IN THE HIGH COURT OF JUSTICE **Claim No. FL-2020-000018**
BUSINESS AND PROPERTY COURTS
COMMERCIAL COURT (QBD)
FINANCIAL LIST
FINANCIAL MARKETS TEST CASE SCHEME

BETWEEN:

THE FINANCIAL CONDUCT AUTHORITY

Claimant

-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

Defendants

FOURTH DEFENDANT'S SKELETON ARGUMENT FOR TRIAL

A. INTRODUCTION

1. These submissions are made on behalf of the Fourth Defendant (**Hiscox**). The Defendants are collectively referred to as **Insurers**.

2. As in its Defence,[1] Hiscox for convenience adopts the abbreviations and nomenclature used in the Particulars of Claim (**POC**) {**A/2**}, but without acknowledgement of their appropriateness or correctness. Where a specific point in that regard arises, it is dealt with below.

B. OVER-ARCHING POINTS

3. There are a number of important over-arching points, which are relevant to the consideration of the whole matter.

Hiscox does not provide insurance against loss caused by pandemics

4. It ought to be self-evident that none of the Hiscox wordings in the test case provides cover for loss caused by pandemics. It must be common ground that the wordings do not do so explicitly, and it is hard to see how an argument could sensibly be mounted that they do so implicitly. Right at the outset, however, the FCA characterises the losses in this case as arising from the COVID-19 pandemic.[2] This might be thought a somewhat self-defeating start, but its submissions throughout do not shrink from the assertion that losses arising from the COVID-19 pandemic are indeed covered. If the first sentence of this paragraph is correct, the FCA's case seeks to impose on Hiscox a risk which it never agreed to bear. If it never agreed to bear it, Hiscox is not liable for it.

5. The FCA's case is to be contrasted with the limited nature of the insured perils in the Hiscox wordings. As will be discussed in these submissions, there are many indications in the wordings, especially in the context of non-damage cover, that they were not objectively intended to cover loss arising from a national or global pandemic or any similar pervasive event. Yet that is precisely what the FCA says that Hiscox 1-4 do cover.

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1 All references to "*Defence*" herein are to Hiscox's Amended Defence {**A/10**}, unless stated otherwise.

2 POC §1 {**A/2/3**} All references to POC herein are to the FCA's Amended Particulars of Claim.

Unprecedented scale and severity of the UK government's reaction to the COVID-19 pandemic

6. The radical and draconian reactions to the COVID-19 pandemic by many governments around the world (including the UK's) were unprecedented. The possibility of a pandemic was predicted in some circles[3], but as far as Hiscox is aware, its consequences were generally unforeseen. The government's actions in response cannot therefore be assumed to have been a set of circumstances in respect of which people, particularly those running the small and medium-sized businesses for the sake of which the FCA brings this action,[4] intended to buy or sell business interruption (**BI**) insurance. To adapt the Rumsfeldian phrase, these actions were an "unexpected unexpected" (cf. the risk of nuclear war, where the catastrophe is foreseen, albeit only as a remote contingency.) There is a difference between such events and the "*uncertain future events, the occurrence of which is unknown and often expected*"[5] which the FCA says form the subject-matter of insurance contracts.

7. The reality is that prediction of the events of 2020 (with vast swathes of businesses compulsorily closed down, and people confined by order to stay at home save where they had reasonable excuse, and guidance given that the most basic currencies of human interaction should be discontinued) would have been dismissed as fantastical. The UK had experienced previous pandemics, including the so-called 'Asian' and 'Hong Kong' influenza pandemics of 1957-8 and 1968-9,[6] but never with any remotely similar effects in terms of government response.

8. In relation to this point, the FCA asserts (without foundation and most improbably) that the parties to these BI wordings would have been aware of the governmental responses to those pandemics and other previous widespread outbreaks of disease.[7] However, the FCA's attempt to compare these previous measures with those taken by the UK government in 2020, with a view to establishing that the 2020 measures must have been in contemplation of the parties, succeeds in demonstrating the exact opposite: the fact that the FCA is reduced to citing the closure of certain venues such as dance halls in US cities in response to the Spanish Flu epidemic of 1918-1919, or the steps taken by the Mexico government

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3 Agreed Facts 7 §8 {**C/12/4**}.

4 §§A-I (especially at A and I) of the Framework Agreement {**F/1/1-3**}.

5 FCA Skeleton §74 {**I/1/33**}.

6 Agreed Facts 7 §§1 and 2 {**C/12/2-3**}.

7 FCA Skeleton §28 {**I/1/16-17**}.

(apparently alone) in response to swine flu as measures of which the parties were supposedly aware[8] – shows just how "off the radar" the actions of the UK government in 2020 prospectively were. Unsurprisingly, in view of this material, the FCA has to acknowledge "*the Government action in response to COVID-19 is unprecedented in the UK…*"[9] Indeed it is. The conclusion sought to be drawn by the FCA as regards knowledge of previous measures in this respect is conspicuously weak: it refers to "*the risk of a pandemic and the possibility of Government action being taken in response to it*" , as part of the factual matrix for construction[10], failing to distinguish between, indeed positively blurring the distinction between relatively trivial and peripheral measures, that would not be expected to impact on businesses save perhaps at the margins, and the extraordinary steps that were taken by the UK government in 2020. The blurring of distinctions will prove to be a hall-mark of the FCA's whole case.

The FCA's consumer-driven approach and its presumption that policies respond to pandemics

9. The FCA, whilst dismissing the relevance of insurers' intentions[11] and sometimes paying-lip service to the need to be objective,[12] in fact (and sometimes in the same breath)[13] takes a one-sided approach to the construction of the policies, from the perspective of the insureds, whom, although they are businesses, it seeks to equate with consumers. This is made starkly clear by the Reply, for example §4 {**A/14/2**} and §40 {**A/14/21**}, where (particularly in the former) the FCA sets out a number of largely unproven factual assertions as to the status of the insureds. These are said to be "*relevant matrix*" and to throw light on "*the true nature of the insurance provided*". As well as begging the question, this is a category error: even if those points were correct in point of fact, §4 {**A/14/2**} misunderstands the nature of the bargain which takes place where BI insurance is bought and sold. The Insurers are not to be regarded as equivalent to overbearing corporations foisting unreasonable clauses upon the unwitting victims of personal injury or negligent conduct. Insurance is about the agreed transfer of risk, and the ambit of the risks which the insurer is willing to assume is defined by the

8 FCA Skeleton §28 {**I/1/16-17**}.

9 FCA Skeleton §31 {**I/1/18**}.

10 *Ibid* {**I/1/18**}.

11 FCA Skeleton §75 {**I/1/33-34**}. As far as Hiscox is aware, no insurer has pleaded the relevance of its own subjective intentions. Hiscox certainly has not.

12 FCA Skeleton §81 {**I/1/36**}. "*It is essential that when the Court considers the construction issues, it addresses the matter objectively by putting itself into the shoes of the typical parties'. In the policyholders' case that will be as an SME policyholder, perhaps a restaurant owner in the suburbs, bringing the claim for a sub-limit of £25,000, and not as if the claimant were a fully advised sophisticated businessman or woman.*" The FCA omits to consider the insurers' perspective.

13 *Ibid* {**I/1/36**}.

contract. As Lord Sumption stated in his dissenting judgment in ***International Energy Group Ltd v Zurich Insurance Plc UK Branch*** [2016] AC 509 {**K/158/56-57**}: *"…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.*"[14] There can be no presupposition that the risks which insurers voluntarily agree to assume are of a particular magnitude, still less so when the issue arises with the benefit of hindsight. The notion that it should somehow be presumed as a default assumption that Hiscox agreed to bear the risks of the present circumstances, by mere virtue of the fact that the insureds are supposedly consumers, is a plain *non sequitur*.

10. Moreover, the FCA's case misunderstands the exercise of construction which English law requires: the court does not adopt the "*unsophisticated*" perspective said by the FCA to be that of one of the parties,[15] although in fact all the FCA says[16] is that "*SMEs are likely to be less sophisticated and many exhibit similar knowledge and consumers*", a statement so qualified that the court could not act on it even if relevant and in evidence. The basic premise in construing a contract is that, with immaterial exceptions, the parties mean what they say. The court then works out what they mean by an even-handed and if necessary meticulous approach to the language which they have used and to the applicable legal principles. It does not do so only where it is satisfied that the parties themselves would have been equally meticulous. They may well not have been: see §50 below. In any event, the FCA's repeated invocation of the lack of sophistication and knowledge of the insureds[17] contrasts with its willingness to deploy arguments of the utmost refinement and sophistication on their behalf.

11. Furthermore, the FCA ignores the fact that it is both parties' presumed objective intentions which are equally relevant. The wordings are not to be construed – in the startlingly Jacobin language of Reply §13.1 – from the viewpoint of the "*reasonable citizen*" {**A/14/9**}. The FCA's approach is redolent of the doctrine of the reasonable expectations of the insured, which is found in certain US state jurisdictions, and out of which it is necessary for contracts on the Bermuda form expressly to contract.[18] This entire mentality, favouring the position

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14 At §§113 and 114 {**K/158/56-57**}.

15 Reply §4 {**A/14/2**}. The involvement of insurance brokers is moreover overlooked in the FCA's choice of adjective.

16 FCA Skeleton §8 {**I/1/8**}.

17 FCA Skeleton e.g. §§78-81 {**I/1/33-36**}.

18 Article VI.O of Form XL004, which provides that the contract is to governed by New York Law, provided however that the contract is to be "*construed in an even-handed fashion as between the Insured and the Insurer…without*

of the insured over that of the insurer's, forms no part of English law, and the surprise is that the FCA should suggest otherwise.

12. Thus, in ***Becker, Gray & Co v London Assurance*** [1918] AC 101 at 113 {**J/42/13**}, Lord Sumner said that causation was "*a matter of the meaning of the contract, and not, as seems sometimes to be supposed, of doing the liberal and reasonable thing by a reasonable assured.*"

13. Likewise, and more explicitly still, in ***Yorkshire Water v Sun Alliance*** [1997] 2 Lloyd's Rep 21 {**K/86/8**}, where the insured relied on US authority to support its case on the ambit of the insured peril, this approach was roundly rejected by Stuart-Smith LJ (with whom Waite and Otton LJJ agreed). He said (at page 28 lhc {**K/86/8**}): "*what is clear is that the American Courts adopt a much more benign attitude towards the insured; this seems to be based variously on the "folly" argument in Leebov or "general principles of law and equity" (Slay at p. 1368) or that insurance contracts are: "contracts of adhesion between parties who are not equally situated" giving rise to the principle:. . .that doubts as to the existence or extent of coverage must generally be resolved in favour of insured . . .or because the Courts have -. . .adopted the principle of giving effect to the objectively reasonable expectations of the insured for the purpose of rendering a "fair interpretation" of the boundaries of insurance cover." [Broadwell at p. 80]. For the most part these notions, which reflect a substantial element of public policy, are not part of the principles of construction of contracts under English law.*"

14. Its one-sided perspective leads the FCA to start with the fact of the pandemic, to characterise the losses as arising from it,[19] and then to attempt to shoe-horn all the losses arising from it into the coverage provided by the policies of all the Insurers. This amounts in effect to a presumption of coverage in relation to pandemics. There are many examples of this approach: the entire summary in POC §4 {**A/2/3-5**} is shot through with it, and many of the FCA's more detailed coverage and causation arguments explicitly or more usually implicitly proceed on the basis of that impermissible presumption.

15. A particularly good example of a sentence which exemplifies the FCA's approach is found in Reply §43 {**A/14/22-23**} (in the context of the alleged significance of the lack of exclusions): "*Those phrases* [i.e. the words in Insurers' wordings] *do not, on an objective construction,*

any presumption or arbitrary interpretation or construction in favour of either the Insured or the Insurer…" See Scorey, Geddes & Harris, ***The Bermuda Form*** at 4.11 {**K/207/14**}.

19 As noted in §4 above.

have the dramatic effect of excluding the contemplated pandemic underlying cause as the Defendants contend."[20]

16. Neither an insured-oriented approach nor the presumption of coverage is an even-handed or a legitimate approach to contractual construction. The right approach is simply to ask without predisposition one way or another and from an objective standpoint whether (i) in the events which have occurred there has been the operation of an insured peril; and (ii) if so, whether that insured peril in principle caused the losses sustained.[21]

The FCA's atomistic approach to construction

17. The FCA's approach is to focus on single words (usually viewed in isolation) and to ask whether, as a matter of their literal meaning, they can be construed consistently with the goal for which the FCA is aiming. This is the wrong approach. The right one is to stand back, read the contract as a whole, and ask what the contract is (and is not) objectively intended to cover. No authority is required for this elementary submission.

The FCA blurs (i) the distinction between the effect of the pandemic itself and the government response; and (ii) the distinctions between different types of government/authority actions in response

18. As part of its presumption of coverage approach, the FCA seeks to characterise everything that happened as one indivisible peril: the disease itself, the economic and social consequences, the entirety of the government reaction. The FCA has to take this approach, given the basic position that Hiscox's wordings do not cover pandemics. Nowhere does the FCA seek to explain why this extreme aggregation of separate facts in different categories is the appropriate standpoint. It is simply a given in its approach, an assumption which is never examined, let alone justified.

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20 All emphasis by underlining in this skeleton argument is supplied, unless indicated otherwise. All text in quotations from Hiscox wordings in bold is original and indicates the use of a defined term.

21 A similar approach to the FCA's is apparent in HAG's skeleton. Furthermore, despite rightly acknowledging that "*this is not the forum for factual disputes*" (at §5 {**I/3/4**}) and that *"this test case proceeds on the basis of Agreed and Assumed Facts"* (at §53 {**I/3/21**}), HAG devotes a significant proportion of its page limit to giving detailed evidence about a selected handful of its members, and a tendentious and selective account of correspondence between Hiscox and certain insureds (see section IV). HAG's legal advisors must have known that skeleton arguments should not contain evidence of this sort, all the more so given the terms of the present case and the limited basis on which HAG was given permission to intervene (which would have been further qualified had HAG given any hint at the second CMC that it intended to take such a course). Be this as it may, the material is irrelevant in the present proceedings, and nothing more need be said about it.

19. This fallacy should be set straight at the first opportunity. How a court should properly characterise a set of circumstances depends on the perspective which it is adopting. That perspective will depend on the purpose for which the characterisation is being conducted, as Lord Hoffmann long ago made clear: *"common sense answers…will differ according to the purpose for which the question is asked."*[22] The only legitimate perspective in the present context is to characterise the facts in the light of ambit of the perils which the parties agreed were to be insured. To insist on a grand historical sweep from the perspective of a 21st century social historian is simply to rewrite the parties' bargain.

20. That the FCA ignores the distinction between the pandemic and the response to the pandemic is evident in its approach to both coverage[23] and causation[24]. Given the narrow terms of cover afforded by Hiscox 1-4, this is obviously impermissible: to ignore this distinction is to ignore the detailed limits of the cover provided by the Hiscox wordings. They cover only certain specified measures by the government or authorities, not the pandemic itself.

21. Consistently with the approach identified thus far, the FCA also ignores the distinction, which both exists in fact and is (again) indisputably required by the policy wordings, between different types of government or authority response, most critically between mandatory regulations or orders on the one hand, and mere guidance and advice on the other. An example of this is POC §56 {**A/2/36**}, which refers to "*an indivisible and interlinked strategy and package of national measures*". Equally, the FCA purports in POC §4.1 {**A/2/3**} to characterise the entire government response to COVID-19, beginning as early as January 2020,[25] (up to the present date and presumably continuing indefinitely into the future) as one indivisible, monolithic subject-matter, notably using the question-begging word "*intervention*",[26] which appears in no Hiscox policy, and appears to be used for no better reason than to obscure the distinction (which might have been thought important for the FCA to focus on) between what is covered by Hiscox 1-4 (and other policies) and what is not. This flows through into the body of the POC: §53 {**A/2/35**}, which begins the "*Causation*" section, repeats the impossibility of such a division. The same approach pervades

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22 ***Environment Agency v Empress Car Co (Abertillery) Ltd*** [1999] 2 AC 22 at 29F {**K/90/8**}.

23 POC §43 {**A/2/28-29**}. FCA Skeleton §§2 {**I/1/3**}, 7 {**I/1/8**} and 66 {**I/1/31**}.

24 POC §53 {**A/2/35**}. FCA Skeleton §§64.11, last sentence {**I/1/30**} and 66 {**I/1/31**}.

25 All dates hereafter are in 2020 unless otherwise indicated.

26 See also FCA Skeleton §§421 {**I/1/153**} and 459 {**I/1/165-66**}, among other examples.

the FCA Skeleton, with the constant "bootstraps" use of words such as "*intertwined*"[27] and "*interweaving*",[28] in relation to mandatory measures, on the one hand, and advice and guidance on the other, repeatedly and in different contexts[29] seeking to elide the two, despite the Hiscox wordings (as will be explained) requiring a distinction between them.

Reasons for the FCA's approach

22. The FCA's extreme approach is clearly taken because it represents policyholders and has undertaken to put forward their arguments.[30] However, this extreme approach also has to be taken. It is the only path by which the FCA can reach its goal. That it is adopted reflects the difficulty for the FCA of fitting the losses sought to be recovered into any conventional analysis, based on orthodox principles of contractual construction and viewing the facts (as they must be viewed) from the perspective of the parties' agreement.

The FCA assumes loss is unitary.

23. A further consequence of the FCA's seeking to blend everything together is the assumption that all loss is necessarily unitary – namely it necessarily has one cause, and in particular one cause over time.[31] This is plainly wrong. On any view, different matters are likely to have caused different losses, and the correct characterisation of the cause or causes is highly likely to change from time to time.

Business Interruption generally is a limited form of insurance covering specified perils.

24. The presumption of coverage and the approach to loss adopted by the FCA, which would not be legitimate in any insurance context, is particularly inapt for BI insurance policies. These typically insure against loss caused by specifically defined events, requiring a distinct trigger, which typically has multiple elements, each of which has to be present. There are

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27 FCA Skeleton §50 {**I/1/24**}.

28 FCA Skeleton §58 {**I/1/26**}.

29 FCA Skeleton e.g. §§119-123 {**I/1/47-49**}; 145 {**I/1/56**}; 162 {**I/1/62-63**}; 167 {**I/1/64**}; 375 {**I/1/140-141**}.

30 Framework Agreement Recital F {**F/1/2**}.

31 For example, POC §53-57; 71 {**A/2/35-39**}, {**A/2/42-43**}.

usually limiting factors stipulated, historically the most common being the requirement, as a precondition of cover, of material damage.[32]

Hiscox policies provide limited coverage against the consequences of certain specified government actions, not the underlying reasons for such actions

25. The relevant Hiscox policies in this case respond (so far as material) to specified government actions taken in specified circumstances and which have specified effects. For example, they cover loss resulting solely and directly from an interruption caused by the insured's inability to use its premises due to restrictions imposed by a public authority following vermin or pests at the insured premises, or illness of or injury to a person who has consumed food on the premises. Self-evidently, the Hiscox policies do not cover infestations of vermin, or food poisoning (any more than pandemics) *per se.* These are just not insured perils, even if they are what the FCA terms the "*underlying cause[s]*" of the insured perils, or the "*insured event*".[33] The insured peril, which is analysed in further detail below, is the relevant government action. To assert coverage for all the consequences of the underlying cause itself is dramatically to widen the cover. If cover is only present when each of factors A, B, C and D exist and are each causally related, it is obviously to broaden the cover unacceptably to make Hiscox liable for all the consequences of A on its own. This ought to be elementary and uncontentious.

26. The FCA in fact recognises that the effect of its stance is to make the disease (or vermin or murder) the insured peril. In the context of the trends clauses the FCA says "…*this clause refers to the need to make ordinary business adjustments to allow for the general state of the business and how it would have been performed without the insured peril in its broad sense – here without COVID-19 affecting the business*."[34] Warming to this theme, the FCA states: "*Similarly, any vermin or pests at the premises where the insured is unable to use the premises through restrictions imposed by a public authority…would likely have had reduced turnover even without that authority, since even without being ordered or advised most business owners would voluntarily restrict their business to protect their staff and customers…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*

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32 ***Colinvaux & Merkin's Insurance Contract Law*** at B-0780 {**K/195/7**}. This is acknowledged at §28 of the FCA Skeleton {**I/1/16-17**}.

33 Reply §43 {**A/14/22-23**}; FCA Skeleton §§286.4 {**I/1/112-113**} and 419 {**I/1/152**}.

34 FCA Skeleton §412 {**I/1/151**}; the example in §413 {**I/1/151**}, although relating to murder, is to the same effect.

proving that trigger (because the public authority order or advice will be easy to prove). But it is not merely an insurance of the top slice of loss due to the incremental addition of that public authority advice; it is not intended to entail an investigation into a counterfactual of other responses to vermin; it is intended to cover vermin as the insured event."[35] There could be no clearer statement of the FCA's position.

The Hiscox insureds

27. It is conspicuous that the FCA in its examples generally and specifically in relation to Hiscox[36] takes businesses, typically restaurants or shops, which, in broad terms, were subject to mandatory closure, although even then with important exceptions. The FCA seems to want to fight the case by reference to what it perceives are the easier examples for the purposes of showing interruption, and shies away in particular from Category 5 examples (professional and service businesses). These businesses were not ordered to close, although the FCA will not even accept this directly.[37] This is a category in which Hiscox is most interested, for reasons set out in the following paragraph.

28. Category 5 businesses comprise around 65%, some two thirds, of the Hiscox insureds. Many professional businesses have, of course, been able to continue trading, but many have nonetheless submitted claims. The fact that Category 5 businesses can in very many cases be carried on in the present circumstances forms no part of the factual picture which the FCA seeks to paint. The very words (which everyone has become entirely familiar with since March) "Zoom", "Skype", "videoconference" and "remote working" are entirely absent from the FCA Skeleton. Even the word "*telephone*" appears only in the FCA's description of Category 4 despite it being central to the continuation of Category 5 businesses[38] The FCA does not acknowledge that for very many insureds in Category 5, businesses will have carried on, albeit with adaptations such as working from home where possible, and increased use of the online facilities. The very example of this test case provides an excellent instance of how service providers and professionals have generally been able to cope without interruption in the present circumstances, and it is an example which could be replicated across many other types of business.

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35 FCA Skeleton §421-422 {**I/1/153-154**}.

36 FCA Skeleton §149-150 {**I/1/57-58**}; §364 {**I/1/137-138**}.

37 FCA Skeleton §§64.5 {**I/1/29**} and 151.5 {**I/1/59**}.

38 FCA Skeleton §151.4 {**I/1/59**}.

C. CONTRACTUAL CONSTRUCTION

(1) General principles

29. Hiscox refers to the document headed "*Insurers' Submissions on Principles of Construction of Contracts*" submitted on behalf of Insurers jointly; the following points are by way of emphasis, elaboration or addition.

30. The principles relevant to the construction of contractual terms, well known to this court and considered in detail in ***Rainy Sky SA v Kookmin Bank*** [2011] 1 WLR 2900 {**J/109**}, were reviewed by the Supreme Court in both ***Arnold v Britton*** [2015] AC 1619 {**J/127**} and ***Wood v Capita Insurance Services*** [2017] AC 1173 {**J/134**} and it is not anticipated that in general terms there will be any issue.

31. In the last of those cases, Lord Hodge[39] {**J/134/7**} emphasised that:

> *"10 The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning…*
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> *11 …where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause…*
>
> *12 …This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated…*
>
> *13 …Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements… There may often…be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge interpreting such provisions may be particularly*

[39] With whom Lords Neuberger, Mance, Clarke and Sumption agreed.

helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type…"

32. Of particular note is the point that construction is not a literalist exercise focused solely on the parsing of the wording in a particular clause – let alone a particular word – but that words must be seen in their wider context. This is to be contrasted with the FCA's microscopic word by word approach to construction, referred to in §17 above. An example of this non-literalist approach is the decision of the Court of Appeal in ***The Sounion*** [1987] 1 Lloyds Rep 230[40] {**K/74**}, described by Lloyd LJ as the case, if ever there was one, to separate the purposive sheep from the literalist goats.[41]

(2) The (ir)relevance of what is absent/not excluded

33. The FCA repeatedly seeks to deduce an objective intention to cover pandemics from the absence of an exclusion clause.[42] This is almost always a weak and circular argument, and particularly so in these circumstances, where pandemics are clearly not, on any view, an insured peril in themselves. There is no need to exclude what is not covered.

34. As a general rule, when construing any contract, "*The function of the court is to construe that which has been agreed between the parties; not that which has not been agreed.*"[43] In general terms, therefore, limited if any assistance may be derived from pointing to whole clauses which are absent from a contract, which is what the FCA does here. This caution does not necessarily affect the force of pointing out that a particular word is used in a contract, and that that word has a settled meaning, such that if a party seeks to give to it some quite different meaning it is legitimate for a court to point out that there exists another readily available word which the parties could have used had they wished to effect that meaning, but did not.

35. With regard to contracts of insurance, the nature of exclusions that may be present or absent from a wording can be relevant in circumstances where the cover is provided in incontestably broad terms or on an "all risks" basis. However, where (as here) both (i) the contractual promise is made in defined terms, and (ii) the cover is narrowly drawn, what matters is the proper construction of the positive promise made by insurers, as opposed to

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40 In that case, a contractual obligation to pay for fuel for "*grates and stoves*" (clearly obsolete words) was held to mean fuel for the crew's domestic purposes.

41 At p.235 lhc {**K/6**}.

42 POC §4.2 and 33{A/2/4}, {A/2/23-24} FCA Skeleton §§10.2 {**I/1/9-10**}, 31 {**I/1/18**}, 75 {**I/1/33-34**}, 76 {**I/1/34**}, 183.4 {**I/1/70**}, 184 {**I/1/70**}, 187 {**I/1/71**}, 352 {**I/1/134-135**} and 714 {**I/1/238**}.

43 Lewison, ***The Interpretation of Contracts*** (6th Ed.) (***Lewison***), §3.04 {**K/202/1**}.

the fact the parties have not used certain negative terms that might have been open to them. As ***The Law of Insurance Contracts*** (***Clarke***) explains at 19-1A[44]:

> *"The scope of a contractual promise can be stated either in simple positive terms or in a mixture of positive terms and negative terms such as exceptions. The use of exceptions as tools of definition has been recognised in the general law, and has been found in the law of insurance for longer. Insurance cover may be defined positively by specifying the risks or circumstances in respect of which cover is provided, for example cover for negligence is a concept which implicitly excludes intentionality and dishonesty. Alternatively, cover may be expressed in broad terms, such as "property damage", subject to exceptions that subtract from the broad terms, so that the precise cut of the insurer's liability, voluntarily assumed in broad terms, is "contractually tailored". In that latter instance it may be that the proper construction of the contract is that there would be cover were it not for the application of an exception; that the matters excepted are carved out of the cover as a sculptor reveals the finished work of art by carving out of a block of stone. Such may be the most natural construction of that type of cover which in practice is often referred to as "all risks"; in respect to which and despite the labelling the cover is always subject to some limitation. Frequently, the intended extent of cover may be expressed as being "subject to" stated exceptions.*
>
> *Distinguish, however, the policy drafted with belt and braces, using so-called exceptions to spell out the negative corollary of terms stating cover, these "should be regarded as merely ensuring that the insured risk does not cover a particular situation" and "may fall to be regarded not as true exceptions in that they exclude a risk"."*

36. The flaw in the FCA's reliance upon the absence of a pandemic exclusion is the obverse of the point made in the paragraph in ***Clarke*** {**K/194**} regarding 'belt and braces' exclusions. Just as the presence of a 'belt and braces' pandemic exclusion in the Hiscox wordings would have added nothing other than to spell out what the positive wording used in the stem[45] and special covers made clear was not covered, so the absence of such a pandemic exclusion adds nothing to understanding the meaning of the positive wording that has been used. The wording must be considered on its own terms.

37. Support for this logic can be derived from the Court of Appeal's decision in ***Burger v Indemnity Mutual Marine Assurance Co*** [1900] 2 QB 348 {**K/38**} in which the claimant insured sought to argue that the fact that only some losses had been expressly excluded by

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44 Malcolm Clarke (ed.), ***The Law of Insurance Contracts*** (6th Ed.) {**K/194/6**}.

45 The 'stem' is defined below in §73. It is the words "*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…*" from which the special covers provided in the Hiscox wordings branch.

insurers meant the insured had the benefit of cover wider than appeared from the positive part of the insuring clause. This argument was rejected.

38. The wording in ***Burger*** {**K/38/1**} provided that in the event the insured's ship collided with another vessel and the insured was *"found liable to pay, and shall pay, any sums (not exceeding the value of the ship hereby assured) in respect of injury to such other ship or vessel itself, or to the goods and effects on board thereof, or for loss of freight then being earned by such other ship or vessel, we will severally pay the assured such proportion of three fourth parts of said sums as our respective subscriptions hereto bear to the value of the ship hereby assured … but this agreement is in no case to be construed as extending to any sums the assured may become liable to pay in respect of loss of life or personal injury to individuals from any cause whatever."*

39. The insured's ship collided with a tug and sank in the River Tees. The Commissioners for Tees removed the wreck and claimed the expenses of doing so from the owners of the tug, who in turn claimed those costs from the insured, who paid them after proceedings in the Court of Admiralty. The insured then sought an indemnity in respect of such costs from insurers. In support of its claim, the insured:

    39.1 Argued that the exclusion with regard to *"loss of life and personal injury"* clearly imparted that the previous words covered consequential damages, such as those claimed, arising from the injury to the *"other ship or vessel"*; and

    39.2 Sought to rely on the fact that it was (as insurers admitted) not unusual to insert a proviso to exclude expenses such as those claimed in this case.

