Appeal No. 2020/0179-0183

IN THE SUPREME COURT OF THE UNITED KINGDOM
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
COMMERCIAL COURT (QBD)
FINANCIAL LIST
FINANCIAL MARKETS TEST CASE SCHEME
Neutral Citation [2020] EWHC 2448 (Comm)
BETWEEN:

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

Appellants

-and-

THE FINANCIAL CONDUCT AUTHORITY

Respondents

-and-

HISCOX ACTION GROUP

Intervener

Appeal No. 2020/0177-0178

AND BETWEEN:

THE FINANCIAL CONDUCT AUTHORITY

Appellant

-and-

(1) ARCH INSURANCE (UK) LTD
(2) ARGENTA SYNDICATE MANAGEMENT LTD
(3) ECCLESIASTICAL INSURANCE OFFICE PLC
(4) HISCOX INSURANCE COMPANY LTD
(5) MS AMLIN UNDERWRITING LTD
(6) QBE UK LTD
(7) ROYAL & SUN ALLIANCE INSURANCE PLC
(8) ZURICH INSURANCE PLC

Respondents

-and-

HISCOX ACTION GROUP

Intervener

WRITTEN CASE OF THE THIRD APPELLANT INSURER (HISCOX)

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INTRODUCTION

1. This appeal is brought by Hiscox from the judgment of Flaux LJ and Butcher J in a Financial Markets Test Case, which is concerned with whether, and if so to what extent, the business interruption ("BI") sections of various insurance policies respond to losses arising in connection with the COVID-19 pandemic.

2. There were four broad types of Hiscox policy involved in the case, known as Hiscox 1, 2, 3 and 4. Each of these types contained a number of different individual wordings (J§244 {**C/3/105**}). The Court considered two types of Hiscox insuring clauses. The first type, and the one to which Hiscox's appeal relates, is the Public Authority clause ("the PA clause"). The PA clause is present in all of the Hiscox 1-4 wordings. Importantly, in all the Hiscox 4 wordings the relevant sub-clause had an express one mile limit – i.e. the occurrence of disease was required to be "*within one mile of*" the premises.

3. The Court also considered another Hiscox clause, the Non-Damage Denial of Access ("NDDA") clause. This clause[1] appears in some of the Hiscox 1-2 and 4 wordings. In summary, it provides cover in respect of an incident within a one mile[2] radius of the premises which results in a denial of or hindrance in access imposed by or by order of a public authority and a resultant interruption. The Court held that there was no coverage under the NDDA clause on the basis that there was no "*incident within a one mile radius*" as required by the clause.[3] The FCA does not appeal against this decision. Save to the limited extent that it is relevant on Hiscox's appeal, it will be ignored.

4. The Court had to consider a large number of different clauses in the eight Insurers' wordings. It divided the range of insuring clauses before it into three types (J§8 {**C/3/33**}): (i) disease clauses; (ii) "*hybrid*" clauses; and (iii) prevention of access clauses. Under this classification the PA clause was termed a "*hybrid*" clause (J§242 {**C/3/105**}) because, the Court said, it refers both to restrictions on the premises and the occurrence of disease. The FCA had in fact originally sought to term the PA clause a disease clause.[4] That was plainly wrong. But the term

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1 The most common form of the clause is set out at J§391 {**C/3/143**} with a variant at J§392 {**C/3/143**}.

2 In the variant "*within the vicinity of*" rather than "*within a one mile radius of*".

3 As reflected in §18.1 {**C/1/13**} of the Order containing the Declarations dated 2 October ("the Order"). The holding that there was no "*incident*" within the meaning of the clause is at §18.2 {**C/1/14**} of the Order.

4 §§4.3 and 69 of the FCA's Amended Particulars of Claim ("APOC") {**D/16/1572**}; {**D/16/1585**}.

"*hybrid*", albeit that the Court said the classification was only for convenience,[5] is barely more satisfactory, and tends to obscure the true nature and structure of the clause. The PA clause has a number of elements which need to be analysed more carefully than the treatment by the Court below: that analysis will show that the essence of the clause is public authority restrictions.

5. The Hiscox PA clause provides as follows:[6]

> "***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*** *caused by:*
>
> …
>
> *Public authority*
>
> *13.* ***your*** *inability to use the* ***insured premises*** *due to restrictions imposed by a public authority during the* ***period of insurance*** *following:*
>
> *a. a murder or suicide;*
>
> *b. an occurrence of any human infectious or human contagious disease, an outbreak of which must be notified to the local authority;*
>
> *c. injury or illness of any person traceable to food or drink consumed on the* ***insured premises****;*
>
> *d. defects in the drains or other sanitary arrangements;*
>
> *e. vermin or pests at the* ***insured premises***."

6. The opening words "***We*** *will insure…caused by*" have been referred to as "*the stem*".[7] The PA clause is one of a number of special covers, forming part of the BI cover provided by Hiscox, which branch off the stem.

RELEVANT ISSUES ON APPEAL

7. The broad question before the Court below was whether, and if so in what circumstances and to what extent, an insured was entitled to recover under the PA clause for financial losses arising from public authority action taken in early 2020 in response to the COVID-19

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5 J§242 {**C/3/105**}.

6 {**C/6/401**}. The only material variation to the wording quoted is in Hiscox 4, where subparagraph b. provides: "*b. an occurrence of a* ***notifiable human disease*** *within one mile of the* ***insured premises****;*" {**C/9/499**}, notifiable human disease being defined elsewhere in the wording in terms that mirror those set out fully in the above-quoted clause (i.e. *"any human infectious or human contagious disease, an outbreak of which must be notified to the local authority*" {**C/9/498**}). The **bold** is in the original and denotes a defined term.

7 E.g. J§265 {**C/3/111**}.

pandemic. There were two types of issues before the Court in relation to the PA clause and which arise on this appeal.

8. First, there were coverage issues which required consideration of the meaning of particular words or elements of the PA clause, namely: (i) "*losses…resulting solely and directly from*" (ii) "*an interruption…caused by*" (iii) "*inability to use the insured premises due to*" (iv) "*restrictions imposed…following*" (v) "*an occurrence of…disease*" (Hiscox 1-3) or (vi) "*…an occurrence of a* ***notifiable human disease*** *within one mile of the* ***business premises***" (Hiscox 4). The Court held as follows:

   8.1. The words "*…an occurrence of disease…*" in Hiscox 1-3 were not confined to an occurrence of a notifiable disease that was small-scale, local and in some sense specific to the insured, and the COVID-19 outbreak in the UK could qualify as "*an occurrence*" (J§271 {**C/3/112-113**}). Accordingly, the Court declared that so far as Hiscox 1-3 were concerned, "*COVID-19 "occurred" on 5 March 2020 in England…*" when it became a notifiable disease (Order §3{**C/1/2**}) and that, although "*following*" imports a causal connection, any relevant "*restrictions imposed*" followed the outbreak of COVID-19 in the UK (J§§271-272 {**C/3/112-113**}).

   8.2. The words "*following…an occurrence of a* ***notifiable human disease*** *within one mile of the* ***business premises***" in Hiscox 4 only (i) entitled an insured to cover in respect of the nationwide COVID-19 outbreak if there was an occurrence of the disease within one mile of its premises, because the local occurrence formed part of the national outbreak; and (ii) did not require the national restrictions causally to follow the local occurrence of disease, but only to succeed them in point of time, it being sufficient if the restrictions were a response to the national outbreak (J§273 {**C/3/113**}).

   8.3. To be "*restrictions imposed*" under Hiscox 1-4, the relevant public authority restrictions:

      8.3.1. Had to be "*something mandatory that has the force of law*" (Order §17.4 {**C/1/13**}), which for the purpose of these proceedings meant in particular Regulation 2 of the 21 March Regulations and Regulations 4 and 5 of the 26 March Regulations (J§267 {**C/3/112**}); but

      8.3.2. Did not "*necessarily have to be directed to the insured or the insured's use of premises*", meaning that Regulation 6 (the lockdown regulation) of the 26 March Regulations was capable of being a "*restriction imposed*" (J§§266-7 and 270 {**C/3/111-112**}; Order §17.4 {**C/1/13**});

8.3.3. However, the cases in which Regulation 6 would have caused an "*inability to use*" the insured premises would be rare (J§270 {**C/3/112**}; Order §17.4 {**C/1/13**}).

8.4. The words "*inability to use*" meant what they said, i.e. "*something significantly different from being hindered in using or similar. …Partial ability to use the premises might be sufficiently nugatory or vestigial as to amount to an "inability to use" the premises, depending on the facts*". (Order §17.3 {**C/1/12**}; J§§268-270 {**C/3/112**}).

8.5. An "*interruption"* in Hiscox 1-4 included "*interference or disruption, not just a complete cessation of the insured's "business" or "activities"*" (Order §§17.2 {**C/1/12**} and 18.3 {**C/1/14**}; J§§274 {**C/3/113-114**}and 409-418 {**C/3/147-150**}).

9. Of these holdings, Hiscox appeals those contained in §§8.1, 8.2, 8.3.2, and 8.5 above. They are Grounds 6, 5, 8 and 7 respectively in its Notice of Appeal. The holdings in §§8.3.1, 8.3.3 and 8.4 were in accordance with Hiscox's submissions and are the subject of appeal by the FCA.

10. Secondly, there was a causation issue: having regard to general principles and the nature of the insured peril, the extent of the indemnity and the basis for assessment of loss under the policy wordings, what is the correct counterfactual[8] to be applied for the purposes of assessing loss under the PA clause? Is it

10.1. as Hiscox contended, one that, save to the extent that COVID-19 caused loss as a result of and in causal combination with the other elements of the insured peril, retains in the counterfactual the impact of the COVID-19 pandemic and the UK Government's response to it; or

10.2. as the FCA contended, one in which it is to be assumed that there was simply "*no COVID-19 in the UK and no Government advice, orders, laws or other measures in relation to COVID-19*" (J§261 {**C/3/110**})?

11. The Court found in favour of the FCA on this issue (J§§278-283 {**C/3/114-116**}; Order §§11.1 {**C/1/6**} and 11.2 {**C/1/6-7**}) and Hiscox appeals this finding at Grounds 1-4 of its Notice of Appeal.

8 Defined in §20 below.

GENERALLY APPLICABLE POINTS

12. A number of points which affect the consideration of the whole case should be identified at the outset.

13. First, the Hiscox policies do not provide explicit coverage for loss caused by pandemics. There are many indications in the Hiscox wordings, and the limited nature of the insured perils which they contain, that they were not objectively intended to cover losses arising from a national or global pandemic. However, the effect of what the Court has found on the causation issue is that, once the insured peril is triggered, Hiscox is indeed liable for all losses arising from the COVID-19 pandemic. Hiscox is treated as being in the same position as an insurer which expressly agreed in the broadest terms to cover all losses arising from COVID-19 and its impact.

14. Secondly, the draconian nature of the measures in response to the COVID-19 pandemic adopted by the UK government was quite unprecedented. The FCA has acknowledged that "*the Government action in response to COVID-19 is unprecedented in the UK*…".[9] These measures were, to adapt the Rumsfeldian phrase, an "unexpected unexpected"; there is no evidence that the possibility of them was foreseen. Previous pandemics in the UK, such as the so-called Asian and Hong Kong influenza pandemics of 1957-8 and 1968-9 (with estimated UK deaths of 33,000 and 80,000, respectively and, in each case, estimated worldwide deaths of between one and four million),[10] had not resulted in anything remotely approaching such a response.[11] When it comes to construing the present contracts, these measures cannot therefore be regarded as something which the parties had (objectively) in mind or sought to guard against or cover.

15. In other words, to approach the Hiscox policies and in particular the PA clause on the basis of present knowledge of this unprecedented response involves an impermissible use of hindsight. In deciding what the parties objectively intended, the clause must be approached prospectively and without knowledge of the extraordinary events of 2020. It will be submitted that the Court nonetheless appears to have been affected by hindsight in reaching the conclusions which it did. At this stage, citation of J§348 {**C/3/132**} suffices to illustrate the point.

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9 FCA trial skeleton §31 {**D/20/1598**}.

10 Agreed Facts 7 §§1-2 {**D/11/1539**}.

11 Agreed Facts 7 §§3-10 {**D/11/1539-1543**}.

16. Thirdly, the FCA proposed (and will no doubt maintain) a one-sided approach to construction, from the perspective of the business insureds whom it wrongly sought to equate with consumers, in order to achieve coverage. That approach is wrong. The buying and selling of BI insurance is about the agreed transfer of risk between commercial entities, as defined by the contract.[12] The case cannot be approached on the basis of a presupposition that insurers agreed to assume risks of a certain nature. The correct approach is to ascertain, without preconception or hindsight, the presumed intentions of both parties, not to adopt something akin to the reasonable expectations of the insured doctrine which prevails in certain US states, but which is not part of English law.[13]

17. Fourthly, and also as part of its presumption of coverage approach, the FCA has sought to characterise everything – COVID-19, its economic and social consequences – as one indivisible peril. This supposed indivisibility is fallacious. How a court should characterise a set of circumstances depends upon the purpose for which the characterisation is being adopted. As Lord Hoffmann said: "*[c]ommon sense answers…will differ according to the purpose for which the question is asked*".[14] Here the only legitimate perspective is to characterise the facts in the light of the agreed insured perils and then to ask from an objective standpoint whether (i) there has been the operation of an insured peril and (ii) if so, whether that insured peril in principle caused the losses sustained.

