Hiscox's potential competing causes (which cannot have been proximate causes of the loss as a matter of historical fact for the reason above) are all matters set out in the insuring clause, properly construed, and so for the reasons above and in the FCA's submissions (variously, and as applicable): (i) they are not separate causes at all;[64] (ii) if they are then they cannot be or are not proximate causes of the loss;[65] (iii) but even if they can be that does not remove cover because the cause on which Hiscox relies is the occurrence of the disease, which must be established under the Public Authority Clause.[66]

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[61] See e.g. Hiscox Def/91.2 – 91.3, the final four paragraphs declinature letter quoted at p.78, appendix 4 to the FCA's Particulars of Claim.

[62] Which, as the Hiscox Interveners understand them, are broadly to the effect that: (i) the proper counterfactual for any but for test (which is often not needed) is no-disease, not merely no legally-binding restrictions; (ii) generally the but for test will only negate proximate causation if the loss would have happened at the same time in the same way even without the insured peril; (iii) it can and should be disapplied or applied in a modified form in cases of two sufficient causes; (iv) so far as it is applied, the various matters relied on by Hiscox are not separate causes from the interruption and so are removed with it in the counterfactual.

[63] FCA Skeleton/237 – 248.

[64] FCA Skeleton/371.2.

[65] [Reference to paragraph of our skeleton on this, that also has a cross reference to the relevant bit of the FCA skeleton which can be lifted and dropped into here]

[66] [Reference to paragraphs of our skeleton on what solely and directly does]

116. Thus the loss was caused solely and directly by the relevant interruption.

A variant

*If the 23 March 2020 measures are not "restrictions imposed by a public authority"*

117. On this premise, if the Hiscox Interveners and the FCA are right about the appropriate counterfactual, then the result on 'but for' causation does not change: the occurrence of disease is removed in the counterfactual and with it the guidance consequent on it. 'But for' causation is made out. However, until 26 March 2020 and the 26 March Regulations there is of course no interruption caused by inability to use the premises due to restrictions because there are no "qualifying" restrictions; thus there is no cover for that period. Then the 26 March Regulations come into force. From then, they are the dominant cause of inability to use the premises which causes the interruption. Then, as set out above, the loss results solely and directly from the interruption.

118. In contrast, if Hiscox is right, then the 23 March 2020 measures remain in the counterfactual (because they are not "qualifying" restrictions that form part of the insured peril). Hiscox would presumably say that before 26 March 2020 there can be no cover for the reasons above, and that it can be inferred from the fact that the insured closed in response to the 23 March 2020 measures that they would have remained closed in response to them even without the 26 March Regulations coming into force, and so the interruption and loss would be the same. Thus, 'but for' causation would not be made out and there would be no cover. The insured would be undone by being sensible; they would have done better to ignore the guidance, remain open from 23 to 26 March 2020, and then only close when forced to do so on 26 March 2020 (rewarding risk-takers and punishing cautious insureds)[67]. Hiscox may, however, say that even if the insured had been open, others would have followed relevant guidance and legislation or been reluctant to shop, depressing sales. The insured would be left to disprove the hypothetical actions of customers it never had in circumstances which never happened.

[67] Further, the happenstance of one insured's reaction to Government advice compared with another insured's reaction is not a principled or fair basis on which the policy terms should be deemed to operate.

**(3) "AN INTERRUPTION TO YOUR ACTIVITIES":**

119. Hiscox's case is that it is insufficient for an insured to show that its activities have been interfered with, rendered less productive/profitable or adversely affected in some other way that falls short of *"interruption"*.

120. As set out above, it is accepted that in the abstract the word "interruption" is *capable* of an extremely narrow and restrictive meaning, but that is not realistic in context. However, it is unlikely that the objectively correct and reasonable construction of the word "interruption", in the "Property – business interruption" section of the Hiscox Policies, should be given the narrow meaning of "stopping completely and starting again". The natural and obvious meaning of the word "interruption" in this context is simply interruption in the sense of the business not being able to operate normally and properly. Notably, the wording is "interruption to your activities [or your business]". It makes less commercial, grammatical and syntactical sense to construe "interruption" here as meaning "stopping and then restarting", as opposed to the above construction;

121. According to the Cambridge English Dictionary [HI/xxx], "interruption" can mean (amongst other things) "an occasion when someone or something stops something from happening for a short period", or "an occasion when a company is prevented from operating as normal". According to the Oxford English Dictionary [HI/xxx], "interruption" can mean (amongst other things) "… hindrance of the course or continuance of something" … "The action, or an act, of hindering or thwarting; hindrance, obstruction".