40. The Court of Appeal unanimously rejected the insured's arguments. A.L. Smith LJ said {**K/38/4**}:

> *"It was argued that the insertion of that proviso, there being no similar proviso with regard to the statutory liability to repay the expenses incurred in removing wrecks, shews that the words describing the first subject-matter of the clause are wide enough to cover, and were intended to cover such expenses. I do not think that is so. It appears to me that the proviso was inserted ex majori cautelâ, and was not really necessary."*

41. Similarly, Vaughan Williams LJ said {**K/38/5**}:

> *"If the words defining the subject-matters of insurance under the collision clause are clear, I do not think that we can extend or alter their effect by reason of the introduction of a proviso, which, when we look at it, appears to be one which a prudent underwriter might well think it*

desirable as a matter of caution to introduce into every policy containing a collision clause whatever its terms might be.

One thing I think is clear in reference to this clause, namely, that it was not intended thereby to make the insurers liable for every sum which the assured might have to pay in consequence of the ship insured coming into collision with another ship. It was plainly intended to limit the effect of the clause in some respects… I do not think that the addition of such a proviso can alter the meaning of fairly plain words preceding it."

42. In ***Burger*** {**K/38**}*,* the exclusion of some matters but not others did not alter the plain meaning of the positive words used in the insuring clause. It follows that the absence of such an exclusion can have no bearing on the positive words used by Hiscox in relation to the Non Damage Denial of Access (**NDDA**) and Public Authority clauses.[46]

43. Against Hiscox, the FCA seeks to buttress its position on the absence of a pandemic exclusion with a specific point that another additional clause in the same section of cover, the cancellation and abandonment clause, contains a relevant exclusion.[47] This is dealt with in more detail in §248 below, but is an especially weak argument, because the insured peril under that clause is (unusually) all risks cover. As ***Clarke*** {**K/194/6**} observes, this type of cover requires the insurer, like a sculptor, to carve out what is covered by the use of an exclusion. Far from showing an intention to cover pandemics elsewhere where such an express exclusion does not exist, the exclusion in the cancellation cover actually demonstrates a general objective intention to exclude pandemics and their consequences.

44. In this connection, the FCA relies, in apparent support of the significance of the absence of an exclusion, on a summary decision of the Paris Commercial Court where the policy terms are not available (the policy being governed by French law).[48] This appears to be the FCA's best case on the significance of the absence of an exclusion, but it was not decided under and does not represent English law. Equally weakly, HAG suggests it is relevant to have regard to the fact there have been "*a wide variety of other business interruption wordings available in*

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46 This is also an answer to HAG's attempt (§61 of its skeleton {**I/3/24**}) to rely upon a change to Hiscox's wordings to exclude loss resulting from or in connection with any communicable disease. The fact that, since the outbreak of COVID-19 someone has moved to add "belt and braces" words is unsurprising, but more importantly irrelevant.

47 This is in six Hiscox 1 wordings, two Hiscox 2 wordings and three Hiscox 4 wordings. Annex 1 to this skeleton summarises the cover provided by the Hiscox 1-4 wordings.

48 FCA Skeleton §76.1 {**I/1/34**}.

the market, any of which were available to consider".[49] It is not clear where this point leads, but it appears to contradict the authority of Lewison in footnote 43 above.

(3) The *contra proferentem* principle

45. The FCA invokes what it calls the *contra proferentem* "*rule*".[50] As the court will be aware, construction *contra proferentem* is regarded as "*very much a last refuge, almost an admission of defeat, when it comes to construing a document*…"[51] Insofar as it is even accurate to describe the principle as a "*rule*", *contra proferentem* will rarely be decisive as to the meaning of a commercial contract. The words used, commercial sense, and the documentary and factual context, are, and should be, sufficient to determine the meaning in the vast majority of cases[52] (including this one). The FCA goes so far as (wrongly) to suggest that *contra proferentem* could even have a role to play in the context of causation, namely "*causal connection … wording as to the appropriate counterfactual*".[53]

46. The *contra proferentem* principle is of no application to Hiscox 1-4, as there is no ambiguity. The court will be wary of being drawn towards finding ambiguity where none truly exists, as Auld LJ recognised in ***McGeown v Direct Travel Insurance*** [2004] 1 Lloyd's Rep IR 599 at [13] {**K/118/5**}:

> "*A court should be wary of starting its analysis by finding an ambiguity by reference to the words in question looked at on their own. And it should not, in any event, on such a finding, move straight to the contra proferentem rule without first looking at the context and, where appropriate, permissible aids to identifying the purpose of the commercial document of which the words form part. Too early recourse to the contra proferentem rule runs the danger of "creating" an ambiguity where there is none…*"

47. As usual, the party invoking *contra proferentem* denies that there actually is any ambiguity.[54] There at least, the parties agree. One way and another, this is not a case in which the court is likely to derive any assistance whatever from the *contra proferentem* principle.

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49 HAG Skeleton §60 {**I/3/24**}.

50 POC §35 {**A/2/24**}.

51 ***BNY Mellon Corporate Trustee Services v LBG Capital*** [2017] 1 All E.R. 497, *per* Lord Neuberger PSC at §53 {**K/168/14**} (with whom Lords Toulson and Mance agreed).

52 ***K/S Victoria Street v House of Fraser (Stores Management) Ltd and others*** [2012] Ch 497, *per* Lord Neuberger MR at §68 {**K/147/22**}.

53 FCA Skeleton §92 {**I/1/39**}.

54 FCA Skeleton §272 {**I/1/107**}.

(4) The court's approach to the drafting of insurance contracts

48. Insurance contracts are not chancery documents over which an individual draftsman has pored for many days, which may therefore be *prima facie* assumed to have adopted consistent terminology, and where (it may be) small differences of language in different clauses invite the supposition of the parties' intention to create alterations in effect. It is unhelpful to approach insurance contracts on the assumption that they have been put together in this way. Commercial judges know that insurance contracts are not drafted to so exacting a standard. One aspect of this is the limited assistance which is provided by the presumption against surplusage in insurance contracts, reflected in the Court of Appeal's decision in ***Tektrol Limited v International Insurance Company of Hanover Limited*** [2005] EWCA Civ 845, a BI insurance case, where Buxton LJ (at §15 {**K/124/7**}) held that the first instance judge had fallen into error by seeking to give meaning to redundant words, an approach he considered "*attributes to the draftsman too precise a use of language*". In ***The Flying Colours Film Company Limited v Assicurazioni Generali Spa & Ors*** [1993] 2 Lloyd's Rep. 184 at 192 rhc {**K/79/9**}, Staughton LJ pointed out that "*surplusage is not unknown in commercial contracts and particularly contracts of insurance*", citing with Devlin J's observation in ***Chandris v Isbrandtsen-Moller Co. Inc***. [1951] 1 K.B. 240 at 245 {**K/54/6**} that "'…*The presumption against surplusage is of little value in ascertaining the intention of the parties to commercial documents, as many great commercial judges have recognized.*"

49. The cases are replete with references to the infelicities of drafting which can arise in this context. An extreme example is ***Eagle Star Insurance Co. Ltd. v J. N. Cresswell & Others*** [2004] 1 All ER 508 {**K/115/10**}, in which Morison J referred to the disputed wording as a "*dog's breakfast*". Similarly, in ***Vesta v Butcher*** [1989] AC 852 {**K/75/42**}, Lord Griffiths said (at 893 B {**K/75/42**}) that he found it "*disturbing*" that the Lloyd's standard form of reinsurance was "*framed in terms which are inelegant and ungrammatical*" and "*obscure*".[55] Lord Bridge said (at 890 E {**K/75/39**}) that standard form needed to be redrafted in "*grammatical, intelligible and unambiguous language*". It is not suggested that the wordings here deserve these sorts of strictures – they obviously do not – but approaching the wording on an assumption that the parties achieved a perfectly drafted and consistent document is liable to lead to the drawing of false conclusions. It can certainly lead to the making of false arguments, as this case will show.

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55 The words "*inelegant and ungrammatical*" were those of Lord Templeman at 891 E {**K/75/40**}.

50. More specifically, it is well-known that insurance contracts are often comprised of clauses taken from multiple different sources, so that internal inconsistencies or tensions can and do arise. This has long been the case: in ***Law Guarantee Trust & Accident Society Limited v Munich Reinsurance Company*** (1915) 31 TLR 572 {**K/42/1**}, Eve J described a reinsurance wording as being "*made up…of paragraphs culled from different precedents and strung together without any accurate assessment of their relative consistency*". This remains the case today:

50.1 In ***J.R. Charman v New Cap Re*** [2003] Lloyd's Rep. I.R. 337, Morison J referred (at §22 {**K/107/2**}) to the practice of "*lifting clauses from different contracts without much thought*" which, he said, "*is all very well, but can lead to unnecessary disputes, such as this*". This point was not appealed.

50.2 In ***Limit (No. 3) Ltd and others v PDV Insurance Company Ltd*** [2003] EWHC 2632 (Comm), Moore-Bick J at §12 {**K/109/5**} said that "*sometimes the wholesale incorporation of clauses lifted from another contract gives rise to linguistic anomalies*", and that even though the draftsman may be alive to this problem and may adapt the clauses in a way which he thinks makes it more suitable for inclusion in the particular contract before him, this is not always done successfully.

51. It should therefore not be assumed that minor differences in wording between two clauses are necessarily intended to create a difference in effect. The difference in language may simply arise from the fact that the clauses have different origins.

(5) *Noscitur a sociis*

52. Where matters described in a particular contract share a common characteristic, general words in the same contract ought to be accorded that same characteristic: *noscitur a sociis*.

53. For example, again in ***Tektrol*** [56] {**K/124/4**} there was an exclusion for loss or damage caused by or consisting of "*erasure loss distortion or corruption of information on computer systems or other records programmes or software caused deliberately by rioters strikers locked-out workers persons taking part in labour disturbances or civil commotion or malicious persons*". The Court of Appeal held that the meaning of "*malicious persons*" was shaped by the list of things in which it appeared, so that it meant a malicious person who was directing an attack on the insured's computer

[56] See §48 above.

systems specifically, rather than (as was the case) somebody sending a virus to many people without a care as to whose systems it infected.[57]

54. This maxim and its application to the Hiscox Public Authority clause are discussed in §230 below.

[57] See Buxton LJ at §§11-13 {**K/124/6**}.

D. THE HISCOX WORDINGS AND POLICYHOLDERS

(1) The relevant Hiscox insureds

55. The following is not by way of evidence intended to bear on the substantive arguments in this case,[58] but by way of information for the court.

56. Around 65% of the Hiscox insureds who have policies which are affected by the issues in this test case are in Category 5,[59] viz businesses which were not required to close or cease business and which typically comprise small accountancy, consultancy, legal and other similar professional businesses. The FCA quaintly pleads[60] that such businesses were neither expressly required to close, nor expressly permitted to stay open. All that this curious statement and its repetition in the FCA Skeleton[61] reveal is a sense of discomfort at the fact that the FCA is arguing that businesses which were indisputably permitted to remain active, whose premises were allowed to remain open[62] and be visited and worked in, insofar as it was "*not reasonably possible*" for the relevant work to be done at home,[63] are nonetheless as entitled to bring claims for interruption as those businesses which were shut down.

57. Of the 35% of Hiscox insureds not in Category 5, considerable numbers are in:

    57.1 Category 2 (indoor and outdoor leisure) required to close/cease business by Reg. 2(4) of the Health Protection (Coronavirus, Business Closure) (England) Regulations 2020 (**21 March Regulations**) {**J/15/2**} and Reg. 4(4) of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (**26 March Regulations**)[64] {**J/16/3**}; or

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58 Cf. section IV of the HAG Skeleton, entitled "*Relevant Background*" {**I/3/14-22**}.

59 As per the Categories in POC §19 {**A/2/13-15**}, which should be read subject to the corrections in Defence §61{**A/10/13-14**}.

60 POC §19.4 {**A/2/14**}.

61 FCA Skeleton §64.5 {**I/1/29**}; §151.5 {**I/1/59**}.

62 As Hiscox pleads in Defence §61.5.2 {**A/10/14**}.

63 Reg. 6(2)(f) {**J/16/4**} of the 26 March Regulations provides: "*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*"".

64 Unless otherwise stated, references to the 26 March Regulations {**J/16**} and the different constituent regulations comprising them, should also be taken also to be a reference to their Welsh equivalents, The Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020 {**J/22**}. The Welsh regulations were structured slightly differently, but imposed all the restrictions imposed in England. Further, in Wales, businesses not required to close, or cease were also required to "*take all reasonable measures to ensure*" that their staff and clients/customers were kept 2 metres apart {**J/22/5-6**}. See footnote 229 below.

57.2 Category 4 (non-essential shops) required to cease business by Reg. 5(1) of the 26 March Regulations {**J/16/3**}, save for making deliveries or otherwise providing services in response to orders received through a website, by telephone or post, and to close any premises not required to carry out such services.

58. A small percentage (less than 5%) of Hiscox insureds are in Category 1 (restaurants etc.), which were required to close by Reg. 2(1) of the 21 March Regulations {**J/15/2**} and Reg. 4(1) of the 26 March Regulations {**J/16/2**}, save for the sale of food or beverages for consumption off the premises. Hiscox has very small numbers (in the present context) in Categories 6 (holiday accommodation) and 7 (schools and places of worship) (fewer than 150 over the two categories).

59. It may assist the court to understand the number of Hiscox's policyholders insured under the various Hiscox wordings within these proceedings and the rationale, as Hiscox understands it, for its wordings being grouped by the FCA as they have been.

How many policyholders are interested in the Hiscox policies?

60. The Hiscox wordings have been split by the FCA into four groups, referred to as Hiscox 1, 2, 3 and 4.

61. A total of 31,171 Hiscox policyholders had live policies in one of these four groups as at 1 March 2020.[65]

62. There are eight different[66] wordings in Hiscox 1:

62.1 16,181 policyholders have policies with wordings in this group.

62.2 The lead wording, chosen by the FCA, is the Retail BI- 16105 wording.[67] However, this wording is only the third most common in Hiscox 1 and in fact accounts for only 895 policyholders (i.e. 6% of Hiscox 1).

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65 All figures as to number of policies in this section refer to the number of live policies as at 1 March 2020. The figures also refer to the total number of live polices across all versions of a particular wording.

66 Recruitment BI-8671 WD-HSP-UK-JMBI(3) and BI-OM (Jelf)-8671 WD-HSP-UK-JMBI (3) are not just materially the same but identical. Hence there is only one wording at {**B/40/1**}.

67 Retail BI-16105 {**B/6**}.

62.3 The wording with the largest number of policyholders in Hiscox 1 is a Professions BI wording.[68] 9,989 policyholders (62% of Hiscox 1) have this wording, which is used in policies issued to professional services businesses within Category 5, i.e. small accountancy firms, solicitors and similar. The next most common wording, Technology BB-16101, has 2,613 policyholders (16% of Hiscox 1).[69] 1,072 policyholders in Hiscox 1 have one of the Hiscox policies used by recruitment businesses.[70]

63. There are twenty-three different wordings in Hiscox 2:

63.1 10,872 policyholders have policies with wordings in this group.

63.2 The lead wording chosen by the FCA is a Salon BI wording.[71] However, this wording is only the seventh most common in Hiscox 2 and accounts for only 290 policyholders (just under 3% of Hiscox 2).

63.3 The wording with the largest number of policyholders in Hiscox 2 is, again, a Professions BI wording.[72] 6,716 policyholders (61% of Hiscox 2) have this wording, which again is used in policies issued to professional services businesses within Category 5.

64. There are only five different wordings in Hiscox 3. Only 582 policyholders have policies with wordings in this group. Of these, 455 have policies with the lead wording, a Gunsmith BI wording.[73]

65. There are four different wordings in Hiscox 4 and 3,536 policyholders have wordings in this group. Of these, 2,790 have policies with the lead wording, a Retail BI wording.[74]

66. Accordingly, while the lead wordings chosen by the FCA for Hiscox 1 and Hiscox 2 might suggest otherwise, by far the most common Hiscox insured is a business providing

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68 Professions BI-16089 {**B/36**}.

69 Technology BI -16101 {**B/36**}.

70 Recruitment BI-8671 [{**B/40**} and Recruitment BI- 16216 {**B/41**}.

71 Salon BI-18680 {**B/7**}.

72 Professions BI-6001 {**B/45**}.

73 Gunsmiths BI-8006 {**B/8**}.

74 Retail BI-15299 {**B/9**}.

professional services that falls into Category 5. When explaining its choice of lead wordings in correspondence, the FCA has stated that the "*Lead Wordings were selected, both within insurer wording types and across all insurers, so as to be broadly representative of businesses within categories 1-7*".[75] That approach may serve the FCA's purposes so far as the litigation as a whole is concerned, but it must not be allowed to create an inaccurate impression of the typical Hiscox insureds.

67. Similarly, the fact that HAG has intervened in these proceedings should not be allowed to give the impression that it represents either a large proportion of Hiscox insureds, or that its members form a representative cross-section of the businesses covered by Hiscox. The 369 businesses within HAG[76] represent just over 1% of the total number of Hiscox policyholders whose wordings are the subject of this test case.

Apparent rationale for the FCA's grouping of Hiscox policies

68. The FCA has not given a clear explanation of its reasons for grouping the Hiscox wordings as it has. However, it appears to Hiscox that the policies have been grouped together for the following reasons:

68.1 The Hiscox 1 wordings (with one exception)[77] all have a trends clause that provides:

> "*Provided that* ***you*** *advise* ***us*** *of* ***your*** *estimated annual* ***income****, or estimated annual* ***gross profit*** *if applicable, at the beginning of each* ***period of insurance****, the* ***amount insured*** *will automatically be increased to reflect any special circumstances or [business] trends affecting* ***your activities****, either before or after the loss. The amount that* ***we*** *will pay will reflect as near as possible the result that would have been achieved if the* ***insured damage*** *had not occurred.*"
>
> ***Your*** *schedule will show if business trends cover applies and the additional percentage amount.*"[78]

68.2 The Hiscox 2 wordings both (i) use the defined term "*notifiable human disease*" in the part of Hiscox Public Authority clause that is at the centre of the arguments

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75 See HSF letter to A&O dated 9 June 2020 {**H/8/1**}.

76 HAG skeleton §2 {**I/3/3**}.

77 The sole exception is Recruitment BI wording (8671 WD-HSP-UK-JMBI) which has a trends clause the form of which is different to all the other wordings in these proceedings: "*For* ***your*** *loss of* ***income*** *or loss of* ***fees****, the* ***amount insured*** *will be automatically increased by 33% to reflect any special circumstances or business trends affecting* ***your activities****, either before or after the loss. The amount that* ***we*** *will pay will reflect as near as possible the result that would have been achieved if the* ***damage****, restriction, failure or* ***cyber attack*** *had not occurred.*" {**B/40/5**}.

78 See the Hiscox 1 lead wording at {**B/6**}.

concerning the Hiscox wordings,[79] and (ii) use a trends clause in a different form to Hiscox 1, an example of which is the Hiscox 2 lead wording, which provides:

> "*The amount* ***we*** *pay for loss of* ***income*** *or loss of* ***gross profit*** *will be amended to reflect any special circumstances or business trends affecting* ***your business****, either before or after the loss, in order that the amount paid reflects as near as possible the result that would have been achieved if the* ***insured damage*** *or restriction had not occurred.*"[80]

68.3 The Hiscox 3 wordings all (i) use a trends clause in the style used by the Hiscox 2 wordings,[81] but (ii) do not use the defined term "***notifiable human disease***" in the subclause of the Public Authority Clause.

68.4 The Hiscox 4 wordings have been grouped together because they all contain an express geographical limit (of one mile) in the subclause of the Public Authority clause that concerns the occurrence of a disease.[82]

69. For the court's information further details regarding the differing features of the Hiscox 1 to 4 wordings are set out in Annex 1 to this skeleton.

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79 A difference of style not substance, because the words in bold are defined in the Hiscox 2 wordings as "*any human contagious disease, an outbreak of which must be notified to the local authority*" {**B/7/24**}, i.e. the same words written out in full in the relevant part of the Public Authority clause for both Hiscox 1 and 3 (and one of the Hiscox 4 wordings).

80 {**B/1/15**}.

81 Although the Hiscox 3 lead wording only refers to "…*what would have been achieved if the* ***damage*** *had not occurred*…" {**B/8/30**}.

82 Lead wording at {**B/9/36**}.

E. COVERAGE – OVERVIEW

(1) The link between coverage and causation

70. Below, Hiscox sets out its case on policy coverage, then on causation. However, caution is required in this respect. The issues of coverage and causation are closely interlinked, and mutually informative. It is important to bear in mind both coverage and causation when analysing the overall position.

(2) The relevant insuring clauses

71. There are two relevant insuring clauses (each with variants) as far as Hiscox is concerned. The first is the NDDA clause (which appears in only the Hiscox 1 wordings, five of the twenty-three Hiscox 2 wordings,[83] and one of the four Hiscox 4 wordings[84]). The second is the Public Authority clause (which appears in all of the Hiscox policies in this test case).

72. For the court's information, at Annex 2 is a table in respect of each Hiscox wording, making clear:

    72.1 Whether it has a Public Authority clause with four or five subclauses;

    72.2 Whether it has an NDDA clause and if so in what form;

    72.3 The style of trends clause used;

    72.4 The BI special covers provided; and

    72.5 The additional covers provided (if any), such as Cancellation and abandonment cover.

73. Both the NDDA and Public Authority clauses are special covers which form part of the BI section. Both covers are branches off the same stem (**the stem**) which 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…*". Subject to immaterial variations,[85] this stem is universally present in all of Hiscox 1-4.

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83 Sports and Leisure BI-16258 {**B/43**}, Sports leisure BI-11431 {**B/62**}, policy 16725 {**B/48**}, Venues BI-7103 {**B/49**} and Venues BI-7103 {**B/50**}.

84 Bowling Clubs 15480 {**B/70**}.

85 These are as follows. (1) In three Hiscox 2 policies and three Hiscox 3 policies, the word "*also*" follows "***We*** *will*" (i.e. "***We*** *will* ***also*** *insure* ***you*** *for* ***your*** *financial losses*…." and the words *"the following"* appear at the end of

74. Hiscox begins by briefly identifying general points that are common to both the NDDA and Public Authority clauses, following which it addresses the NDDA clause specifically. Thereafter, the Public Authority clause is discussed in more detail.

(3) General considerations relevant to both the NDDA and Public Authority clauses

75. As noted in §25 above, both the NDDA and Public Authority clauses respond to public authority action. This point emerges further from the detailed consideration of each clause.

76. The BI insurance in Hiscox 1-4 is an adjunct to property cover. This is explicitly clear from the title of each and every Hiscox BI wording in this test case. For example the Hiscox 1 lead wording's title is: "*Property – Business Interruption (Specialist Retail)*".[86] The BI section of every Hiscox BI wording also expressly adopts the definitions used in the property section of the relevant policy[87] and uses them extensively. For example, the Hiscox 1 lead wording uses the following terms from the Property definitions:[88] "*Activities*", "*Damage*", "*Gross profit*", "*Hacker*", "*Income*", "*Insured damage*", "*Insured premises*", "*Insured failure*" and "*Property*". These points serve to emphasise the close relationship of the BI cover to the property cover.

77. The fact that the BI cover is an adjunct to the property cover supports the conclusion that the two relevant covers (NDDA and Public Authority) are objectively intended to address risks local and specific to one or more of the insured, its business or its premises. The other special covers which branch off the stem, together with the subject matter of the restrictions within the Public Authority clause itself, reinforce this point. 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.

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the stem before the list. This is the case in those policies where the relevant stem follows a separate clause concerning business interruption caused by insured damage to the insured's property, for example, at {**B/46/1**}. (2) In all but two of the Hiscox 2 policies, all but one of the Hiscox 3 policies and all the Hiscox 4 policies, the defined term "***your business***" is used in place of the defined term "***your activities***", e.g. the Lead Wording for Hiscox {**B/7/24**}. (3) The Lead Wording in Hiscox 3 refers not to "*financial losses and other items specified in the schedule*" but to "*loss of* ***gross profit*** *up to the limit stated in the schedule as applicable …*" {**B/8/29**}. Similarly, one of the other Hiscox 3 wordings refers to "*…loss of* ***income*** *or loss of* ***gross profit*** *and* ***additional expenses*** *up to the limit stated in the schedule as applicable…*" {**B/65/1**}.

86 {**B/6/40**}.

87 "*The General terms and conditions, the Property definitions and the following terms and conditions apply to this section.*" {**B/6/40**}.

88 {**B/6/21-23**}.

78. The points in §§75-77 above are relevant to both the NDDA and Public Authority clauses. To avoid repetition, they are developed in §223 and from §232 below in relation to the Public Authority clause.

79. The principles of construction set out in §29-32 above make clear that the correct approach is not an exercise of parsing each word in isolation and seeing if, microscopically examined in this way, it can be made as a matter of the English language to map onto the present circumstances. The FCA's atomistic approach to construction[89] is to treat each of the various words in each clause separately, but it is of course the case that words have be construed in the context of the whole clause in which they appear, and the clause has to be seen in the context of the BI section and indeed the whole policy. One must also be cautious about making minute comparisons between different clauses in the same policy, in view of the way in which insurance contracts are typically drafted (see §§48-51 above).

89 The exact opposite of its over-centralising treatment of the facts: both extremes are equally unjustified.

F. COVERAGE – THE NDDA CLAUSE

80. The most common version of the NDDA clause provides as follows (including the stem):

> "*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:…*
>
> ***Non-damage denial of access***
>
> *An incident occurring during the* ***period of the insurance*** *within a one mile radius of the* ***insured premises*** *which results in a denial of access or hindrance in access to the* ***insured premises,*** *imposed by any civil or statutory authority or by order of the government or any public authority, for more than 24 consecutive hours*"[90]

81. In the Hiscox policies being considered in the test case, there is one variant. Two of the five Hiscox 2 policies that have an NDDA clause state "*within the vicinity*" instead of "*within a one mile radius*" (and also only refer to the denial or hindrance in access being imposed by *"the police or other statutory authority"*) as follows:

> "*An incident during the period of insurance within the vicinity of the* ***business premises*** *which results in a denial or hindrance in access to the* ***business premises*** *imposed by the police or other statutory authority.*"[91]

82. The case for coverage under the NDDA clause is hopeless for a number of different reasons. HAG advances no case on coverage under the clause, despite some of its members having policies with the benefit of this cover.[92] Nonetheless, a case is advanced by the FCA under the NDDA clause and, given the limited time for oral submissions, Hiscox will have to address in writing all the reasons why the case is without merit. Many of them are equally applicable to the Public Authority clause.

83. Taking the commonest NDDA wording (in §80 above), there must be an "*incident*" within a one mile radius of the insured premises which results in a denial of or hindrance in access being imposed by a relevant authority or by order of the government or any public authority,

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90 All text in bold is original, and indicates that the emboldened word or phrase is a defined term.

91 Sports and Leisure BI-16258 {**B/43/2**}, Sports leisure BI-11431 {**B/62/2**}.

92 First Witness Statement of Richard Leedham in support of HAG's intervention, §1 (which states that HAG's members "*are pursuing claims in arbitration against Hiscox and assert that, under a 'Public Authority' extension of their business interruption cover, they have a right to be indemnified…*" {**G/5/2**}. There is no mention of a claim under the NDDA clause at all, even though NDDA cover is included in what Mr Leedham describes as Policy 1: see page 33 of exhibit RL1 {**G/8/33**}. Nor does the HAG Skeleton in this case advance any such claim: HAG skeleton at §4 {**I/3/3**}: *"the Hiscox Interveners focus their claims on the Public Authority Clause…This Skeleton Argument, therefore, does not address the "Non-damage denial of access" clause.".*

for more than 24 hours. It is plain that the paradigm type of situation at which the clause is objectively intended to be aimed is something like a fire or gas explosion close to the insured premises, and which results in roads to the insured premises being cut off by the police.

84. The NDDA clause is not applicable in the present circumstances for four independent reasons:

84.1 There was no "*incident*".

84.2 There was no incident "*within one mile of the insured premises*".

84.3 There was no denial of or hindrance in access.[93]

84.4 Even if there was a denial of or hindrance in access, it was not the "*incident … within a one mile radius"* (or the vicinity) "*which result[ed] in…*" the denial of or hindrance in access.

85. These points are expanded upon below.

86. The meaning of "*interruption*" which is in the stem, and is common to and a requirement of both the NDDA and Public Authority clauses, is addressed in the context of the Public Authority clause from §275 below. Those submissions apply *mutatis mutandis* to claims under the NDDA clause.