18. Although the Court rightly recognised the distinction between various types of government action for the purposes of considering coverage and held that under the PA clause "*restrictions imposed*" were confined to mandatory restrictions with the force of law,[15] in the context of causation the Court appears to have given undue and unwarranted weight to the unproven and asserted indivisibility of COVID-19 and all its consequences. An example of this occurs in J§348 {**C/3/132**} when the Court deals with the trends clause in the context of the Arch Insurance UK Limited ("Arch") policies. Although in the specific context of the Arch policies, as the passage itself makes clear the points relate to all Insurers:

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12 As Lord Sumption stated in his dissenting judgment in ***International Energy Group Ltd v Zurich Insurance Plc UK Branch*** [2016] AC 509 at §§113 and 114: *"…The liabilities of an insurer are wholly contractual…the incidents of liability in tort are the creation of rules of common law, whereas the extent of a contractual liability depends on the intentions of the parties"* {**E/21/528-529**}.

13 ***Yorkshire Water v Sun Alliance*** [1997] 2 Lloyd's Rep 21 at 28 lhc per Stuart-Smith LJ {**F/52/1109**}.

14 ***Environment Agency v Empress Car Co (Abertillery) Ltd*** [1999] 2 AC 22 at 29F {**F/27/513**}.

15 J§§266-267 {**C/3/111-112**}; Order §17.4 {**C/1/13**}.

> "*In our judgment, this approach to the counterfactual question raised by the trends provision is not only correct on the true construction of the policy wording but accords with commercial and practical reality. We agree with [the FCA] that the approach advocated by the insurers of stripping out the government restrictions etc. and their immediate effect, such as, in the case of the Arch wording, prevention of access, whilst leaving the pandemic and its economic and social effects is entirely artificial and ignores the inextricable connection between the various elements of the insured peril, both as a matter of legal analysis and as a matter of practical reality, given the nature of the pandemic emergency*."

19. There is, with respect, no contractual or evidential basis whatever for the statements that the division between the government restrictions and their immediate effects, and the other consequences of COVID-19, is "*artificial*",[16] nor that there is in any relevant sense an inextricable connection between the elements of the insured peril.

GROUNDS OF APPEAL

Grounds of Appeal 1-4: the causation issue

Preliminary

20. Although dealing with causation, these inter-connected grounds are addressed at the outset, for two reasons. First, they raise important points of principle which in one form or another are common to all Insurers. Secondly, given that the measure of recovery under a contract of indemnity insurance is to restore the insured to the position it would have been in if the insured peril had not happened, the inquiry into the counterfactual (i.e. the hypothetical position that the insured would have been in had the insured peril not occurred) requires a close focus on the insured peril itself. It is the true nature of the insured peril which determines the extent of the indemnity under the PA clause.

21. In practical terms, the question which arises is whether the indemnity under the PA clause is

    21.1. only against loss caused by COVID-19 insofar as it acted in causal combination with the other elements of the clause, as Hiscox submitted; or,

    21.2. once the relevant insured peril has occurred, against all the consequences of COVID-19, as the FCA submitted and the Court held.

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[16] The artificiality of a counterfactual is in any event no reason not to adopt it: see §92.5 below and ***Orient-Express Hotels v Assicurazioni Generali*** [2010] EWHC 1186 (Comm); [2010] Lloyd's Rep IR 531 at §§46-48 {**E/31/930**}and 51-53 {**E/31/931**}.

Ground 1: Nature and essence of the Insured Peril and General Principles

General principles

22. The Hiscox policies are contracts of indemnity.[17] This means the insurer has undertaken to hold the insured harmless against specified loss, i.e. loss caused by the specified insured perils. The protection granted to the insured by the policies is therefore in respect of loss caused by the insured perils, whatever their ambit, and no more.

23. The insured's claim under a contract of indemnity insurance is for damages; the insurer is in breach of contract on the occurrence of the insured peril causing loss, because it has failed to hold the insured harmless and the insured is entitled to be restored to the position it would have been in, had the breach not occurred.[18]

24. As with other claims for breach of contract, an assessment of what loss has been caused by the breach involves asking, as a matter of factual causation, what would the position have been "but for" the occurrence of the insured peril and the loss caused thereby.[19]

25. The "but for" test necessarily involves removing the insured peril and the loss caused thereby from the counterfactual, no more, no less.[20]

26. After some initial havering in the pleadings,[21] it became clear that that the FCA accepted that the "but for" test was to be applied. On Day 1, Mr Edelman QC said in opening:

> "*[The Court] is not being asked to disapply, rule on or modify the rules of proximate or "but for" causation as they apply to the law of obligations. What it is being asked to do is to rule on their application within the confines of specific BI insurance policies.*"[22]

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17 ***Castellain v Preston*** (1883) 11 QBD 380 per Brett LJ at 386: "*the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified.*" {**F/15/253**}.

18 ***Firma C-Trade SA v Newcastle Protection and Indemnity Association ("The Fanti" and "The Padre Island")*** [1991] 2 AC 1 per Lord Goff at 35G-H {**F/30/621**}; ***Endurance Corporate Capital v Sartex Quilts*** [2020] EWCA Civ 308 per Leggatt LJ at §§35-36 {**E/37/1053**}.

19 ***Endurance Corporate Capital v Sartex Quilts*** [2020] EWCA Civ 308 per Leggatt LJ at §36 {**E/37/1053**}; See also §§61-71 of the Written Case of the Fourth Appellant, MS Amlin Underwriting Limited ("Amlin").

20 This is confirmed by ***Orient-Express***. See judgment at §§38 {**E/31/929**}, 46-48 {**E/31/930**} and 52 {**E/31/931**}.

21 E.g. APOC §74: "*If and to the extent applicable, the "but for" test*…" {**D/16/1586**}. All emphasis by underlining in this skeleton argument is supplied, unless indicated otherwise.

22 Page 92, ll. 4-9 {**D/26/1633**}.

27. The Court below expressly applied the "but for" test in the context of Hiscox 1-4 (J§278 {**C/3/114**}), as elsewhere. No one seeks to argue that it was wrong. The question which divides the parties is how "but for" causation operates where (i) there is a composite insured peril with several elements; and (ii) the insured peril requires those elements to be acting in a given causal combination and only covers loss caused by that combination.

28. The answer is that it operates in the same way as with any insured peril: one removes the insured peril and its consequences. Here, that means the particular causal combination specified, and its consequences. Any other approach would mean that the counterfactual exercise would not, as the Court rightly held it must, "*give effect to the insurance effected*" (J§278 {**C/3/114**}), but would re-write the contract and give effect to something else.

Application of general principles

29. It is then necessary to apply these basic principles. Three preliminary points are central to the causation issue.

30. First, the insured peril under the PA clause is not just a composite one; i.e. one that involves several elements. Importantly, those elements are required to operate as part of and in a causal combination. Thus, to be triggered, the PA clause requires "*losses solely and directly resulting from an interruption to your activities caused by*" "*an inability to use due to*" "*restrictions imposed following*"[23] "…*an occurrence of … disease*". Unless and until the elements act in that causal combination, the insured peril is not triggered. Further, the insured peril operates only as long as that causal combination continues. These propositions are, or should be, incontrovertible.

31. Secondly, as a corollary of the first point, the PA clause protects the insured against losses caused by those elements in causal combination and not losses caused by anything other than that combination. Self-evidently, the clause does not protect the insured against the consequences of the disease (or vermin or murder) alone: the clause does not insure against losses "resulting solely and directly from an interruption to your activities caused by an occurrence of… disease, an outbreak of which must be notified to the local authority." There are other, critical causal elements in the PA clause between the occurrence of disease and the loss.

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[23] It was common ground (J§§259 {**C/3/110**} and 265 {**C/3/111**}) that "*following*" involved a causal connection, but looser than a proximate cause, and the Court so found at J§§95 {**C/3/65**} and 272 {**C/3/113**}.

32. Thirdly, and most significantly, although the insured peril has several elements, it is not axiomatic that each element has equal weight. Whether this is so, or whether instead the insured peril has a predominating element or core character, is a matter of construction. It is an important question of construction because identifying the core of the insured peril yields the answer to the scope of the indemnity and the appropriate counterfactual.

33. Here, as a matter of construction, the core of the insured peril under the PA clause is the "*restrictions imposed by a public authority*".

34. That "*restrictions imposed*" are the core of the insured peril (as opposed to murder or suicide, faulty drains, disease, vermin etc.) under the PA clause is plain from (i) the title of the clause; (ii) the language of the clause; (iii) the substance of the clause; and (iv) other provisions of the BI sections of Hiscox 1-4.

    34.1. The title of the clause is "*Public Authority*". That is clearly shorthand for public authority restrictions, as the only public authority actions referred to in the clause are "*restrictions imposed*". The title is not accidental: it is a shorthand which signifies what the cover is aimed at; it does not refer to or identify any other element of the clause.

    34.2. Syntactically, the words from "*interruption*" to "*restrictions imposed*" all look forwards to "*restrictions imposed*". The words after "*restrictions imposed*" all look back to them. They are the centre of gravity of the PA clause.

    34.3. As a matter of substance, the words from "*interruption*" to "*restrictions imposed*" describe the character of the relevant restrictions, namely that they are such as to prevent the use of the insured premises causing an interruption to the insured's activities. The words after "*restrictions imposed*" describe the reasons for the restrictions imposed which fall within the cover. Thus, the cover pivots on the "*restrictions imposed*".

    34.4. As an example of the fourth point, many of the Hiscox trends clauses expressly refer to a "*restriction*" to denote the relevant insured peril.[24] Where they do not, the Court below held that references to "*damage*" in the trends clauses were to be treated as

[24] E.g. Hiscox 2 trends clause at J§249 {**C/3/107-108**}.

manipulated so as to refer to "*restrictions*": J§275 {**C/3/114**}.[25] The Indemnity Period[26] and the Under Insurance clauses[27] also refer to "*restriction*".

35. This point of construction was made by Hiscox below, but the Court did not address it. However, it is crucial: since the essence of the insured peril is the "*restrictions imposed by a public authority*", it cannot be anything wider than those restrictions imposed and their consequences which must be stripped out[28] of the counterfactual.

36. In the PA clause, the presence of sub-clauses a. to e. makes clear that it is not all "*restrictions imposed*" by the authorities which will trigger cover, but only those imposed for the reasons which are identified. If these limits were not present, there could be no doubt that the insured peril was "*restrictions imposed*" by the authorities. The underlying causes a.-e. limit and qualify the public authority action which is within the cover. They cut down the breadth of the insured peril, by making it clear that it only responds to a sub-set of all the possible causes of "*restrictions imposed*". It is therefore obvious that the presence of these limitations cannot have the effect of expanding the insured peril, or the indemnity. Nor do they change its character. Since the "*occurrence of … disease*" is not an insured peril in its own right, but rather its presence in the clause is to qualify and define the type of "*restrictions imposed*" which trigger the cover, it cannot in principle be correct to require Hiscox to indemnify the insured as if disease was an independent insured peril.

37. The FCA actually agrees with the methodology in §32 above. However, what it says is that the core of the peril is vermin, disease etc. In its skeleton below, it submitted: "*The cover is for the effects of murder or suicide, but only where there is public authority intervention—that is the 'something extra'*";[29] and that the cover "*is intended to cover vermin as the insured event.*"[30]

38. The FCA's construction turns the clause on its head. The cover is for public authority restrictions, provided they have been imposed following murder, bad drains, disease etc. It is

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25 The actual manipulation performed in J§276 {**C/3/114**} is, however over-lengthy and unrealistic; all that is necessary is to add the word "restriction", as is already the case in other Hiscox trends clauses.

26 {**C/6/399**}.

27 {**C/6/404**}.

28 In the Court's phrase: J§278 {**C/3/114**}.

29 FCA trial skeleton §421 {**D/20/1609**}.

30 FCA trial skeleton §422 {**D/20/1609-1610**}.

not for murder, bad drains, disease etc. – provided only that there is consequent public authority action.

39. Hiscox does not submit that COVID-19 is not a part of the insured peril and that it is left in the counterfactual in its entirety. It has to be removed too, but only insofar as it leads to the restrictions imposed, and only to the extent that loss flows from those restrictions imposed. (For clarity of exposition at this stage, the elements in the peril "downstream" of the restrictions imposed are left out of account, but the same analysis applies to them: each successive causal element in the chain acts as a potential filter, reducing the loss which flows from the first element in the chain taken on its own.)

40. It also follows that it is the consequences of the "*restrictions imposed*" caused by COVID-19 which are stripped out, not the consequences of other matters caused by COVID-19, such as government guidance or general economic factors which do not qualify as "*restrictions imposed*".

41. Contrary to the FCA's submission referred to in §37 above, it is not the disease (or any of the other specified underlying matters in sub-clauses a.-e. of the PA clause) which are the insured peril or are the core of the insured peril. There is therefore no justification for subtracting from the counterfactual the underlying cause of the restrictions, be it disease, vermin or food poisoning etc., and all the other consequences of that underlying cause.

42. It follows that the indemnity under the PA clause only extends to the consequences of its elements acting in causal combination; and that what one strips out of the counterfactual is COVID-19 insofar as it leads to restrictions imposed causing an inability to use causing an interruption, i.e. COVID-19 insofar as it operates within the insured peril. Otherwise, COVID-19 and its effects and consequences remain in the counterfactual.