122. The objectively reasonable and impartial observer would consider, in the context of this kind of insurance, that it is too literalist and uncommercial to construe the word "interruption" to mean, for example, literally only the business stopping entirely and then re-starting, as opposed to the normal operation of the business being "interrupted" in the above broader sense. Giving the word "interruption" its normal and obvious meaning, read in context and properly construed, this part of the clause simply means that the insured business is prevented from operating as normal. The various forms of interruption to the insureds' businesses, of course, vary on the facts specific to those businesses and the relevance and impact of the various public authority restrictions to each insured. Importantly, as set out above, most Hiscox Interveners in fact suffered no "interruption" until they were directly affected by the public authority restrictions (by closure under the Regulations, or otherwise).

123. Finally on this issue, the Hiscox Interveners note and agree with paragraphs [150 to 160] and [356 to 358] of the Claimant's Skeleton.

**(4) "CAUSED BY YOUR INABILITY TO USE THE INSURED PREMISES":**

124. Hiscox's case is that it is essential that the relevant restriction renders an insured unable to use the insured premises. As set out above, it is accepted that the wording is *capable* in the abstract of this uncommercial and extremely restrictive construction.

125. However, read in context, "your inability to use the insured premises" means your inability (in the sense of the inability) to use[68] the insured premises normally. It does not mean "your" (as in nobody else's at all, including customers') inability to use the premises (in the sense of complete physical and/or legal inability). There is no reason to read these words in such a limited way, especially in the present context[69]; indeed, there is every reason to read them commercially and properly as meaning the inability to use the insured premises normally. It must be remembered that those words form part of the fuller wording *"… an interruption to your activities caused by … your inability to use the insured premises …"*. That wording makes clear that the narrower reading is unrealistic, in context.

126. Further, this part of the clause does not provide, for example, "your prevention from access to the insured premises", or "denial of access or hindrance in access" – as appears in the Non-damage denial of access clause. Further, seen in light of sub-clauses (a) to (e) in the Public Authority Clause, it is clear that "restrictions imposed by a public authority … following … [(a) to (e)]" covers a wide of possible causes. First, there is no limitation on what amounts to "restrictions imposed by a public authority" (addressed below). Second, the connecting word "following" requires only a loose temporal and causal connection. Therefore, whilst one possibility is that following one of (a) to (e), the insured premises is closed down (and therefore cannot be used at all by the insured), that is only one out of a wide range of other possibilities. The restrictions could be of a wide variety, arising following a wide variety of events, and that helps one to understand what is meant by "inability to use the insured premises" – i.e. inability to use the insured premises normally.

127. Further, the kinds of insureds affected will be a wide variety. One possibility is a shop that is actually closed by order. Another possibility is a building company that has to change how it conducts building works (with social distancing, for example). The clause caters for both categories, strongly indicating that a restrictive reading of "your inability to use the insured

[68] As to the meaning of "use", the Hiscox Interveners agree with paragraphs [141 to 143] of the Claimant's Skeleton Argument.
[69] See also the other wordings available in the market: "enforced closure", "closure" and "prevention of access" and "enforced closure".

premises" is unduly limited. This is also relevant to the word "your", which simply means (read in context) the inability to use. It would make nonsense of the clause if it only applied where the insured could not use the insured premises, but not if, for example, the insured could use the premises but customers could not. This construction (requiring an absolute prohibition on all use of the Insured Premises) puts too much strain on the wording and is commercially unrealistic. Of course, the extent of the inability to use will be fact-specific in any given case.

128. Finally on this issue, the Hiscox Interveners note and agree with paragraphs [337 to 348] of the Claimant's Skeleton.