(1) There was no "*incident*"

87. There was no "*incident*" within the meaning of the NDDA clause.

88. The word "incident" is defined in the Shorter Oxford English Dictionary (6th ed.) {**K/225/1**} as a "*distinct occurrence or event, esp. one that attracts general attention or is noteworthy in some way.*" The natural meaning of "*incident*" in the NDDA clause is a specific, local, identifiable event of relatively short temporal duration. This meaning is confirmed by the "*one mile*" or "*vicinity*" requirement, which also makes expressly plain that the incident must be close to the insured premises. Relevant examples of an "*incident*" in this context are a fire, an explosion, or a severe traffic accident close to the insured premises, which result in a

93 Hiscox's alternative case is that, if there was any denial of or hindrance in access, it was limited to situations in which there was mandatory closure of the premises or cessation of business pursuant to Reg. 2 of the 21 March Regulations {**J/15/2**} and Regs. 4 and 5 of the 26 March Regulations {**J/16/2-3**}: see §116 below.

police cordon preventing access to the insured premises. That kind of localised incident is clearly what the clause is driving at, not a global pandemic.

89. The FCA seeks to attack this proposed meaning by questioning the meaning of short temporal duration.[94] But that is a non-point. It will usually be clear in a given case what qualifies and what does not by reference to the facts. There may be borderline cases, but that possibility always exists: it is an everyday exercise for the court to decide which side of a given line a case falls. The FCA then makes a thoroughly weak point that the incident itself cannot be of short duration because the denial of access must last for more than 24 hours.[95] This is so obviously fallacious that no answer to it need be supplied.

90. As a general point, whilst the noun "*incident"* may be sufficiently flexible to embrace a wide variety of facts, on any view it is inapposite as a label for a continuing state of affairs extending across a large territory (or the entire globe) over a long period, affecting different parts of the territory in different ways (if at all) at different times.

91. For example, one would not as a matter of ordinary language describe the German bombing of the UK between September 1940 and May 1941 (the Blitz) as "*an incident*". It was non-specific both geographically and temporally, since it affected different parts of the nation at different times and in different ways, and in many cases not at all. It lasted for some nine months (whereas the ordinary meaning of "*incident*" is an event of relatively short temporal duration). By contrast, the specific bombing of Battersea Power Station on the night of 7 September 1940 might be accurately described as "*an incident*", because it was a specific identifiable event of limited temporal duration and geographical impact.

92. Similarly, the international movement against historical and current racial discrimination which emerged in different ways in different parts of the UK (and the world) at various times during 2020 was not an "*incident*" (whereas the toppling of the statue of Edward Colston in a particular street in Bristol on 7 June 2020 was an "*incident*"[96]). The former was too diffuse, varied, prolonged and unspecific to be an "*incident*" as a matter of ordinary language.

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94 FCA Skeleton §715 {**I/1/238**}.

95 FCA Skeleton §716 {**I/1/238**}.

96 See, for example, the description of this event as an "*incident*" by Detective Superintendent Liz Hughes of Avon and Somerset Police {**K/226/1**}: https://www.avonandsomerset.police.uk/news/2020/06/images-released-as-part-of-colston-statue-investigation/

93. Lord Mustill in ***Axa Reinsurance v Field*** [1996] 1 W.L.R 1026 {**J/74/10**} said, in relation to an "event", that it is "*something which happens at a particular time, at a particular place, in a particular way*"[97] This applies *a fortiori* to "*incident*".

The FCA's case on "incident"

94. The FCA's primary pleaded case on "*incident*" is:[98]

> "*The pandemic was a nationwide emergency arising out of a highly contagious disease with an actual and believed substantial risk of fatality when contracted. Accordingly, there was from at least 3 March 2020 (when a UK Government action plan was published, quarantining in place and there were 176 Reported Cases across the country), alternatively 12 March 2020 (when the UK Government elevated the risk level to high, following COVID-19 being designated notifiable in the UK and characterised as a pandemic by the WHO, and a week after the first reported UK death), alternatively such other date as the Court shall determine: …an incident (Hiscox 1-2, Hiscox 4…) everywhere in the UK which necessarily included in the vicinity of the UK premises (Hiscox 2…) and within 1 mile (Hiscox 1-2, Hiscox 4…).*"

95. This case is far from clear.[99] Insofar as a case is being made that the nationwide COVID-19 pandemic was itself "*an incident*" for the purpose of the NDDA clause,[100] that is hopeless. The pandemic is an ongoing international state of affairs which has persisted and appears likely to continue for some time. It is too geographically dispersed, prolonged, non-specific and varied[101] to qualify as "*an incident*" within the ordinary meaning of the word.

96. Insofar as there is separate reliance on what happened on or the state of affairs as at 3 March or 12 March or "*such other date as the Court may determine*", that too is hopeless. A state of affairs is not an incident, and the government announcements or actions referred to were not and could not conceivably be described as "incidents" within the ordinary meaning of that term, let alone "*an incident*" for the purposes of the clause. The very fact that the FCA falls back on the argument that the court may determine when the incident took place, it having been previously unclear, reveals the thinness of the whole case. Something the timing of which is

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97 At page 1035G {**J/74/10**}.

98 POC §43 {**A/2/28-29**}.

99 FCA Skeleton §719 {**I/1/239**} does not resolve the lack of clarity.

100 It is unclear from POC §43 {**A/2/28-29**}, but to judge from POC §64 {**A/2/40**} and the reference back to §42 {**A/2/28**} it appears that it is.

101 I.e. it has not affected all parts of the nation in the same way at the same time. Some parts of the nation appear to have had high incidence of COVID-19 (London), whereas others (e.g. the Scilly Isles – see {**C/16/2**}) have had no cases at all.

uncertain and requires determination by a court is hardly the sort of "*incident*" which the NDDA clause is contemplating. In truth, it is not an incident at all.

97. The FCA's alternative case is that there was an "*incident*" within one mile or the vicinity of the premises whenever "*it is proven that a person with COVID-19 had been present within 1-mile of the premises, or within the vicinity of the premises, respectively*…"[102] This too is an impossible case. COVID-19 is a disease from which people suffer. It is not "*an incident*" within the meaning of the NDDA clause. Its presence in a person or in more than one person in a particular locality cannot be described as "*an incident*", since the presence of medical conditions (even in more than one person) is not an incident. It is a continuing (and developing) state of affairs. Moreover, somebody becoming infected with COVID-19 is not what the NDDA clause means by an "*incident*", because the clause clearly contemplates something identifiable: it is typically not known when infection takes place (sometimes for days, sometimes ever), or where, or even that it has.

98. Suppose that a person who (unbeknownst to him) is infected with COVID-19 walks around Hyde Park. The person would come and go without (possibly ever[103]) knowing that he had COVID-19, and would behave completely normally and in just the same way as if he was not infected. If anybody saw him, they would not know that he was infected. Such an (undetectable) happening cannot be an "*incident*". It would not warrant general attention of any kind, either at the time or in retrospect.

99. This stance is criticised by the FCA[104] as being akin to saying that trees do not fall unless they are seen to fall. This is a consequence of the FCA looking at "*incident*" in isolation. The "*incident*" here has to "*result*" from the denial etc. of access which the clause requires. The clause simply could not work if the "*incident*" could occur without being known about, and this is clearly not what was contemplated.

100. The FCA's entire argument on incident is a good, early example of the Humpty Dumpty approach to construction satirised by Lord Atkin in ***Liversidge v Anderson*** [1942] AC 206

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102 POC §43 {**A/2/28-29**} and FCA Skeleton §720 {**I/1/239-240**}.

103 COVID-19 is often asymptomatic: see Agreed Facts Document 2 {**C/3/2**} and {**C/3/5**}.

104 In the related context of the meaning of "occurrence" in the Public Authority clause: FCA Skeleton §358 {**I/1/136**}.

at 245 {**K/51/40**}.[105] The FCA actually goes as far as to say when dealing with the word "*incident*" that "*[i]n short, a pandemic…is contemplated*",[106] despite the fact that the clause does not even refer to disease.

(2) There was no incident "*within a one mile radius*" of the insured premises

101. Whilst the word "*incident*" in the NDDA clause of itself implies something of relatively limited geographical reach, the clause specifies that it must be "*within a one mile radius of the insured premises*" (or occasionally "*within the vicinity of the insured premises*"). The clause says "*within*". The clear objective intention is that it should respond to localised incidents occurring within the radius, not incidents that are both within and outside the radius. It must be common ground that a state of affairs which exists entirely outside the radius is not covered. Equally, a state of affairs which exists only incidentally within and preponderantly outside the radius is not an "*incident*" within the radius. Any other conclusion entails an abuse of language. A similar point applies in relation to those occasional Hiscox 2 policies where the wording is "*within the vicinity*" rather than "*within a one mile radius*".

102. The word "*within*" means what it says: it does not refer to a nationwide situation. True it is that there might on particular facts be a borderline case in which an incident straddles the border of the one mile radius or extends just outside it. In such a case, the tribunal would have to apply the clause to that situation. But the fact that it is possible to imagine a (quite different) borderline case does not begin to permit the FCA to ascribe a meaning to the phrase "*within a one mile radius*" which it cannot sensibly bear, with a view to manipulating the present facts into the language of the clause so as to trigger cover. Common sense and ordinary meaning point the way. An incident (if such it was) which is almost entirely outside the stipulated area, and has at most an adventitious connection with the locality, cannot be treated as an "*incident … within a one mile radius*" under the NDDA clause. Such an interpretation is to transform the cover, and radically to extend it beyond the paradigm case

105 "*When I use a word*,' *Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean, neither more nor less.*" Lewis Carroll, *Through the Looking Glass* (Macmillan, 1871).

106 FCA Skeleton §714 {**I/1/238**}.

referred to in §83 above. The far-fetched reverse-engineering which the FCA undertakes also goes to show that it is wrong in its case about the meaning of "*incident*".

The FCA's case on "within a one mile radius"

103. As to the FCA's primary case,[107] even assuming it is otherwise an incident for these purposes, the nationwide pandemic emergency does not itself qualify. It had nothing to do with the relevant area of a one mile radius.

104. Nothing else referred to in the FCA's primary case, and certainly not the publishing of the Government's action plan on 3 March nor the elevation on 12 March of the risk level to "*high*", was an "*incident*" everywhere in the UK and thus "*within a mile or the vicinity of the premises*". It is nonsensical to say that publication of an action plan by the Department of Health in Westminster was an "*incident*" within one mile of an insured in Newcastle.

105. As to the alternative case, if the mere presence of a person (possibly undiagnosed or asymptomatic) with COVID-19 at a place can really be characterised as "*incident*" within the meaning of the NDDA clause, which it cannot, Hiscox accepts that it would in principle be possible to prove that someone with COVID-19 was within a mile or the vicinity of the premises. As to how this might be proved, see section H below.

106. On the word "*vicinity*", a separate point arises. A "*vicinity*" rather than "*one mile*" limit appears in some Hiscox 2 policies.[108] As to this:

    106.1 The FCA's primary[109] case on "*vicinity*" appears to be that from 31 January (when the first UK case of COVID-19 was diagnosed) there was an "*incident*" within the "*vicinity*" of every single insured in the UK. This primary case proceeds on the basis that any given insured is in the "*vicinity*" of the whole of the UK. So, for example, a case of COVID-19 in Stranraer is (according to the FCA) within the "*vicinity*" of Newport Pagnell, because both towns happen to be in the UK. This is more Humpty-Dumpty construction. The word "*vicinity*" derives from *vicinus* (neighbour). It means adjacent

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107 POC §43 {**A/2/28-29**}.

108 It is unclear from the POC what the FCA's case is against Hiscox as to the meaning of 'vicinity', since the FCA pleads a case about this word against RSA only in POC §41.5 {**A/2/27**}. It appears from POC §43 {**A/2/28-29**} that this may be advanced against Hiscox too. This lack of clarity, moreover, remains despite §§176-187 {**I/1/66-71**} and 721 {**I/1/240**} of the FCA skeleton.

109 POC §41.5(a) {**A/2/27**} and §43 {**A/2/28-29**} and FCA skeleton §719 {**I/1/239**}.

to or nearby. On any objective view, Newport Pagnell is not adjacent or close to Stranraer. The primary case is absurd.

106.2 The FCA's alternative case appears to be[110] that an occurrence of COVID-19 will "*always*" be in the "*vicinity*" if it is in the same "*city, town village or other development*" as an insured.[111] This alternative case is only moderately less unacceptable than the primary case. It is possible that a case of COVID-19 in a small village would be in the "*vicinity*" of an insured in that place. That is far less likely to be the case in a town. Reading is a town with a population of some 230,000; a case of COVID-19 in one household close to the Madjeski Stadium in South Reading is not in the "*vicinity*" of an office in Caversham, which is about 17 miles away, over the River Thames, in North Reading. The alternative case is almost bound to be wrong in a city: a case in Hackney is not in the "*vicinity*" of South Kensington. It is not clear what if anything the reference to "*other development*" adds.

(3) There was no "*denial of or hindrance in access*"

The FCA's case

107. The FCA has a compendious and two-fold case on what amounts to "*denial of or hindrance in access*" which is set out in POC §46-47 {**A/2/30-33**}:

107.1 The primary case[112] is that all the advice, instructions and announcements as to social-distancing, self-isolation, lockdown, and restricted travel and activities on 16 March and many occasions subsequently constituted a denial of[113] or hindrance in[114] access for the purposes of Hiscox 1-2 and 4.

110 POC §41.5(b) {**A/2/27**} and FCA skeleton §720 {**I/1/239-240**}.

111 POC §41.5(b) {**A/2/27**}.

112 POC §46 {**A/2/30**}. It was unclear from the POC whether the reference to "*lockdown*" was intended to encompass Regs. 6 and 7 of the 26 March Regulations {**J/16/4-5**} or whether the intention was to refer only to non-mandatory matters. It now appears (FCA Skeleton §69 {**I/1/31**}) it was intended to encompass Regs.6 and 7. Regs. 6 and 7 are dealt with in §§117-123 below. If there was any denial of or hindrance in access (which Hiscox denies for the reasons set out in §§108-115 below), it can only have been pursuant to Reg. 2 of the 21 March Regulations {**J/15/2**} and Regs. 4 and 5 of the 26 March Regulations {**J/16/2-3**}.

113 POC §46.1 {**A/2/30**}.

114 POC §46.3 {**A/2/31**}.

107.2 The "*[f]urther or alternatively*" case[115] is, as regards businesses in Categories 1, 2, 4, 6 and 7, that when "*ordered*" to close the premises or cease the business or only to provide take-away or mail order/online business on 20, 21, 23, 24 and/or 26 March, there was a denial of access[116] or hindrance in access[117] at that time.

The matters alleged by the FCA cannot amount to denial of or hindrance in access

108. Hiscox's primary case is that the NDDA clause is wholly inapplicable.[118] The NDDA clause is concerned with an incident which results in a "*denial of or hindrance in access to the insured premises*". The word "*access*" means ability to reach the insured premises. The clause is concerned with physical or legal inability or difficulty in getting to and into the insured premises. It is not concerned with the insured's ability to use the premises for any particular purpose (or not). The difference is between a police cordon preventing access to the premises of a restaurant (which would be a denial of access), and a law ordering the closure of all restaurants (which would not prevent the owner (say) from getting to and entering the premises). The NDDA clause only covers denial of or hindrance in access, i.e. the prevention of or a hindrance in reaching or entering the premises, not prevention of a particular use or closure of particular types of business. The latter is dealt with by the Public Authority clause, which is concerned with "*inability to use*" insured premises, and is discussed in section F below.

109. The FCA seeks to ignore this difference. It gives an example of a shop owner who could visit a shop to attend a fire or flood, but says there is "*no access for the purpose which is insured, namely making money by selling clothes to customers*".[119] Access is not qualified by purpose; use involves some purpose. A further example makes the same error.[120] Purpose is simply an irrelevant concept under the NDDA clause. Yet the FCA seeks to put an impermissible major gloss on the plain words: "*None of the key participants or attendees can have access in furtherance of the usual scope of the insured business or activity*."[121]

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115 POC §47 {**A/2/32**}.

116 POC §47.1 {**A/2/32**}.

117 POC §47.3 {**A/2/32**}.

118 Defence §85.3 {**A/10/23**}.

119 FCA Skeleton §147 {**I/1/56**}.

120 FCA Skeleton §149 {**I/1/57**}.

121 FCA Skeleton §507 {**I/1/179**}.

110. The clause is dealing with denial of or hindrance in access to all (insured and customers) without distinction. The FCA points out[122] that Hiscox does not contend that the denial of access must be limited to that of the insured or employees. That is correct. It then makes the illogical leap that denial of access can relate to anyone including customers and suppliers. The reason there is no "*your*" in denial of access is because the denial of or hindrance in access referred to applies indifferently to all. That is clearly what is intended. The incident results in no one being able to access the premises. It is not enough if a certain person or a certain class of persons cannot get access. Suppose a celebrity chef is booked to cook at a restaurant for one week only; expectant diners have booked for weeks ahead. On his way there, and whilst within a mile of the restaurant, he becomes involved in a fight and is arrested and remanded, so is prevented from cooking at the restaurant. The insured's business is interrupted as a result, since there is no other chef of comparable standing who can stand in, and the restaurant closes for the week. On the FCA's reasoning, that would amount to a denial of access within the meaning of the clause, which would give rise to a claim.

111. The NDDA clause is similar to others in the Hiscox wordings which are concerned with denial of access in the event of damage. The "*Denial of access*" clause, which appears immediately before the NDDA clause, is in the following terms:

> "*Denial of access*
>
> *[ ]* ***insured damage*** *in the vicinity of the insured premises which prevents or hinders* ***your*** *access to the* ***insured premises***." [123]

112. Similarly, the "*Bomb threat*" cover provides (insofar as relevant) as follows:

> "[4] ***your*** *total inability to access the* ***insured premises*** *due to restrictions imposed by the police or the British Armed Forces caused by the presence or suspected presence of an incendiary or explosive device within the insured premises or within the vicinity of the insured premises…*"[124]

113. Both of these clauses are clearly concerned with a situation in which the insured cannot or is hindered in accessing, i.e. getting to, the insured premises. What is covered is a situation

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122 FCA Skeleton §725 {**I/1/240**}.

123 For example, see the Hiscox 1 lead policy Retail BI-16105 at {**B/6/41**}.

124 For example, see the Hiscox 1 lead policy Retail BI-16105 at {**B/6/41**}.

in which it is impossible (or difficult) physically or legally to reach or enter the insured premises, such as where the bomb disposal unit has erected a cordon following a bomb scare. They are not concerned with a situation in which the insured premises are required by law to close to the public, or the specific business is ordered to cease.

114. Thus, even the most stringent measures taken in response to COVID-19, i.e. the 21 and 26 March Regulations which mandatorily required the closure of certain premises or the cessation of certain businesses did not result in any denial of or hindrance in access to the premises. Those Regulations said nothing at all about ability to access the insured premises, and indeed they necessarily permitted and contemplated such access. The Regulations were concerned with the use to which certain premises may and may not be put. For example, Reg 4(1) required certain types of premises to cease selling food or drink for consumption on the premises, and in that sense to "*close*" them. However, restaurants and pubs required to close were permitted to continue as or convert to takeaway and/or shops.[125] Businesses could continue or adapt in this way because access to their premises, by owners, suppliers and customers alike, was never prevented or hindered. The use of premises for a particular purpose is not the same as access to those premises, and the NDDA clause is concerned only with the latter.

115. On this basis, the NDDA clause simply does not apply at all.

Alternatively, there was no denial of or hindrance in access except as regards businesses forced to close or cease business

116. If Hiscox is wrong that the NDDA clause is wholly inapplicable, its application is limited by the following two points:

116.1 The word "*imposed*" clearly means that only mandatory regulations or orders, i.e. those which have the force of law and are compulsorily applicable, could amount or give rise to a denial of or hindrance in access for the purposes of the clause;

116.2 There would only be a denial of or hindrance in access if there was an order for closure or cessation of business.

[125] For example: https://www.stamfordmercury.co.uk/news/landlords-invite-locals-to-shop-at-the-pub-9107903/ {**K/229**}.

"Imposed"

117. The word "*imposed*" appears in the Public Authority clause and more detailed submissions are developed from §191 below, but in short it clearly connotes something mandatory. The denial of or hindrance in access in the NDDA clause must be "*imposed*" by any civil or statutory authority or by order of the government or any public authority. It is not something suggested, requested or advised by such authorities. It connotes something compulsory and inescapable, not optional. There is no question but that each of the types of authority referred to in the clause has the power to impose (in the above sense) denial of or hindrance in access.

118. As regards the government and other measures relied on by the FCA in POC §18 {**A/2/7-13**}, only the 21 and 26 March Regulations are mandatory in the sense required, namely something which has the force of law, and compliance with which is compulsory.

119. Thus, non-mandatory advice, guidance, and information to whatever effect and in whatever terms cannot amount to a denial or hindrance of access which is "*imposed*" within the meaning of the clause.

120. If (contrary to Hiscox's primary case above) there was any denial of or hindrance in access to the insured premises at all, it was therefore limited to situations in which there was mandatory closure of the premises or cessation of business pursuant to Reg. 2 of the 21 March Regulations {**J/15/2**} and Regs. 4 and 5 of the 26 March Regulations {**J/16/2**}. The specific Regulations identified required either the closure of premises or the cessation of certain specified types of business (e.g. serving food for consumption on the premises). It is only where closure of premises or cessation of business was required that one could conceivably argue that there was any denial of or hindrance in access "*to the* ***insured premises***". By contrast, there was on no possible view any denial of or hindrance in access as regards businesses permitted to stay open (such as Category 5 businesses), and which could be entered and worked in insofar as working from home was not reasonably possible.

121. In this context, Regs. 6 and 7 of the 26 March Regulations {**J/16/4-5**} are simply not relevant. Reg. 6 embodied the lockdown, providing that during the emergency period "*no person may leave the place where they are living without reasonable excuse*".[126] That Regulation does not

126 Reg. 6(1) of the 26 March Regulations {**J/16/4**}.

deny or hinder access to the insured premises. It does not concern the insured premises at all and does not affect access to them; it is not aimed at or specific to the insured premises or indeed any business premises. There is no prohibition against going to the insured premises. The effect of Reg. 6 is to prevent people from leaving their homes without reasonable excuse. The fact that a would-be customer living 10 miles away from the insured premises cannot leave his home without reasonable excuse and is therefore not allowed to visit (among myriad other places) the insured's premises is nothing to the point. One cannot equate the general prohibition subject to reasonable excuse in Reg. 6 with a denial of or hindrance in access to a particular premises.

122. Suppose that a customer living in Manchester wished to visit his gunsmith in Mayfair. In view of Reg. 6, he was not allowed to leave his home in Manchester without reasonable excuse. That is not a denial of access to the gunsmith's premises. Reg. 6 says nothing whatsoever about access to the gunsmith or any other business: it is concerned only with the circumstances in which the customer could lawfully leave his own home in Manchester. If the FCA's case were correct, Reg. 6 would fall to be construed as a denial of access to every single place in the UK which the customer in this example does not have a reasonable excuse to visit. The notion that this sort of tortured reasoning lay within the objective contemplation of the NDDA clause is unacceptable.

123. Similar points apply to Reg. 7, which banned public gatherings of more than 2 people (with limited exceptions) {**J/16/5**}. Again, the Regulation does not concern and is not aimed at premises and does not in any way affect access to them.

(4) No incident "*within a one mile radius … which results in*" denial of or hindrance in access

124. The NDDA clause only applies where "*an incident…within a one mile radius … results in a denial of access or hindrance in access*". The "*incident … within the one mile radius*" must therefore result in the denial of or hindrance in access.

125. There is thus an inescapable and necessary causal requirement between what happens "*within"* the one mile radius (or vicinity) and the denial of or hindrance in access. The phrase "*results in*" requires a strong causal nexus. In the paradigm case of a police cordon blocking access after a fire, such a nexus would be clear.

126. Equally on the facts here, it is inescapable that the measures relied on by the FCA, and any denial of or hindrance in access, were not the result of what happened within a mile of (or within the vicinity of) any particular insured premises, but were the consequence of a national situation without reference to any specific area.

127. Thus, even if Hiscox were wrong on all its other points on the NDDA clause, it is simple common sense that any incident within the one mile radius (or within the vicinity of the insured premises) cannot possibly be said to have caused any denial of or hindrance in access. This might be thought self-evident. But the FCA argues otherwise.

The FCA's case

128. The FCA's case on this point, so far as it is possible to discern it, appears to be as follows.

129. On both its primary case (that there was an incident "*everywhere in the UK*"[127] because there was a national pandemic and/or because of what happened on 3 or 12 March or some other date which the court may determine), and its alternative case (that there was an incident when someone suffering from COVID-19 was simply in the relevant area), the basis of the FCA's approach appears to be that there is one proximate, dominant, effective cause as set out in POC §53[128] {**A/2/35**}, namely COVID-19 and the measures in response, and that no division is possible between, amongst others, two sets of matters:

    129.1 "*the 'local' disease (i.e. local manifestation of the national disease outbreak) and the national disease or pandemic*"[129] and

    129.2 *"'local' action or advice (i.e. the local manifestation of the national action or advice) and action or advice at the national level*".[130]

130. The implicit notion that these opaque terms (freighted with almost incomprehensible parentheses), and the impossibility of any distinction between them, would have formed part of the pre-contractual perception of the "*reasonable citizen*"[131] can hardly be taken seriously.

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127 POC §43 {**A/2/28**}.

128 Foreshadowed in POC §42 {**A/2/30**}.

129 POC §53.2(a) {**A/2/35**}.

130 POC §53.2(c) {**A/2/35**}.

131 Reply §13.1 {**A/14/8-9**}.

131. Be that as it may, the FCA's case in relation to the first set is elaborated in POC §54 {**A/2/35-36**} where it is said that, where the disease, emergency or public authority intervention[132] are required to be within "*a particular locality to the premises*", that prevents coverage for solely remote events, not for local and nationwide events. Reliance is placed both on (i) the alleged lack of any express wording concerning events operating at both a local and a national level, and (ii) the reference to "*government*" in the most common form of the NDDA clause, the use of which, it is alleged, contemplates cover in the case of a wide-area/national pandemic.

132. The FCA's case in relation to the second set is expanded upon in POC §56 {**A/2/36**} where it is said that all public authority actions are part of an indivisible and interlinked strategy and package of national measures.

133. This leads on to allegations in POC §64 {**A/2/40**} and §65 {**A/2/41**} that:

133.1 As regards the FCA's primary case, the relevant authority action itself resulted from an incident[133] within one mile or the vicinity for the purposes of Hiscox 1-2 and Hiscox 4;[134] and

133.2 As regards the alternative case, that "*all public authority advice, instructions and regulations that post-dated COVID-19 being carried or contracted by a person within 1 mile or within the vicinity of the premises*" [135] were a result of the incident.

134. Both these cases are, with respect, again hopeless.

FCA's primary case

135. Taking the FCA's primary case – i.e. that the nationwide COVID-19 pandemic and/or what happened on 3 or 12 March or some other date, was itself an incident "*everywhere in the UK",* for the purpose of the NDDA clause, and that this "*incident*" within the one mile radius

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132 None of these terms is in fact used in the Hiscox NDDA clause.

133 This "*incident*" for the purposes of the primary case as per POC §43 {**A/2/28-29**} is, as explained above, confused. It may refer to the particular situation or actions on 3 or 12 March (or other date) or the nationwide pandemic. This confusion is not resolved by FCA Skeleton §719 {**I/1/239**}.

134 Hiscox 1-2 and Hiscox 4 appear to have been omitted in error after the words "*'resulted' from*" in the second line of POC §64 {**A/2/40**}, which is confined to an Amlin wording.

135 This word "*contracted*" is added here, although it does not appear in POC §43 {**A/2/28-29**}.

resulted in a denial of or hindrance in access[136] – it is clear, even on its own formulation of the case, that it was not an incident within the one mile radius or the vicinity which resulted in the denial of access, but an incident everywhere in the UK.

136. This is an inevitable recognition that what resulted in the imposition of any denial of or hindrance in access was the national situation, without reference to any particular area, let alone an area within one mile of or the vicinity of any particular premises. Indeed, the FCA itself pleads[137] that all of the advice and actions set out in POC §18 {**A/2/7-13**} were imposed on all locations in England and Wales at the same time "*because of the anticipation and occurrence of a nationwide pandemic. They were not limited to particular areas where COVID-19 was present or feared … because all of the UK was at risk.*"[138]

137. It is no good for the FCA to say[139] that the wording of the NDDA clause does not differentiate between incidents at a local and a national level because it does not contain words to the effect that the incident must be solely within the one mile radius (or vicinity). The meaning of the words that are used is quite clear. The denial or hindrance must be imposed as a result of an incident "***within***" the one mile radius or the vicinity.

138. Nor is there any significance in the fact, also relied on by the FCA,[140] that there is reference to "*government*" amongst other authorities in the NDDA clause. The word "*government*" is wide and vague. In any event a localised incident, for example an attack involving a deadly poison like Novichok, which might be thought beyond the capacity of any local authority to deal with, could attract direct government intervention. It is simply a case of the draftsman covering the bases. The suggestion that the inclusion of "*government*" means that a wide-area incident was being contemplated would not have any weight even on its own, but what is certain is that a wide-area incident is flatly inconsistent with the reference to a one mile radius or vicinity.

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136 POC §64 {**A/2/40**}, which repeats POC §42 {**A/2/28-29**}.