The decision of the Court below

43. The key passages of the Court's reasoning are at J§§278-283, in particular J§278 {**C/3/114**}.[31]

> "*As to how the counterfactual is to be applied, whether it is being considered for the purposes of considering the losses which the insured can claim, either as a matter of application of the insuring clause, or pursuant to the "trends clause", we consider that the exercise must give effect to the insurance effected. This means assuming that the insured peril did not occur. The insured*

[31] The Court returns to the counterfactual in the context of "*hybrid*" clauses at J§531 {**C/3/178-179**} but the passage simply refers back to how it has dealt with the counterfactual in the context of the Hiscox wordings, namely at J§§278-283 {**C/3/114-116**}.

> *peril is a composite one, involving three interconnected elements: (i) inability to use the insured premises (ii) due to restrictions imposed by a public authority (iii) "following" one of (a) to (e), relevantly (b) an occurrence of an infectious or contagious disease. What the insured is covering itself against is, we consider, the fortuity of being in a situation in which all those elements are present. In answering the counterfactual question as to what would have been the position of the insured's business but for the occurrence of the insured peril, it is accordingly necessary to strip out all three interconnected elements, including in this instance the national outbreak of COVID-19.*"

44. The Court starts by stating the correct test in principle. Whether approached as a matter of the trends clause or the main insuring clause:

    44.1. in applying the counterfactual "*the exercise must give effect to the insurance effected. This means assuming that the insured peril did not occur.*" and

    44.2. the counterfactual question is "*what would have been the position of the insured's business but for the occurrence of the insured peril…*".

45. As regards the insured peril, the critical sentences are the following:

> "*The insured peril is a composite one, involving three interconnected elements: (i) inability to use the insured premises (ii) due to restrictions imposed by a public authority (iii) "following" one of (a) to (e), relevantly (b) an occurrence of an infectious or contagious disease. What the insured is covering itself against is, we consider, the fortuity of being in a situation in which all those elements <u>are present</u>.*"

46. The first sentence correctly identifies that (other than the stem) there are three interconnected elements[32] and the Court set out the causal connections between those elements. However, in describing what the insured has protected itself against, the Court said that it is the fortuity of being in a situation in which all those elements <u>are present</u>. That is not correct. The fortuity is a situation in which all those elements are present <u>and acting in causal combination</u> to cause interruption and loss.

47. This failure to reproduce the true (and more limited) nature of the composite peril is what leads to the erroneous conclusion in the final sentence that it is "*accordingly necessary to strip out all three elements, including in this instance the national outbreak of COVID-19*".

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[32] The insured peril includes "*interruption*", but the Court was here focussing on the elements particular to the PA clause.

48. That conclusion, with respect, cannot be justified. It involves an unexplained leap from removing only the insured peril to removing something more than the insured peril, namely the national outbreak of COVID-19 and all its consequences. That conclusion accorded with the FCA's case, which was that one removed from the counterfactual the presence of COVID-19 anywhere in the UK so that Hiscox was liable for all the consequences of COVID-19. But Hiscox never agreed to insure any such thing – whether under a clause insuring against the consequences of public authority restrictions or at all.

49. Setting out the elements of the insured peril in their correct causative sequence they are: (A) an occurrence of notifiable disease (B) leading to restrictions imposed by a public authority (C) causing an inability to use (D) causing an interruption, by which the losses must be solely and directly caused. What the insured has protected itself against are the consequences of A→B→C→D acting in causal combination.

50. The insured has not protected itself against the consequences of any of the elements in a causal combination other than A→B→C→D. So, for example, the insured has not protected itself against the causative combination A→D (without B and C) causing losses; that would be a different (and much wider) insurance. Nor has the insured protected itself against the consequences of any of the four composite elements individually. A alone is not an insured peril, no more than is B or the other elements. Nor (as will be seen in §63 below) has the insured protected itself against the consequences of A→X→C→D.

51. One cannot, therefore, strip out individual elements of the necessary causal combination in isolation, together with their independent consequences. Specifically, one cannot, as the Court has done, subtract the disease and its independent consequences. To do so is to ignore the causal chain and to convert the cover into what is extremely wide disease cover.

52. In case it assists, Hiscox seeks to illustrate the point pictorially. Suppose A, B, C and D are tiles. What is being insured is not the fact that the tiles are all present on a given surface and adjacent. Rather, what is being insured is the consequences of the tiles being present and being on top of each other (and moreover in a particular order). If the tiles are not on top of each other - if they are merely adjacent - there is no cover. The Court below made the mistake of construing the indemnity as if it extended to adjacent tiles ("*a situation in which all those elements are present.*").

53. Another way of illustrating the point is to imagine a pipeline (A) through which liquid flows. A is the disease. The liquid represents the loss which the pandemic causes the insureds. At a certain point there is flange at which several smaller pipelines lead off pipeline A. One of those is a pipeline (B), which is public authority restrictions. It receives 25% of the total liquid. Other pipelines, X, Y and Z take the other 75% of the liquid. The cover here is only against the loss flowing through pipeline B. For the counterfactual, one removes A, to the extent it supplies liquid to B, and B. But one does not remove X, Y and Z or the liquid which flows through them.

54. Another means of testing the point is to imagine the PA clause in a shortened form with a simpler causal combination (as in §53 above). Suppose the clause read "losses solely and directly resulting from restrictions imposed by a public authority following" murder or suicide, an occurrence of disease etc. In such a clause there would be only two elements in the causal chain, the murder or disease etc. and the public authority restrictions. A clause in that shortened form serves to emphasise that what is being insured is <u>not</u> the underlying cause (murder etc.) of the restrictions but only the consequences of the restrictions imposed because of the murder. The reintroduction of elements C and D changes nothing.

<u>Effect of the Court's ruling</u>

55. The effect of the Court's ruling is to transform the insured peril through the back door of causation. To remove A in its entirety from the counterfactual is the equivalent of holding that A, with all its consequences, is an insured peril. That it is the equivalent of so holding follows from the fact that the only matters which can legitimately be removed for the purposes of the counterfactual are the insured peril and its consequences, as the Court in fact recognised in the passages cited in §44 above.

56. The moment that all the elements of the insured peril are present, the Court therefore has promoted COVID-19, with all its consequences, to the status of an insured peril. This is, with respect, an impermissible and radical recasting of the bargain. There is no scope for a counterfactual which does anything other than reflect the removal of the insured peril and its consequences, no more and no less.

57. Thus, suppose that A (the disease) on its own causes the insured losses of £100; but that A→B→C→D in causal combination only causes £10 of losses. If one reverses A and all its consequences out of the counterfactual, the whole £100 is removed and the insured recovers

that sum; if one reverses, as one should, the insured causal combination and its consequences, what is removed is only £10. In this way, an insurer who has specifically contracted only to indemnify an insured against the consequences of A→B→C→D in causal combination is wrongly put in the position that it is insuring all the consequences of A.

58. This striking consequence of the result reached by the Court indicates that something has gone wrong. The effect is that however many the elements of the causal combination in a composite peril and however narrow in consequence the insured peril, once all elements are acting in combination, that is to say once the insured peril is triggered, the insurer becomes liable for all the consequences of the first element of the causal chain. Logically the position should be the reverse: the narrower the insured peril, the narrower its consequences and the wider the counterfactual.

59. These points were made by Hiscox below, but were not addressed by the Court. The Court has not explained how the conclusion reached can be justified either as a matter of construction or general principle. There is, with respect, no logical or principled way in which the Court's conclusion can be reached.

60. Instead of analysing the clause and addressing the submissions made above, the Court gave justifying reasons for its conclusion. There are four strands to the Court's reasoning: (i) the artificiality of the counterfactual proposed by Hiscox (J§279 {**C/3/115**}); (ii) Hiscox's failure to recognise the disease as an essential element of the insured peril (J§279); (iii) the fact that cover would be rendered "*illusory*" if Insurers were right (J§§280-281); and (iv) difficulties of proof if Insurers were right (J§§280-282). These reasons do not withstand scrutiny.

61. As to the first reason, counterfactuals are in any context artificial and unrealistic, because they involve a hypothesis which has not happened and which never could have happened, given what actually has. The counterfactual has to assume, contrary to reality, that the tort or breach of contract had not occurred, for example that the chronically incompetent professional had after all done a good job. In the insurance context, the counterfactual may entail an even more unlikely scenario, such as a hurricane which devastates New Orleans, but leaves the insured hotel undamaged.

62. For the Court below to argue by reference to the parties' intentions in this context is to reason backwards. The content of the counterfactual is simply dictated by the content of the agreed insured peril. It is its mirror image. The parties' agreement as to the insured peril requires that

a distinction be drawn between "*restrictions imposed*", i.e. matters which are mandatory and have the force of law, and any other type of public authority action. Likewise, it is only the consequences of the "*restrictions imposed*" which are covered, not other consequences of the disease. That agreed distinction has to be carried through to the counterfactual.

63. Thus, the government's social distancing guidance (X) is not in the A→B→C→D chain because it does not qualify as a "*restriction imposed*"; only restrictions with the force of law qualify. It was, however, undoubtedly caused by A (the disease). On the Court's approach, however, once the A→B→C→D chain is established, then all consequences of A, including A→X→C→D,[33] are recoverable.

64. There is in any event, nothing in the suggestion that a counterfactual which removes mandatory measures but leaves in place all other consequences of COVID-19, including government guidance and the economic impact, is unrealistic. That situation is akin to what occurred in Sweden,[34] and what had occurred in the UK under previous pandemics.[35] It is far from implausible. It only becomes implausible in hindsight.

65. The Court's second point, that Hiscox's construction fails to recognise that an occurrence of disease is an essential ingredient of the insured peril, is simply not correct. Disease is (like vermin, murder etc.) a necessary element in the insured peril, but only to the extent that the occurrence of disease causes the other elements in the causal chain and their consequences. That is what the parties have agreed. The Court's construction promotes disease to the dominant element of the peril, when it is no such thing: see §§33-38 above.

66. The Court's third reason, the "*illusory*" cover point, does not support its conclusion. Before considering the Court's example in J§281 {**C/3/115**}, two notes of caution should be sounded.

    66.1. There was no evidence before the Court, e.g. from loss adjusters, and the example given has no factual basis. Whether there would be the supposed difficulty in practice was not remotely established. The example is not a proper foundation on which to ascertain the parties' intentions.

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33 Assuming, which is highly unlikely, that social distancing could cause inability to use.

34 Agreed Facts 6 §§1-4 {**D/10/1537**}. Public gatherings of more than 50 people including at cinemas and concerts were banned.

35 Agreed Facts 7 §§2-7 {**D/11/1539-1541**}.

66.2. Examples involving restaurants are easily understood, and the FCA focuses on them for its own reasons, in particular because they require the physical presence of customers; but it is only a small percentage (in fact fewer than 5%) of Hiscox insureds who are in category 1 (J§243 {**C/3/105**}), so it hardly seems fair to determine important questions of construction on the basis of such cases. An accountants' office with a vermin problem is somewhat less lurid than a case where "*no one is likely to want to eat at a restaurant infested by vermin*" (J§281 {**C/3/115**}), not least because the physical presence of clients in this case is usually not required.

67. The Court accepted the FCA's inapposite and extreme example of a restaurant teeming with rats (J§281 {**C/3/115**}). However, if one must hypothesise a restaurant, a far more realistic situation is the detection of vermin or pests in the kitchen, not of rats running amok over customers' feet. The customers would typically never have been aware of cockroaches in the kitchen but for the restrictions. In the paradigm situation, there will be no difficulty in the insured proving its loss, because it would be the closure itself which stopped the customers from coming. In cases such as food poisoning or legionnaires' disease in the building or a suicide in an adjacent flat, the position would be even clearer. The likelihood is that no customer would know about these events until a restriction was imposed, and so the problem identified by the Court simply would not arise.

68. The reason why there may be no or limited recovery in the FCA's preferred case of rats running around a restaurant before public authority intervention is not because the cover is illusory; it is an illustration of the point that the cover under the PA clause is not against the effects of rats, but against the effects of public authority restrictions. Likewise, the responsible restaurateur who closes his restaurant because of rats, without the need for public authority intervention, is not covered because he has not bought insurance against this eventuality. This is not a question of rewarding the irresponsible insured and penalising a more responsible insured.[36] It is an inescapable consequence of the cover purchased. The peril of infestation by rats is not covered, and all the consequences of that infestation do not <u>become</u> covered, merely because the authorities subsequently act.

69. The consequence of the Court's approach is to demote the public authority restrictions from the core of the insured peril to the status of a mere condition which, when satisfied, effectively converts the cover into insurance against vermin, murder, or disease and their consequences.

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[36] §45 of the FCA's Page 5 information **{A/1/21}**.

Indeed, the FCA below went so far as to argue that the requirement of public authority "*restrictions imposed*" is present in the clause only to ensure that the outbreak of vermin is sufficiently serious, and to enable it to be proven: "*The trigger of restriction of use through public authority order or advice ensures that claims are only made whether [sic] there is a vermin infestation of suitable seriousness, and provides an easy way of proving that trigger (because the public authority order or advice will be easy to prove). … it is intended to cover vermin as the insured event*."[37]

70. As submitted in §38 above, the cover under the clause is against the consequences of public authority restrictions, provided that they have been imposed following (in a causal sense) murder, bad drains, disease etc. The cover is not against the consequences of murder, bad drains or disease etc., provided only that there has been public authority reaction.