## (5) "DUE TO RESTRICTIONS IMPOSED BY A PUBLIC AUTHORITY":

129. Hiscox's case is that the "restriction" must be one that has been *"imposed"*, i.e. has force of law. Mere requests, guidance or advice, however forcefully given and however authoritative its source, is insufficient. Again, it is accepted that in the abstract the word "imposed" *could*, in a different context, mean "having the force of law". But (a) that is not what the clause says, (b) if Hiscox had wanted to say that, they could have done and (c) Hiscox did say that in the "Non-damage denial of access" wording "… by order of the government or any public authority …".

130. Looked at as a matter of practical reality, it is extremely difficult to say that (for example) the public statement made by the Prime Minister on 16 March 2020 to all members of the public, making various express demands of the public and businesses, would not (in ordinary use of the language) amount to "restrictions imposed by a public authority". The language used by the Prime Minister on 16 March 2020[70] was clear:

> *"… first, we need to ask you to ensure that if you or anyone in your household has one of those two symptoms [a high temperature or a new and continuous cough], then you should stay at home for fourteen days.*
> …
> *… second, now 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.*
> …
> *So from tomorrow, we will no longer be supporting mass gatherings with emergency workers in the way that we normally do. So mass gatherings, we are now moving emphatically away from.*
>
> *…"*

[70] Paragraph 18.9 of the FCA Amended PoC [A/2/9].

131. The same can plainly be said of the Prime Minister's 23 March 2020 statement[71]. Properly construed, all of the restrictions pleaded by the FCA at paragraph 18 of the Particulars of Claim [A/2/7 to A/2/13] amount to restrictions[72] imposed[73] by a public authority[74] during the period of insurance[75]. For the avoidance of doubt, the relevant "restrictions" include both direct requirements to close specific businesses and also other restrictions which on the facts result in the inability to use the Insured Premises normally, because the business owners, employees, workers, customers and other users could not use the Insured Premises normally.

**(6) "FOLLOWING AN OCCURRENCE OF … DISEASE":**

132. At paragraph 14.3 of its Defence [A/10/6], Hiscox summarises its case on the relevant part of this issue as follows:

> "14.3 An "*occurrence*" must be local and specific to the insured, its business or business activities or the premises. This is plain in particular from (i) the fact that the business interruption cover is an adjunct to property cover; (ii) the other special covers under the same stem; and (iii) the other matters, e.g. murder/suicide falling under the Public Authority clause."

133. Once again, it is accept that in the abstract, the word "occurrence" can have a restrictive meaning[76]. Here, however, the correct construction of this word is simply an "occurrence" in the sense of an event or happening, not the restricted sense above. What is required, of course, is an occurrence of disease "an outbreak of which must be notified to the local authority". The context of the word "outbreak" is helpful in that it indicates that the occurrence could be localised or much more general. Indeed, the natural reading of "outbreak" indicates that the clause does not primarily look to localised occurrences, but it could. Certainly, there is no express restriction on the "occurrence" or the "outbreak".

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[71] Paragraphs 18.17-18 of the FCA Amended PoC [A/2/11]. The language used on 23 March 2020 was mandatory / imperative: "… All non-essential premises must now close. … Non-essential businesses and premises must now shut. … must remain closed … These premises and other venues must close".

[72] As to the meaning of "restrictions", the Hiscox Interveners agree with paragraphs [147 to 149] of the Claimant's Skeleton Argument.

[73] Further as to the meaning of "imposed by", the Hiscox Interveners agree with paragraphs [109 to 113] of the Claimant's Skeleton Argument.

[74] As to the meaning of "public authority", the Hiscox Interveners agree with paragraphs [96 to 100] of the Claimant's Skeleton Argument.

[75] The Hiscox Interveners also rely on the 18 March 2020 statement of the Mayor of London, Sadiq Khan [HI/xxx].

[76] See, for example, *AXA Re v Field* [1996] 1 WLR 1026 in the context of aggregation clauses.