137 POC §42 {**A/2/28**}.

138 See also POC §43 {**A/2/28-29**}, which describes "*a nationwide emergency arising out of a highly contagious disease…*"

139 POC§54.1 and 54.2 {**A/2/34-36**}.

140 POC§54.3 {**A/2/36**}.

FCA's alternative case

139. The FCA's formulation of its alternative case on this aspect is particularly striking: it begins with the identification of "*all of the public authority advice, instructions and regulations that post-dated COVID-19 being carried or contracted by a person within 1 mile or within the premises were a result of … an incident*".[141] That is a *non sequitur*. *Post hoc* is not equivalent to *propter hoc*. It simply ignores the causation requirement in the clause that the denial of or hindrance in access must result from the incident within the one mile radius. It is in effect an admission that the requirements of the clause cannot be satisfied in this respect. This approach and effective admission is repeated in the characterisation of the case in the FCA's skeleton: "*All of the Government's actions subsequent to their [sic] being an incident within one mile/the vicinity led to the action*".[142] The FCA skeleton states repeatedly that "*if there was a case of COVID-19 within 25 miles or 1 mile of the premises then that was part of what the Government was responding to.*"[143]

140. The FCA argues that "*If there was a case of COVID-19 within 1 mile or the vicinity of the premises then that was part of what the Government was responding to. … It would be absurd to argue that the incident was nowhere within the country*".[144] The answer is that of course the disease was not nowhere; but from the point of view of the cause of the government action, it was nowhere in particular, and certainly not within a mile or the vicinity of any insured's premises.

141. The government measures taken in response to COVID-19 did not result from any individual infected with the disease being at a particular place at a particular time. The government did not pass the Regulations (or do anything else) because of the disease being in any particular location, and the FCA itself admits this.

142. The causation requirement in the NDDA clause cannot be satisfied, no matter how the FCA attempts to distort the meaning of the word "*incident*". Indeed, the contortions of the FCA's case on this point underline that Hiscox 1, 2 and 4 cannot objectively have been intended to provide cover in this situation.

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141 POC §65 {**A/2/41**}.

142 FCA Skeleton §728 {**I/1/241**}.

143 FCA Skeleton §§825 {**I/1/269**}, 902 {**I/1/289**} and 996 {**I/1/316-317**}.

144 FCA Skeleton §730 {**I/1/241-242**}.

143. The NDDA clause can therefore have no applicability, for each of the independent reasons set out above.

"Interruption"

144. Even if the FCA could overcome all of the obstacles above, an interruption to the insured's business would need to be shown, as a separate and distinct element. "*Interruption*" is dealt with in the context of the Public Authority clause from §277 below.

G. COVERAGE – THE PUBLIC AUTHORITY CLAUSE

145. The main Public Authority clause[145] (subject to immaterial variations[146]) provides (including the stem) as follows:

> "*We will insure you for* ***your*** *financial losses and other items specified in the schedule, resulting solely and directly from an interruption to* ***your activities*** *caused by:*
>
> *…****your*** *inability to use the* ***insured premises*** *due to restrictions imposed by a public authority during the* ***period of insurance*** *following:*
>
> *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;* [147]
>
> *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****.*"

146. Eight Hiscox 2[148] and three Hiscox 3[149] wordings omit paragraph d., the "*defects in the drains or other sanitary arrangements*", and thus have only four paragraphs under "*following*". This difference is immaterial.

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145 As taken from the Hiscox 1 lead policy Retail BI-16105 {**B/2**} at {**B/41-42**}. This is used because, as previously stated in §233.3, 16,181 out of 32,125 policyholders have Hiscox 1 policies and because (subject to the points in §§146 and 147) the wording is representative.

146 (1) The immaterial variations in the stem are addressed in §73 above in relation to the NDDA clause. (2) While all the Hiscox 1 wordings, one of the Hiscox 3 wordings and two of the Hiscox 4 wordings refer to an inability to use the "***insured premises***", this term is not used in the Hiscox 2 wordings, nor is it universal in the Hiscox 3 and Hiscox 4 wordings. Rather, depending on the nature of the businesses, the wordings sometimes refer to an inability to use "***business premises***" (in ten of the Hiscox 2 wordings, two of the Hiscox 3 and two of the Hiscox 4 wordings), "***office***" (seven of the Hiscox 2 wordings), "***venue***" (in three Hiscox 2 wordings) and "***insured location***", "***hall***" and "***salon***" (which each appear in one Hiscox 2 wording). (3) Where *"insured premises"* is not used, but some other term (e.g. "***office***"), subclauses (c) and (e) simply refer to "…*consumed on the premises*" or "…*pests at the premises*", rather than using the alternative term "***office***" etc in the subclauses. The only exceptions to this are the Hiscox 2 Charity BI- 9248 wording {**B/51**} which refers in subclause (e) to vermin "*at the* ***insured location***" at {**B/51/2**} and the Hiscox 4 wordings which refer in subclause (b) to a notifiable human disease within one mile of "*the* ***business premises***" (three wordings including the Hiscox 4 lead Retail BI-15299 wording {**B/9/36**} or "*the* ***insured premises***" (wording 20155). See also Annex 2.

147 In some policies the italicised words are replaced by the defined term "***notifiable human disease***" but that term is defined in the language of the italicised words. This point also applies to the variant, referred to in §147.

148 For example, the Office BI-11335 wording at {**B/54/2**}.

149 For example, the Hiscox 3 lead Gunsmiths BI-8006 wording at {**B/8/30**}.

147. There is a material variant (Hiscox 4) which is identical to the clause quoted in §145 above, save that paragraph b. provides: "*an occurrence of any human infectious or human contagious disease, an outbreak of which must be notified to the local authority, within one mile of the* ***insured premises***."[150]

Nature of the Public Authority clause and the insured peril

148. The FCA refers to the Public Authority clause as a "*disease clause*".[151] It is not a disease clause, and to say that it is constitutes a serious mischaracterisation, transparently begging a central question in the case. In the FCA Skeleton, there has been a slight retreat from this position, so that the Public Authority clause is now described as a "*hybrid public authority/disease wording*"[152] This remains, however, equally objectionable as a description of the clause.

149. A more accurate summary of the essence of the insured peril is that it consists of public authority "*restrictions*". In particular, the clause insures against a narrow range of restrictions imposed by a public authority that both (i) relate to the use of the insured premises by the insured and (ii) have the effect that the insured is unable to use those premises.

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

150.1 In the absence of any term indicating the contrary in any of the Hiscox wordings before the court, titles or headings may be taken into account as aids to construction.[153] The title of the clause is "*Public Authority*". That is clearly shorthand for Public Authority actions, and the only actions mentioned in the clause are "*restrictions*".

150.2 Linguistically, the words from "*interruption*" to "*restrictions*" all look forwards to "*restrictions*". The words after "*restrictions*" all look back to "*restrictions*".

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150 Wording 20155 {**B/71/2**}. As set out in footnote 146 above, the other three Hiscox 4 wordings including the lead refer not to *"**insured premises**"* but to *"**business premises**"*. The difference is immaterial.

151 This misnomer is applied to the Hiscox wordings specifically in POC §4.3 {**A/2/4**} and §67 {**A/2/41**}, and in Schedule 4 at {**A/2/74**}, {**A/2/87**}, {**A/2/92**}, and {**A/2/95**}. The Questions for Determination deploy the slightly different but equally inaccurate phrase "*Disease cover*" at {**A/5/2**} and {**A/5/4**} fn. 56.

152 FCA Skeleton e.g. heading above §329 {**I/1/128**}, and at §331.1 {**I/1/128**}.

153 ***Lewison*** §5.13 {**K/202/45-47**}.

150.3 As a matter of substance, the words from "*interruption*" to "*restrictions*" describe the effect which the relevant restrictions must have, namely that the insured is unable to use the insured premises causing an interruption to the insured's activities. The words after "*restrictions*" describe the reasons for the restrictions which fall within the cover.

150.4 As regards the other provisions of the BI sections of Hiscox 1-4, the following are of note:

> "*Indemnity period*
>
> *The period in months, beginning at the date of the* ***insured damage*** *or* ***insured failure*** *or the date the restriction is imposed, and lasting for the period during which* ***your income*** *is affected as a result of such* ***insured damage***, ***insured failure*** *or restriction, but for no longer than the number of months stated in the schedule.*
>
> …
>
> *Under-insurance*
>
> *If, at the time of the* ***insured damage***, ***insured failure***, ***loss of licence*** *or restriction* ***we*** *establish that*
>
> *1. the* ***annualised amount insured****;*
>
> *2. the* ***annualised declared amount****…*
>
> *does not represent* ***your*** *actual* ***income*** *or* ***your*** *actual* ***gross profit*** *during the 12 months immediately preceding the date of the* ***insured damage, insured failure*** *or restriction, we will reduce the amount* ***we*** *pay…*"[154]

151. Reference may also be made to the particular trends clauses that appear in twenty-six of the forty Hiscox wordings[155] before the court. These trends clauses expressly refer to amending the amount paid to the insured in a way that reflects the result that would have been achieved *"if the restriction…had not occurred."* Thus, the Hiscox 2 lead wording provides:

> "*The amount we pay for loss of* ***income*** *or loss of* ***gross profit*** *will be amended to reflect any special circumstances or business trends affecting* ***your business****, either before or after the loss, in order that the amount paid reflects as near as possible the result which would have been achieved if the* ***insured damage*** *or restriction had not occurred.*"[156]

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154 Hiscox 1 lead wording at {**B/6/44-45**}. Nine Hiscox wordings use a different form of Under Insurance provision, but this too refers to *"restriction"*. For example, the Hiscox 4 lead under insurance provision provides: "…*If the* ***annualised amount insured*** *is less than 85% of* ***your*** *actual* ***gross profit*** *during the 12 months immediately preceding the date of the* ***insured damage***, ***insured failure***, ***cyber-attack*** *or restriction, the amount* ***we*** *pay will be reduced in the same proportion as the under insurance.*" {**B/9/37**}.

155 Twenty of the Hiscox 2 wordings, three of the Hiscox 3 wordings and five of the Hiscox 3 wordings. See Annex 2.

156 {**B/7/26**}.

152. It is therefore clear that other important provisions of the wordings characterise the insured peril as "*restrictions*".

153. By reason of all these points, it is plain that the insured peril is public authority "*restrictions*" of the type specified.

Hiscox's points on the Public Authority clause

154. Hiscox's points on the Public Authority clause[157] are as follows:

154.1 The clause refers to "***your*** *inability to use*" and, therefore, the person whose inability to use is contemplated and required is the insured, and no one else.

154.2 Inability denotes the state of the insured being unable to use, nothing less.

154.3 The "*restrictions*" referred to, particularly because of the use of the word "*imposed*", must be mandatory. They must also have the effect that the insured is unable to use its premises. The only restrictions capable of fulfilling these requirements (and then only in respect of businesses covered by them) are Reg. 2 of the 21 March 2020 Regulations {**J/15/2**} and Regs. 4 and 5 of the 26 March Regulations {**J/16/2-4**}.

154.4 The only "*occurrence*" which is contemplated by the clause is one which is local and specific to one or more of the insured, its business or its premises. There was no such occurrence here.

154.5 The clause contemplates an "*occurrence*" that must be identifiable – i.e. (in this context) a case of COVID-19 that has been scientifically confirmed. An unidentifiable occurrence could never lead to public authority action.

154.6 The word "*following*", requires a causal connection and there was no such connection between any occurrence in the above sense and the restrictions.

154.7 Interruption means cessation, not something less.

155. These points are now addressed in turn.

157 As taken from the Hiscox 1 lead policy Retail BI-16105 {**B/6**}.

(1) "*[Y]our inability to use*"

156. The word "*your*" in the phrase "*your inability to use*" makes quite clear that the person whose inability to use is required is the insured (i.e. the person whose business it is) and no one else. The clause together with the stem makes clear that the "*use*" in question is use for the purpose of the insured's business activities. The FCA correctly admits that the effect of "*your*" is that the inability of use must be that of the insured itself.[158]

157. It follows that inability on the part of the customers or other persons is immaterial. Customers would not be "*us[ing]*" the premises in this or any other relevant sense. HAG attempts to deal with this difficulty by ignoring the language of the clause; it boldly submits[159] that "*your inability*" in context means "*the inability to use*" (original emphasis). That is simply not what the clause says.

(2) "*[I]nability to use*"

158. The word "*inability*" is unambiguous. It means that there must be some (most likely) legal obstacle which makes it impossible for the insured to use the premises for its business activities.[160] The condition of "*inability to use*" is plainly not met by virtue of the use of the insured premises becoming merely more difficult or inconvenient, or requiring adaptation (e.g. to cater for social distancing). The words employed are "*inability to use*" not, for example, "increased difficulty in using". Nor is the condition satisfied because the insured is unable to use merely part of the insured premises. There is no qualification of the word "*inability*", so there is no warrant for reading it as referring to partial inability. The factual question which arises is simply: can the insured use its premises for its business activities or not? If the answer is yes, there is no inability to use within the meaning of the clause. Whilst this may involve a question of fact, in many cases whether or not there is inability to use will be obvious (see the examples in §173 below).

158 FCA Skeleton §363 {**I/1/137**}. Further, at §124 of its skeleton {**I/3/42**}, HAG concedes that the phrase inability to use is capable of being interpreted as Hiscox says it should be.

159 HAG Skeleton §127 {**I/3/43**}.

160 Most likely, given that the Public authority's restrictions imposed are most likely to be of that character.

159. In the Bomb threat clause[161] reference is made to "*your total inability to access*". The FCA says[162] that there is some significance to be ascribed to the fact that the Public Authority clause does not refer to "total inability to use". It has been explained in §§48-50 above that pointing to small differences between clauses in a wording which may well have had different clauses added to it at different times is unlikely to be a fruitful exercise. Nonetheless, the use of "*total*" here is readily explicable. Other clauses in the same BI wordings refer to "*denial of or hindrance in access*". The word "*total*" objectively reflects the parties' desire to make clear that only if there was no access at all would the clause bite in the case of a bomb threat. This is emphasised by the use of "*total access*" in the last line of the clause.

The FCA's case on "inability to use"

160. The FCA's case is that "*inability to use*" means "*the inability to utilise or employ the premises for or with its intended aim or purpose, i.e. for the insured's business activities*".[163] That formulation is then developed into a case that any deviation from the intended aim or use is sufficient to amount to an "*inability to use*". It is very broad and wholly unrealistic. It is important for Hiscox that the court should state in terms that this argument is far too wide, and that the mere fact that the way in which the business is carried on at the premises has to adapt to reflect new conditions does not constitute "*inability to use*".

161. In line with this breadth of approach and without justification or explanation, the FCA asserts that the "*inability*" may be partial or total.[164] There is an attempt to justify this construction by reference to the fact that the uninsured working expenses including Rent which are to be deducted from Gross Profit include rent "*for the business premises that you must legally pay whilst the business premises or any part are unusable as a result of insured damage, insured failure or restriction*".[165] The FCA says this would make no sense if the inability to use were not triggered by a partial inability to use, but this is obviously a bad point. Among other answers,

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161 Which appears in all the Hiscox 1 wordings, four Hiscox 2 (Venues BI-7103 WD-CCP-UK-PVB(2) {**B/49**}, Venues BI-7103 WD-VEN-UK-PYZ(3) {**B/50**}, Charity BI-9248 {**B/51**}, Sport Leisure-11431{**B/62**}), one Hiscox 3 (Cricket Club BI-14174) and two Hiscox 4 wordings (Bowling Clubs-15480 {**B/70**} and 20155 {**B/71**}.

162 FCA Skeleton §367 {**I/1/139**}.

163 FCA Skeleton §360 {**I/1/137**}; see too §338.1(a) {**I/1/131**}.

164 FCA Skeleton §360 {**I/1/137**}.

165 FCA Skeleton §369 {**I/1/139**}. The FCA also attempts (FCA Skeleton §367 {**I/1/139**}) to rely on the supposed contrast to the Bomb Threat and the fact that clause refers to *"total inability"* rather than *"inability"*. This is a bad point addressed above at §159.

the clause includes reference to "*insured damage*" and "*insured failure*", both of which could result in partial inability to use. The draftsman included the reference to "*any part…*" because of the inclusion of those perils, rather than have more cumbersome drafting dealing with each of the three matters (insured damage, insured failure and restriction) separately. This detailed quantification provision could in any event hardly be a useful guide to the meaning of "*inability to use*".

162. The FCA's case on inability to use relies upon the same matters as regards denial of or hindrance in access; here again, there is a two-fold approach.[166] First, the FCA says that all the advice, instructions and guidance given on and after 16 March as to social-distancing, self-isolation, lockdown and restricted travel and activities "*amounted*" to an inability to use.[167]

163. Secondly, the FCA says that the measures which the FCA identifies as orders[168] in POC §47 gave rise to an inability to use.[169] In fact, of the matters identified by the FCA as orders in POC §47 {**A/2/32-33**}, only the 21 March and 26 March Regulations were mandatory.

164. As regards the non-mandatory advice, instructions and guidance on and after 16 March which are identified in POC §18,[170] these could not give rise to an "*inability to use*" because they had no legal force. They did not mean that the insured (or for that matter anyone else) was unable to use premises. They were incapable of creating such inability. They did not create a legal, still less a physical, obstacle to use. Compliance with such advice, instructions and guidance was and is a matter of choice.

165. The suggestion,[171] for example, that the 16 March 2020 statement of the Prime Minister was not just advisory because "*it explained repeatedly what the Government was asking people to do and*

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166 Confirmed by the FCA Skeleton §§338.1 and 338.2 {**I/1/131**}.

167 POC §46 {**A/2/30-32**}. As set out in footnote 112 above in relation to §95.1 above, it is unclear from the POC whether the FCA's case is confined to non-mandatory action. It now appears (FCA Skeleton §69 {**I/1/31**}) the FCA's primary case is not confined to non-mandatory action, but is intended to encompass Regs. 6 (lockdown) and 7 of 26 March Regulations. Hiscox says that the only government actions capable of creating an inability to use were the mandatory requirements of Regulation 2 of the 21 March Regulation and Reg. 4 and 5 of the 26 March Regulation. See §172 *ff.* below.

168 POC §47 {**A/2/32-33**}.

169 POC §47.2 {**A/2/32**}.

170 POC §46 {**A/2/30-32**}.

171 Reply §11 {**A/14/7**}. This point is maintained in the FCA Skeleton at §§118 {**I/1/47**}, 123 {**I/1/48-49**} and 376 {**I/1/141**}. In the last of these it is, however, conceded that in the speech the Government *"…used the word 'advice' but also explained repeatedly what the Government was 'asking' people to do and explained what they 'should' do and what the Government would 'no longer be supporting'.* Despite the FCA's attempts to suggest otherwise, this is not the language of imposition.

telling them what they "should" do and what the Government would no longer "be supporting"" only serves to reinforce the point that such advice or guidance was not mandatory.

166. The allegation in Reply §13.1 {**A/14/8-9**} that "*prohibition does not require legal force, it requires that something is forbidden by someone with authority*" is plainly wrong and a *non sequitur*. If the Prime Minister suddenly announced that people must immediately stop smoking, that would not be an effective prohibition; it would have no legal status. The "*understanding of the reasonable citizen*" invoked here has no basis at all and could not conceivably be used as a tool of contractual construction. Equally as to the points in Reply §17 {**A/14/11**} on social distancing, there is no concept of executive prohibition (so far as material) and fastening upon the word "*must*" adds nothing. The verb is often used in a hortatory, rather than mandatory way. The points on the legal status of government advice and guidance are developed further in §§169-192 below.

167. At this point it is necessary to divert briefly in order to deal with the FCA's reference in this context[172] to the meeting between various insurers (including Hiscox) and the Chancellor of the Exchequer, which was the subject of the statements on 17 and 18 March pleaded in POC §18.11 to 18.13 {**A/2/9-10**}.[173] This is relied upon by the FCA in POC §48 {**A/2/33**} in support of its case that non-mandatory advice, instructions and guidance were sufficient to trigger cover.

168. Having pleaded (in summary) that the Chancellor announced that he had agreed with insurers that policies would respond as if the advice given had been an order, footnote 2 states {**A/2/9**}:

> "*The FCA does not seek to prove that any particular matter was agreed between the insurers and the Government, but that …it was incumbent on insurers to inform the Government if they disagreed, so that the Government could take further steps to ensure that such policies were triggered.*"

169. On no possible view can whatever happened – admittedly not said to have been a provable agreement – or the plea of 'incumbency' affect the status of the non-mandatory advice and

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172 POC §48 {**A/2/33**}.

173 The reference at §49.6 of the FCA Skeleton {**I/1/23**} is to a written parliamentary answer given on 1 May by John Glen MP to Daisy Cooper MP. https://www.theyworkforyou.com/wrans/?id=2020-04-22.39016.h&p=24839 {**K/230/2**}.

guidance for the purposes of Hiscox 1-4, or any other policy, nor the construction of Hiscox 1-4. At the Second CMC, Flaux LJ said that, having discussed the matter with Butcher J, they were "*singularly unimpressed by the pleading*".[174] He described it as "*knocking copy*", and said: "*I can't really see what its relevance is to the issues we have to decide.*"[175] That was entirely correct. Mr Edelman QC later asked Flaux LJ to confirm that his comments were "*confined to those who were not at the meeting*", which he did.[176] The fact remains that Flaux LJ's comments are equally apposite to the plea against those Insurers who were at the meeting, and Hiscox adopts them.

170. That is an end of the matter. In truth, these matters should never have been pleaded in the first place. The plea is a crude and unsuccessful attempt to make a 'merits' point. Hiscox, does not plead in detail to these paragraphs because they are irrelevant, but denies that there was any agreement.[177] Moreover, it was not "*incumbent*" (legally or otherwise) on Hiscox to do anything.

171. The suggestion in the Reply[178] that the matters are relied upon as "*demonstrating the view that stay-at-home and equivalent orders amounted to "closure" of businesses…is a credible one*" does not specify whose credibility is invoked or why: it cannot seriously be suggested that the subjective views of Mr Sunak or of anyone else in government (whatever they were) are an admissible and relevant aid to construction. The "*credible view*" point is simply repeated without elaboration in the FCA Skeleton.[179]

172. What is relevant to the present case are the mandatory Regulations of 21 March and 26 March. Hiscox accepts that Reg. 2 of the 21 March Regulations {**J/15/2**} and Regs. 4 and 5 of the 26 March Regulations {**J/16/2-4**} may have created an "*inability to use*" insofar as they required closure or cessation of a business. As stated above, whether this is so in any given case is a question of fact, although in many cases it will be easily resolved and the court will be able to provide guidance based on assumed facts. The FCA accepts it is a question

174 CMC 2 Transcript, page 6 lines 20-22 {**F/29/3**}.

175 CMC 2 Transcript, page 7 lines 22-24 {**F/29/3**}.

176 CMC 2 Transcript, page 9 lines 5-8 {**F/29/4**}.

177 Defence §57 {**A/10/13**}.

178 Reply §12.4 {**A/14/8**}.

179 FCA Skeleton §50 {**I/1/24**}.

of fact: "*As to whether an inability to use in a given case may be a question of fact, it is a question of fact (or, more likely, a mixed question of fact and law)*".[180]

173. Take the case of a Michelin-starred restaurateur who would not dream of providing takeaway food from his restaurant. Absent special circumstances, he will be able to prove "*inability to use*" his restaurant as a result of the operation of the March Regulations. By contrast, take the case of a Chinese restaurant 80% of whose business is takeaway, and which carries on a roaring trade throughout the lockdown, no doubt buoyed by the fact that other restaurants are closed. It is plainly not unable to use its premises.[181] The way forward is not for the court to be set an essay question requiring some exhaustive, platonic definition of "*inability to use*", but rather to recognise that it is ultimately a jury question, although in many paradigm cases it will be a straightforward one.

174. The FCA seeks to criticise[182] Hiscox's approach by reference to the general obligation in the policies to take reasonable efforts to minimise loss[183] and the fact that cover is provided for additional costs incurred in order to continue activities or minimise loss of income,[184] saying that if a dine-in restaurant started a take-away service then it would be "*punished*", if it was not able still to argue an inability to use. This makes no sense. First, insureds often take steps to avoid or mitigate insured perils, and if they do so, those steps may enure to their benefit and the insurer's. That is not a punishment; it is normal business life. Secondly, if the restaurant in this case successfully adapted, it would be able to claim the costs of doing so from Hiscox.[185] It is hard to see where the punishment or injustice lies.

175. The FCA caveats its plea in POC §47 {**A/2/32-33**} (dealing with what it characterises as mandatory orders on 20, 21, 23, 24 and/or 26 March creating an inability to use[186]) with the phrase "*insofar as the business was not already a wholly take-away/mail order/online business*". That is

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181 For much the same reasons, HAG's suggestion at §125 of its skeleton {**I/3/42**} that what is required is simply *"the inability to use the premises normally"* must also be wrong.

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182 FCA Skeleton §370 {**I/1/139**}.

183 Hiscox 1 lead {**B/6/19**}.

184 The cover in respect of Additional Increased Cost of Working and Increased cost of Working is set out in the Loss of income and Loss of gross profit clauses in the Hiscox 1 lead at {**B/6/44**}. Additional Increased Cost of Working and Increased cost of Working are defined at {**B/6/40**}.

185 See the clauses referred to in the previous footnote.

186 An inaccurate characterisation as regards the 20, 23 and 24 March since only the 21 March and 26 March Regulations were mandatory.

to say that the FCA alleges that there was an "*inability to use*" unless, prior to the Regulations, the business was not wholly take-away/mail order/online.[187] That plainly goes much too far. If some take-away/mail order/online business was being conducted from the premises already, there is in principle unlikely to have been an inability to use. Again, although the answer may be obvious in many cases, it is ultimately a question of fact.

176. In this connection, the FCA wrongly states[188] that Hiscox accepts that the Regulations satisfy the test of inability to use, despite having limited exceptions. The paragraph from the Defence cited[189] as the basis for this supposed concession says no such thing. The FCA treats Hiscox's plea as a recognition that if (say) a restaurant can carry on a take-away service, that does not mean that it is still able to use its premises. That is not and never has been Hiscox's position. Its position is that the existence in a Regulation of an exception *per se* (and some exceptions are very narrow indeed) does not of itself prevent an insured claiming an inability to use. It will depend on the facts, and a restaurant conducting a takeaway business from its premises is clearly able to use them, not unable to use them.

177. The effect of Regs. 6 (lockdown) and 7 (banning public meetings) of the 26 March Regulations {**J/16/4-5**} is irrelevant. They do not concern the ability of the insured (or indeed of anyone else) to use the premises and they do not therefore amount to or create an "*inability to use*" in the requisite sense. They are directed not at the use of any premises, but at preventing people from leaving homes which may be many miles away. Use of the premises as such is unaffected.

178. Further, and as stated in §156 above, it is the insured and no-one else who uses the premises for its business activities or purposes. The relevant inability to use must be of the insured and prevent the fulfilment of the insured's business purposes. Thus, a restaurateur living above his restaurant who cooks himself an omelette is obviously not using the insured premises in that sense, and no Insurer contends that he was, or that the omelette prevents him showing "*inability to use*". It follows that Regs. 6 and 7, which prevent people from leaving home, cannot create an "*inability to use*" because any customers, even if the restaurant was open, would not themselves be using it for the insured's business purposes, but to satisfy

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187 HAG's arguments seem to be of similar effect. HAG skeleton §125 {**I/3/42**} says that *"…your inability to use the insured premises'…means your inability (in the sense of the inability to use the insured premises normally…"*

188 FCA Skeleton, footnote 265 {**I/1/109**}.

189 Defence §14.2 {**A/10/5**}.

their hunger or for some other recreational purposes. (Of course, the fact that the customer might also have chosen to entertain a business client is irrelevant, since it is only the insured's business which is covered.)

179. It is a very strained construction to treat Reg. 6, for example, as *ipso facto* giving rise to an inability to use on the part of all BI insureds everywhere, whether ordered to close or not, provided only they could not use their premises "*normally*". Reg. 6 plainly had no such effect.

180. The FCA takes issue with Hiscox's argument that it is the insured's inability to use which matters, not that of the customers.[190] The FCA says that if the business requires customers to attend premises[191] or relies on being able to invite customers in,[192] there is an inability to use the premises in view of Reg. 6.[193] However, Reg. 6 had nothing to do with people not going to businesses once they were ordered to close. Moreover, in the case of a great many insureds, including in particular those in Category 5 (which the FCA generally ignores),[194] it is perfectly possible to be a customer without leaving home. Whilst the FCA does not do so, it is important for the court to consider the position of Category 5 businesses in this context. As noted above, by the terms of Reg. 6 of the 26 March Regulations {**J/16/4-5**}, which provided that no person might leave the place where they were living without reasonable excuse, one of the matters recognised as a reasonable excuse is to travel for the purposes of work, where it is not reasonably possible to work from the place where they are living.[195]

181. The effect of Reg. 6 is thus that if an accountant needs to read an important file in his office, which he cannot remove from the office for reasons of security, he is permitted to go to his business premises for that purpose, and to spend the day reading through the file. Myriad other examples might be given in relation to professional persons, such as a lawyer who has a large set of physical files in his office which he needs to read, and cannot accommodate at home. It is also to be noted that the travel for the purposes of work excuse is not confined

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190 FCA Skeleton §364 {**I/1/137-138**}.

191 FCA Skeleton *ibid* {**I/1/137-138**}.

192 FCA Skeleton §365 {**I/1/138**}.

193 FCA Skeleton §366.1 {**I/1/138**} and the reference there to "ordered to stay at home".

194 When dealing with Hiscox 1-4 specifically as regards "*inability to use*", there is no reference to a Category 5 example: FCA Skeleton §§360-371 {**I/1/137-140**}.