71. The Court did not say outright, because in the face of the clause it could not, that the insured peril is the disease or the vermin. But that is the effect of its position, once cover is triggered. But that very effect illustrates the fallacy. Insured perils do not transform themselves, on their occurrence, into something wider; it would be extraordinary if they did. Insurance against the consequences of A→B cannot, on the occurrence of A and B, become an insurance against the consequences of A.

72. As to the fourth point, difficulties of proof, the Court relied on the point (J§280 {**C/3/115**}) that it is part of the very nature of the restrictions that they will prevent the insured seeing what the effect of the cause of the restrictions would have been. The Court also referred (J§282 {**C/3/115**}) to the difficulty in identifying and the impracticality of cross-examining customers about their motives in not coming. There are a number of answers to these points.

73. First, a similar note of caution is required to that sounded in §66.1 above. There was no evidence before the Court in this respect. Its supposition that the fact of restrictions will generally prevent proof of the position in their absence is without any evidential basis whatever. It is not therefore a reliable foundation for deriving the parties' intention as to how the clause should work. There is likewise no evidence of any difficulty having previously arisen in its operation. Claims under these clauses will presumably be dealt with by loss adjusters in the ordinary course, and there is no basis for supposing a difficulty which is not even half-proven.

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37 FCA trial skeleton §422 {**D/20/1609-1610**}.

74. Secondly, the Court's supposition is not generally correct. In the paradigm case, the insured will be able to say that it was the fact of the public authority restrictions which brought the problem to the customers' notice and stopped them from coming. An extreme case is not a useful guide to construction. In any event, Hiscox never suggested cross-examination of customers.

75. Thirdly, to the extent that any difficulties of proof remain, they are not a reason for coming to the conclusion at which the Court arrived.

    75.1. BI insurance is notorious for giving rise to difficult questions of quantification, a fact which is recognised in the textbooks;[38] one has to look at how a business would have performed had the insured peril not occurred, and this frequently involves complicated hypothetical enquiries, looking at different aspects of the business.

    75.2. For example, as regards a restaurant which hired a new chef the day before a fire, the fire would, in the Court's language (J§280 {**C/3/115**}), "*prevent the insured from seeing what would have been the effect of the [chef] in the absence of the [fire]*". This does not demonstrate any "*fallacy and unreality*" in Hiscox's position, cf. J§281 {**C/3/115**}; it is just how BI insurance works, and the loss adjusters would simply go about their business.

    75.3. Trends clauses, which expressly require one to look at what the position would have been had the insured peril not occurred, similarly raise difficult hypothetical questions as to the effects of particular matters on the putative performance of the business.

    75.4. The fact that in the present case the sums insured may be quite low does not change any of this.

    75.5. Difficulties of proof cannot, in any event, justify re-writing the contract to expand the insured peril or ignoring the application of the "but for" principle.[39]

    75.6. In any given case, once the elements of the PA clause are satisfied, and loss has been *prima facie* shown to be due to their combined effect, the evidential burden may shift to the insurer. (This point too was ignored by the Court.)[40]

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38 See e.g. Chapter 14 of Riley on Business Interruption Insurance (10th ed, 2016) {**E/50/1402**}. See also §20 {**E/31/925**} of the award in ***Orient-Express***, cited in ***Orient-Express*** judgment §17 {**E/31/924**}.

39 As the arbitrators held in ***Orient-Express***, "*all claims for [BI] raise hypothetical issues and whilst…the evaluation required on the facts of the present dispute is more difficult than most, this cannot affect what is the correct approach in principle.*" ***Orient-Express*** judgment §17 {**E/31/924**}; award §20 {**E/31/925**}.

40 "*Thus, on insurers' case the insured could not recover…unless it could show…*": J§281 {**C/3/115**}.

76. There is no basis for ascribing to the parties an intention to abdicate any attempt to inquire into the cause of loss, once the insured peril is triggered – to suppose that the parties decided in advance that the problem of quantification of loss would be so difficult (necessarily for all situations under the clause) that the normal rules governing counterfactuals would be discarded. Rather, the basis of assessment of loss must simply be what would have happened had the insured peril not occurred, in accordance with orthodox principles. The Court's reasons for its conclusion as set out in J§§279-282 {**C/3/115**} do not justify a departure from those principles.

Ground 2: Trends Clauses

77. The trends clauses, which are the subject of Ground of Appeal 2, provide an independent reason for deciding the causation issue in favour of Hiscox.

78. All the relevant Hiscox 1-4 wordings contain an applicable trends clause.[41] The trends clauses are in differing forms. The trends clauses in the Hiscox 1-4 lead policies are set out or described in J§§246 {**C/3/106-107**}, 249 {**C/3/107-108**}, 251 {**C/3/108**} and 253 {**C/3/109**}. All Hiscox trends clauses, however, have words the same or materially similar to those in the Hiscox 1 lead policy trends clause: "*the amount that we will pay will reflect as near as possible the result that would have been achieved if the [restriction] had not occurred*" (J§246) {**C/3/106-107**}.

79. It is not controversial, and the Court so held in relation to Hiscox 1-4, that the trends clauses mandate a "but for" approach to causation.[42]

The decision of the Court below

80. The Court made generally applicable points in relation to all Insurers' trends clauses when dealing with RSA3. The Court referred to them (J§121 {**C/3/71**}) as being part of the quantification machinery and not part of the delineation of cover. In one sense that is correct, because the trends clauses do not define the insured peril. The trends clauses clearly indicate, however, as the Court in fact held in J§121 {**C/3/71**}, the basis upon which the assessment of loss must be approached, and that exercise affects the extent of the indemnity provided. In J§121 {**C/3/71**} the Court also held that:

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41 J§§276-277 {**C/3/114**}; Order §13 {**C/1/8**}.

42 Also confirmed by the ***Orient-Express*** judgment at §§46, 47 {**E/31/930**} and 57 {**E/31/931**}; the policy there contained a materially similar trends clause.

> "*Where the policyholder has therefore prima facie established a loss caused by an insured peril, it would seem contrary to principle, unless the policy wording so requires, for that loss to be limited by the inclusion of any part of the insured peril in the assessment of what the position would have been if the insured peril had not occurred.*"

81. It is clear from this paragraph of the Judgment and J§§345-351 {**C/3/131-133**},[43] in particular J§§346-348 {**C/3/131-132**}, that the Court held, for the period of the operation of the insured peril, that no part of the insured peril could be taken into account for the purposes of the trends clauses including those in Hiscox 1-4. As regards Hiscox 1-4 this is also apparent from J§278 {**C/3/114**}.[44] This is wrong for all the reasons given in relation to Ground 1 and, at least in the context of the Hiscox PA clause, the Court's reference to "*any part of the insured peril*" wrongly analyses the insured peril as merely requiring the simultaneous presence of the composite elements (see too J§278 {**C/3/114**}). This confuses mere presence with the necessity for the causal relationship of the elements to cause loss.

82. It also appears from J§348 {**C/3/132**} that the Court may have accepted the FCA's case that the trends clauses were only dealing with "*something extraneous which can fairly be described as an ordinary vicissitude of commercial life, such as economic trends or regulatory actions independent of the COVID-19 outbreak*"[45] and not matters "*interlinked*" with the insured peril.[46]

83. There is no warrant in the language of the trends clauses in Hiscox 1-4 for confining their operation to "*extraneous*" or not "*interlinked*" factors. (A similar argument was rejected in ***Orient-Express***.)[47] The trends clauses simply require removal of the insured peril as such. If the trends clauses had been intended to have the effect that something other than the insured peril was removed from the counterfactual, or to apply only to "*extraneous*" or not "*interlinked*" matters, they would have said so.

84. The Court's conclusion does not, as it reasoned (J§348 {**C/3/132**}), accord with commercial and practical reality. On the contrary, it does not reflect the commercial bargain made or the expressly limited nature of the insured peril, and it appears to assume, without any evidential

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43 This passage is in the context of the Arch trends clause but is applicable to all Insurers.

44 Where the Court expresses its views on the counterfactual "*either as a matter of the application of the insuring clause, or pursuant to the "trends clause"*".

45 APOC §76 {**D/16/1587**}.

46 APOC §77 {**D/16/1587**}.

47 Judgment at §57 **{E/31/931}**. Furthermore, ***Orient-Express*** is clear authority that the trends clause requires removal only of the insured peril, not "*interlinked*" matters such as the underlying causes of the insured peril: §§46-48 **{E/31/930}**, 57 **{E/31/931}**.

foundation, that the effects of the elements of the insured peril are so "*inextricabl[y] connect[ed]*" that it is not practical to separate them.

85. The Court's conclusion, expressly influenced by hindsight ("*the pandemic and its economic and social effects*"[48]), is reached despite the fact that contracts here clearly do not insure the consequences of the pandemic's economic and social effects, but only the consequences of public authority "*restrictions imposed*" following an occurrence of the disease etc. The distinction which the insurances expressly require was simply over-ridden by the Court.

86. Hiscox's argument is also reinforced by the terms of the Indemnity Period clause, which appears in all of Hiscox 1-4 (with immaterial variations): the definition of "*Indemnity Period*" refers to "*the period…beginning at…the date the restriction is imposed…and during which <u>your income is affected as the result of such…restriction.</u>*"[49] The clause talks only of income being affected by the restriction, not by anything else.

87. If one element of the insured peril, operating independently and not via the stipulated causal chain, causes loss, there is no warrant for removing it from the counterfactual under the trends clause. Such indeed was the Court's decision (against which the FCA appeals) in relation to the period prior to the occurrence of the complete peril: J§§349-351 {**C/3/132-133**}. The same logic applies afterwards.

88. Indeed, there is an illogicality in the Court's approach. It is common ground between the Insurers and the FCA[50] (as the Court held at J§351 {**C/3/133**}) that losses caused by COVID-19, including any government response, <u>before</u> the commencement of the operation of the insured peril are not recoverable. The underlying reason for this common ground and the Court's holding can only be that the consequences of COVID-19 not amounting to the insured peril are not insured.

89. Under the PA clause, losses caused by COVID-19 and consequent government advice are not part of the insured peril, because advice does not amount to "*restrictions imposed*". Prior to the commencement of the insured peril, it is common ground that such losses are not recoverable. No adequate explanation is provided by the Court, however, as to why, <u>after</u> the commencement of the insured peril, losses caused by such advice should become recoverable.

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48 J§348 {**C/3/132**}.

49 {**C/5/403**}.

50 See e.g. §46 of the FCA's Page 5 information {**A/1/21**}.

Such a conclusion is logically insupportable, but the only basis for it seems to be an unfounded assumption that the elements of the insured peril are so inextricably linked that causes of the losses are indivisible.[51]

90. Similarly, the Court rightly held, in relation to trends clauses and generally, that in the context of composite perils it is permitted in principle, when assessing loss, to take into account as a trend or circumstance a downturn in income due to the effects of COVID-19, which occurs before the composite insured peril begins. (The relevant passages in the Court's Judgment are at J§§349-351 {**C/3/132-133**} and J§§385-389 {**C/3/141-142**}. Although these passages are in the context of Arch and Ecclesiastical Insurance Office Plc's wordings, they are of general application: see J§283 {**C/3/116**} and Order §11.4 {**C/1/7-8**} especially at (c). This holding is the subject of an appeal by the FCA.)

91. The reason why the Court was correct in this holding is because there is no insured peril unless and to the extent that all the elements of the insured peril are present and acting in causal combination; the effects of an element of the peril acting on its own are uninsured. That same reason, however, ought to have led the Court to conclude that once the insured peril had occurred, those uninsured effects could and should not be removed from the counterfactual.

Ground 3: *Orient-Express*

92. ***Orient-Express*** was relied on by Insurers at trial and is relied on in Insurers' appeals. The principal submissions on the authority are contained in §§98-121 of Amlin's Written Case. In relation to Hiscox's position, ***Orient-Express*** is authority for the following propositions.

    92.1. The correct approach includes the application of "but for" causation in the assessment of loss.[52]

    92.2. Loss that does not result from the causal chain contemplated by the insuring clause remains in the counterfactual and is not recoverable.[53]

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51 As to this see §125 below, where Hiscox adopts the criticisms of the concept of indivisible cause made by the Second Appellant, Argenta Syndicate Management Limited ("Argenta") and by Amlin.

52 §§20-38 ***Orient-Express*** judgment {**E/31/926-929**}.

53 §38 ***Orient-Express*** judgment {**E/31/929**}.

92.3. The same approach is mandated by the trends clauses; one simply asks what the position would have been but for the damage (in that case),[54] or the restrictions (in the present case).

92.4. The trends clauses are not confined, contrary to the FCA's argument, to extraneous circumstances.[55]

92.5. Artificiality is an irrelevant objection as regards the counterfactual.[56]

92.6. It is nothing to the point to say that, on Hiscox's argument, the wider the impact of the pandemic, the less the indemnity.[57]

The decision of the Court below

93. Hiscox needs to add little to the analysis of ***Orient-Express*** in Amlin's Written Case.

94. In §112 of its Written Case Amlin demonstrates why the Court was wrong to say that Hamblen J had mischaracterised the insured peril in that case. Had this supposed mistake not been made, the Court held, Hamblen J would have realised that not only the damage to the hotel but also "*the hurricanes and their effect generally*" were to be stripped out of the counterfactual: J§527 {**C/3/177**}. Even if one were to assume that Hamblen J had made the elementary error attributed to him, the Court below's reasoning contains, with respect, a complete *non sequitur*. Let it be supposed Hamblen J and the arbitrators had "correctly" identified the insured peril, that would not have begun to justify stripping out the general effect of the hurricanes, given that it remained the case that what was insured was only loss due to interruption caused by damage to the hotel; Hamblen J was clear about this, both as a matter of the main insuring clause and in the light of the trends clause.[58] No doubt one of the reasons for his conclusion is that, viewed without hindsight knowledge of the actual peril which occurred, there could have been many causes of damage to the hotel giving rise to interruption which did not entail city-wide devastation.