134. There is a simple answer to Hiscox' point (i) "the fact that the business interruption cover is an adjunct to property cover", which is that there is a perfectly adequate restriction on the ambit of the clause already – i.e. the restrictions imposed following the occurrence of the disease must operate such that there is an inability to use the insured premises. Thus, the insured premises are expressly and directly affected in this way, which is a perfectly adequate limitation, if Hiscox is concerned that a wider construction of "occurrence" is getting too far removed from business interruption cover as an adjunct to property cover. Further and in any event, many of the business interruption sub-clauses concern matters physically remote from the insured premises (albeit affecting the insured premises in various ways) – see, for example, Hiscox1 sub-clause 10(c) [B/6/41] (the failure in the supply of electricity could take place anywhere, as long as the impact was on the insured premises) or sub-clause 11 [B/6/42], similarly. The reliance placed by Hiscox[77] on the "Cyber-attack" wording does not assist Hiscox. Indeed, it assists the Hiscox Interveners because it is another example of a (physically) remote cause affecting the Insured / Insured Premises and cover still being provided under the business interruption cover.

135. The response to Hiscox's point (ii) "the other special covers under the same stem" is that this in fact assists the Hiscox Interveners. A comparison between sub-clauses 3 and 13 in Hiscox1 [B/6/41 and B/6/42] is particularly helpful: there is clear and express wording "localising" clause 3, when compared to clause 11(b); and there could be inappropriate potential overlap between clauses 3 and 11(b) if "localisation" were to be read into clause 11(b).

136. As to Hiscox's point (iii) "the other matters, e.g. murder/suicide falling under the Public Authority clause", the same point as above can be made. Sub-clause (a) is not necessarily limited to the vicinity of the insured premises. Instead, the restriction on the clause is that the restrictions following the murder / suicide must affect the Insured Premises in the relevant way. Sub-clause (c) is stated in terms to be limited to the Insured Premises. Sub-clause (d) is not limited to the Insured Premises and could be physically very remote. Again, what matters is the impact of the restrictions on the Insured Premises, which restrictions follow the relevant event. Sub-clause (e) is also stated in terms to be at the Insured Premises. If Hiscox's case were correct, therefore, it would be very surprising that sub-clause (b) expressly does not limit the occurrence of disease to any geographical location when, to state the obvious, it certainly could have done. Some of the wordings in (a) to (e) are restricted in

[77] Hiscox Defence/9, 75.2.

this way and others are not. But, again, the limitation placed on the clause is not as to where the relevant event in (a) to (e) takes place, but instead the fact that it must affect the Insured Premises – which, again, is a complete answer to this point.

137. Further and in any event, Hiscox4 [B/9/36] expressly includes the wording *"… within one mile of the insured premises"*, restricting the Public Authority Clause. The fact that it has been included in some Hiscox Policy wordings and not the others is obviously striking and must be presumed to have been deliberate. Such wording was readily available to Hiscox, and openly available in market, which is relevant to the factual matrix in which the Public Authority Clause is to be construed. With respect, comparing the wording with the 1-mile restriction and the wording without the 1-mile restriction renders Hiscox's construction of the latter extremely difficult.

138. There is also no reason why any "localisation" wording should be implied into the Public Authority clause (particularly where there is already an adequate restriction on the clause, as above). Whilst Hiscox do not go quite so far as to argue that the "localisation" wording should be implied, the reality of Hiscox's construction is that this is in effect what Hiscox's approach achieves. It is therefore helpful to note the strict requirements of the test for the implication of terms (*Marks & Spencer v BNP Paribas* [2016] AC 742). This is particularly the case where not only was express "localisation" wording available, but also was expressly included in Hiscox4.

139. It is unlikely that there is such an implicit "localisation" requirement for various reasons, based on language used elsewhere by Hiscox:

    a. First, Hiscox4 has an express 1-mile requirement. Hiscox chose not to use that or similar wording in the other Hiscox Policies. That informs the proper construction of the Public Authority Clause wording in those Policies.

    b. Further, if Hiscox was right about there being an inherent localisation requirement in the Public Authority wording in the other Policies, the express 1-mile requirement in Hiscox4 would not be a restriction at all, but instead an expansion of cover that would otherwise be localised to the insured or the premises. That would be surprising.

    c. Further still, Hiscox has used the phrase "*in the vicinity of the insured premises*" in the denial of access and bomb-threat sections of its policies, but not in the relevant part of the relevant Public Authority clauses. Hiscox, therefore, had that language available to it when drafting the Public Authority extension in Hiscox1, but chose not to use it.