195 Note the overstatement of the requirement by the FCA at FCA Skeleton §151.5 {**I/1/59**}, where they refer to travel to work being compliant with government guidance only if it is "*essential*".

to travelling to one's own office. An accountant who needed to travel to conduct an audit at a client's office would be able to do so.

182. The critical point in relation to Category 5 businesses is that, on any view (and even if Hiscox is wrong that Regs. 6 and 7 are in principle irrelevant as regards inability to use), there was no general inability to use. Not only were such businesses not ordered to close, but the premises could be used, and work done for customers there, if it was not reasonably possible to do work from home. The FCA simply fails to grapple with this at all. When dealing with prevention of use (or access) generally, it does not address the position of Category 5 businesses adequately; most of its examples are of retail or restaurants.[196] The case of a clothes shop as at 24 March is an unhelpful and proleptic example.[197] The example dealing with a Category 5 business refers to a customer being prevented from travelling to the office of a financial adviser or recruitment consultant.[198] That does not prevent the financial adviser or recruitment consultant visiting the office to get access to files and papers in order to speak to a customer or for some other valid reason. There is manifestly no inability to use the premises by reason of Regs 6 and 7.

183. However, there is a more important general point here. Those providing professional services (such as lawyers) have continued to provide their services or carry on businesses, albeit placing more reliance on technology (email, phone, Zoom, Skype, etc) to assist them in doing so. These services may not have been provided in the manner that would have been considered usual in 2019, but they have nonetheless carried on. Conducting business through Zoom or Skype has become the new normal. To the extent necessary, they are allowed to use their premises to do so.

184. The same is true of many other professionals and service providers, such as accountants and those working in financial services, as well as other Category 5 businesses. No government measure (mandatory or not and including Reg. 6 of the 26 March Regulations {**J/16/4-5**}) has prevented such businesses being carried on, if necessary from insured premises.

196 FCA Skeleton §§144-151 {**I/1/56-60**}.

197 FCA Skeleton §146 {**I/1/56**}.

198 FCA Skeleton §148 {**I/1/57**}.

185. It is a very obvious point, and in keeping with the FCA's approach, to take the case of a restaurant with no take-away.[199] The next example given,[200] of a non-food shop, is actually a bad one. A tailor is able to attend her premises, as are her employees, to do work which cannot reasonably be done at home; they can despatch clothes by post. They can work through the backlog of existing orders and indeed take new orders by telephone or email. Reg. 5(1) of the 26 March Regulations {**J/16/3**} specifically allows this; and the owner and employees are allowed to come onto the premises to do this (Reg. 5(1)(c)). Small (and large) businesses that make items for their customers can function in this way, and have done so. Thus, a cakemaker with an online business could still continue to use his premises' kitchen.

186. The adoption of social distancing measures in relation to staff and customers, quite apart from the fact that they are not mandatory, affecting any customers visiting premises does not mean there is an inability to use.[201] HAG goes so far as to suggest that social distancing measures affecting working practices of themselves amount to an inability to use: but this a hopeless point.[202] The familiar sight of the butcher's shop where the queue extends outside because of the need for social distancing is obviously not an example of inability to use.

187. Then the FCA says that Hiscox's argument means there would be no inability to use a school even if no teachers or pupils could attend.[203] This is a particularly bad example. Many schools were not closed, but have remained open for the children of key workers and the vulnerable. Even if they were only open for a sub-set of children, they were being used. Again the example of teachers being unable to hold assembly without pupils is a bad one. It is common knowledge that teachers have been holding Zoom assemblies, and giving remote lessons throughout. Furthermore, teachers can go in to schools to access material or computers for use in communicating with children.

188. The overstatement of the FCA's case is nowhere better exemplified than in §366.1 of its Skeleton {**I/1/138**}. "*It is not only a matter of customers. The owner herself or himself or the business's employees could not legally attend work. They were ordered to stay at home (save for a small number of businesses).*" That, with respect is simply not right. It is an illustration of the failure to give

199 FCA Skeleton §364 {**I/1/137-138**}.

200 FCA Skeleton §365 {**I/1/138**}.

201 FCA Skeleton §366.2 {**I/1/138-139**} simply asserts that such measures made it impractical for many businesses to operate.

202 HAG Skeleton §127 {**I/3/43**}.

203 FCA Skeleton §366 {**I/1/138-139**}.

any proper recognition to the effect of the significant qualifications and exceptions to Reg. 6. Moreover, as regards businesses permitted to stay open under Reg. 5, Reg. 6 allowed people to visit them. This point is expanded upon in the context of "*interruption*" in §310 below.

(3) The words "*restrictions*" and "*imposed*"

"*[R]estrictions*"

189. The effect which the "*restrictions*" must have is that they must cause the insured's inability to use. That is so because "*your inability to use the insured premises*" must be "*due to*" the restrictions. Thus they must create (i) an inability (ii) on the part of the insured (iii) to use the premises. Although the matter is put beyond doubt by the word "*imposed*", the fact that the restrictions must create an inability, i.e. make it impossible for the insured to use the premises, shows that the "*restrictions*" must be mandatory. Advice, guidance and instructions are not sufficient. The fact that the effect of the restrictions must be that the insured is unable to use the insured premises makes plain on its own that the only relevant restrictions which could fall within this meaning are Reg. 2 and Regs. 4 and 5 of the respective March Regulations. Regs. 6 and 7 do not create the requisite inability.

190. The FCA takes a bad point[204] that because the clause does not refer to "restrictions on you", in contrast to "*your inability to use*", the relevant restrictions can be imposed on anyone, and that must colour the meaning of "*inability to use*". The reverse is the case. "*Your inability to use*" the premises must be due to the restrictions. As stated in §189 above, the restrictions take their character from the effect which they have. They must be restrictions which cause an inability to use, and therefore they look to the position of the insured.

"*[I]mposed*"

191. The "*restrictions*" must be "*imposed*" by a public authority in order to fall within the clause. As briefly foreshadowed in §117 above in the context of the NDDA clause,[205] the word "*imposed*" clearly refers to something mandatory. It is not a word that can apply to guidance, advice or instructions which may be ignored by the recipient without infraction or legal sanction. It naturally suggests something compulsory and as having the force of law, and the

204 FCA Skeleton §368 {**I/1/139**}.

205 The submissions on "*imposed*" here generally apply to the NDDA clause as well.

fact that the imposer is a public authority which would have power to impose in this sense supports that meaning. It cannot seriously be suggested that government advice, however well-meaning, that British citizens should eat five portions of fruit and vegetables a day, or restrict their alcohol intake to some specified level, amounts to the imposition of "*restrictions*". The present guidance or advice is no different in kind. It is inherent in the very nature of such pronouncements that they are not mandatory.

192. This meaning of "*imposed*" derives further support from the "*Bomb threat*" clause,[206] cited above, where reference is made to "*your total inability to access the insured premises due to restrictions imposed by the police or British Armed Forces caused by the presence or suspected presence of an incendiary or explosive device*…" Clearly "*imposed*" there is used in the sense of something compulsory and with the force of law.[207]

193. Dictionary definitions of "*impose*" also support Hiscox's case and show that the word connotes an element of being forced or of compulsion. They include:

193.1 "*to officially force a rule, tax, punishment, etc to be obeyed or received*"; "*to force someone to accept something, especially a belief or a way of living*".[208]

193.2 "*to* ***impose*** *verb 1 – force (an unwelcome decision or ruling) on someone: "the decision was theirs and was not* ***imposed on*** *them by others." – put (a restriction) in place: sanctions imposed on South Africa.*" [209]

193.3 "***imposition*** *– noun – the action or process of imposing something or being imposed: 'the imposition of martial law.'* "[210]

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206 An example is in the Hiscox 1 lead wording Retail BI-16105 at {**B/6/41**}. See footnote 155 above for details of all the wordings in which it appears.

207 For example, section 33 of the Terrorism Act 2000 {**K/11/48**} empowers the police to cordon off an area if it is expedient to do so for the purposes of a "*terrorist investigation*". A "*terrorist investigation*" is defined by section 32 as including the "*investigation of- (a) the commission, preparation or instigation of acts of terrorism, [or] an act which appears to have been done for the purposes of terrorism*," Section 36 confers on the police various powers to enforce the cordon and makes it an offence if a person fails to comply with "*an order, prohibition or restriction imposed*" by the police for that purpose.

208 Cambridge English Dictionary {**K/215/12**}. To the same effect is the French word *impôts*, which means taxes.

209 Oxford Dictionary of English (3rd Ed.) {**K/221.1/2**}.

210 Oxford Dictionary of English (3rd Ed.) {**K/221.1/2**}.

194. In this context, HAG[211] attempts to draw a distinction between the meaning of "*imposed*" in the NDDA clause on the one hand, where it appears to be implicitly accepted that it is inherent in the word that what is "*imposed*" has the force of law, and the Public Authority clause on the other, on the apparent ground that the phrase "*by any civil or statutory authority or by order of the government*" does not feature in the latter. HAG does not explain how "*imposed*" is to be understood in the Public Authority clause in the light of this difference, or why the difference should give rise to any distinction.

195. This attempted distinction lacks grammatical coherence. The number of agents who are responsible for the imposition cannot change the meaning of the verb. In the NDDA clause, the relevant phrase is "*imposed by any civil or statutory authority or by order of the government or any public authority*"; in the Public Authority clause the phrase is "*imposed by a public authority*". Even looked at in isolation, the phrase in the latter, although shorter, is clearly referring to mandatory imposition in the same way as the former. The word "*imposed*" in the former relates to "*civil or statutory authority*" as well as government etc., and clearly has the same meaning in relation to those other authorities. Further, a "*public authority*" is one of the bodies that may impose within the meaning of the NDDA; the same type of body is mentioned in the Public Authority clause. All that is different is that more authorities are mentioned in the NDDA clause. There is no ground whatever for arguing that this changes the character of the word "*imposed*".

196. Moreover, one cannot look at the word "*imposed*" in isolation. In the Public Authority clause what has to be established is an "*inability to use due to restrictions imposed by any public authority*". The "*restrictions imposed*" must result in an inability to use, i.e. as explained above, making use impossible. Only mandatory restrictions could have such an effect. Thus "*imposed*" must, on any view, mean something mandatory.

197. Further support for this construction of "*imposed*" is provided by both the language used in the March Regulations and the nature of the public authority actions envisaged by paragraphs a. to e. of the Public Authority clause.

198. The March Regulations were made by the Secretary of State pursuant to the Public Health (Control of Diseases) Act 1984 (**the 1984 Act**), section 45C(3)(c) of {**J/5.1/15-16**} which empowered him to make regulations "*imposing or enabling the imposition of restrictions or*

211 HAG Skeleton §129 {**I/3/44**} and its Skeleton for the Intervention Application {**F/19**}.

requirements on or in relation to persons, things or premises in the event of, or in response to, a threat to public health…". This language is reflected in the preamble to both the March Regulations where it is confirmed (as was essential by reason of s.45D(1) {**J/5.1/16**} of the 1984 Act[212]) that "*The Secretary of State considers that restrictions and requirements imposed by these Regulations are proportionate to what they seek to achieve.*"

199. Similarly, the matters identified in paragraphs a. to e. of the Public Authority clause are ones in respect of which mandatory action can be taken in respect of the insured premises or their immediate surroundings that would directly affect the use of the premises. For example:

199.1 A murder or suicide might cause the police to use their common law power to close off a public right of way over private land (e.g. a shopping precinct) and prevent unauthorised persons from entering, in order to preserve and examine the crime scene.[213]

199.2 A justice of the peace may *"impose…restrictions or requirements"* including that premises be closed or destroyed if he is satisfied that the premises (or a group of premises including the insured premises) may be infected or contaminated, that the infection or contamination is one that presents or could present significant harm to human health, that there is a risk that the premises might infect or contaminate humans, and that it is necessary to make the order to remove or reduce that risk.[214]

199.3 Where the authorised officer is satisfied that the construction or state of premises used by a food business involves an imminent risk of injury to health he may by serving a hygiene emergency prohibition notice "*impose*" 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.[215] This notice can in turn lead to the magistrates court deciding to *"impose"* a hygiene emergency prohibition order confirming the prohibition imposed

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212 Which limits the Secretary of State's power to make regulations imposing restrictions pursuant to s.45C(3)(c) {**J/5.1/16**} to circumstances where he "*considers, when making the regulations, that the restriction or requirement is proportionate to what is sought to be achieved by imposing it.*"

213 ***DPP v Morrison*** [2003] EWHC 683 (Admin); (2003) 167 J.P. 577, *per* Hooper J (with whom Kennedy LJ agreed) at [25] {**K/105/9-10**}, answering in the affirmative the question (recited at [4] and [5]) {**K/105/3**}: "*whether to preserve and examine the scene where a crime is alleged to have been committed, the police may temporarily close off a public right of way over private premises and prevent unauthorised persons from entering therein*". The Court held that the police did have this power at common law.

214 Sections 45I and 45J of the 1984 Act {**J/5.1/20-22**}.

215 Reg. 8 of the Food Safety and Hygiene (England) Regulations 2013/2996 {**K/19/9-11**}.

by the notice.[216] The prohibitions imposed by the notice and the order cease to have effect when the enforcement authority has certified that it is satisfied the business has taken sufficient measures to secure that there is no longer a risk of injury to health in respect of the food business.[217]

199.4 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.[218] Further, defective drains or sanitary arrangements in a food business could pose the kind of imminent risk to health that could lead to the imposition of a hygiene emergency prohibition notice and order.

199.5 Under the Prevention of Damage by Pests Act 1949[219] 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. Again, the presence of vermin or pests at a food business would also constitute the kind of circumstances that could lead to the imposition of a hygiene emergency prohibition notice and order.

200. All of this is supported by the use of the word "*imposed*", in the sense of imposition of a legal requirement, by Lewis J in ***Dolan v (1) Secretary of State for Health and Social Care and (2) Secretary of State for Education*** [2020] EWHC 1786 [Admin] {**K/183**} when considering whether the Government had legally required schools to close in consequence of COVID-19 (see §207 below). This case is not referred to in the FCA Skeleton.

The FCA's case on "restrictions" and "imposed"

201. The FCA's case is set out in POC §44[220] and asserts that the entirety of the response of the public authorities, as set out in POC §18 {**A/2/7-13**}, without differentiation between advice, instructions and regulations was "*imposed*" and constituted "*restrictions*". This is clearly wrong for the reasons given above. The only *"restrictions imposed"* were the 21 March and 26

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216 Reg. 8(4) and 7(2) and (3) of the Food Safety and Hygiene (England) Regulations 2013/2996 {**K/19/8-11**}.

217 Regulation 8(8) of the Food Safety and Hygiene (England) Regulations 2013/2996 {**K/19/10**}.

218 Public Health Act 1961, s.17 {**K/3/8-9**} and Building Act 1984, ss.59 {**K/8/66-67**} and 99 {**K/8/106**}.

219 Sections 4 and 5 {**K/1.1/3-4**}.

220 POC §44.2 {**A/2/29**}.

March Regulations (of which only Reg. 2 of the 21 March Regulations {**J/15/2**} and Regs. 4 and 5 of the 26 March Regulations {**J/16/2-4**} are relevant: see §§154.3 and 172-57 above).

202. The FCA submits, particularly as regards "*imposed*", that the "*government is the highest authority and that when it tells its citizens to do something then that is mandatory, and is an "imposition" and an "order"*…"[221] The important thing, the FCA contends, is "*whether the core sense is what the citizen is being told/asked to do in not understood to be optional giving the citizen a genuine choice but rather to be compulsory*."[222] Further, this "*is the case whether or not the instruction is backed by legislation or not. The 2 m rule was never legislated*."[223] The FCA's case is summarised in §123.4 of its Skeleton {**I/1/49**}:

> *"All of these requirements were 'imposed' or Government 'order' or 'enforced' within the meaning of these terms, being Government interventions that the Government (and indeed the insurer) would expect UK citizens to comply with."*

203. First, the FCA's case is a striking example of its approach to factual categorisation, which pays no regard to distinctions inherent in the wordings and therefore required to be applied.

204. Secondly, on the FCA's approach the definition of "*imposed*" and "*restrictions*" is so elastic that it would be impossible to know what was within the clause and what was not. The confinement of the clause to mandatory restrictions avoids this uncertainty and is clearly what the clause was objectively intended to apply to. The suggestion of a test based on what the reasonable citizen would understand, apart from the objections in §166 above, only heightens this uncertainty point. Differing people have differing views; but the more fundamental point is that what is mandatory in the UK is not based on any view of the notional reasonable citizen.

205. Thirdly, the FCA's approach is suffused in hindsight. At the time of contracting, no one would have conceivably envisaged the introduction of guidance as to (say) social distancing, namely that human beings should not touch or approach but always stay two metres apart. The FCA seeks to widen the clause to fit circumstances never envisaged.

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221 FCA Skeleton §123.1 {**I/1/48**}.

222 FCA Skeleton §123.2 {**I/1/48**}. HAG's approach appears similar. In a half-hearted passage in the HAG skeleton at §129 {**I/3/44**} it is said: *"looked at as a matter of practical reality, it is extremely difficult to say that [statements by government including the Prime Minister" would not (in ordinary use of language) amount to restrictions".*

223 FCA Skeleton §123.3 {**I/1/48**}.

206. Fourthly, the fallacy in the FCA's approach of treating guidance as mandatory can be illustrated by their approach in relation to schools. The FCA admits[224] that while a power to give directions to restrict attendance or close schools was granted to the Secretary of State by section 37 {**J/13/25**} and Schedule 16 {**J/13/157-176**} of the Coronavirus Act 2020, no direction was given under that Act. In the Reply at §15 {**A/14/10**}, the FCA says as follows:

> "*…the legal power to close schools is not relevant: the Government closed the schools by advising the schools to close in circumstances in which this was rightly understood to be a mandatory direction, as made clear in the Prime Minister's announcement of 18 March 2020: "we think now that we must apply downward pressure, further downward pressure on that upward curve by closing the schools. So I can announce today and Gavin Williamson is making a statement now in the House of Commons that after schools shut their gates from Friday afternoon, they will remain closed for most pupils – for the vast majority of pupils – until further notice." The Chancellor then stated on 20 March 2020 : "We have closed schools"…*"

207. In ***Dolan*** {**K/183**}, the status of the government's statements/actions in relation to schools in response to COVID-19 was an issue. The applicant submitted that there had been a direction or instruction that schools should close; the government submitted that it had not exercised any power, but rather had simply <u>requested</u> schools not to provide education on school premises {**K/183/22**}.

> "*106. Mr Havers submitted that it was clear from the speeches made by ministers in March 2020 that ministers were directing or instructing schools to close…*
>
> *107. Sir James Eadie submitted that the government had not exercised any power to close schools. Rather, they had requested schools not to provide education on school premises save for the children of key workers and vulnerable children. and to comply with their continuing duties to provide education by other means...*"

208. Lewis J held that no order had been made under the Coronavirus Act 2020 to close any school and that no other power had been identified as having been exercised so as to <u>impose</u> – and it is notable that that is the term used by the judge – any legal requirement on any school in England to close {**K/183/22**}:

> "*108. There has been discussion about the precise meaning of certain of the statements made in relation to schools in March 2020. It is neither necessary, nor helpful, to spend time dealing with that matter in this judgment.*

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224 Reply §15 {**A/14/10**}; Defence §61.7 {**A/10/14**}.

> *109. The factual position is this. As at about the 18 March 2020, the government considered that education should not be provided at school premises in England save for the children of key workers and vulnerable children.*
>
> *110. The legal position is that there is currently no legal measure made by either of the two defendants requiring those responsible for running schools to close those schools. The Regulations made on 26 March 2020 prohibited gatherings in a public place but the government did not consider that schools were public places for these purposes. In any event, regulation 7 as amended and in force from 1 June 2020, and which imposes restrictions on gatherings in public and private places, specifically exempts educational facilities. No order has been made under the Coronavirus Act 2020 to close any school in England. No other power has been identified as having been exercised so as to impose any legal requirement on any school in England to close.*"

209. It is thus quite clear from the judgment that there was no "*mandatory direction*" that schools close, despite the FCA's contention in Reply §15 {**A/14/10**} that there was.

210. Fifthly, and more generally, the UK government requires a proper legal basis in order to introduce anything which is mandatory: primary or secondary legislation, something directly or indirectly approved by Parliament, is required as a foundation. This is a basic principle of our constitution. No government statement, guidance or instruction however couched can legally restrict the freedom of any citizen or be regarded as imposed on them unless it is either part of legislation or made under powers authorised by legislation. Of course, that it is precisely why the 21 March and 26 March Regulations were made, so that hortatory statements would become binding. These propositions are obvious, but require stating in view of the FCA's approach, which describes the government's "say-so" (even though acknowledged not to have the force of law) as something "*imposed*".[225] Two examples are worth reference in this regard:

210.1 Lord Sumption wrote an article in The Times on 26 March 2020, entitled "*There is a difference between the law and official instructions*" {**K/214/1**}. Referring to the prime minister's "*orders*" on Monday 23 March 2020, he stated (amongst other things) {**K/214/2**}:

> "… *in his press conference Boris Johnson purported to place most citizens under virtual house arrest through the terms of a press conference and a statement on the government website said to have "immediate effect". These pronouncements are no doubt valuable*

[225] FCA Skeleton §375 {**I/1/140-141**}.

as "advice", even "strong advice". But under our constitution neither has the slightest legal effect without statutory authority."

210.2 Reference to Agreed Facts 1 {**C/1**} also neatly confirms this. At entry 54 there is set out guidance issued to businesses by the government on 23 March {**C/1/27**}:

"*As of 2 pm on 21 March 2020, closures on the original list from 20 March <u>are now enforceable by law</u> in England and Wales due to the threat to public health*."

That is recognition by the government itself that statements about the closure of businesses on 20 March did not have legal force until the coming into force of the 21 March Regulations at 2 pm on 21 March {**J/15/1**}.

211. Sixthly, the distinction between mandatory and non-mandatory pronouncements in the present situation can be illustrated further. Obvious examples of what falls short of a mandatory restriction are:

211.1 The advice that people should regularly wash their hands for at least 20 seconds.

211.2 What is often, mistakenly, referred to, including by the FCA, as the two metre "*rule*".[226]

212. Both have been repeated by the Government on occasions beyond number, but neither is embodied in either the 21 March or 26 March Regulations. It would be not just wrong, but absurd to suggest that, for example:

212.1 A person who did not wash their hands after handling boxes from a delivery driver, or gave them a cursory rinse under the tap for a few seconds, committed an offence or could be the subject of some other enforcement action; or

212.2 A shopper attending a bakery that was permitted to remain open committed an offence if he strayed within two metres of a friend whom he happened to see in the shop.

213. The difference, in this context, between mere guidance and something that is mandatory can be illustrated by comparing the provisions of the 26 March Regulations with their Welsh equivalent.

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226 This mistake is made in the FCA Skeleton at §43 {**I/1/20**} and §123.3 {**I/1/48**}, although the latter admits the "*rule*" was never "*legislated*".

213.1 Government guidance issued to businesses stated that those businesses permitted to remain open had to, among other things, ensure a distance of two metres between customers and shop assistants.[227] However, neither the 21 March nor the 26 March Regulations, nor any amendments to them, incorporated these as conditions of remaining open.

213.2 In contrast, Reg. 6 of the Welsh Regulations {**J/22/8-9**} provided that even those businesses permitted to remain open (i.e. food retailers, pharmacies, newsagents etc)[228] were obliged to "*take all reasonable measures to ensure that*" (i) a two metre distance was maintained between any persons on the business premises (unless members of the same household etc);[229] (ii) persons were only admitted in small numbers; and (iii) a distance of 2 metres was maintained between persons waiting to enter the business premises. Reg 10(1) of the Welsh Regulations {**J/22/16-18**} also provided that if there were reasonable grounds for suspecting that Reg 6 had been contravened and it was considered necessary and proportionate to do so, a prohibition notice could be issued to prevent a continued contravention of Reg 6. Failure to comply with a prohibition notice was made an offence under Reg. 12(3) {**J/22/19**}.

214. On the FCA's case, a business in Bristol that failed to take reasonable measures to ensure a two metre distance was maintained between persons on its premises would be in the same position as one in Cardiff. Such an approach cannot be right. It ignores the different content of the relevant regulations. (Of course, even those businesses in Wales would not be able to show that the restrictions imposed on them had rendered them unable to use their premises, but they could at least show they had been subject to some kind of "*restriction imposed*" to

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227 Agreed Facts 4, §§16 to 18 {**C/7/4**}.

228 Set out in Schedule 1, Part 4 of the Welsh Regulations {**J/22/26-27**}.

229 The FCA wrongly describes (FCA Skeleton §64 {**I/1/27-30**}) the two metre "*rule*" as being "*formally prescribed*" in "*the statute*" in Wales and Scotland. That was (as the description in the text shows) not the effect of the relevant Regulations in Wales, nor Scotland. In Wales, there was simply an obligation on those businesses not closed or required to cease, to "t*ake all reasonable measures to ensure*" that: (a) a distance of 2m was maintained between persons on the premises, (b) persons were only admitted in sufficiently small numbers to permit this, and (c) that a distance of 2m was maintained between those queuing to get into their premises. (see The Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020, e.g. Regs 4(5B), 5(3C), 6(1) and 6(2A) {**J/22/5-9**}). From 7 April 2020, in Wales it was also provided that businesses with this obligation had to "*have regard to guidance issued by Welsh Ministers about reasonable measures to be taken to ensure that a distance of 2 metres is maintained between persons.*" The Scottish Regulation {**J/23**} were materially the same as those in Wales, save that a requirement for businesses to "*have regard to*" guidance on ensuring a 2m distance between persons, was not included.

ensure compliance with social distancing guidance, something an English business could not.)

215. It is presumably for this reason that the National Police Chief's Council "*COVID-19 – Policing brief in response to Health Protection Regulations*" for England issued on 1 June 2020 expressly states:

> *"…As the pandemic has developed, guidance and legislation has been produced and amended…Government guidance – is not enforceable, for example two-metre distancing, avoiding public transport or wearing of face coverings in enclosed spaces. Do not issue fines to people for not adhering to government guidance.*"[230]

216. The FCA has stated, in relation to Category 3 and Category 5 businesses, that while these businesses might have been permitted to continue trading, they had to comply with tortious and statutory duties owed to employees, customers and other visitors.[231] Hiscox does not suggest otherwise. However, these were pre-existing obligations, not a response to COVID-19. Guidance directed at minimising the risks posed by community transmission of COVID-19 might be of relevance to how these pre-existing obligations should be discharged, but in the absence of legislative action, such as was taken in Wales, it remained just guidance. It is not in itself enforceable. The fact that it might be taken into account in assessing whether, for example, an employer had fulfilled other obligations does not change its character. Such guidance was not a "*restriction imposed*" within the meaning of the Public Authority clause.

217. In this respect, the Health and Safety Executive (**HSE**) has issued guidance in relation to COVID-19, "*designed to help you make your work and workplace safe (be COVID-secure). It'll help you manage the risk associated with re-starting or running your business during the outbreak…Follow this guide for an overview of the practical measures you can take. It includes help with how to maintain social distancing in your workplace, staggering shifts, cleaning and how to talk with workers…*"[232] But as the HSE explains on its own website "*…the guidance is not compulsory, unless specifically stated …*"

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230 https://www.met.police.uk/SysSiteAssets/media/downloads/central/advice/covid/covid-19-briefing-english-010620.pdf - see Agreed Facts Document 4, §35 footnote 62 {**C/8/517**}.

231 POC §§19.3 and 19.5 {**A/2/14-15**}.

232 https://www.hse.gov.uk/coronavirus/working-safely/index.htm {**K/227/1**}.

(3) The "*occurrence*" must be local and specific to the insured, the business or the premises

218. There are four reasons why "*occurrence*" should be read as referring to something local and specific to the insured, the business or the premises.

219. Before dealing with these points it is appropriate to deal with the point that both the FCA[233] and HAG[234] categorise this an attempt to imply a term, rather than simply construing the word "*occurrence*". That is a plainly bad point. What Hiscox says is that when read in context, the correct reading is that occurrence should be something local and specific in the above sense. This is the sort of exercise of construction which courts perform all the time, without implication of any term. The word "*occurrence*" appears and all Hiscox is doing is explaining and extrapolating the meaning in context, which is precisely what the FCA is failing to do.[235]

220. This is a completely normal technique and both sides use it in this case. To take some examples from the same clause, the FCA says that "*inability*" means "*total or partial*" inability;[236] the FCA and Hiscox agree that "*use*" means "*use for business activities*"[237] not just any use. Similarly, HAG says that "*your inability to use the insured premises*" means inability to use "*normally*".[238] Hiscox disagrees with the FCA's and HAG's points, but not on the grounds that they constitute an attempt to imply a term, and the implications proposed cannot satisfy the stringent test for implication of terms. Hiscox simply says that these arguments are wrong as a matter of construction.

221. It is particularly inapposite to criticise Hiscox in this respect when it relies upon the uncontroversial aid to construction *noscitur a sociis*. The very existence of that tool shows that it is perfectly legitimate, as a matter or construction, to identify a limiting characteristic which applies to an apparently general word.