95. The Court also held (J§526 {**C/3/177**}) that Hamblen J should have realised that the cover provided was "*illusory*" on his construction of the insured peril, and that the perverse result

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54 §§46-48, 57 and 59 ***Orient-Express*** judgment {**E/31/930-932}**.

55 §§46-48 and 57 ***Orient-Express*** judgment {**E/31/930-931}** .

56 §§46-48 and 51-53 ***Orient-Express*** judgment {**E/31/930-931}**.

57 §51 ***Orient-Express*** judgment {**E/31/931**}.

58 §§38 and 46-47 ***Orient-Express*** judgment {**E/31/929-930**}.

was achieved that if the hurricane had only caused damage to the hotel, there would have been a full recovery, but the more serious the fortuity, the less the recovery. The Court did not regard the judge's answer – that this result was dictated by the terms of the policy – as convincing. But the Court's criticism is misplaced: cover is only "*illusory*" if one makes the (unwarranted) assumption that the policy was intended to provide cover against the consequences of the hotel being involved in wide area damage. In fact, coverage against the impact of wider area events was provided by the Loss of Attraction and Prevention of Access clauses.

96. These supposed errors would have led the Court to say ***Orient-Express*** was wrongly decided (J§529 {**C/3/178**}). However, the Court also incorrectly held (J§529 {**C/3/178**}) that ***Orient-Express*** was distinguishable on the grounds that the composite perils involved in the instant case were different to the insured peril under consideration in ***Orient-Express***. Of course, the perils were different, but Hamblen J's approach and reasoning were clearly relevant, in particular in the respects identified in §92 above.

Ground 4: "*Solely and directly*"

97. The stem in Hiscox 1-4 provides: "*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*…".

98. The words "*solely and directly*" relate directly to the word "*interruption*". The losses for which Hiscox has agreed to indemnify the insured must therefore arise solely and directly from an interruption "*caused by*" the matters specified in the relevant clause branching off the stem. As regards the PA clause, the causal chain leading to interruption (D) is A→B→C→D. As interruption is the last element in the causal chain comprising the insured peril, the words "*solely and directly*" require that any losses must solely and directly result from that composite peril.

99. The significance of the words "*solely and directly*" is thus that they emphasise and re-confirm that the extent of the indemnity provided is only in respect of losses caused by the insured peril alone and nothing else, and the correct counterfactual must reflect that. Save to the extent that COVID-19 causes loss in causal combination with other elements of the insured peril, COVID-19 and its consequences remain in the counterfactual.

100. Although the Court recorded Hiscox's reliance on the words "*solely and directly*" (J§265 {**C/3/111**}) and Hiscox made submissions on them, the Court did not deal with them in its Judgment and there is no decision on their meaning or effect.

Ground 5: Hiscox 4 – the effect of the one mile limit

101. This Ground of Appeal arises only in relation to Hiscox 4. In Hiscox 4 the relevant sub-clause (unlike those in Hiscox 1-3)[59] has an express one mile limit:

> "*restrictions imposed…following: …b. an occurrence of a* ***notifiable human disease*** *within one mile of the* ***business premises***;"

102. The clause thus provides cover against specified potential consequences of an expressly local occurrence of a notifiable disease. In particular, it concerns circumstances where (i) there has been an occurrence of disease "*within*" one mile of the insured's premises (as opposed to a wider outbreak); and (ii) that occurrence has caused the subsequent imposition of relevant restrictions ("*following*").[60]

The decision of the Court below

103. In relation to Hiscox 1-3 the Court held that (i) the words "*occurrence of…disease*" were not specific or local to the insured; (ii) the COVID-19 outbreak in the UK therefore qualified as an "*occurrence*" of disease; and (iii) the necessary causal connection between the occurrence and the "*restrictions imposed*" (to the extent that there were any) was satisfied.[61]

104. In relation to Hiscox 4, however, and despite the unavailability of the first element of its reasoning in relation to Hiscox 1-3, the Court "*with more hesitation*" reached what it called a "*similar*" conclusion on this basis: "*For reasons which we have canvassed in relation to the "disease clauses" above, when one is considering notifiable diseases, it is not difficult to envisage that official responses will be to the full extent of an outbreak, and not necessarily specific to those in a given geographical area. In the circumstances, and unless the language otherwise dictates, it is appropriate to regard a response as having "followed" the local occurrence of the disease, provided that the response was temporally posterior, if it was a response to the outbreak of which the local occurrence formed a part.*" (J§273 {**C/3/113**}).

105. This holding is, with respect, clearly wrong. It disregards the local nature of the cover provided by Hiscox 4, fails to take account of the obvious purpose of the one-mile limit, and gives no effect to the (admitted) need for a causal connection between the relevant local occurrence and the "*restrictions imposed*" that the language of the clause clearly dictated. The

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59 The meaning of "*occurrence*" in Hiscox 3 is the subject of Ground of Appeal 6.

60 In relation to the word "*following*" it was common ground, and the Court found, that it required a causal connection: see footnote 23 above.

61 J§§271-272 {**C/3/112-113**}.

fact that the Court referred to its hesitancy in reaching the conclusion may be a recognition of the problems inherent in its conclusion.

Cover concerned with local occurrences within one mile, not wider outbreaks

106. There are strong indications of the local nature of the cover given under the relevant Hiscox PA sub-clause, which requires an occurrence of a notifiable disease, *a fortiori* given the one mile radius in Hiscox 4.

107. First, notifiable diseases may often be highly localised or confined. Legionnaires' disease is the most obvious example; so too is food poisoning.[62] Other diseases typically manifest themselves locally; measles say, or typhus. Others (like SARS) may be more widespread. There is no reason (except hindsight) and no justification for pre-supposing that the clause was aimed at the likely most widespread disease; on the contrary, the one mile limit is a strong pointer in the opposite direction.

108. Secondly, the other sub-clauses within the PA clause refer to small-scale, local events. Taking first sub-clauses c. and e. of the clause, both expressly refer to matters occurring at the insured premises themselves: "*(c) injury or illness of any person traceable to food or drink consumed on the* ***insured premises***…(e) *vermin or pests at the* ***insured premises***". The local flavour of the events contemplated could not be clearer.

109. Sub-clauses a. and d. concern respectively "*a murder or suicide*" and "*defects in the drains or other sanitary arrangements*". They are not expressly limited to the premises, but it is clear that the murder or suicide envisaged would either have taken place on or very close to the premises and, as regards the defective drains, similarly that the defects would be at the premises or, if not, very near to them.

110. Each of the sub-clauses therefore insures what can only be local events. Sub-clause b. should be construed in the same way.

111. The doctrine of *noscitur a sociis*, which is a creature of the primary principle that provisions must be read in context, and is considered by the Court at J§§67-70 {**C/3/53-54**}, applies: there is (J§70 {**C/3/54**}) "*a common characteristic*" of the surrounding sub-clauses and nothing in the wording "*dictate*[*s*]" a different conclusion – on the contrary.

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62 Schedule 1 to The Health Protection (Notification) Regulations 2010 {**E/5/88**}.

112. Thirdly, the matters identified in sub-clauses a. to e. of the PA clause are ones in respect of which (i) mandatory actions can be taken by a public authority; and which (ii) are purely local in character. For example:

112.1. As to sub-paragraph a., murder or suicide: A death that transpired to be a murder or a suicide would frequently lead the local police, pursuant to their duty to bring offenders to justice, to use their common law power to erect a cordon in order to prevent access to and use of the premises so as to preserve the scene. Deliberately crossing the cordon and/or carrying on the normal use of premises within it would be an offence under s.89(2) of the Police Act 1996.[63] If a local authority is satisfied that a dead body is or may be infected or contaminated so as to present significant harm to human health, it can serve a notice requiring a person controlling the premises to prohibit any person from entering the room in which the dead body is located.[64]

112.2. As to b., occurrence of disease: A justice of the peace, who would obviously be local, may "*impose…restrictions or requirements*" including that premises be closed or destroyed if satisfied that the premises may be infected or contaminated and that the infection or contamination is one that presents or could present significant harm to human health and there is a risk the premises might infect or contaminate humans.[65]

112.3. As to c., injury or illness caused by food: An illness or injury caused by the consumption of food on the premises could prompt an authorised officer, who would again be local, if satisfied that the construction or state of premises used by the business involved an imminent risk of injury to health, to serve a hygiene emergency prohibition notice "*impos[ing]*" a prohibition on "*the use of the premises…for the purposes of the business or any other food business*", knowing contravention of which is an offence.[66] This notice could in turn lead to the (local) magistrates' court deciding to "*impose*" a hygiene emergency prohibition order confirming the prohibition imposed by the notice.[67]

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63 ***Ghani v Jones*** [1970] QB 693, per Denning LJ at 708A-709D {**F/31/644-645**}; ***DPP v Morrison*** [2003] EWHC 683 (Admin); (2003) 167 J.P. 577 at §23 {**F/25/472**}; and ***Austin and another v Metropolitan Police Commissioner*** [2008] QB 660, per Sir Anthony Clarke MR at 691B, §68 {**F/7/53**} (not challenged on appeal).

64 Reg. 10 of the Health Protection (Local Authority Powers) Regulations 2010/657 {**F/4/9-10**}.

65 Sections 45I and 45J of The Public Health (Control of Disease) Act 1984 {**E/7/102-104**}. See also Agreed Facts 5, §15.5 {**D/9/1534**}.

66 Reg. 8(1) and (6) of the Food Safety and Hygiene (England) Regulations 2013/2996 {**F/2/4-5**}.

67 Reg. 8(2) {**F/2/4**} and 7(2) and (3) {**F/78/1494**} of the Food Safety and Hygiene (England) Regulations 2013/2996 .

112.4. As to d., drainage and sanitary arrangements: where a local authority considers that a drain is not sufficiently maintained and kept in good repair and/or that a building has not been provided with satisfactory drainage, it may take action to ensure that the necessary works are carried out, including carrying out the necessary works itself.[68] Defective drains or sanitary arrangements in a food business could also pose the kind of imminent risk to health that would lead to the imposition of a hygiene emergency prohibition notice and order.

112.5. As to e., vermin or pests: the local authority can serve a notice requiring that reasonable steps to destroy mice/rats be taken, failing which it may take such action itself and recover the costs of doing so from the person served.[69] Again, the presence of vermin or pests at a food business would constitute the kind of circumstances that could lead to the imposition of a hygiene emergency prohibition notice and order.

113. Fourthly, the relevant disease sub-clause in all the Hiscox wordings requires "*an occurrence*". In the context of insurance, that is something specific on a small scale, comparable to an incident or event. An event is "*something which happens at a particular time, at a particular place, in a particular way*": ***Axa Re v Field*** [1996] 1 WLR 1026 at 1035G {**E/8/120**}. The FCA rightly equated an "*occurrence*" with an incident or an event.[70] This accords with the dictionary definition.[71]

114. The term "*occurrence*" is to be contrasted with words like "*danger*"[72] or "*emergency*"[73] which are apt to refer to something less specific and particular, such as a state of affairs, which might obtain over a wider area. An "*occurrence*" of disease cannot naturally be read as referring to a pandemic or the national state of emergency created by the pandemic. Again, the one mile radius makes this point stronger still.

115. The Court itself recognised the significance of "*occurrence*" in this context when dealing with MSA 1-2.[74] The Court held (J§196 {**C/3/94**}) that the absence of the word "*occurrence*" made

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68 Public Health Act 1961, s.17 {**F/5/11-12**} and Building Act 1984, ss.59 {**F/1/1-2**} and 99 {**F/1/3**} .

69 Prevention of Damage by Pests Act 1949, Sections 4 and 5 {**F/79/1497-1499**}.

70 FCA trial skeleton footnote 329 {**D/20/1606**}.

71 The Oxford Dictionary of English (3rd ed, 2010) gives the meaning of "*occurrence*" as "*an incident or event*" {**F/68/1366**}.

72 Which appears e.g. in MSA 1, with the relevant clause (Clause 1) set out at J§419 {**C/3/150**}.

73 Which appears e.g. in Arch 1, with the relevant clause (Clause 7) set out at J§308 {**C/3/121-122**}.

74 The relevant clauses are at J§178 {**C/3/89-90**} (MSA 1, Clause 6 a) iii) and J§183 {**C/3/91-92**} (MSA 2, Clause 6 a) iii).

it "*relatively straightforward*" to conclude that cover was not limited to the specific effects only of the instances of the disease within the radius. Implicit in this is that the converse is true.

116. Given these points, it is surely obvious that the purpose of the express one mile limit in Hiscox 4 is to make sure that only local events are covered. The limit cannot sensibly have been included so as to ensure that, if there is a nationwide epidemic, the cover will respond, but only as long as the disease happens to come within the specified radius. In this context, the word "*within*" is important: it means inside, not inside and outside.[75] If the parties had intended to cover wide epidemics, the one mile radius would serve no discernible commercial purpose. It would make such pandemic cover depend on the wholly adventitious and irrelevant fact of encroachment within the radius, a fact moreover which might not be proven to have been satisfied until the adduction of scientific or statistical evidence long after the event.[76] The absurdities of this construction are demonstrated in §41 of Amlin's Written Case.