140. Further still, not only would Hiscox be seeking to imply words into sub-clause 11(b), but Hiscox would fail the test for implication because it has not (as far as the Hiscox Interveners

are aware) specified what it means by the "*local and specific*" to the Insured or the Insured Premises and whether (and if so, why) this is more or less than 1 mile (or any other distance). By "*local and specific*", Hiscox appears to mean "*vicinity*" or something similar. This can be contrasted with the policy referred to in paragraph 41.5 of the FCA's Particulars of Claim which uses the word "Vicinity" and defines what is meant by it in qualitative terms.[78]

141. To repeat and expand on a point above, it is an impossible oddity in Hiscox's construction that if it is correct that the true meaning of sub-clause 11(b) in Hiscox1 is that the *"occurrence"* following which the restriction had been imposed must be one that is specific to the insured or the Insured Premises / its locality, then this would (apparently) be narrower than the Hiscox4 wording that expressly includes the 1-mile restriction. That is, with respect, an impossible construction where an obvious restriction is actually an expansion of cover.

142. It is also relevant that there is no exclusion for pandemics or epidemics in the Public Authority wording, although such wording could have been included, for example as appears in the "Cancellation and abandonment" wording in (for example) Hiscox1 [B/6/43]. Further still, if Hiscox had wanted to exclude occurrences of disease distanced from the Insured Premises, it could simply have drafted wording to that effect (and made that clear by adding it to the "What is not covered" section). As noted by Schroeder JA, sitting in the Ontario Court of Appeal in *Shea v Halifax Insurance Co* [1958] OR 458-474 "… if the defendant insurer had desired to create an exemption from liability for damage resulting from an explosion, however caused, it should have had the commercial courage to spell out the exemption in clear and unambiguous language rather than to have endeavoured to shield itself from liability by subtly resorting to the employment of vague and misleading terms especially in this case where, the insured being a distributor of petroleum products, an explosion due to an accidental igniting of such products was not an unlikely occurrence."

143. In the Hiscox Interveners' submission, therefore, the meaning of "occurrence" is clear. However, if (which is denied) there were ambiguity here, reliance is placed on the *contra proferentem* approach to construction.

## (7) BUSINESS TRENDS CLAUSES

144. The Hiscox Interveners adopt the FCA's submissions on this point.

[78] Though it should be noted that Hiscox's position is that it is not admitted that its version of "vicinity" means the same as the definition of "Vicinity" used in the RSA policy referred to in paragraph 41.5 of the FCA's Particulars of Claim. See e.g. Hiscox Def/82 and 84 [A/10/21 and A/10/22].

## VII. THE HISCOX INTERVENERS' CLAIMS

145. In the circumstances, the Hiscox Interveners of course seek an indemnity from Hiscox. As the Court will obviously recognise, the outlook for the economy is extremely bleak. Whilst that does not assist with the proper construction of the policies in issue in this case, it is essential to recognise the consequences of the Hiscox's refusal to indemnify its insureds at the time when they need support the most.

146. Properly construed, the Hiscox Policies do respond, certainly in the narrow and reasonable way that the Hiscox Interveners put their case (relying on the Public Authority Clause with no 1-mile restriction). In those circumstances, Hiscox's position is a matter of huge regret and concern to the Hiscox Interveners. Indeed, many Hiscox Interveners have suffered further significant losses as a result of Hiscox' conduct and seek additional damages from Hiscox under s.13A Insurance Act 2015 in respect of such losses – in many cases, an indemnity from Hiscox will be the difference between survival or not for the businesses and the livelihoods of those involved.