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233 FCA Skeleton §345 {**I/1/133**}.

234 HAG Skeleton §35 {**I/3/13**} and §138 {**I/3/47**}.

235 FCA Skeleton § 347{**I/1/133-134**} – a particularly good example of construing a word in isolation.

236 FCA Skeleton §360 {**I/1/137**}.

237 FCA Skeleton §363 {**I/1/137**}.

238 HAG Skeleton §125 {**I/3/42-43**}. Indeed at §31 {**I/3/11-12**} HAG concedes that *"interruption"*, *"your inability to use the insured premises" and* "due to restrictions imposed by a public authority" are all capable of the meanings for which Hiscox contends but suggest that *"in reality, and read in context"* each word/set of words should be read in a particular way.

222. Neither the FCA nor HAG cite any authority or make any reasoned argument (rather than mere assertion) to support the point that what Hiscox is doing is seeking to imply a term. That is not surprising: in ***Chartbrook Ltd v Persimmon Homes Ltd*** [2009] 1 A.C. 1101, Lord Hoffman said at §25 {**J/103/14**} that there are no limits to what one can do as a matter of construction:

> *"25. What is clear from these cases is that there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant. In my opinion, both of these requirements are satisfied."*

223. Returning to the four points referred to in §218 above, first, there is the general point referred to in §§76-77 above that the BI cover provided is an adjunct to property cover. Thus in the Hiscox 1 lead policy wording, the title of the Section is: "*Property – business interruption (specialist retail)*". This is invariably the case: all of the relevant sections in the Hiscox wordings in this test case refer to "*property*" in their headings.[239] The fact that the BI cover is an adjunct in this way shows that it is objectively intended to cover events which are specific and relate to the property and the business conducted at the property.[240] As stated in §77 above, the objective aim of property insurance 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.

224. Secondly, the other possible reasons for the restrictions referred to in the Public Authority clause support this point. The clause covers restrictions with the relevant effect imposed by a public authority for five different reasons,[241] which it is convenient to repeat:

> *"…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****;*

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239 See §76 above.

240 The point taken at §134 of the HAG Skeleton {**I/3/45-46**} is a bad one. The nexus has to be in the sub-clauses a to e, not the introductory words.

d. defects in the drains or other sanitary arrangements;

e. vermin or pests at the ***insured premises***."

225. Two of the reasons other than the relevant one, b., expressly refer to something occurring at or on the insured's premises (i.e. paragraphs c. and e.).

226. The other two reasons are (i) murder or suicide, and (ii) defects in the drains or other sanitary arrangements (where applicable).

226.1 The murder or suicide envisaged would either have taken place on or very close to the premises, such as a suicide in a flat above an office, or, in the case of murder, where the police traced a suspect or vital evidence to a place at or close to the premises. Common to these scenarios is a specific, local and direct nexus between the reason for the restriction imposed and the premises.

226.2 Defects in drains or other sanitary arrangements or sanitary problems are clearly matters which (as well as at the premises) could occur a short way away from the premises, but which would still physically affect the insured premises. Once again, there would be a specific, local and direct nexus between the reason for the restriction imposed and the premises.

227. It is also clear, as set out in §199 above, that the kind of mandatory action that would be taken in response would be localised, and would target the premises or their immediate locality. Indeed, it is hard to see that any other sort of mandatory action would be permissible.

228. Each of the four other matters, therefore, must occur either on the premises or very close to them, and contemplate within each sub-clause (and not only by reference to the words "*inability to use*" in the introductory words) a specific local and direct nexus between the reason for the restriction imposed and the premises.

229. It is clear that an occurrence of human infectious or contagious disease must be construed in the same way. The very words used ("*an occurrence of any … disease … an outbreak of which must be notified to the local authority*") naturally connote an isolated, local event. A paradigm case would be the diagnosis of cases of legionnaire's disease among the staff of an office on one floor of a building that was traced to the building's air conditioning, leading to a mandatory closure of the entire building.

230. The maxim *noscitur a sociis* is directly applicable here (see §52 above). The other four matters provide important context. They are all matters that must be local and specific to the insured, its business or its premises. The same characteristic therefore applies to "*occurrence*" of disease: it is a local and specific occurrence envisaging a local and specific response. Although an old example, a further[242] useful illustration of the principle is the case of ***Watchorn v Langford*** (1813) 3 Camp 422 {**K/24**} where a policy of fire insurance covered "*stock in trade, household furniture, linen, wearing apparel and plate*". The insured, who was a coach plater and cow-keeper, had bought a large amount of linen on speculation, which was destroyed in a fire. His claim under the policy was rejected. Lord Ellenborough said (at 423 {**K/24/1**}):

> "*I am clearly of the opinion that 'linen' in the policy does not include articles of this description. Here we may apply 'noscitur a sociis'. The preceding words are 'household furniture', and the succeeding 'wearing apparel'. The linen must be the 'household linen or apparel'.*"

231. Here the same reasoning applies. Given its context, what clearly cannot be intended by "*an occurrence*" of disease, is hundreds and then thousands of occurrences somewhere or anywhere in the UK (or beyond) of COVID-19 or any other disease. Moreover, on the FCA's case, an occurrence of the disease in Carlisle, or indeed in Carcassonne, leading to nationwide restrictions in the UK, would constitute an occurrence of the disease for the purpose of a business in Cardiff. On no fair and objective reading of this clause can such a consequence have been intended. There are no grounds for supposing that the parties to the present insurances had the extraordinary features of the present case in mind.

232. Thirdly, the other insuring clauses comprising the special covers branching off the stem are similarly either local or specific to the insured, the business or the premises.

233. The development of this point is lengthened and complicated by the wide variety in number and to a lesser extent substance[243] as regards the special covers branching off the stem in the various types of Hiscox 1-4 which are before the court. Hiscox will therefore address this point in the following way.

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242 In addition to ***Tektrol*** {**K/124**}, referred to in §53 above.

243 The special and additional covers applicable to each Hiscox policy are set out in Annex 2

233.1 First the Hiscox 3 lead policy (455 policyholders)[244], which has the smallest number (four) of such other special covers amongst Hiscox 1-4, will be considered.

233.2 Next, the Hiscox 2 policy with most policyholders in that category (6,716),[245] which has only five other special covers, will be addressed.

233.3 Next, the Hiscox 1 lead policy, which has the largest number of other special covers (15) branching off the stem, will be considered (there are 16,181 Hiscox 1 policyholders).[246]

233.4 Lastly, other special covers which are different from those in any of the policies specifically considered will be dealt with.

234. As a preliminary point, before embarking on the analysis of the other special covers branching off the stem, it is relevant to note that even where the special covers concern matters associated with damage elsewhere, Hiscox 1-4 still require that such damage is "*Insured damage*".[247] That is damage that both (i) is of the type that would be covered by the Hiscox policy and (ii) is insured by some other insurer that has either made a payment or admitted liability.

The Hiscox 3 lead policy

235. Taking the lead Hiscox 3 policy,[248] the position is:

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244 Out of a total number of 582 Hiscox 3 policyholders.

245 Out of a total number of 10,872 Type 2 policyholders.

246 The lead wording has 895 policyholders.

247 In the Hiscox 3 Lead Wording, the definition is: "***Damage*** *to* ***property*** *provided that: a. the* ***damage*** *is not otherwise excluded by the Buildings or Contents section of this* ***policy****; b. payment has been made or liability admitted by the insurer under any insurance covering such* ***damage***." {**B/8/29**}. There are immaterial variations of this definition reflecting the activities of particular insureds and the range of covers provided by Hiscox in the particular wording. For example: (1) The "*Cleaners BI-8358*" provides that the damage must not be "*otherwise excluded by the Buildings, Contents or Tools and equipment section of this policy*…" {**B/65/1**}; (2) In those policies that provide the insured with the *"Equipment breakdown"* special cover in respect of an "*Insured failure*" of computers and other equipment that is insured by Hiscox under the policy, the definition of "*Insured damage*" expressly excludes "*failure*" of such equipment. Thus, the definition of "*Insured damage*" in the Hiscox 1 Lead Wording Retail BI-16105 and Hiscox 2 Lead Wording Salon BI-18680 begin "…***Damage****, other than* ***failure****, to property*…" See Property definitions at {B/6/22} and {**B/7/24**} respectively.

248 Gunsmiths BI-8006 policyholders {**B/8/29**}.

235.1 There is cover in respect of business interruption losses caused by *"insured damage"* to "***your contents**, or the building or any other property used by **you** at the **business premises**.*"[249]

235.2 "*a. Premises access*", requires "*insured damage*" to property in the vicinity of the insured's "*business premises*" that prevents or hinders "***your***" access to those premises.

235.3 "*b. Suppliers*" requires insured damage at one of "***your***" supplier's premises.

235.4 "*c. Public utilities*" requires a failure of the water, gas, electricity or telecommunications supply to the insured's "***business premises***" caused by *"insured damage*" to any property.

236. The applicable definitions explain that:

236.1 "*Business premises*" means "*The space **you** occupy…[including] any outbuildings **you** occupy on the same premises.*"[250]; and

236.2 "*Contents*" means: "*The contents of **your business premises** used in connection with the **business** which belong to **you** or for which **you** are legally responsible…*"[251]

237. Accordingly, all the special covers are demonstrably local or specific to the insured, its business or its business premises.

The Hiscox 2 wording with the most policyholders

238. The Hiscox 2 wording[252] with the largest number of policyholders (6,716) has a total of five other special covers. Four either closely resemble or are materially the same as those in the Hiscox 3 lead:

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249 In this wording, this cover is in a self-contained clause rather than in the same list as the special covers which provides: "***We** will insured **you** for **your** loss of **gross profit** and **outstanding debts**, as specified in the schedule, resulting solely and directly from an interruption to **your business** caused by **insured damage** to your contents, or to the building or any other property used by **you** at the **business premises**.*" "***Contents***" is defined in the contents section of the policy as "*The contents of **your business premises** used in connection with the **business** which belong to **you** or for which **you** are legally responsible…*"

250 {**B/8/17**}.

251 {**B/8/23**}.

252 Professions BI-6001 {**B/45**}.

238.1 "*1. Financial losses from insured damage*" which requires *"insured damage"* either (i) to "*property*"[253] covered under the property sections of the insured's policy[254] which relate to the buildings specified in the insured's schedule and contents or equipment "*which belong to **you** or for which **you are** legally responsible*"[255]; or (ii) to property that, while not insured by Hiscox, was "*contained in the **office***",[256] the office being defined as the "*office space **you** occupy*";[257]

238.2 "*2. Denial of access*" which is materially the same as "*a. Premises access*";[258]

238.3 "*3. Suppliers*" which is materially the same as "*b. Suppliers*";[259] and

238.4 "*4. Public Utilities*" which provides coverage in respect of the supply of utilities "*to the **office***" caused by insured damage either at the premises of the supplier, or to the "*terminal feed to **your office** or **business premises***" or the pipes or cables conveying the utilities "*to the **office***".[260]

239. The Hiscox 2 wording also has a special cover for "6. *Equipment breakdown*"[261] which covers the failure of "***Equipment** that belongs to **you** or for which **you** are responsible*"[262], "***Computers** and ancillary equipment that belong to **you** or for which you are legally responsible*", and other items

253 Defined in the property definitions as *"Tangible property"* {**B/45/5**}.

254 Other than "*Equipment breakdown*" which is covered by a separate special cover {**B/45/2**}.

255 See the Buildings section, {**B/7/15**} and Contents section {**B/7/19**} of the Hiscox 2 lead policy Hiscox 2 lead policy.

256 {**B/45/2**}.

257 Definition of "*office*" is in the Property definitions section at {**B/45/5**}.

258 The Hiscox 2 wording refers to "*office*" instead of "*Business premises*" to reflect the different kinds of insured/premises.

259 The Hiscox 2 wordings excludes cover where the supplier's premises suffered insured damage "*caused by **flood** or **earth movement**…*" and simply provides that the suppliers must be "*operating and based in the European Union*" rather than also referring to the UK, Channel islands, Isle of Man and Gibraltar.

260 {**B/45/2**}.

261 {**B/45/2**}.

262 See definition of "*Equipment*" in the property definitions {**B/45/4**}. "*Equipment, which belongs to **you** or for which **you** are legally responsible: 1. Built to operate under vacuum or pressure, other than the weight of contents; or 2. Used for the generation, transmission or utilisation of energy. **Computers** are not included in this definition.*"

that "*belong to **you** or for which **you** are legally responsible*",[263] provided in each case that Hiscox has admitted liability or made a payment.[264]

240. Again, all these special covers are demonstrably local or specific to the insured, its business or its premises.

The Hiscox 1 lead policy

241. The Hiscox 1 lead policy wording[265] overlaps with the Hiscox 2 wording considered above.

241.1 The following clauses provide cover in respect of "*insured damage*"[266] at or in the "*vicinity*" of the insured premises.

(a) "*1. Financial losses from insured damage*" and "*2. Denial of access*", are both materially the same as under the Hiscox 2 wording: see §§238.1-238.2 above.[267]

(b) "*4. Bomb threat*", provides cover against inability to access "*the insured premises*" due to restrictions imposed by the police or armed forces caused by the presence or suspected presence of an incendiary or explosive device "*within the insured premises or their vicinity*".

(c) "*5. Loss of attraction*" provides cover in relation to insured damage *"in the vicinity of the insured premises"* or any fundraising event. The latter could only relate to the insured and/or the insured business, wherever the fundraising event took place.

241.2 The NDDA clause requires "*3. an incident…within a one mile radius of the insured premises*".

241.3 Other clauses provide cover in relation to "*insured damage*" which must occur at the premises of one of the insured's customers or suppliers:

(a) "*6. unspecified customers*" refers to "***your** direct customers*";

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263 {**B/45/1-2**}.

264 The "*Equipment breakdown*" special cover simply cross refers to the definition of "***Insured failure***" which in turn refers to the "***Failure** of **equipment**, **computers**, oil or water storage tanks and other insured items…*" {**B/45/1-2**}.

265 Retail BI–16105{**B/6**}.

266 Or in the case of "*Bomb threat*", potential damage {**B/6/41**}.

267 The only difference is that the Hiscox 1 lead refers to the "***insured premises**" rather than the "**office***".

(b) "*7. specified customers*" refers to "*any direct customer of **yours***" stated in the Schedule;[268]

(c) "*8. unspecified suppliers*" refers to "***your** suppliers*";

(d) "*9. specified suppliers*" refers to "*any supplier of **yours***".[269]

241.4 "*10. Public utilities*" which, like the public utilities cover in the Hiscox 2 example, concerns the supply of water, gas and electricity "*to the **insured premises***" caused by insured damage either at the premises of the supplier, or to the "*terminal feed to the **insured premises***" or the pipes or cables conveying the utilities "*to the **insured premises***".[270]

241.5 "*11. Telecommunications and internet service providers*" and "*12. Online market places*" require the existence of insured damage, and relate to telecommunications and internet supply "*to the **insured premises***"[271] and, in respect of online market places, to those "*used by **you***".[272]

241.6 The Public Authority cover is at 13, following which there is "*14. Cyber attack*". This potentially very wide cover is in fact carefully limited by the definition of "*Cyber attack*"[273] which is as follows:

> "*Any financial harm caused to **you** due to:*
>
> *a. the activities of a third party who specifically targets **you** alone by maliciously blocking electronically the access to **your computer system, programs** or data held electronically by **you** or on **your** behalf; or*
>
> *b. a **hacker**[274] who specifically targets **you** alone.*"

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268 The definition of "***specified customer***" is "*Any direct customer of **yours** operating and based at the address individually stated in the Business interruption section of the Schedule.*" {**B/6/41**}.

269 The definition of "***specified supplier***" is "*Any supplier of **yours** operating and based at the address individually stated in the Business interruption section of the Schedule.*" {**B/6/41**}.

270 {**B/6/41**}.

271 {**B/6/42**}.

272 *Ibid.*

273 *Ibid.*

274 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.*" {**B/6/22**}

241.7 Thus, what is potentially very wide cover against a pervasive event is constrained by the requirement that the attack must specifically target the insured alone, those words being used in each limb of the definition.

241.8 "*15. Equipment breakdown*", as with the Hiscox 2 example (see §239 above), provides cover in relation to the failure of equipment[275], computers[276] and other items[277] where (i) they belong to the insured or for which the insured is responsible and/or (ii) Hiscox has admitted liability or made a payment in respect of the failure.

241.9 "*16. Loss of licence*" cover is self-explanatory and is clearly specific to the insured and/or its business.

241.10 The additional covers listed at 17-19 are also specific to the insured or its business: "*17. Hacker damage*" deals with the cost of repair after a Cyber attack, and is thus limited both by the definition of Cyber attack in §241.6 above and Hacker,[278] so must be aimed specifically at the insured. "*18. Employees' lottery win*" provides cover against the consequence of an employee's resignation in the wake of such a win, something which can only affect the insured or its business. "*19. Cancellation and abandonment*" covers a promotional event organised by the insured in connection with the insured's activities. The last of these covers notably has exclusions which rule out many general risks: failure of finance, strikes, adverse weather, action taken by various bodies or agencies to control, prevent or suppress infectious disease (discussed in §248 below) and war or nuclear risks.[279]

242. Again, these Hiscox 1 covers are local or specific to the insured, the business or the premises. There is manifestly no objective sign of insurers' willingness to accept the consequences of pervasive events which may affect millions of others along with the insured, nor to accept the consequences of a prolonged and catastrophic nationwide state of affairs which indifferently affects the insured in the same way as countless other businesses across the country. A cyber attack is a good example of an insured peril which might have major, even

275 Definition of "*Equipment*" at {**B/6/21**}.

276 Definition of "*Computers*" at {**B/6/21**}.

277 Other items falling within the contents section that covers contents that "*belong to **you** or for which **you** are legally responsible…*"

278 *Ibid.*

279 {**B/6/43-44**}.

nationwide, consequences but the peril is defined in such a way as to narrow its ambit to a malefactor who specifically targets the insured.

243. If one then stands back, the special covers considered above under Hiscox 3, 2 and 1 have the following characteristics by way of limiting factors, which control Hiscox's exposure to broad risks. By the use of such language, Hiscox was stipulating that it was not willing to bear such broad risks, even in relation to expected unexpected events, let alone the present unexpected state of affairs.

243.1 The majority 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.

243.2 Of that majority, a number are restricted to insured damage (or failure) occurring at or in the vicinity of the premises: financial losses from insured damage,[280] denial of access, bomb threat, loss of attraction (in part); equipment breakdown. 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).

243.3 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,[281] a supplier, a customer, public utilities, a telecommunications or internet supplier, or an online market place. These covers are specific to the insured in the sense that there is a specific pre-existing relationship. It is notable that there is no non-damage cover in any of these respects.

243.4 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:

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

(b) Cyber attack requires a specific targeting of the insured alone;

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280 Which forms the self-contained clause in Hiscox 3 requiring "*insured damage*". See §235.1 and footnote 249 above.

281 There is coverage under the loss of attraction clause {**B/6/41**} for such events.

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

(d) Hacker Damage 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***";

(e) Employees' lottery win by definition can affect only the insured or its business alone;

(f) Cancellation and abandonment cover 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.

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

245. This point is emphasised by the "***What is not covered***" section of the Hiscox 1 lead which states:

> " ***We*** *will not make any payment*
>
> *1. for any interruption to* ***your activities*** *directly or indirectly caused by, resulting from 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***." [282]

246. There could be no clearer indication of the objective reluctance of Hiscox to accept liability in respect of pervasive events (especially non-damage related) than the words in the (computer) virus exclusion. Given the level of society's dependence upon information technology, computer viruses, just like a coronavirus pandemic, have the capacity to cause global havoc, indiscriminately rendering businesses unable to function and causing devastating impacts upon the functioning of normal economic and social life. This wording makes objectively clear that Hiscox wanted nothing to do with risks of this kind.

247. The FCA's case is apparently that, in the case of disease alone, the Hiscox underwriters are to be treated as having thrown caution to the wind and assumed an unlimited liability (in the

282 {**B/6/44**}.

sense in which limits have been discussed in this section) for the consequences of any notifiable disease anywhere, and with no proximity to or connection with the insured or its business or premises whatever – and all as an adjunct to property cover. This seems wildly improbable from an objective standpoint. But this is precisely what the FCA says Hiscox clearly intended.[283] On the contrary it is objectively obvious that Hiscox intended no such thing.

248. The point is also emphasised by the last of the additional covers in the Hiscox 1 lead, the cancellation and abandonment cover, dealt with briefly in §43 above and also referred to in §241.10 above. This covers cancellation and abandonment as a result of <u>any</u> "*unforeseen incident or event*". The FCA relies on the fact that here alone there is an exclusion in respect of an agency's response to an infectious disease, the wording of the exclusion being in respect of "*any action taken by any national or international body or agency directly or indirectly to control, prevent or suppress any infectious disease.*"[284] As addressed in Section C above (particularly §§33-43), reliance upon the absence of an exclusion in the BI cover generally (even if other underwriters might have included it *ex majori cautelâ*) is misplaced in principle. Moreover, the exclusion in this additional cover in fact again objectively <u>confirms</u> the reluctance of Hiscox to accept liability in relation to non-damage cover for the consequences of pervasive, widespread events. While the exclusion is arguably necessary in this specific clause because the cover is essentially of an "all risks" nature covering any unforeseen cause of cancellation, the exclusion is not necessary in relation to any other covers, because it is plain that the character of the event causing the loss has to have had a close nexus with the insured, its business or premises.

249. All these special and additional covers are thus demonstrably limited to matters local or specific to the insured, its business or premises. Nowhere else is there coverage on any scale remotely comparable to coverage for the consequences of a nationwide pandemic. The reason why there is no such comparable coverage in other respects is because such coverage was not objectively intended. The reference to "*an outbreak of disease*" in the Public Authority clause was not objectively intended to create an anomalously broad cover in this instance alone. If it were to do so, this would in effect be an objectively unintended result, which is a good reason to avoid it. It is only the exercise of hindsight, the presumption that there should

283 FCA Skeleton §350 {**I/1/134**}.

284 {**B/6/43**}.

be cover in the circumstances which have occurred, and a sedulous omission to consider the words used in their context that enable the FCA to argue otherwise.

Other special covers

250. Although the special covers specifically considered above in Hiscox 2 and Hiscox 1 policies feature in many other policies and are the most common special covers, there are some special covers in the BI sections of Hiscox 1-4 which do not appear in those example policies. To avoid over-lengthening this argument, these special covers are addressed in Annex 3 hereto. They are all local or specific to the insured, its business or its premises.

251. For all the above reasons, the "*occurrence*" referred to must on a proper construction of the wording as a whole be local or specific to the insured, its business or premises.

The FCA's case on "occurrence"

252. The FCA's case in POC §38[285] {**A/2/25**} is that the relevant "*occurrence*" was on 5 March, when COVID-19 became a notifiable disease. The unspoken reasoning is that there were by that stage occurrences of COVID-19 in the UK and that, as the clause requires the disease to be notifiable, as soon as it became notifiable there was an occurrence within the meaning of the clause.

253. The FCA's case is, to put the matter no higher, surprising – indeed eye-catching. To state it explicitly, it is that an occurrence of a disease in Alnwick is a sufficient occurrence for the purposes of an insurance policy protecting a small office in Ilfracombe. Such is the FCA's position, notwithstanding that there might be no occurrence of the disease anywhere near Ilfracombe or indeed the whole of the South of England, or even if the outbreak was confined to Alnwick alone. Indeed, there would be no need for the occurrence even to be in the UK. Whilst there is no point in trading adjectives, it is impossible to pass by the fact that it is the FCA which ventures to describe Hiscox's case on this point as "*desperate*".[286]

254. The FCA's construction cannot be correct. This is BI cover for small to medium-sized businesses based, by virtue of their size, in a specific locality (or localities, if more than one branch or outlet). It was plainly not objectively intended that occurrences entirely

285 Which refers back to POC §37 {**A/2/24-5**}.

286 FCA Skeleton §345 {**I/1/133**}.

unconnected with the insured and hundreds of miles away might engage the cover. Apart from the FCA's impermissible insistence on construing the word "*occurrence*" in isolation, there is no objective basis for supposing that the parties contemplated any such thing.

255. In contrast with the FCA's technique, this is not to reason backwards from the desired result.[287] The points made above by reference to the other matters in the Public Authority clause itself and the wordings more broadly (§§224-251 above), show that an occurrence bearing no sufficient or specific nexus with the insured, its business or premises simply was not within the contemplation of the cover provided.

256. The FCA then attempts to say that the government restrictions are in fact "*specific to every insured*".[288] But that is a misuse of language. Restrictions which apply indifferently to all cannot be described as specific.

257. The supposed point[289] that Hiscox 1-2 and 4 contemplate "*wide area damage*" because of an obligation to report damage resulting from riot or civil commotion, in no way meets the point. This does not contemplate "*wide area damage*" as opposed to local damage. On any view, what is contemplated here is orders of magnitude smaller than the effects of the present pandemic.

258. The FCA[290] – and HAG[291] – make the point that there is no vicinity or other limit in relation to the word "*occurrence*" (although this point does not apply to Hiscox 4: see §259 below).[292] Indeed the FCA goes so far as to describe the Hiscox Public Authority clause as a "*simple*" case.[293] The objective reason why there is no one mile radius or vicinity limit in Hiscox 1-3 is that the original draftsman would not have contemplated that the occurrence could be argued to be anywhere in the UK (or beyond, on the FCA's case). The objective likelihood is that there was therefore thought to be no need to guard against the possibility of someone divorcing "*occurrence*" from the other four obviously local and premises-specific matters in the Public Authority clause and contending that it applied wherever the relevant occurrence

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287 The FCA accuses Hiscox of reverse-engineering the meaning of "*occurrence*": FCA Skeleton §355 {**I/1/135**}.

288 FCA Skeleton §355 {**I/1/135**}.

289 *Ibid* {**I/1/135**}.

290 FCA Skeleton §350 {**I/1/134**}.

291 HAG Skeleton §34 {**I/3/13**}.

292 POC §4.3 {**A/2/4**}.

293 *Ibid* {**A/2/4**}.

took place, so that an occurrence in York could be relevant to Southend-on-Sea. No doubt it was rather hard in pre-COVID-19 days to imagine such a thing. At some stage, however, it presumably did occur to the or another draftsman that somebody might one day seek to contend that the occurrence could be not merely local, hence the insertion in Hiscox 4 of an express geographical limit, out of an abundance of caution. This point is dealt with in §261 below.

259. The argument against Hiscox based upon there being no express limit is, in fact, an argument in favour of the construction which Hiscox puts upon the clause. Viewed objectively, there can have been no intention that "*occurrence*" was effectively geographically limitless and non-specific to the insured. Had there been any such conception in the mind of the draftsman, then, bearing in mind particularly the limits in the other elements in the Public Authority clause and the other special covers, a limit would have been included.

260. Furthermore, pointing to the absence of an express one mile (or vicinity) limit is subject to the same cautions as apply in relation to arguments based on the absence of exclusion clauses and in any event assumes what it seeks to establish: such a limit would only be even arguably necessary if the clause was not clearly aimed solely at local and specific matters.

261. The FCA[294] and HAG[295] then deploy the related point that because Hiscox 4 contains an express one mile requirement in relation to the word "*occurrence*", and Hiscox 1-3 do not, it must follow that Hiscox 1-3 were not objectively intended to require any local and specific nexus between the "*occurrence*" and the insured, its business and premises. This is a fallacious point. First, it entails construing contracts by reference to what is not in them, which is misguided (see §§33-34 above). Secondly, it is a *non sequitur*. Thirdly, it presupposes that a draftsman at Hiscox introduced into Hiscox 4 a limitation not as a matter of an abundance of caution, (as he may well have done, a possibility recognised in a similar context by A.L. Smith LJ in the ***Burger*** case {**K/94**}[296]), but in order to create a geographical limitation for the very first time. It further presupposes that the same draftsman must be taken to have deliberately decided to eschew any such language in Hiscox 1-3. Just as one should not assume that one chancery draftsman called into existence an insurance wording in a single act of creation, it is even more far-fetched to assume that the draftsman made a deliberate

294 FCA Skeleton §350 {**I/1/134**}.

295 HAG Skeleton §34 {**I/3/13**} and §139a {**I/3/47**}.

296 See §40 above.

decision to omit reference to a radius in Hiscox 1-3, in order to broaden the cover for Hiscox 1-3 policyholders as distinct from Hiscox 4. Fourthly, even if all this were established in point of fact or probability, it would still beg the question as the meaning of Hiscox 1-3. But in fact none of it is established or even plausible.

262. The FCA affects not to understand Hiscox's case that the "*occurrence*" must be local and/or specific to the insured, its business, activities or premises.[297] The basis for this incomprehension is presumably because the FCA looks at the word "*occurrence*" in isolation and divorced from context. Once one actually construes the word in context, Hiscox's case is not only understandable but obvious.

263. HAG implies[298] that the limitation on cover in Hiscox 1-3 proposed by Hiscox is too imprecise a limit to have been intended by the parties. The first point to be made, which is answer enough on its own, is that this submission lacks any force whatever in circumstances in which "*vicinity*" is used to denote a necessary area in some Hiscox and other Insurers' policies. This term lacks precision, yet it has been not only tolerated but agreed. All the same arguments could be ranged against "*vicinity*".