117. The fact the express limit in Hiscox 4 is so small (in contrast to, say, 25 miles), further serves to emphasise the strongly local character of what is being covered. With regard to QBE 3, the Court regarded the existence of a one mile limit[77] as reinforcing "*the view that what is being contemplated is specific and localised events*" (J§237 {**C/3/104-105**}). The same reasoning should have applied to Hiscox 4.

118. Similarly, the inclusion of a "*one mile*" limit in the typical Hiscox NDDA clause was a significant reason for the Court's view that this clause was not intended to cover something as "*geographically dispersed, variegated, prolonged and non-specific*" as a national COVID-19 outbreak (J§405 {**C/3/146**}) and its acceptance of Hiscox's submission that the NDDA provided only "*a narrow, localised cover intended to insure events or incidents which occur within the one mile radius*" (J§406 {**C/3/146**}). The Court should have attached the same significance to the one mile limit in the PA clause in Hiscox 4 (and the same meaning to the word "*within*"); indeed some Hiscox policies contain both clauses.[78] There are no sufficient grounds for any distinction.

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75 See §25.1 (b) of Amlin's Written Case.

76 What scientific and statistical evidence might be used to establish prevalence of COVID-19 is considered in Section H of the Judgment. In this context, §§552-560 {**C/3/183-185**}, which consider the application of averaging and undercounting methodologies to available data relating to COVID-19 are of particular relevance.

77 The clause covers interruption or interference with the business in consequence of any of events including "*an occurrence of a notifiable disease within a radius of one mile of the premises*" (J§213 {**C/3/99-100**}).

78 {**C/22/1559**} is an example of a Hiscox 4 wording with a one mile NDDA clause.

119. It is notable that both the FCA[79] and HAG[80] placed reliance on the absence of such an express geographical limit in the relevant sub-clause in Hiscox 1-3, contrasting that with the presence of limits in Hiscox 4. On the Court's approach, the FCA and HAG are permitted to have it both ways.

The relevant restrictions must have been caused by ("*followed*") the local occurrence

120. The clear purpose of an express "*within one mile*" limit in combination with the causal requirement imposed by "*following*",[81] was to ensure that only the consequences of a local occurrence were covered, not those of a wider outbreak.

121. Nevertheless, the Court tentatively found (J§273 {**C/3/113**}) that the causal requirement between "*occurrence…within one mile*" and "*restrictions imposed*" was satisfied if the restrictions imposed were a response to a wider outbreak, not the local occurrence, provided the local occurrence was part of the wider outbreak and the "*restrictions imposed*" were temporally posterior to the local occurrence.

122. This approach was inconsistent with the approach the Court took to Hiscox 1-3 (J§272 {**C/3/113**}), where the need for the stipulated occurrence to have a causal effect was recognised; it simply ignores the requisite causal requirement between the occurrence itself and the restrictions imposed; it gives "*following*" no meaning in relation to the required "*occurrence…within one mile*". It means that rather than cover depending on a causal relationship between the relevant restrictions and a local occurrence of disease (as the parties and the Court agreed was required by the word "*following*"), it depends on whether the national pandemic which caused nationwide restrictions happened to encroach within a one mile circle, as to which see §116 above.

123. The first reason given by the Court to support its interpretation was that it was not difficult to envisage that the official response would be to "*the full extent of the outbreak*". But this

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79 FCA trial skeleton at §350: "*If the parties had intended [a geographical limitation], they would have included one as indeed they did in Hiscox 4*" {**D/20/1607**}.

80 HAG trial skeleton §34 {**D/24/1626}**, where it was said the inclusion of the limit in Hiscox 4, as opposed to Hiscox 1-3, was "*obviously striking and must be presumed to have been deliberate*" and §139a) {**D/24/1629**} where it was said that the inclusion of the limit in Hiscox 4 "*informs the proper construction of the Public Authority clause wording in [Hiscox 1-3] Policies.*"

81 See §102 (ii) above.

completely begs the question whether or not the clause in Hiscox 4 was objectively intended to respond to the full extent of a non-local outbreak.

124. Secondly, the Court suggested the language did not "*dictate*" another approach. But it does. The stipulated peril is an occurrence within one mile and it is that, not something else, which is required to be the cause of the restrictions. As set out above, this was recognised by the Court in relation to Hiscox 1-3, but, in the context of Hiscox 4, the Court inconsistently held that "*following*", as regards the stipulated occurrence, only means "*temporally posterior*", so that restrictions temporally following the local occurrence sufficed to engage the clause.

125. The local occurrence is treated by the Court as being part of the national outbreak. Of course, from certain perspectives, that is true. But as Lord Hoffmann said,[82] the proper expression of a value judgement (such as whether something is part of something else) depends on the purpose of the enquiry. Here, the Court is not looking at matters from the standpoint of epidemiology or history. Here the correct perspective is a contractual one and from that perspective it is the local occurrence, not the national outbreak, which must be the cause of the "*restrictions imposed*" because that is what the clause requires. The Court's approach seems to have been influenced by its conclusion that there was one "*indivisible*" cause of losses, namely the COVID-19 pandemic (J§111 {**C/3/69**}). That conclusion is criticised by Argenta[83] and Amlin[84] and Hiscox adopts those criticisms. One cannot by the use of vague phraseology circumvent the requirement of the clause that the relevant causal occurrence be local.

126. The Court acknowledged the causative element in "*following*" by referring to "*a response…to the outbreak of which the local occurrence formed a part*" (J§273 {**C/3/113**}). However, in doing so it has transferred the causal requirement from the insured local occurrence to the uninsured national outbreak. The Court's reading confuses what is covered but not causative with what is causative but not covered. By this means the clear requirement for the local occurrence to be the cause is impermissibly side-stepped.

127. The Court recognised the need for a local cause when dealing with causation in relation to the NDDA clause, a point again made more forceful by the fact that one of the Hiscox 4 policies[85] contains an NDDA clause with the one mile radius. In that context the Court held

82 See §17 above.

83 Argenta's Written Case at §§89-96.

84 Amlin's Written Case at §79.

85 {**C/22/1559**}.

(J§418 {**C/3/149**}): "*Even if the presence of a person with COVID-19 within the radius or in the vicinity could be said to be "an incident" which it cannot, for the reasons we have given, it simply cannot be said that any such localised incident of the disease caused the imposition by the government of the restrictions.*" The Court employed (J§§235 {**C/3/104**} and 238 {**C/3/105**}) similar reasoning in relation to QBE 2 (25 mile radius),[86] QBE 3 (1 mile radius).[87] There was no basis for approaching the question of causation in the Hiscox 4 PA clause in any different way.

128. Thirdly, the Court relied on an anomaly, namely that if there was a severe outbreak just outside the one mile limit, but a few cases within, it would be surprising if restrictions imposed because of the outbreak outside the limit were not within the clause. But that is a circular argument: it is only surprising if one assumes the objective intention is to have such cover; it does not show that that is the objective intention. If this is an anomaly at all, rather than simply a consequence which flows from the existence of any given radial limit, it is a much less rebarbative one than a result which provides cover for all consequences of COVID-19 but only if the disease happens to encroach within the one mile limit, the senseless or arbitrary nature of which condition the Court, in the context of RSA 3, acknowledged to be "*undoubtedly a significant argument*" (J§102 {**C/3/67**}).

129. Again, the Court seems to have been influenced by hindsight here. Prior to the pandemic, all that would have been understood to fall with the Hiscox 4 PA clause was local authority action closing down premises because of local matters. The clause should not be strained, when there are no pointers in support of such a construction, so as to encompass the unprecedented events of this year.

130. The Court should, therefore, simply have asked whether the 21 and 26 March Regulations were caused by a particular occurrence within a one mile radius of any premises insured under Hiscox 4. The answer to that question was clearly "no". The local occurrence was no cause at all. The Regulations did not depend on any such local occurrence but were, and were expressed to be, in response to the position in the nation at large.

Ground 6: Hiscox 1-3, meaning of "*occurrence*"

131. This ground concerns the meaning of "*occurrence*" in Hiscox 1-3, where there is no express geographical limit. Hiscox nonetheless submits that it is clear from (i) the nature of the cover;

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86 The clause, 3.2.4 c), is at J§208 {**C/3/97-98**}.

87 The clause, 3.4.8 c), is at J§213 {**C/3/99-100**}.

(ii) the context in which the word appears in the PA clause, and the powers likely to be exercised; and (iii) the context given by other special and additional covers which appear in the Hiscox wordings, that the "*occurrence*" referred to means something limited, small-scale, local and specific to the insured, its premises or business.

The decision of the Court below

132. The Court's decision and reasoning on this point are contained in J§271 {**C/3/112-113**}. The Court rejected Hiscox's argument and decided that an occurrence anywhere in the UK could suffice. Whilst recognising that Hiscox's submission represented the "*typical*" case of what might fall within the sub-clause, the Court held:

> "…*we do not consider that the words used dictate that no other episode (to use what is intended to be a neutral term) can qualify, and nor is the context sufficient to mandate such a limited meaning.*"

133. The first point to consider is the nature of the cover. The BI insurance in Hiscox 1-4 is an adjunct to property cover. The FCA itself emphasises that these are covers "*attaching to premises*" by way of extensions to property cover.[88] This supports the conclusion that the PA clause is objectively intended to address risks local and specific to one or more of the insured, its business or the premises. As is usual with property insurance, the objective aim to is to cover misfortunes that happen specifically to the insured, it may be alone, it may be in common with some others, but not misfortunes whose character is that they affect everyone in the nation.

134. A second specific reason in support of Hiscox's submission derives from the nature of the matters in the other sub-clauses of the PA clause which are required to be the cause of the restrictions imposed by the public authority. These are analysed in §112 above in relation to the Hiscox 4 appeal. As submitted there, there is a specific, direct and local nexus between the subject matter of each of those sub-clauses and the premises.

135. Sub-clause (b) – "*an occurrence of any disease…an outbreak of which must be notified to the local authority*" – should be similarly construed. It would be surprising if, sandwiched between expressly specific and local matters, there nestled something that was capable of responding to events hundreds of miles away, as if – in this single, isolated instance – Hiscox had thrown caution

88 §56 of the FCA's Page 5 information {**A/1/24**}.

to the winds in terms of the generality and ambit of risks underwritten, so that an occurrence of disease in Alnwick triggered cover for an accountant's office in Ilfracombe.

136. As also submitted above, the doctrine of *noscitur a sociis* (J§§67-70 {**C/3/53-54**}) applies: (i) there clearly is a common characteristic; and (ii) there is nothing in the particular words or other features of the contract which dictate that the principle should give way. As to (ii), not only has the Court not identified any such words or features sufficient to displace the operation of the principle, it has accepted that a limited, small-scale local event is a typical case of what may fall within sub-clause (b).

137. Thirdly, the nature of the other special covers (those branching off the stem) and additional covers (in the BI section but not branching off the stem) support Hiscox's submission as to the meaning of "*occurrence*". What they clearly show is that there is, objectively, no intention to insure the effects of widespread pervasive events, particularly where no damage is involved; on the contrary it is made clear that Hiscox is not prepared to insure such matters.

138. Because of the variety of Hiscox wordings (some have only four special covers branching off the stem, some sixteen) fully to develop the submission (as Hiscox did below) would be an over-lengthy exercise. The point can be made sufficiently by an examination of the lead wording in Hiscox 1, where the special cover clauses (1 to 16) and additional cover clauses (17 to 19) appear at {**C/6/400-403**} .

139. The majority of special covers are limited to circumstances where there is insured damage or, in the case of equipment breakdown, insured failure. The necessity in these cases for insured damage or the like is itself a limiting factor.

140. Of that majority, a number are restricted to insured damage[89] (or failure) occurring at or in the vicinity of the insured premises: financial losses from insured damage (1); denial of access (2); bomb threat (4); loss of attraction (in part) (5); and equipment breakdown (15). These are local and specific to the insured, the business or the premises (though in some cases a relatively small number of others may be affected).

141. Where there is cover caused by insured damage away from the premises, the limiting factor of insured damage must affect some entity with which the insured has a pre-existing contractual relationship: a fundraising event (5); a customer (6 and 7); a supplier (8 and 9);

[89] In the case of bomb threat, potential damage only: clause 4 {**C/6/400**}.

public utilities (10); a telecommunications or internet supplier (11); or an online market place (12). These covers are specific to the insured in the sense that there is a specific pre-existing relationship. It is further notable that there is no non-damage cover in any of these respects.

142. When one turns to non-damage based cover, the requirement of a local or specific nexus is more stringent and/or the assumed risks are again limited:

142.1. The NDDA clause (3) requires an "*incident*" within a one mile radius or in the vicinity;

142.2. Cyber attack (14), which is an example of a potentially very wide-ranging and pervasive peril, is defined extremely narrowly: it requires a specific targeting of the insured alone; thus it protects against "*a…the activities of a third party who specifically targets you alone… or b a hacker who specifically targets you alone*";

142.3. Loss of licence (16) by definition can only affect the insured or its business alone;

142.4. Hacker damage (17) only applies in the aftermath of a cyber attack and is subject to the same limitation, but also refers to someone "*who maliciously targets **you***";[90]

142.5. Employees' lottery win (18) by definition can affect only the insured or its business alone; and

142.6. Cancellation and abandonment (19) applies to a promotional event organised by the insured in connection with its activities; there are exclusions of various general risks, notably including actions to control, prevent or suppress infectious disease, which might affect many.