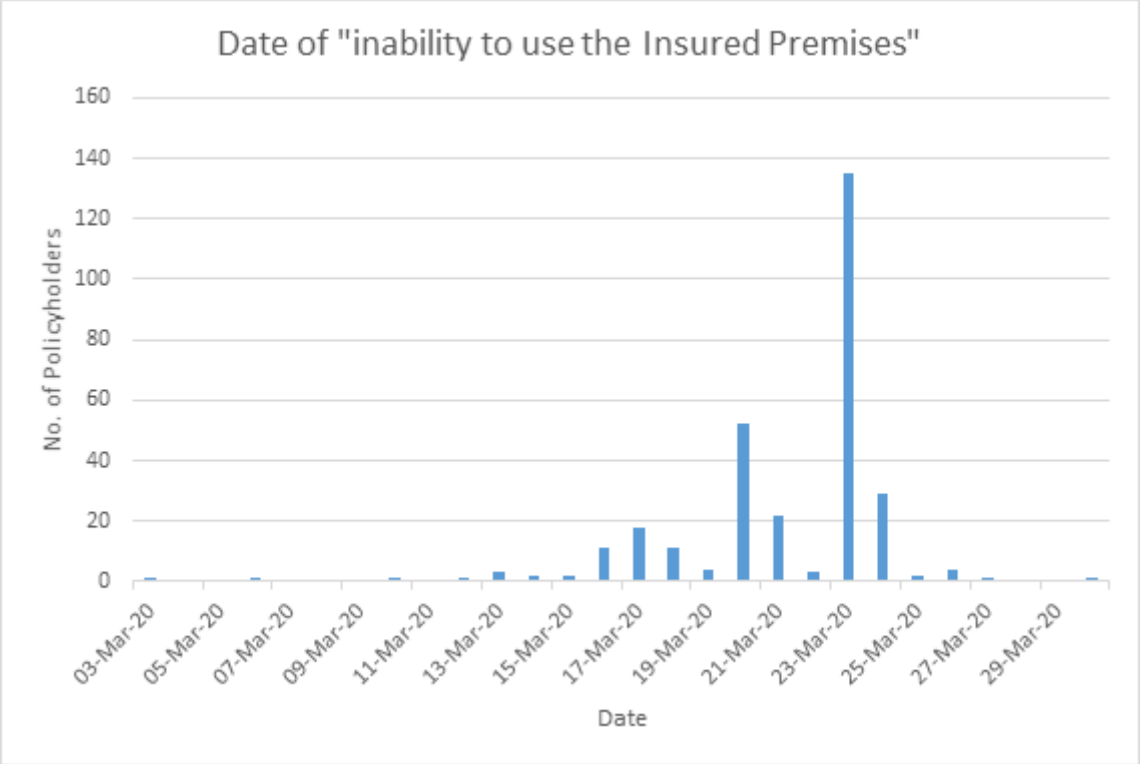
**BEN LYNCH Q.C.**

**CHRISTOPHER KNOWLES**

**FOUNTAIN COURT CHAMBERS**

**10 JULY 2020**

**Annexe 1**




Based on the information available to date (which is incomplete, based on a sample of 308 of the Hiscox Interveners, and subject to review), the majority of the Hiscox Interveners were *not* financially impacted prior to their "inability to use the Insured Premises due to restrictions imposed by a public authority …".

Further, of the 369, the significant majority were only unable to use their Insured Premises from the end of 23 March 2020 onwards.

Only 7 were unable to use their Insured Premises prior to 16 March 2020, for various reasons: (a) two closed earlier (both on 13 March 2020) because they were unable to ensure social distancing (in response to the Government guidance issued to business on 3 March 2020 – see the FCA Amended Particulars of Claim PoC para 18.6 [A/2/8]); and (b) five closed earlier due to someone showing symptoms of Covid-19. Of those five: (i) three post-dated the Government requirements on self-isolation issued on 11 March 2020 (FCA Amended Particulars of Claim para 18.8 [A/2/9]), thus due to a restriction imposed by a public authority (where these were people without which a small business could not use its Insured Premises); and (ii) of the remaining two that closed earlier than 11 March 2020 with symptoms, they closed on 3 and 6 March 2020. One (3 March) was directed to self-isolate by his doctor, the other closed (6 March) as the owner had COVID-19 symptoms.