264. Further, this sort of submission is often made in relation to a contractual provision which requires the exercise of a value judgment. For example, it is often used to resist the construction of a contractual term as importing a standard of reasonableness. This argument rarely succeeds, and nor should it here.[299] As Bridge LJ observed in ***Shell UK Ltd v Lostock Garage Ltd*** [1976] 1 WLR 1187 {**K/65/18**}: "…*it is no novelty in the common law to find that a criterion on which some important question of liability is to depend can only be defined in imprecise terms which leave a difficult question for decision as to how the criterion applied to the facts of a particular case. A clear and distinct line of demarcation may be impossible to draw in abstract terms; yet the court does not shrink from the task of deciding on the facts of any case before it on which side of the line the case falls.*" The court is not required to provide an essay answer (here, on what is meant by "local and specific"), but simply to articulate a legal rule (in this case as to the meaning of a contract) sufficient to enable the fact-finding tribunal to decide on the facts of a given case whether

297 Reply §46 {**A/14/23**}.

298 HAG Skeleton §36 {**I/3/13**}.

299 E.g. ***Sparks v Biden*** [2017] EWHC 1994 (Ch) {**K/170**}, *per* HHJ David-White sitting in the Chancery Division, where a term was implied into an option agreement requiring the buyer/developer of a parcel of land to sell newly constructed dwellings on that land within a reasonable period of time. The Court rejected a contention that such a term was inherently uncertain and formulated with insufficient precision.

the nexus is satisfied. Sometimes when the court does this, the answer on the facts will be obvious; sometimes less so. All of this is entirely usual. What is quite certain is that the present is not a borderline case: an occurrence of disease in Alnwick has no nexus whatever with a business in Ilfracombe.

The FCA's case on occurrence within one mile

265. The FCA's primary case is as set out in §252 above.[300] In section J of the POC, the FCA deals with cases where it is necessary to prove the "*Presence of the disease within a certain distance from the premises*". In this context, it is alleged in POC §41 that "*there was an occurrence of COVID-19 whenever and wherever a person or persons had contracted COVID-19 so that it was diagnosable (whether or not it was in fact verified by medical testing or a medical professional and/or formally confirmed or reported to the PHE and whether or not it was symptomatic*)". [301]

266. There are specific objections to the FCA's alternative case, which relate to the words "*(whether or not it was in fact verified by medical testing or a medical professional and/or formally confirmed or reported to the PHE and whether or not it was symptomatic*)". Hiscox accepts,[302] subject to all its other points, that in that context a scientifically verified instance of the disease would amount to an "*occurrence*" for the purposes of the clause. However, it is not enough for someone to have the disease in merely a diagnosable form (i.e. possibly unverified and possibly asymptomatic) for there to be an "*occurrence*" within the meaning of the clause. The Public Authority clause refers to restrictions imposed by a public authority following the relevant occurrence. That must imply that the occurrence contemplated by the clause is known about and scientifically verified. It cannot have been intended to operate on the basis that something completely unknown would satisfy the need for "*an occurrence*", because otherwise it would in practical terms be impossible to know whether or not such an occurrence had eventuated.

267. This stance is criticised by the FCA[303] as being akin to saying that trees do not fall unless they are seen to fall. This is again a consequence of the FCA looking at "*occurrence*" in isolation. The "*occurrence*", it accepts, must be the cause (see the FCA's case on "*following*" in §269 below) of the Public Authority action which the clause requires. The clause simply

300 HAG does not make submissions on this wording: see HAG Skeleton §4 {**I/3/3**}.

301 {**A/2/26**}.

302 Defence §77.1 {**A/10/19**}.

303 FCA Skeleton §358 {**I/1/136**}.

cannot operate if the "*occurrence*" could occur without being known about. On the FCA's case,[304] the existence of an occurrence within one mile of an insured's premises can be proved by an analysis of data, the application of averages and the use of an undercounting ratio. Assuming that this technique is admissible and proves for the first time the existence of the disease within a particular area, the occurrence will only have become manifest at some time in the future. That cannot possibly be reconciled with what the clause requires: an occurrence leading to restrictions imposed by a public authority.

(4) The meaning of "*following*"

268. It is convenient to set out the relevant part of the clause once more:

> "…***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***."

269. The word "*following*" on any view must have a temporal element. The only question is whether or not it has a causal element too. The FCA's case on the word "*following*" is as follows:

> "*the word "following" deliberately connotes an event which is part of the factual background and represents a looser causal connection than "resulting from" and similar.*" [305]

270. In agreement with the FCA, Hiscox's case is that some element of causal relationship is necessarily implicit in the clause: otherwise, ludicrous results could follow. For example, a restaurant closed as a result of diners falling ill in 2015 would be entitled to cover in respect

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304 FCA Skeleton §203-213 {**I/1/77-85**}.

305 POC §60 {**A/2/40**}.

of a later closure in 2020 that was not prompted by a fresh instance of illness or injury, but imposed for an entirely unrelated reason.[306]

271. The relevant restrictions, as submitted above in relation to the NDDA clause, were not imposed "*following*", in the requisite causal sense, any occurrence of disease that was local or specific to the insured, its business or premises, or (for the purposes of Hiscox 4) within a one mile radius. Manifestly the restrictions were introduced because of the national situation, not because of any particular occurrence or occurrences. This argument has been addressed *mutatis mutandis* in the context of the NDDA clause at §§128-142 above.

272. The FCA wrongly states in its Skeleton at §396 {**I/1/147-148**}, without any reference, that Hiscox "*does not dispute that restrictions imposed by a public authority were "following" an occurrence of a notifiable disease within a one mile limit*". Hiscox most certainly does dispute this. It is obvious that the causal element of "*following*" cannot be satisfied in this regard and this is more or less admitted by the way in which the FCA describes its case in the Skeleton: "*The 1-mile public authority/disease hybrid clauses were satisfied from the same dates and in the same circumstances as above, provided an insured can establish the presence of COVID-19 preceding the relevant authority action.*"[307] The use of the word "*preceding*" effectively accepts that the causal element will not be shown.

306 In its Defence §101, Hiscox pleaded that "*following*" was temporal only. On reflection, Hiscox has amended that paragraph of its Defence to admit POC §60 {**A/10/31**}.

307 FCA Skeleton §338.2 {**I/1/131**}.

The FCA's case on "following"

273. At POC §66 {**A/2/41**}, the FCA wrongly alleges that restrictions were imposed "*following*" (in the causative sense) an occurrence of COVID-19.

274. The restrictions were not imposed "*following*" any occurrence in the sense used in §270 above. They were imposed because of decisions taken at a national level because of the national situation, as indeed is accepted and averred by the FCA.[308]

(5) Meaning of "*interruption*"

275. The word "*interruption*" is in the stem of both the NDDA and the Public Authority clauses. It makes a cessation or stop or break in the insured's "*business*"[309] (or "*activities*"[310]) an essential requirement to establish a right to an indemnity. It is not sufficient that the insured's business activities have become more inconvenient or burdensome or difficult to perform, or are subjected to external limitations, or are less profitable. A constriction in flow is not an interruption. Nothing short of cessation is sufficient. It follows that a business that continues in part (for example, with its employees working from home) has not in principle been interrupted.

276. Hiscox's position in this regard is supported by:

276.1 The natural meaning and etymology of the word *"interruption"*;

276.2 The fact that the FCA seeks[311] to construe the word interruption as meaning in effect interference of any form with normal working;

276.3 The nature of the special covers provided in Hiscox 1-4; and

276.4 Commonwealth authority on the meaning of the word "*interruption*" in a business interruption insurance context.

Natural meaning of "interruption"

308 POC §42 {**A/2/28**}.

309 Hiscox 3 and 4 {**B/8**} and {**B/9**}.

310 Hiscox 1 and 2 {**B/6**} and {**B/7**}.

311 POC §46.8 {**A/2/31**}.

277. The natural meaning of "*interruption*" is a stop or break. This is supported by the definitions to be found in the Oxford Dictionary of English (3rd Ed., 2010) {**K/221.1/1**}:

> ***"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 [mass noun] the action of interrupting or being interrupted…"*

278. The etymology of interrupt is the Latin *rumpere* (to break). The prefix clearly indicates that one is dealing with a break between things.

279. The word "*interruption*" used in Hiscox 1-4 is to be contrasted with the words "interfere" and "interference", which are defined in the Oxford Dictionary of English (3rd Ed., 2010) {**K/221.1/3**} as concerning circumstances where something can still be carried on, but cannot be carried on properly:

> *"**interfere** verb [no obj.] **1** (**interfere with**) prevent (a process or activity) from continuing or being carried out properly…"*
>
> *"**interference** noun [mass noun] **1** the action of interfering or the process of being interfered with…"*

280. In the HAG Skeleton reference is made to the definition of "*interruption*" in the Cambridge Dictionary[312] which includes the following: "*an occasion when a company is prevented from operating normally*". However, this definition of the word only appears to be in the Cambridge Business English Dictionary and, moreover, HAG's quotation is selective. On any fair reading, the editors of that dictionary clearly regard the normal meaning of the word "*interruption*" as connoting a stop:

280.1 The primary definition of "*interruption*" in the Cambridge Dictionary and Cambridge Business English Dictionary is "*an occasion when someone or something stops something from happening for a short period*".[313]

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312 HAG Skeleton §121 {**I/3/42**} and the Exhibit H1 to that skeleton at p.52 {**I/4/52**}. The Cambridge Dictionary can be viewed online: https://dictionary.cambridge.org/dictionary/english/interruption {**K/215/13-15**}.

313 https://dictionary.cambridge.org/dictionary/english/interruption {**K/215/13-15**}.

280.2 The examples given under the definition quoted by HAG support the normal meaning of interruption as being a stop (the last example is accurate, although not well-expressed, in talking of interruption of rail services – i.e. individual services undoubtedly would be interrupted):

> "*We will endeavor to minimize supply chain interruptions.*"
>
> "*Business will continue as usual, without interruption.*"
>
> "*Energy traders are protected should an unexpected interruption in supply prevent them honouring their contracts.*"
>
> "*The strike could result in widespread interruption of US rail services.*"

281. Notably, the Cambridge Business English Dictionary on which HAG relies, also gives a definition of "*business interruption*" that is consistent with a complete cessation, namely "*a period when a business cannot operate because of a storm, flood, or other event*".[314] HAG has omitted to include this.

282. HAG also refers to a definition of *"interruption"* within the Oxford English Dictionary that it says supports its case,[315] but notably the primary definition of *"interruption*" in in the Oxford English Dictionary is also consistent with Hiscox's position: *"…A breaking in upon some action, process, or condition…so as to cause it (usually temporarily) to cease;…"* {**K/220/16**}.

"Interference" not an alternative to "interruption" in the Hiscox wordings

283. Viewed objectively, if the parties had intended to cover circumstances in which there was not a cessation in the insured's business, the word "*interruption*" would not have been used or would have been softened by the inclusion of mere "interference" as an alternative. It ought hardly to be necessary to state that, had this been intended, the readily available word "interference" would have been used, since (unlike "*interruption*") it actually means what the FCA would have "*interruption*" mean. A clause that only refers to "*interruption*" must require a narrower approach than that taken in other policies before the court in this test case, which

314 https://dictionary.cambridge.org/dictionary/english/business-interruption {**K/215/20**}.

315 HAG skeleton §121 {**I/3/42**}.

provide cover for "*interruption or interference*": see for example, MS Amlin 1[316] and RSA 3.[317] Broader wording of this kind is also used in the example wordings in appendices to ***Riley on Business Interruption Insurance***.[318] It would be clearly wrong to conclude that the clauses in these other instances (within and outside the case) had the same meaning as Hiscox 1-4 despite the less demanding alternative of "*interference*" being absent from Hiscox 1-4.

The nature of the covers provided

284. The requirement for a cessation in the insured's activities is also consistent with the nature of the other special covers provided in the BI wordings. Using the lead wording in Hiscox 1 as an example,[319] the circumstances listed at paragraphs 1 to 16 in that wording are all capable of leading to a cessation in an insured's businesses.

285. The only exception to this is the "*Loss of attraction*" special cover, which does not require an interruption. It applies where there is a mere "*shortfall in **your** expected income*". The obvious objective explanation for this is that the "*Loss of attraction*" special cover has been dropped into the policy in an anomalous place (see the comments in the authorities in §§50-51 above about the way in which insurance contracts are put together, sometimes without regard to internal consistency). It should have been included as an additional cover, set out with other additional covers listed at 17 to 19 (which include "*Cancellation and abandonment*"). The anomaly is therefore a limited one. What objectively it cannot be intended to do is to transform the plain meaning of "*interruption*" in relation to all of the other special covers. That would dramatically widen the scope of cover, and constitute an extreme example of the tail wagging the dog. (The FCA presumably agrees, since it does not mention this point in its Skeleton.) It would also mean that "*interruption*" meant different things in different Hiscox wordings, depending on whether there was or was not Loss of Attraction cover.

286. The "*Loss of attraction*" cover can and should be interpreted in a way that does not disadvantage either insurer or policyholder, as a cover that unlike all the other covers listed from 1 to 16 does not require any interruption at all, in any sense.

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316 {**A/2/100**}.

317 {**A/2/133**}.

318 10th Ed., at page 464 (Appendix A(i)) {**K/206/91**} and page 474 (Appendix B) {**K/206/97**}.

319 {**B/6**}.

Commonwealth authority

287. The meaning of "interruption" in a business interruption insurance context has been considered in two Canadian first instance authorities.

287.1 In ***EFP Holdings Limited v Boiler Inspection and Insurance Co. of Canada***, 2001 BCSC 1580, 34 C.C.L.I (3d) 212 {**K/94/7-8**}, the policy provided that insurers were obliged to provide an indemnity if the business carried on by the insured was *"interrupted or interfered with solely as a result of an accident which occurs while this coverage is in effect."* Pitfield J held that:

> "*[16] In my opinion the words "interrupted" and "interfered with" as used in the phrase "interrupted or interfered with" should be read disjunctively. The words have different meanings. "Interruption" contemplates a break in the continuity of the business. "Interference" contemplates a lesser event which may not interrupt the business but impedes or interferes with the profit making capability of the business resulting in a diminution in gross profit.*"

287.2 In ***Le Treport Wedding & Convention Centre Limited v Co-Operators General Insurance Company***, 2019 ONSC 3041 {**K/179/35**}, Gray J also held than the word "*interruption*" in a business interruption policy "*means that the business must cease operating*" (see §253). He reached this conclusion in relation to wording on an endorsement which agreed to indemnify the insured "*against loss directly resulting from necessary interruption of business, caused by destruction or damage by the perils insured against to property at the "Premises"…*" {**K/179/34**}. In that case the insurer argued that these words required "*a complete, albeit temporary, cessation of the business in order for the endorsement to apply*" {**K/179/34**}.

287.3 Gray J referred to (i) the decision in ***EFP Holdings*** {**K/94/8**}, observing that in the policy before him the words "*interfered with*" were not used, and (ii) the Oxford English Dictionary and Cambridge Business English Dictionary definitions of interruption and "*business interruption*", before concluding {**K/179/35**}:

> "*253. In my view, there is no ambiguity in the term "interruption of business". It means that the business must cease operating. Where that happens, the insurer will compensate the insured for its loss of business resulting from the business being shut down. However, unless there is an interruption of business, the endorsement does not apply.*

254. In this case, the business was not shut down. Accordingly, the endorsement does not apply."

288. The approach of the Canadian judges reflects the clear meaning of the word "*interruption*". An insured's activities are not interrupted if they continue, however much they have been interfered with. Nothing short of a stop will do.

Was there any qualifying "interruption"?

289. As set out above, interruption means a cessation in business.

290. As regards the Public Authority cover, the "*interruption*" must be caused by an "*inability to use*" due to "*restrictions imposed*" by a public authority for one of the given reasons. As the "*interruption*" is at the end of chain and must be caused by the other elements of the clause, there can be no "*interruption*" unless all the other elements of the clause are satisfied. Similarly as regards the NDDA clause; all other elements must be satisfied, with "*interruption*" being the last stated cause of the loss.

291. "*Interruption*" is thus a distinct and separate requirement which, as it can only arise if and when all the other elements of the clause are satisfied, may only arise in the circumstances delimited by the rest of the clause.

292. It follows, given the above submissions on the other elements of both the NDDA and Public Authority clauses, that an "*interruption*" could in principle only occur in relation to businesses which were required to close their premises or cease their business by Reg. 2 of the 21 March Regulations {**J/15/2**} or Regs. 4 and 5 of the 26 March {**J/16/23**} Regulations.

293. The "*interruption*" is, however, an additional and separate requirement to the preceding necessary elements. Whether or not there is an "*interruption*" even in a case where all the other elements of the Public Authority clause or the NDDA clause are made out, is ultimately a question of fact in each case. It may often be an easily resoluble question of fact, but it nonetheless arises in every case. Suppose for example, Reg. 2 of the 21 March {**J/15/2**} and/or Regs. 4 and 5 of the 26 March Regulations {**J/16/2-3**} apply to a business and that they created an inability to use because the business was required to close completely. That is not necessarily the end of the matter. If the business was already closed for refurbishment, or the owners had taken a break to go on a world cruise, there would in either such case be no interruption.

294. It follows therefore that one cannot say in principle that an interruption necessarily follows from an inability to use (or if applicable under the NDDA clause a denial of or hindrance in of access). It is a question of fact; but as in the context of inability to use, the answer will often be obvious and the court will be able to give guidance based on assumed facts.

Alternative case if Regulation 6 could amount to denial or hindrance of access or inability to use

295. A further important point arises in relation to interruption and the impact of Reg. 6 {**J/16/4-5**}, in the event, contrary to Hiscox's primary case, that Reg. 6 (the lockdown) was itself held to amount to a denial of or hindrance in access or an inability to use. This applies especially in relation to Category 5 businesses which were not required to close or cease business.

296. Reg. 6(1) of the 26 March Regulations {**J/16/4**} prevented people from leaving home without reasonable excuse. One of the permissible excuses listed in Reg. 6(2) was 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*"".

297. Accordingly, nothing prevented owners or employees of such businesses travelling to work, if it was not reasonably possible for them to work from home. That means:

    297.1 If work could <u>not</u> 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 self-evident.

    297.2 If work <u>could</u> reasonably be done at home, the insured's business or business activities will not have sustained any interruption, within the meaning of Hiscox 1-4, because they could be continued at home. None of the professionals engaged in this case, for example, most of whom will have been working from home since March, could credibly say that their business activities had been interrupted. This example could be replicated across many different businesses and professions.

298. All of this is plain sailing, but it needs to be stated, and decided by the court. Given that about 65% of Hiscox's relevant policyholders are in Category 5, this point is of particular significance to Hiscox, though it only comes in as a fall-back position, in the event that Hiscox were to fail on its primary case.

The FCA's case on "interruption"

299. The FCA's case on "*interruption*" is pleaded in the same paragraphs of the POC as its case on denial of and hindrance in access and inability to use, namely POC §46 and 47. As submitted in §§290-291 above, the "*interruption*" is in fact a distinct and separate requirement.

300. As regards the advice, instructions and announcements on and after 16 March referred to in POC §46 {**A/2/30**}, it is pleaded that there was "*interruption to…the business or the insured's (usual) activities (…Hiscox 1-4…), given that normal business operations and the owners' employees' and/or customers' use of and access to the premises and any business there ceased or were suspended and/or obstructed.*"[320]

301. In its Skeleton the FCA goes even further, equating "*interruption"* with "*interference*" and stating that "*some operational impact is key*".[321] This notion of "*some operational impact*" is supposedly based on the authority of ***The Silver Cloud*** [2004] Lloyd's Rep 696, *per* Rix LJ at §113 {**J/91/23**}. Indeed, the FCA's entire discussion of interruption is introduced under the aegis of ***The Silver Cloud*** {**J/91**}**,** which is put forward as standing for or supporting the proposition that "*These terms* [i.e. both interruption an interference] *require some operational impact*".[322]

302. Neither Rix LJ at §113 {**J/91/23**} nor anything else in that case is authority for the proposition that interruption merely involves or axiomatically only requires "*some operational impact*". The meaning of interruption is not discussed. The relevant clause (in the Ai cover) so far as interruption is concerned is at Annex 1 to the judgment {**J/91/29-34**}, and provides:

> "*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….*"

320 POC §46.8 {**A/2/31**}.

321 FCA Skeleton §160 {**I/1/62**}.

322 FCA Skeleton §159 {**I/1/62**}.

303. Rix LJ in §113 {**J/91/23**} of the judgment was considering "*interference*" with the schedule in contrast to a "*change*" in schedule (relevant to Aii cover[323]). In that context he said:

> ""*Interference" to my mind reflects the necessity under cover Ai for there to have been some operational impact upon the vessel's itinerary (see also the word "Interruption" under the third paragraph relating to health hazards) whereas "change" reflects the more voluntary impact of a commercial decision taken in the light of the economics of the cruising market. I do not accept Mr. Flaux's submission that under this policy "interference" is apposite to describe a change of schedule adopted by Silversea to mitigate its difficulties.*"

304. All that Rix LJ was doing was praying in aid the reference to "*interruption*" as support for the point that there had to be operational impact as opposed to none. He was clearly not holding that "*some operational impact*" was sufficient for "*interruption*" in that case, let alone holding that that was so in <u>any case</u>.

305. That the FCA builds its case on "*interruption*" on such a flimsy foundation is telling as to the difficulties which it faces. Yet it proceeds from Rix LJ's §113 {**J/91/23**} to refer to a description of the term "*interruption*" (used in tandem with "*interference*" to soften the extremity of the proposition) as "*intentionally wide*", and invites the court to hold that an interruption is constituted by each of a reduction of customers, a reduction of supplies, a reduction in capacity or an increase in the cost of working.[324] None of this is an available meaning of the word "*interruption*".

306. The FCA vainly attempts to square this circle by accepting[325] that "*interruption*" requires "*some element of cessation*", but then says, with a further glance in the direction of Rix LJ, that "*that requirement must be viewed in terms of the operational requirements of the business. A business would be interrupted where it was not able to carry out <u>operations in the manner that it had been and would ordinarily have been carrying out those operations</u> without contravening the advice, instructions and/or announcements referred to in paragraphs 46, 47 and 49 [sc. of the POC]*". This is far too broad, and contrary to common sense: it would mean that any shop permitted to stay open and serve customers, but which followed government guidance in relation to social distancing, had had its business interrupted. This is indeed the FCA's position.[326]

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323 Judgment §12 {**J/91/8**}.

324 FCA Skeleton §160 {**I/1/62**}.

325 FCA Skeleton §162 {**I/1/62-63**} and 379 {**I/1/141**}.

326 FCA Skeleton §163 {**I/1/63**}.

307. The FCA's difficulty is compounded by the example it then gives[327] of a clothes store which is able to extend its existing mail order business or which starts a mail order business. The FCA says that the non-mail order part of the business has been interrupted. Hiscox submits that there is simply no interruption.

308. The logic of the FCA's reliance[328] on two metre distancing as ordinarily being sufficient to amount to an interruption to the business's activities because "*[i]t impedes customers access to the and by customers to the extent it has a major operational impact, interrupting the normal functioning of the business*" shows the breadth of the FCA's case and the unwarranted dilution of the simple and straightforward requirement of interruption.

309. That an inability to continue "*normal business operations*" cannot be equated with an interruption is illustrated by the examples given from §181 above, of those professionals who have continued much as before whilst placing greater reliance on technology.

310. Nor do increased difficulties or a reduced flow of customers amount, as asserted in the FCA Skeleton, to an "*interruption*".[329] It refers to businesses reliant on customer footfall as likely to be interrupted by being required to stay at home, presumably under Reg. 6 of the 26 March Regulations {**J/16/4-5**}. However, there is a correlation between those businesses allowed to stay open under Reg. 5 and the ability to visit them under Reg. 6. Reg. 5 of 26 March Regulations {**J/16/4**} provides that the businesses in Part 3 of Schedule 2 {**J/16/11-12**} may stay open. Therefore, as regards the (mainly) retail businesses permitted to stay open, it would be a reasonable excuse under Reg. 6(2)(a) {**J/16/4**}, which allows one to "*obtain basic necessities… supplies for the essential maintenance and functioning of the household… or to obtain money including from any business listed in Part 3 of Schedule 2*." to visit such a business.

311. The FCA's example[330] of a factory with two out of three production lines down but one functioning has not suffered an interruption. The FCA says that this conclusion is "*remarkable*" but (as is obvious) such a point can be met by the equally "*remarkable*" counter-example of a factory with ten production lines of which only one is down. On the FCA's case of partial interruption, this factory would have suffered a business interruption and

327 FCA Skeleton §162 {**I/1/62-63**}.

328 FCA Skeleton §163 {**I/1/63**}.

329 FCA Skeleton *ibid* {**I/1/63**}.

330 FCA Skeleton §165 {**I/1/64**}.

could bring a claim. Rather than trading examples at the extreme, it is better to look at the meaning of the words.

312. Another example of the FCA overlooking Category 5 occurs in this context. In §381 of its Skeleton {**I/1/142**}, the FCA says that "*the fact that an insured may be able to restart some of its activities from another location does not mean that its normal business or business activities have not been interrupted.*" It then goes on to refer to "*small contributions*" made by home working. A number of points arise. First, as to the use of the word "*restart*": at least very many Category 5 businesses will never have stopped but simply shifted operations. In many cases, there will have been a more or less seamless change. The position of these businesses is dealt with in more detail above in relation to "*inability to use*". Secondly, the reference to "*small contributions made by home working to gross profit*" ignores the fact that many business will have managed to do better than that. Indeed, many have worked from home in more or less the same way as from the office. Third, and related to the first point, in this discussion the interruption is more or less assumed.

313. Two thoroughly bad points are then taken in support of the FCA's construction of "*interruption*". It is said[331] that the Increased costs of working cover[332] would be futile if Hiscox were right, because it would never apply if the policy only paid out when working had ceased completely. That overlooks both the fact that the indemnity period can (and often will) be for longer than the period of the interruption,[333] and the fact that increased cost of working cover is, far from being futile, of value where there has been an interruption, allowing the insured to recover costs expended in minimising the reduction of income for which insurers would otherwise be liable (for example by purchasing equipment or renting alternative premises to restart business). It is also said[334] that because the indemnity is for the difference between "*actual income and estimated income*", that shows a partial interruption must be contemplated.[335] This argument overlooks at least two points: (i) actual income can be nil; and (ii) the indemnity period extends (subject to a maximum period) for as long as

331 FCA Skeleton §379 {**I/1/141**}.

332 The definition of "*increased costs of working*" is at Hiscox 1 {**B/6/40**}. As usual, such costs are payable in addition to payments in respect of Loss of income/Loss of Gross profit, see {**B/6/44**}.

333 It lasts for the *"period during which* ***your income*** *is affected as a result of such* ***insured damage*** *etc…"* (Hiscox 1 lead wording {**B/6/40**}.

334 FCA Skeleton §166 {**I/1/64**}.

335 See definition of Loss of income *"…The difference between* ***your*** *actual* ***income*** *during the* ***indemnity period*** *and the* ***income*** *it is estimated* ***you*** *would have earned during that period…"* {**B/6/44**}.

the insured's "***income*** *is affected as a result of such* ***insured damage***, ***insured failure***, *or restriction*…"[336], meaning it can straddle both a period of interruption when there may be no income and a period after interruption where income is still adversely affected.

314. In the same vein, it is also said,[337] that construing a policy as requiring full cessation would "*punish the actions taken by a policyholder to minimise its losses.*"[338] There is no question of punishing the insured, and the points made in §174 are repeated. If the insured's business has been interrupted, the insured is obliged to take steps to minimise any loss but, if money is necessarily and reasonably expended in fulfilment of that obligation, it will be recoverable as increased costs of working.

315. Finally in relation to POC §46 {**A/2/32**}, given that non-mandatory advice, instructions and announcements did not require businesses to cease or close and created no denial of or hindrance in access, an interruption is highly unlikely to have resulted from such advice, instructions and announcements.

316. As regards the matters relied upon as orders in POC §47 {**A/2/32**},[339] which relates to businesses ordered to close, the plea is as follows, so far as material to Hiscox:

> "*interruption to … the business or the insured's (usual) activities (…Hiscox 1-2, Hiscox 4…)*[340] *given that owners, employees and/or customers were ordered not to use the premises for its business.*"

317. The concept of "*usual*" activities is immaterial. It is no part of the Hiscox wording, and "*interruption*" requires cessation of activities.

318. The only relevant orders, in the sense that the only ones which contained mandatory "*order[s]*" to close, are Regs. 2, and 4 and 5 of the respective Regulations. However, the effect of these orders is, in any event, described too broadly in the FCA's plea quoted above. As

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336 Hiscox 1 lead wording {**B/6/40**}.

337 FCA Skeleton §380 {**I/1/141-142**}.

338 Hiscox 1, Your Obligations, 2 (a) {**B/6/19**}.

339 POC §47 {**A/2/32**} is apparently only aimed at Hiscox 1-2, and Hiscox 4 but was pleaded to and is dealt with here on the basis it was intended to apply to all Hiscox policies, as the plea in §47.2 {**A/2/32**} is relevant to Hiscox 1-4, not just Hiscox 1-2 and Hiscox 4.

340 This is presumably intended to be Hiscox 1-4: see previous footnote.

the FCA recognises in the opening part of POC §47 {**A/2/32**}, even the businesses ordered to close were not all ordered to cease business completely or close premises completely.