143. The objective intention of the parties is to cover losses sustained in the absence of insured damage only in very limited circumstances.

144. The clearest example perhaps is in the "***What is not covered***" section where there is an exclusion in respect of any interruption caused by or in connection with:

> "*…b. any **virus** which indiscriminately replicates itself and is automatically disseminated on a global or national scale by or to an identifiable class or sector of users unless created by a **hacker**.*"[91]

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90 A hacker is defined as "*Anyone who maliciously targets **you** and gains unauthorised access to **your** website, intranet, computer system, network, telephony equipment or data held electronically by **you** or on **your** behalf.*" {**C/6/381**}.

91 {**C/6/403**}.

145. Computer viruses are, like a pandemic, capable of wreaking global havoc, indiscriminately rendering businesses unable to function and with potentially devastating and widespread social and economic impacts. There could be no clearer objective indication that Hiscox did not wish to insure any risk of such a type. It is implausible, therefore, that by sub-clause b. of the PA clause, dealing with otherwise very limited events, Hiscox should have agreed to underwrite such a risk.

146. Although there are, in other Hiscox wordings, other special and additional covers which differ from Hiscox 1, all conform to the above analysis.

147. In relation to Hiscox 1-3, the Court held that the causal connection required by the word "*following*" between the occurrence and the restrictions imposed was satisfied on the basis that the "*occurrence*" included the outbreak of COVID-19 in the UK. Had it accepted that "*occurrence*" referred to something small-scale, limited and local, the Court would necessarily have found that the causal requirement in "*following*" was not satisfied.

Ground 8: was Regulation 6 capable of being a "*restriction imposed*"?

148. It is necessary at the outset to distinguish between three interrelated questions which arise on either Hiscox's or the FCA's appeal:

148.1. What is meant by "*inability to use*"? The Court held in short that "*inability to use*" meant what Hiscox submitted that it meant.[92]

148.2. Whether "*restrictions imposed*" denoted mandatory restrictions with the force of law? The Court held, as Hiscox submitted, that they did.[93]

148.3. Whether such "*restrictions*", in order to fall within the clause, have to be directed to the insured's use of the premises, and whether or not Regulation 6 is therefore capable of falling within "*restrictions imposed*". The Court held, contrary to Hiscox's submission, that it did not have to be directed to the premises and therefore that Regulation 6 was so capable.

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92 J§§268 {**C/3/112**}, 270 {**C/3/112**}; Order §17.3 {**C/1/12**}. The FCA and HAG seek to appeal that decision: FCA's Ground 3 at §§53-58 of its Page 5 information {**A/1/23-25**} and HAG's Ground 3 at §§38-44 of its Page 5 information {**A/2/51-53**}.

93 Order §17.4 {**C/1/13**}. The FCA and HAG seek to appeal that decision: FCA's Ground 2 at §§48-52 of its Page 5 information {**A/1/22-23**} and HAG's Ground 2 at §§31-37 of its Page 5 information {**A/2/49-51**}.

149. Hiscox's appeal is concerned only with the third point. Hiscox submitted that Regulation 6 was not capable of being a "*restriction*" because a restriction within the meaning of the PA clause needed to be directed to the insured and its use of the premises; only Regulation 2 of the 21 March Regulations and Regulations 4 and 5 of the 26 March Regulations, dealing with mandatory closures, were capable of being "*restrictions imposed*". Regulation 6 was by contrast concerned with preventing people leaving their homes without reasonable excuse, and was not directed at premises at all.

150. In substance and as regards Hiscox insureds, this was an argument about Categories 3 and 5, which were either expressly or implicitly permitted to remain open under the 26 March Regulations.

The decision of the Court below

151. The Court's reasoning is set out at J§269 {**C/3/112**}. Although the Court accepted that restrictions often would be directed to the insured or its use of the premises in cases falling within sub-clauses a. to e. of the PA clause, it held they did not necessarily have to be, and gave as a sole example a police cordon set up after a murder or suicide outside the insured's shop. Its effect would be to keep the public away, but it would not be directed at the insured or its use of the premises.

152. Without further explanation and on the basis of this example, the Court held that Regulation 6 was capable of falling within "*restrictions imposed*". It then went on to hold that given that "*inability to use*" meant what it said and in the light of the exceptions to Regulation 6, it considered that it would be a "*rare*" case where Regulation 6 caused an "*inability to use*" the insured's premises.[94]

153. The Court erred in holding that Regulation 6 could fall within "*restrictions imposed*" within the meaning of the PA clause. The effect of the Court's ruling was to treat any mandatory restriction as a "*restriction imposed*" regardless of its character or purpose. A more limited meaning is required by (i) the nature of the policy; (ii) the language of the clause; (iii) the nature of the matters covered in the other sub-clauses; (iv) the circumstances that prevailed at the time the Hiscox policies were concluded (before the COVID-19 pandemic); and (v)

94 §17.4 Order {**C/1/13**} and J§270 {**C/3/112**}.

the consequences of the Court's ruling. Further, the Court erred in its reliance on the example of the police cordon to justify its conclusion: that example if anything supports Hiscox's case.

154. First, all the Hiscox business interruption wordings are an adjunct to property cover. This signals that the "*restrictions*" referred to are concerned with the insured premises and their use. This is inconsistent with the cover extending to a general lockdown regulation which is not concerned with the insured's use of premises at all.

155. Secondly, as to the particular language of the PA clause, it provides that an insured will be entitled to losses resulting solely and directly from an interruption caused by "…***your*** *inability to use the* ***insured premises*** *due to restrictions imposed*".

156. The clause is therefore expressly directed at the insured's use. It is the insured's use for the purposes of conducting its business activities. It follows that the customers' use is not relevant because they are using the premises for their own purposes. Somebody visiting a gym does not visit for the purposes of the insured's business, but for their own health or recreational purposes. The customers' inability to use may affect the insured's business, but the question what regulations constitute "*restrictions imposed*" looks to the character and purpose of the restriction.

157. The third point arises from the other matters referred to in sub-clauses a. to e. of the clause. The Court recognised in its reasoning (J§269 {**C/3/112**}) that in the case of matters falling with sub-clauses a. to e. restrictions "*often*" would be directed at the premises. That was, however, significantly to understate the matter. The matters in all the sub-clauses are clearly the kind of events which the parties would have had in mind as posing a risk of restrictions directed at the premises and their use. The clause is concerned with a restriction which directs the insured business that it may not use its premises, for one of the five reasons in sub-clauses a. to e. This is demonstrated by the analysis in §112 above, in the context of the Hiscox 4 appeal. The effect of such restrictions is that customers cannot attend, but that is a consequence of the insured's inability to use, not its cause.

158. The Court's reliance on the example of a police cordon was the only basis of its rejection of Hiscox's case as to the character of "*restrictions*" required by the PA clause (J§269 {**C/3/112**}). However, an important part of the purpose of a cordon erected in such circumstances is precisely to prevent the use by the insured of its premises inside the cordon, so as to preserve the forensic scene. It is a restriction directly aimed at those with premises inside the cordon.

In any event, it hardly constitutes a persuasive reason for bringing the whole of Regulation 6 within the ambit of "*restrictions imposed*".

159. Regulation 6 was not in any way concerned with the insured's ability to use premises for business purposes. It was not about premises at all. Unlike Regulation 2 of the 21 March Regulations and Regulations 4 and 5 of the 26 March Regulations, it contained no requirement for businesses to close. It was a restriction of an entirely different character to the kind envisaged by the PA clause. It concerned confining individuals to their homes, subject to exceptions. It was not directed at any particular insured or even classes of insured(s), let alone the use of particular premises; it said nothing about how premises might be used. Insofar as it mentioned premises at all, it mentioned businesses which people could use, i.e. those in part 3 of Schedule 2.[95]

160. As stated in §150 above, this is an argument relevant only to Categories 3 and 5 (categories where there was no enforced closure of business premises). As to the former, Regulation 6 could not possibly be a "*restriction imposed*" leading to any "*inability to use*" the insured premises on the part of Category 3 insureds; their businesses were expressly permitted to remain open by the 26 March Regulations and, moreover, Regulation 6 expressly permitted people to leave their homes both to travel in order to work for those businesses[96] and to obtain goods from them.[97] Similarly, Category 5 businesses were not required to close, and Regulation 6 both generally allowed people to leave the place where they were living if they had a "*reasonable excuse*", and specifically permitted travelling to work where it was not reasonably possible for a person to carry out their work from where they were living.[98] In this context, it is significant that in the context of the NDDA clause, the Court held (J§415 {**C/3/149**}) that any restriction on use was not imposed by the Government because it said nothing about Category 5. Furthermore, many businesses could reach out to their customers in their homes, via the internet, Zoom, Skype etc. So Regulation 6 cannot be construed as the type of, or within the range of "*restrictions imposed*" leading to "*any inability to use*" the premises.

161. There is a good reason for this. The fourth, and important point is that, in the pre-pandemic era, when the Hiscox wordings were agreed, the parties would never have dreamed that an

95 {**E/3/27-28**}; Reg. 6(2)(a) {**E/3/20**}.

96 Reg. 6(2)(f) {**E/3/20**}.

97 Reg. 6(2)(a) {**E/3/20**}.

98 Reg. 6(2)(f): "*to travel for the purposes of work…where it is not reasonably possible for that person to work…from the place where they are living.*" {**E/3/20**}.

insured business in the UK could potentially be reduced to the state of an "*inability to use*" its premises not because of some order directed at and concerning the premises, but by reason of the entire public being mandatorily subjected to a modified form of house arrest. Such a thing would have appeared utterly far-fetched. So, objectively, the parties cannot be taken to have intended that the cover should extend to such an order. The Court failed to give proper weight to this fundamental point, and was unduly influenced by hindsight knowledge.

162. Fifthly, if "*restrictions imposed*" means <u>any</u> mandatory restriction, so that all that matters is whether the mandatory restriction had the effect, as the FCA argued, of causing the insured's inability to use its premises, it would follow that any restriction, however remote from the insured's use of the premises, would qualify. It would produce most surprising results. Take a hypothetical example of an insured sole trader arrested on suspicion of murder by the police and lawfully held in custody, but subsequently released without charge. The detention would be a "*restriction*" entitling him to an indemnity. Or take a sole trader who on 6 March 2020 (after COVID-19 became notifiable) returned to England from a holiday abroad in an infected area, only to be detained for screening pursuant to Regulation 4 of The Health Protection (Coronavirus) Regulations 2020[99] before being placed in isolation for several days under Regulation 8 after being diagnosed with COVID-19[100]. That "*restriction*" would fall within the clause and be indemnifiable. These strained outcomes cannot have been within the parties' objective intentions.

163. Finally, it should be noted that the effect of the Court's conclusion is that, if the FCA were to succeed on its appeal as to the meaning of "*inability to use*", namely that it means any inability to use in material part,[101] it follows that any Category 3 or Category 5 business which relied to any material extent on the physical presence of customers would argue that "*restrictions imposed*" had created an "*inability to use*", simply by pointing to Regulation 6. The argument would be that Regulation 6 itself created an "*inability to use*" simultaneously on all businesses everywhere that relied materially on customers being physically present. Again, this is simply not what the phrase "*restrictions imposed*" in its context was objectively intended to mean.

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99 {**F/80/1515**}

100 {**F/80/1518**}

101 §55 of the FCA's Page 5 information {**A/1/24**}.

Ground 7: the meaning of "*interruption*"

164. Hiscox submitted that the word "*interruption*" in the Hiscox policies meant that a cessation or stop or break in the insured's "*business*"[102] or "*activities*"[103] was an essential requirement.

The decision of the Court below

165. The Court concluded that "*interruption*" meant "*business interruption generally*" and included "*interference or disruption, not just a complete cessation of the insured's "business" or "activities"*".[104] In doing so, it failed to give proper weight to both the natural meaning of the word "*interruption*" and the fact it appeared alone in the stem, and also placed too much reliance on secondary context, which was insufficient to displace the clear meaning of the term.

166. Alternatively, even if the Court was correct to conclude that "*interruption*" did not require a cessation of the insured's business or activities and should be given some wider meaning, it should have made clear that the term did not extend to any kind of disruption, however slight, and that it was a much more demanding test than "interference". If complete cessation is not required, then there should only be "*interruption*" where any continuation of activities was so insignificant as to be regarded as nugatory (consistently with the Court's holding on the meaning of "*inability to use*": J§268 {**C/3/112**}).

Cessation essential

167. The stem of the Hiscox wordings requires an insured's losses to result solely and directly from "*an interruption*". The natural meaning of "*interruption*" is a stop or break.[105] The word "interference" has a very different meaning. It concerns circumstances where something continues, but cannot be carried on properly.[106]

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102 The term used in the majority of the Hiscox 2 and 3 wordings and all the Hiscox 4 wordings.

103 The term used in all the Hiscox 1 wordings (including the Hiscox 1 lead {**C/6/464-501**), three Hiscox 2 wordings and one Hiscox 3 wording.

104 Order §§17.2 {**C/1/12**}and 18.3 {**C/1/14**}; J§§274 {**C/3/113-114**}and 409-418 {**C/3/147-149**}.

105 Oxford Dictionary of English (3rd ed, 2010): "***interrupt*** *verb [with obj.]* ***1*** *stop the continuous progress of (an activity of process)…• stop (someone speaking) by saying or doing something* ***2*** *break the continuity of (a line or surface)…****interruption*** *noun…the action of interrupting or being interrupted…*" {**F/70/1370**}.

106 Oxford Dictionary of English (3rd ed, 2010): "***interfere*** *verb [no obj.]* ***1*** *(****interfere with****) prevent (a process or activity) from continuing or being carried out properly…* ***interference*** *noun …* ***1*** *the action of interfering or the process of being interfered with*" {**F/70/1372**}.

168. The use of "*interruption*" in isolation in the Hiscox wordings, moreover, contrasts starkly with typical business interruption wordings, including, as the Court acknowledged, other wordings in this case,[107] which cover loss caused by "*interruption or interference*". The fact that, despite this stark contrast and the very different meanings of "*interruption*" and "*interference*", the Court has concluded that Hiscox's policies encompass not just "*interruption*" in the normal sense of the word but also "*interference or disruption*", is surprising. It comes close to re-writing, rather than interpreting, the contract. It stretches "*interruption*" too far.

169. Significantly, as a point of departure the Court accepted that there was "*much force in*" Hiscox's submission that "*interruption*" on its own required a cessation in an insured's activities, "*since had it been intended that interference with the business would be covered, the wording could and would have said so, as other wordings we have to consider do.*"[108] Where it fell into error was in allowing itself to be persuaded that the "*context of the insuring clauses which follow*"[109] the stem required an interpretation of "*interruption*" that overrode its clear meaning. Those clauses did not so require.

170. First, cessation is not an unduly onerous requirement. It can be satisfied even by a short period of cessation. It would also, as premises-based cover, be satisfied where an insured has two or more premises, but its activities ceased at only one of them. It is not necessary in such circumstances for all the insureds' activities to have ceased in all locations.

171. Secondly, while the Court focussed on clauses that it considered were suggestive of an intention to provide cover in circumstances that fell short of a cessation, in each Hiscox policy, the significant majority of the clauses following the stem on any view contained no such suggestion. The Hiscox 1 lead wording, for example, had the following clauses relating to circumstances which clearly could stop business activities continuing: insured damage, denial of access, NDDA, bomb threat, public utilities, telecommunications, online marketplaces, public authority, cyber attack, equipment breakdown and loss of licence.[110]

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107 For example: MSA 1 {**C/10/558**}, QBE 1 {**C/12/745**}and RSA 1 {**C/15/1135**}.

108 J§§274 {**C/3/113-114**} and 409 {**C/3/147**}.

109 Also in J§§274 {**C/3/113-114**} and 409 {**C/3/147**}.

110 {**C/6/400-402**} Clauses 1, 2, 3, 4, 10, 11, 12, 13, 14, 15 and 16.

172. Thirdly, as regards the clauses in the Hiscox 1 lead wording,[111] which the Court identified as requiring its broad interpretation of "*interruption*",[112] these are not a sound basis for the conclusion.

173. Reliance was chiefly placed on the loss of attraction special cover[113] which is not only absent from the majority of Hiscox wordings,[114] but is (on any view) out of place under the stem. It expressly provides that an insured need only suffer "*a shortfall in your expected income*" as a result of damage in the vicinity of the premises or any fundraising event, and so does not require an insured to show any other impact on its business, whether interruption, disruption or otherwise, but only a reduction in income. On any proposed meaning of "*interruption*" therefore, it is not an appropriate clause to branch off the stem, and the Court's reliance on it proved too much. The Court should therefore have accepted Hiscox's submission that the loss of attraction clause had been misplaced and belonged among the so-called '*additional cover*[*s*]'[115] rather than under the stem.[116] The loss of attraction cover is no guide to construing the meaning of "*interruption*" in the stem.

174. The other special covers relied on by the Court as "*only really making sense if the word "interruption" encompasses disruption and not just complete cessation*" (J§411 {**C/3/147-148**}), were covers dealing with interruption caused by damage at the premises of specified and unspecified suppliers and customers.[117] There are clear answers to the Court's reasoning and the clauses are in any event no basis for overriding the clear meaning of "*interruption*".

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111 Which are all at {**C/6/400**} in the Hiscox 1 lead policy.

112 Loss of attraction (J§§410-411 {**C/3/147-148**}), specified customers and specified suppliers (J§§411-412 {**C/3/147-148**}), and unspecified customers and unspecified suppliers (J§413 {**C/3/148**}).

113 Referred to at J§§410-411 {**C/3/147-148**}: see Hiscox 1, clause 5 {**C/6/400**}.

114 The loss of attraction clause appears in: 4 (of 8) Hiscox 1 wordings; 5 (of 23) of Hiscox 2 wordings ; and 3 (of 4) Hiscox 4 wordings . It does not appear in any Hiscox 3 wordings.

115 These covers do not branch off the stem and so do not require an interruption. In the Hiscox 1 lead wording they are: hacker damage, employees' lottery win, and cancellation and abandonment cover. {**C/6/402**}.

116 In this context there is well-known authority to the effect that insurance contracts are not to be approached on the basis that they are perfectly drafted or necessarily consistent documents and they are often comprised of clauses taken from different sources so that internal inconsistencies may arise: e.g. ***Tektrol Limited v International Insurance Company of Hanover Limited*** [2005] EWCA Civ 845, per Buxton LJ at §15 {**F/47/979**}; ***Limit (No. 3) Ltd and others v PDV Insurance Company Ltd*** [2003] EWHC 2632 (Comm), per Moore-Bick J at §12 {**F/34/754**}. In the case of BI cover, where it may well be that clauses have been added over the years to an initial basic clause covering financial losses consequent on damage to property at the premises (as per Clause 1 {**C/6/400**}), such inconsistency would be even less surprising.

117 These are all at {**C/6/400**}, Clauses 6, 7, 8, and 9.

175. Particularly with a small to medium-sized business, failure of supply from an important supplier (for example of an essential component or piece of equipment) is plainly capable of causing a business to come to a stop; similarly if a major customer fails to take delivery of some large piece such as an engine which blocks a workroom or which stops the operation of the production line. Another example would be a small IT business where employees are all working at a customer's premises on a major contract and the customer's premises are damaged, meaning no work can be done. Although these might not be frequent situations, the clauses have purpose and make sense on the basis of the standard meaning of the word "*interruption*".

176. Furthermore, these are standard form insurance wordings rather than being individually negotiated.[118] The presence of some covers that some insureds might be unlikely to be able to call upon save in limited circumstances is not surprising in such policies.

177. Fourthly, there are good reasons why a policy would stipulate that a cessation was necessary in order for an insured to be entitled to cover, rather than allowing claims where there had merely been interference or disruption. It provides a clear and straightforward test, something that is in the interests of insurer and insured; once one moves away from cessation, one moves into the realms of uncertainty. The FCA felt able to argue that even as regards a Category 3 business: "*requiring a business to keep 2m distancing between customers (and employees) would ordinarily be sufficient to amount to an interruption to the insured business's activities.*"[119] Such a contention is clearly wrong (see §§180-183 below), but it is obvious why the parties might have agreed a term that avoided such arguments.

178. There is no sufficient basis for ignoring the clear meaning of "*interruption*" and giving to it a meaning which is so different from its natural one.

Alternatively, "*interruption*" is a much more demanding test than interference

179. Even if the Court was right to conclude that "*interruption*" did not require cessation, and had a meaning which extended beyond that, it should have made clear that "*interruption*" did not extend to any kind of disruption to a business, however slight, and that mere disruption to or alteration in normal activities would not be sufficient. The Court's judgment left the point open, an uncertainty in fact created by the rejection of Hiscox's main submission. To

118 This was common ground: APOC §32 {**D/16/1580**}; §69 of Hiscox's Amended Defence {**D/19/1597**}.

119 FCA trial skeleton §163 {**D/20/1601**}.

recognise the fact that "*interruption*" is used and used alone in the stem, the Court should have made clear that only a very significant interference with the effectiveness of the insured's activities akin to cessation would suffice: a situation where the activities which could be continued were nugatory or of no real significance.

180. At first instance, the FCA argued that there would be an "*interruption*" for the purpose of the Hiscox wordings as long as there was "*some operational impact*"[120] or (coming to the same thing) something – the example relied on being social distancing – which "*interrupt[ed] the normal functioning of the business*".[121] These are not on any view available meanings of the word "*interruption*". The incoherence of the FCA's case and the difficulties posed for it by the word "*interruption*" are demonstrated by the fact that it accepted that "*interruption*" had a meaning distinct from interference and that it required some element of cessation.[122] However, for these purposes "*cessation*" apparently included the requirement for 2 metres distancing and the delay in or reduced numbers of customers entering a store.[123]

181. The foundation of the FCA's case and the origin of the test of "*some operational impact*", was supposedly ***The Silver Cloud***,[124] per Rix LJ at §113 of the judgment. Neither Rix LJ at §113, however, nor anything else in that case is authority for the proposition that interruption merely involves or only requires "*some operational impact*". The meaning of "*interruption*" is not discussed. Rix LJ was construing a clause in the Ai cover of the relevant policy, which responded to loss as a consequence of interruption or interference with vessels' schedules[125] and was considering whether cancellations due to lack of demand amounted to interference.[126] He was primarily contrasting the meaning of the word "*interference*" with the word "*change*" in the Aii cover.[127] In that context, he considered that the words "*interference*" and "*interruption*"

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120 FCA trial skeleton at §§158-160 {**D/20/1599-1600**}.

121 FCA trial skeleton §163 {**D/20/1601**}. FCA's trial skeleton at §166 – social distancing again being given as an example. {**D/20/1602**}.

122 §§162-163 of the FCA's trial skeleton {**D/20/1600-1601**}: "*it is accepted that an 'interruption' to a business, in contrast with 'interference', requires some element of cessation*…".

123 FCA trial skeleton §163 {**D/20/1601**}; FCA's oral submissions, Day 2, page 154 l. 21 to page 155 l. 7 {**D/27/1638**}.

124 [2004] Lloyd's Rep 696 {**E/19/444**}.

125 "*This insurance covers loss due to the vessel being wholly or partially deprived of income as a consequence of an occurrence within the policy period of one of the following events:… Interruption of the vessel's schedule due to the outbreak on board of any disease of health hazard…Acts of war, armed conflicts, strikes, riots and civil commotions which interfere with the scheduled itinerary of the insured vessel, whether actual or threatened….*" p.725 lhc {**E/19/451**}.

126 §§106-108 {**E/19/443**}.

127 The Aii clause is at p.725 rhc {**E/19/451**}.

reflected the need "*for there to have been some operational impact upon the vessel's itinerary*" and that "*interference*" was not "*apposite to describe a change of schedule adopted by Silversea to mitigate its difficulties*". He was clearly not holding that "*some operational impact*" was sufficient for "*interruption*" in that case, let alone holding that that was so in any case. He was merely saying that, by contrast with the word "*change*", some operational impact was required for interference and interruption.

182. A threshold of "*some operational impact*" on or any disruption to the normal functioning of a business is far too broad a test of interruption. This can be demonstrated by consideration of Category 3 and 5 businesses.

183. With regard to a Category 3 business for example, as noted, the FCA argued below that such businesses had been interrupted because of the 2 metre social distancing guidance.[128] Such businesses, however, were expressly permitted to remain open and were able to and did trade effectively, as Regulation 6(2)(a)[129] expressly permitted people to travel in order to visit them. It is not a proper or common-sense use of language to say these Category 3 businesses sustained an "*interruption*".

184. A similar point arises in relation to Category 5 businesses which were not required to close. The permitted excuses listed in Regulation 6(2) included at (f): "*to travel for the purposes of work …where it is not reasonably possible for that person to work…from the place where they are living*".[130] Thus:

    184.1. If work could not reasonably be done at home, owners and employees were permitted to travel to work, and it follows that there can have been no interruption within the meaning of Hiscox 1-4, because work was being done, and the business had not stopped. This is especially so as such businesses could continue to reach customers by the use of internet media and telephone (J§335 {**C/3/128-129**}).

    184.2. If work could reasonably be done at home, the insured's business or business activities will not have sustained any interruption, because they could be continued there. The professionals engaged in this case could not credibly say that their business activities had been interrupted as a result of working from home since March. This example could be replicated across many different businesses and professions in Category 5,

128 FCA trial skeleton §§163, 166 {**D/20/1601**}, {**D/20/1602**}.

129 **{E/3/20}**.

130 {**E/3/20**}.

where the power of technology has allowed services to be provided effectively from home. The suggestion that such people suffered an "*interruption*" due to the fact that their normal working methods were disrupted has only to be stated for its absurdity to be apparent.

CONCLUSION

185. Hiscox invites the Court to allow its appeal for the following among other reasons, namely that the Court below was wrong to hold that:

185.1. Once the insured peril occurred, Hiscox was liable for all the consequences of COVID-19 and not just for the consequences of COVID-19 acting in causal combination with the other elements of the peril (Grounds 1-4, Hiscox 1-4);

185.2. There was coverage under Hiscox 4 in respect of the COVID-19 pandemic in the UK (Ground 5, Hiscox 4);

185.3. An "*occurrence*" was not required to be small-scale, local and specific to the insured, and that there was coverage under Hiscox 1-3 in respect of the COVID-19 pandemic in the UK (Ground 6, Hiscox 1-3);

185.4. Regulation 6 was capable of constituting "*restrictions imposed*" (Ground 8, Hiscox 1-4);

185.5. "*Interruption*" did not require a cessation; alternatively, the Court erred in failing to hold that there was an "*interruption*" only where any continuing activities were so insignificant as to be nugatory (Ground 7, Hiscox 1-4).

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