319. In relation to businesses subject to an order to close, whether or not there was an interruption remains a question of fact. In many cases no doubt it will be established and be easy to establish, and the court will be able to give further guidance by reference to paradigm cases. But if, for example, businesses were able to operate in certain respects (serving takeaway or operating by mail order or online) there would not be an interruption. POC §47 {**A/2/32**} goes far too far in stating that such businesses were interrupted unless the businesses were already wholly take-away/mail order or online. This is no more meritorious a plea than the case of ten production lines of which only one is down.

H. PROOF OF OCCURRENCE OF THE DISEASE IN A PARTICULAR LOCALITY

320. This question arises if, contrary to Hiscox's submissions, there is potential coverage under either the NDDA or the Public Authority clause, and deals with how the insured shows the necessary presence of the disease within any relevant area.

321. Hiscox adopts the submissions of the Third and Fifth Defendants in relation to prevalence.

I. CONCLUSION ON COVERAGE

322. The argument that the NDDA cover applies is hopeless; as noted above, it is clear that HAG does not rely on it at all.

323. As regards the Public Authority clause, it could only be even potentially applicable in cases where there was a closure of the premises or cessation of the business due to Regulations creating an inability to use which had caused an actual interruption following, in a temporal and causative sense, an occurrence in the sense identified above – a local medically verified occurrence of the disease. About two-thirds of Hiscox insureds will not be able, in the absence of special facts, to show an inability to use and/or an interruption in the sense required. There will be no cases where all of these requisite elements of the clause can be demonstrated by any insured, given the meaning of "*following*" and "*occurrence*".

J. CAUSATION

Introduction

324. Hiscox does not address in this section those "causation" points which are in reality coverage points, namely that:

324.1 in the NDDA clause, it is the incident within the one mile radius (or vicinity) which must result in the denial of or hindrance in access; and

324.2 in the Public Authority clause, the restrictions must follow (in a sense denoting a causal relationship) a local and specific occurrence.

325. Whether or not these conditions are satisfied does not turn on any contested question of causation as such, but on the meaning of the subjects which govern the causal verbs underlined in §324.2 above. These are arguments which have been addressed in §§124-143 and 268-274 above.

326. For the purposes of the true causation issues which arise in this case, the Defendants' Joint Skeleton Argument on Causation is incorporated *in extenso* at this juncture.

327. So far as Hiscox is concerned, the critical question is what is the correct counterfactual which must be posed for the purposes of causation and hence the assessment of loss.

328. This question is approached in the following three ways:

328.1 As a matter of general principle;

328.2 By considering the effect of the key clauses in the wordings, including but not limited to the trends clauses in Hiscox 1-4;

328.3 By analysing the effect of the "*solely and directly resulting from*" limitation in the stem in the Hiscox wordings.[341]

329. Those three points are independent of each other and success on any one of them is sufficient for Hiscox to succeed on its case as to the proper counterfactual. Before

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341 FCA Skeleton §386 {**I/1/144**} says that the focus of Hiscox's Defence is "*on the "solely and directly" wording and on the counterfactual*". It is not clear why the FCA has this impression. Hiscox relies on "*solely and directly*", as indicated above, but it also relies strongly on the points of general principle and the trends clauses.

addressing these points further, it is useful to set out the rival positions as to what the proper counterfactual should be in this case.

Proper Counterfactual

330. Hiscox submits that the proper counterfactual under Hiscox 1-4, whether one is considering the NDDA or the Public Authority clause, is one which assumes (as actually occurred) the existence of COVID-19 in the UK, its impact on the economy and public confidence, and the government measures falling short of the mandatory "*restrictions*", namely Reg. 2 of the 21 March {**J/15/2**} and Regs. 4 and 5 of the 26 March Regulations {**J/16/2-4**}. These Regulations are the only aspects of the government response to the pandemic which could actually engage the NDDA and Public Authority clauses.[342]

331. The significance of this is that, although obviously no precise findings can be made in this respect, at least the great majority of the insureds' losses will have been caused by the matters which are retained in this counterfactual and therefore would have occurred anyway, even if the insured peril(s) had not happened. It necessarily follows that the losses caused by the limited insured perils under Hiscox 1-4 (in both a "but for" sense and proximately[343]) are likely to have been minimal.[344]

332. Should Hiscox be wrong in any of its submissions on coverage, e.g. in relation to the ambit of the government measures capable of engaging the clauses, the counterfactual will be altered accordingly, as the insured peril is widened. The broader the insured peril(s), the greater the number of changes between what actually happened and what is assumed to have happened in the counterfactual. The narrower the insured peril, the smaller the number of changes between what actually happened and what is assumed to have happened in the counterfactual. All this flows from the relationship between insured peril and counterfactual; the narrower the former, the wider the latter[345] and *vice versa*.

333. When one talks in terms of what actually happened and what would have happened in the counterfactual, the focus is on what happened and would have happened to the insured, rather than what would have happened in some generalised sense. This follows from the

342 See §§117-123 and 172-177 above.

343 Concurrent proximate causes of loss being excluded by the "*solely and directly*" wording.

344 Joint Skeleton on Causation at §§63-74 {**I/6/68-71**}.

345 In the sense that the broader is the scope of the facts as they are in the real world which remain unaltered.

fact that the exercise is undertaken in order to work out what loss has been proximately caused to the insured by reason of the operation of the insured peril. It is therefore with ascertaining the actual and hypothetical consequences to the insured that the court is engaged.

334. The FCA by contrast states what it says is the proper counterfactual at POC §77 {**A/2/45**}, namely that "*what would have happened but for the perils insured considered in this Claim is the situation in which there was no COVID-19 in the UK and no Government advice, orders, laws or other measures in relation to COVID-19, or alternatively in which such of these events as the Court adjudges to be interlinked (if not all) had not occurred.*" The case made in the FCA Skeleton[346] is identical.

335. The lesser point to be made about this paragraph is that it once again puts forward the shibboleth of "*interlink[age]*" as if it were an incontestable element in the equation, and without examining on what basis such interlinkage is being proposed. Once it is clear that the wordings require identification and separation of that which is, and that which is not within the perils insured, the whole premise of the supposedly inevitable interlinkage falls to the ground.

336. The greater point to be made about POC §77 {**A/2/45**} is that the FCA's counterfactual removes from the picture in its entirety (i) the presence of COVID-19 anywhere in the UK; (ii) the entire government response to COVID-19, whatever the nature of that response; and (iii) by necessary implication (given the removal of COVID-19) the entire impact of COVID-19 on the economy and public confidence. It effectively therefore treats the consequences of each and all of these as if they were comprised within the indemnity to which Hiscox agreed, as a consequence of the insured peril. This conclusion is obviously wrong as a matter of impression: see §4 above. Why it is wrong as a matter of principle is explained in the Joint Skeleton on Causation.

(1) General principle

Insured Perils

337. The key point established by the general principles explained in the Joint Skeleton on Causation is that what is and must be reversed or subtracted for the purposes of ascertaining the correct counterfactual is the insured peril and nothing more than the insured peril.

346 FCA Skeleton §415 {**I/1/151**}.

Strictly speaking, it is the consequences of the insured peril for the insured which must be subtracted, in order to ascertain what loss the insured would have suffered anyway, and what loss therefore fails the "but for" test.

338. As submitted above,[347] the essence of the insured peril in both the NDDA clause and the Public Authority clause is mandatory government restrictions. Those points are not repeated here, although some consideration of the nature of the insured peril is necessary in this context as well.

NDDA clause

339. The NDDA clause, including the stem, which is part of the insured peril, provides as follows (repeated for ease of reference):

> "*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:…*
>
> ***Non-damage denial of access***
>
> *An incident occurring during the* ***period of the insurance*** *within a one mile radius of the* ***insured premises*** *which results in a denial of access or hindrance in access to the* ***insured premises,*** *imposed by any civil or statutory authority or by order of the government or any public authority, for more than 24 consecutive hours*" [348]

340. The insured peril begins with the word "*interruption*". The essence of the ensuing insured peril is a denial of or hindrance in access imposed by or by order of one of the specified authorities resulting from an incident within a one mile radius or from within the vicinity.

341. The clause does not actually refer to disease at all. Although the FCA's causation case on the NDDA clause is actually no more than an extreme version of its case on the Public Authority clause, the fact that the FCA even advances it serves as a useful thirteenth chime in relation to the FCA's causation case as a whole. The idea that the NDDA clause counterfactual requires, on the FCA's case, the reversing out of the entire COVID-19 pandemic in the UK and all of its impacts is an impossible one. The logic (which as stated is just an extreme version of the FCA's general stance) yields a ludicrous conclusion.

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347 §§24, 74, 82, 148-149.

348 Hiscox 1 lead wording {**B/6/41**}.

342. What the clause is clearly not doing is providing insurance against the "*incident*" itself (if, contrary to Hiscox's submissions in §87-100 above, this could be the pandemic). The clause is not providing insurance against any consequences of the incident other than the consequences of the resulting denial of or hindrance in access imposed by the relevant authority, which causes an interruption to the insured's activities.

343. What, therefore, the court has to subtract from the situation which in fact exists, in order to arrive at the proper counterfactual, are the consequences of a denial of access or hindrance in access to the insured premises imposed by the relevant authority, resulting from an incident within a one mile radius (or where applicable within the vicinity) of the insured premises, causing an interruption to the insured's activities. The FCA deals with the proper counterfactual[349] largely in the context of the Public Authority clause and Hiscox does likewise from §345 below.

344. It is not enough if an incident causes an interruption. The interruption has to be caused by an incident resulting in a denial of or hindrance in access and not just any denial of or hindrance in access but one imposed by or by order of one of the specified authorities. It is for the consequences of this narrow peril alone that Hiscox has agreed to indemnify the insured. Loss which the insured would have suffered anyway is not caused by the operation of this peril.

Public Authority clause

345. The terms of the paradigm Hiscox Public Authority clause (again including the stem) are repeated for convenience.

> "*We will insure you for* ***your*** *financial losses and other items specified in the schedule, resulting solely and directly from an interruption to* ***your activities*** *caused by:*
>
> *…****your*** *inability to use the* ***insured premises*** *due to restrictions imposed by a public authority during the* ***period of insurance*** *following:*
>
> *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;*

349 FCA Skeleton §729 {**I/1/241**}.

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****.*" [350]

346. The insured peril under the Public Authority clause has been analysed from §148 above, and that analysis is not repeated in full here. For the reasons there stated, the core of the insured peril is "*restrictions*". Under this clause, the insured must prove that loss has been caused by each of the following: (i) an interruption (ii) caused by inability to use the insured premises (iii) due to restrictions imposed (iv) following (i.e. caused by[351]) an occurrence of a disease. Stating these components in their correct causal sequence, they are (A) an occurrence of a disease followed by; (B) restrictions imposed causing; (C) an inability to use causing (D) an interruption.

347. It is manifest that what is not insured is the occurrence of the notifiable disease itself or on its own (A), nor are any consequences of the occurrence of a notifiable disease insured save for those precise consequences which are specified in the clause and by which the insured's loss must be "*solely and directly*" caused. The insured peril is conspicuously narrow. There are multiple elements which need to be satisfied, each reducing, not increasing, the scope of the insured peril and the amount of the indemnity.

348. For the purposes of the counterfactual, therefore, what one subtracts is only the consequences of the restrictions imposed (following an occurrence of disease) which cause an inability to use the insured premises which causes an interruption.

349. The FCA's case is that where a trigger contains four elements, and provided that the qualifying conditions for cover are met, the full consequences of each element considered in isolation are subtracted in order to construct the counterfactual. If one followed the approach of the FCA, it would be as if Hiscox had insured an occurrence of disease independently, rather than losses flowing from all the necessary elements in combination. What is insured is A causing B causing C causing D. Hiscox is not insuring each or any cause independently. Nor is Hiscox insuring the consequences of each cause independently. Suppose that A on its own (COVID-19) causes the insured a loss of £100. If one reverses

350 {**B/6/41**}.

351 This point is conceded by the FCA in POC §60 {**A/2/40**}.

out A in the counterfactual, all of the insured's loss would have been avoided; none of it would have occurred anyway. However, if (adding in B, C and D), one asks what loss would have been incurred anyway but for the interruption to the insured's business caused by its inability to use the premises, caused by the restrictions following an occurrence of the disease, the answer is likely to be all or nearly all of it, because if one reverses out only the consequences of that combination of matters, all or nearly all of the loss would have been incurred anyway. Certainly, and as pointed out in §72 of the Joint Skeleton on Causation {**I/6/71**}, it would make no sense to enable the insured to recover £100 for the consequences of A if the consequences of A to D were only £10.

350. Hiscox is no more insuring against all the consequences of the occurrence of a disease than it is insuring against all the consequences of vermin and pests being found at the premises or of all the consequences of an outbreak of food poisoning at the premises. Suppose that vermin are found at a restaurant premises and that they are later made the subject of a closure order for two weeks, whilst the vermin are eradicated. After that time the restaurant is allowed to re-open. Takings however are down over the next two months by 40% because the rats have received publicity (because a journalist took a picture of one before the closure and published it in a newspaper) so that diners have been put off visiting. The insured could obviously not recover for the consequent diminution in trade after re-opening, however broad the basis of settlement clause. The insurance is not against the occurrence of vermin. Nor does it help the insured to point out that the vermin caused the restrictions which caused the inability to use which caused the interruption. The insured is only entitled to be indemnified for the consequences of A+B+C+D in combination, not for the consequences of A alone, albeit that A did in fact cause B which caused C which caused D.[352]

351. The correct approach is that the more elements there are in the A+B+C+D chain, the narrower the insured peril and the broader the counterfactual (i.e. the fewer the number of facts reversed to construct it). One cannot in the A+B+C+D example reach the conclusion that an insurer who has stipulated only to pay for the consequences of the four elements in combination ends up paying for the consequences of A. This point is illustrated in the Joint Skeleton on Causation §§71 to 76 {**I/6/71-72**}.

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352 There is "*Loss of attraction*" cover available (it is present in some Hiscox wordings: see §241.1(c) above). This clause is present in thirteen Hiscox wordings, for example special cover number 5 in the Hiscox 1 lead at {**B/6/41**}, but it is restricted to situations in which there is damage in the vicinity of the premises or a fundraising event.

352. Despite the incontrovertible correctness of the above, the FCA argues that what Hiscox is insuring, is in effect, the disease (or murder, bad drains, or vermin). This is clear from (e.g.) FCA Skeleton §§412-413 {**I/1/151**}, and 419-422 {**I/1/152-153**}. The same approach is taken in HAG Skeleton §§17-19 {**I/3/7**} and §§72-79 {**I/3/26-29**}. The FCA observes that "*Hiscox does not dodge this example*"[353]. Indeed Hiscox does not; it invites attention to it. What is fundamental is that the cover is not for murder, disease etc, provided only that there is "*something extra*" in the form of public authority actions. (Cf. the FCA's position: "*The cover is for the effects of murder or suicide, but only where there is public authority intervention—that is the 'something extra'.*"[354]) This is to turn 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 not for murder, bad drains, disease etc. – provided only that there is consequent public authority action.

353. Moreover, and as with the FCA's previous use of this authority in the context of interruption (see §301 above), the taking of a short phrase ("*Something extra*") used by one judge in one case to describe the effect of clauses particular to that case cannot be reliably deployed in the wholly different context of a different case. The FCA's very use[355] of the analogy of ***The Silver Cloud*** {**J/91**} (like all analogies) begs the question. It is also a wrong use of authority.

354. Putting forward the same argument in the context of vermin and pests, the FCA argues:[356]

> "*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). But it is not merely an insurance of the top slice of loss due to the incremental addition of that public authority advice; it is not intended to entail an investigation into a counterfactual of other responses to vermin; it is intended to cover vermin as the insured event.*"[357]

355. The absurd point has now been reached where the FCA treats the public authority element in the clause as there only to ensure (i) that Hiscox's suppositious insurance of vermin is only triggered in a suitably serious case of vermin; (ii) to enable the insured to prove that there are really are vermin. But Hiscox does not insure vermin. By the time that the argument

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353 FCA Skeleton §421 {**I/1/153**}.

354 *Ibid* {**I/1/153**}.

355 FCA Skeleton §419 {**I/1/152**}.

356 FCA Skeleton §422 {**I/1/153**}.

357 Note that Hamblen J described the hurricane as the insured event in ***Orient-Express*** at §58 {**J/106/12**}, so this is not a promising phrase for the FCA.

gets as far as the trends clauses, the FCA asserts that "*COVID-19 affecting the business*" is "*the insured peril in its broad sense*".[358] It is no such thing.

356. The FCA then pays Hiscox the lukewarm compliment of saying that its assertion – that the policy does not cover losses due to the rats or murder themselves causing people to stay away from the business – captures the core dispute in the case.[359] The FCA says that it fundamentally disagrees that the parties would understand that the indemnity could be reduced or removed completely because the murder or vermin was a proximate or "but for" cause of loss, but this unreasoned objection falls far short of any principled explanation as to why an insurer who only agrees to pay for the consequences of four matters in combination is to be held liable for all the consequences of only one of them in isolation.

357. It is then necessary to return briefly to FCA Skeleton §419 {**I/1/152**} and the usual over-reliance by the FCA upon Rix LJ's judgment in ***The Silver Cloud*** {**J/91**}.[360] What is said by the FCA is "*Following The Silver Cloud, the underlying cause … is expressly required as part of the trigger. The public authority action responds to the notifiable disease…and is the "something extra" required. It is the insured event in any common sense interpretation of the policy even if not the "insured peril" in the sense of it not being sufficient (although it is necessary) to trigger cover. It cannot have been intended that any other things caused by the same emergency are competing causes that can prevent the "resulting from" test being satisfied….the parties would not understand the insurance merely by the word "resulting from" to have given with the hand providing emergency cover but to then taken away with the other hand*" {**I/1/52**}.

358. This is an argument that insurers should be liable for all the consequences of A, even though the insurance was only for the consequences of A+B+C+D. It has already been addressed. Insofar as it is necessary to spend further time on ***The Silver Cloud*** {**J/91**}, detailed submissions on that authority in this context are contained in the Joint Skeleton on Causation.[361]

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358 FCA Skeleton §412 {**I/1/151**}.

359 FCA Skeleton §421 {**I/1/153**}.

360 {**J/47/21**}.

361 §60 {**I/6/62-67**}.

359. For present purposes, it is necessary to add little. The argument Rix LJ was addressing was whether or not an exclusion clause in the following terms excluded market losses. The clause read:[362]

> "*Deterioration of market and/or loss of market and/or lack of support for any scheduled cruise unless as a direct result of an insured event.*"

360. Insurers were arguing that the underlying events (the 9/11 attacks) were not an insured event for the purposes of this clause; and the Court of Appeal found against them. Rix LJ's conclusion that there was no intention under the policy to exclude losses caused concurrently by the warning and the underlying causes was not addressing any question of counterfactuals or indemnity. He was simply referring to the ambit of the exclusion clause. Rix LJ's judgment is no foundation or authority for the FCA's approach.

361. The FCA also argues that Hiscox's approach cannot be right, because it would involve difficult questions of proof on the counterfactual.[363] However, this is a largely illusory difficulty. In the vast majority of cases, it is most unlikely to be a problem: it is only because the FCA is seeking to extend the Public Authority clause far beyond its natural ambit that these issues are said to arise. In the case of many quotidian instances where there are rats or a suicide without any closure (i.e. the counterfactual), these are unlikely to have made any appreciable difference, and it is hard to imagine the parties having an argument about this. In this case, Hiscox 1-4 are not objectively intended to cover this situation, and more complex questions therefore arise than normal. But in any event BI losses are often difficult to assess, involving complex considerations and accountants.[364] Further, even on the FCA's narrow view of the trends clause, consideration of and potentially complicated evaluation of "*extraneous*"[365] matters (i.e. the vicissitudes of commerce) and their financial effect may be involved, potentially requiring expert evidence.

362. HAG attempts what is, with respect, a risible justification of the argument that the insurer in the present situation is liable for all the consequences of A. It says[366]that this consequence

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362 §97 {**J/47/21**}.

363 POC §76 {**A/2/45**}; FCA Skeleton §421 {**I/1/153**}.

364 As shown by Chapter 14, Claims Calculation, in ***Riley on Business Interruption Insurance*** (10th Ed.) {**J/154/43**}.

365 FCA Skeleton §271 {**I/1/106**}.

366 HAG Skeleton §90 {**I/3/32**}.

is "*the trade-off the insurer must make…for forcing the insured to prove a long chain of matters, and the causal relationship between each of them*". It is unclear what legal principles are being invoked here: Hiscox is unable to identify any. But the FCA's arguments are no more principled. Apart from repeated attempts to apply ***The Silver Cloud*** {**J/91**} to the present case, its arguments boil down to differently expressed assertions that the result contended for by Hiscox cannot have been intended.

363. Thus, it does not assist the FCA's argument[367] to assert that any reasonable person would not understand the Public Authority clause as providing only incremental loss beyond the consequences of the underlying event itself. There is no basis advanced for this rather loaded statement. Any reasonable person who could follow the present arguments on either side would understand that the clause provided cover against losses caused by the insured peril, not by one or each element of the insured peril taken on its own. The FCA's argument in this respect is part of its theme that the stance which Insurers advocate is unfair to the insured. On the contrary, the FCA's stance would lead to unfairness to Insurers by imposing on them a liability never undertaken.

364. It is instructive how far the FCA takes the "*something extra*" point – the supposedly incidental nature of the need for authority action. In §276.1 of its Skeleton {**I/1/108**}, the FCA gives an example of a voluntary closure before Public Authority action is taken. In such a situation, the FCA says, the action is the sole cause of interruption or loss from the date of the authority action (notwithstanding that there is nothing to interrupt), but also that the Public Authority action when it occurs "*takes over or encompasses/absorbs (as an interlinked and so not truly concurrent cause) the prior disease-related causes as the sole proximate and but for cause of the interruption or loss*". That is a remarkable argument; but it shows, with respect, to what extent the FCA is prepared to rewrite the cover in order to reach the desired result.[368] In this example, the necessary causal link between the Public Authority action and the interruption is indisputably not present; but what the FCA does is retrospectively to interpose a causal link which never existed into the chain. This is heresy indeed; but it is a stark example of the extreme nature of the FCA's case.

365. In its Skeleton §423 {**I/1/167**} the FCA attacks a case which Hiscox is not making. Hiscox is not saying that one only removes B in the counterfactual; it should be now be clear that

367 FCA Skeleton §422 {**I/1/167**}.

368 HAG make a similar argument in relation to an example; HAG Skeleton §23 {**I/3/9**}.

what one removes in the counterfactual is A+B+C+D and the consequences of that chain. HAG similarly devotes much energy to attacking a non-existent case.[369]

366. In POC §72 {**A/2/43**} the FCA pleads specifically in relation to the Public Authority clause in Hiscox 1-4 in the following terms:

> "*In particular, in relation to the Hiscox 1-4 wordings, the assumed loss did result "solely and directly" from an interruption to the insured's business activities caused by inability to use the premises due to restrictions imposed by a public authority following an occurrence/outbreak of a notifiable or human infectious or contagious disease (with, it is noted in the case of Hiscox 1-3, no vicinity limit, such that there can be no realistic counterfactual other than that set out in the Claimant's primary case). Where public authority orders and advice are only covered by an insured peril where they follow the outbreak of a disease, they cannot sensibly be said not to be covered because the interruption does not solely and directly result from the orders or advice as it also results from the disease. The disease will always,* ***by definition****, have occurred in addition to the orders and advice, and that reading of "solely and directly" would leave the public authority orders and advice insured peril with no realistic scope in any situation. Such an absurd result, giving the public authority wording no force at all, cannot have been intended*." (Emphasis in original)

367. The effect of the words "*solely and directly*" in the stem is dealt with specifically from §421 below, but the argument that Hiscox's case on causation leaves the insured peril with no realistic scope in any situation is fallacious. The clause works perfectly well in the sort of situation which it was objectively intended to cover. If, for example, there was an outbreak of legionnaire's disease or a suicide in the same building as a restaurant and the restaurant was closed for a week in consequence, it is likely that it will be that restriction, rather than the outbreak or suicide itself which will be the only cause of the interruption and the resulting loss. The supposed problem identified in POC §72 {**A/2/43**} is chimerical.

368. The FCA's approach is to re-write the contract of insurance by greatly widening the ambit of the insured peril(s). It seeks to achieve this by a heterodox and goal-driven approach to causation. That is an impermissible, back-to-front exercise. It is the insured peril which necessarily dictates the counterfactual, not the other way around. The result of Hiscox's submissions on causation is only "*absurd*", as the FCA contends,[370] because it starts from the premise that the insurance was intended to provide cover in the present situation. The more

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369 HAG Skeleton §92 {**I/3/32**}.

370 POC §72 {**A/2/43**}.

it is analysed, the more the FCA's argument in fact demonstrates that the cover was not objectively intended to apply to this situation.

369. What the FCA seeks to do, as explained in the Joint Skeleton on Causation, is to assert a single proximate cause: "*the disease everywhere and the Government and human responses to it*",[371] and then to force that into narrow and limited insured perils. That is not permissible for the reasons given in the Joint Skeleton on Causation.[372] The supposed identification of a single cause leads to an assertion of indivisible loss, something which is manifestly not the case.[373]

(2) Other clauses of the Policy including trends clauses

370. Further support for Hiscox's argument as to the proper scope of the counterfactual can be derived from the other clauses within the BI section of Hiscox 1-4.

Loss of Income clause

371. In the "*How much we will pay*" part of the BI section there is, in the great majority of Hiscox 1-4 wordings[374], a Loss of Income clause in the following terms:

> "*The amount we pay for each item will be calculated as follows:*
>
> *"Loss of income: The difference between your actual income during the indemnity period and the income it is estimated you would have earned during that period…*"

372. The loss of income clause is silent as to the counterfactual denoted by "*the income it is estimated you would have earned during that period*". But the counterfactual must be and can only be the income which it is estimated that the insured would have earned during that period if the insured peril had not occurred. There is no other arguable possibility. If there is another independent concurrent cause of loss, loss thereby caused is expressly ruled out by this clause. Hiscox refers to the Joint Skeleton on Causation, which addresses concurrent independent causes at §50 *ff* {**I/6/41**}.

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371 FCA Skeleton §225 {**I/1/91**}.

372 §§81-83 {**I/6/75**}.

373 Joint Skeleton on Causation §§84-91 {**I/6/78-81**}.

374 The clause is taken from the Hiscox 1 lead policy {**B/6/44**}. It appears in all Hiscox 1 policies {**B/36**} **to** {**B/42**}; all Hiscox 2 policies {**B/43**} **to** {**B/64**} but 15779 {**B/46**} and Electrical contractors BI - 10117 {**B/64**}; and in Hiscox 3 policies Cleaners BI - 8358 {**B/65**}, Cricket Club BI - 14174 {**B/66**}, Media and entertainment BI - 9519 {**B/67**} and one Hiscox 4 policy, Bowling Clubs 15480 {**B/70**}. Thus it appears in the great majority of policies and in policies covering the great majority of policyholders.

373. The situation is no different from that in ***Orient-Express*** where both the arbitral tribunal[375] and Hamblen J[376] held that the trends clause only made clearer what was in any event the effect of the policy.

374. This clause is consistent with and supports Hiscox's position.

Indemnity Period clause

375. Hiscox's argument is also reinforced by the terms of the Indemnity Period[377] clause referred to in §150.4 above: the definition of "*Indemnity Period*" refers to "*the period…beginning at …the date the restriction is imposed…and during which your income is affected as the result of such…restriction.*"[378] The clause talks only of income being affected by the restriction, shorthand for the insured peril, and not anything else.

Trends clauses

376. The trends clauses in Hiscox 1-4 (there is a version of the trends clause in all policies[379]) also support Hiscox's position as to the approach to the counterfactual, both as a matter of their language, and on the authority of the *Orient-Express* case.

377. The FCA, so far as Hiscox is concerned, raises:

377.1 one general point on the trends clauses; and

377.2 three points of detail, which the FCA relies on to argue that certain of the trends clauses in Hiscox 1-4 are not applicable.

378. The FCA's general point on the trends clauses[380] is that "*if and insofar as applicable their purpose is not to exclude the natural and probable (if not inevitable) result of the peril that has resulted in loss to the*

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375 Award §17, quoted in judgment §17 {**J/106/4**}.

376 §58 {**J/106/12**}.

377 The Indemnity Period clause appears in all of Hiscox 1-4. Although there are immaterial variations all refer to "*restriction*".

378 {**B/6/44**}.

379 The variants are explained in §§340-344 below.

380 POC §76 {A/2/45}. FCA Skeleton §§268-271 {**I/1/106-107**} esp. at 271 expresses the point in essentially the same terms.

insured. They contemplate 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."

379. The three points of detail relied on by the FCA are:

379.1 The fact that a number of the Hiscox trends clauses make no express reference to "*restrictions*": they do not say "*if the* ***insured damage****, [****insured failure****] or restriction had not occurred*", but only "*if the* ***insured damage*** *had not occurred*".[381] This point applies to all Hiscox 1 wordings with one exception, some Hiscox 2 and 3 and one Hiscox 4.[382]

379.2 That some of the trends clauses are optional and thus only apply where the trends clause has been opted for in the policyholder's schedule;[383]

379.3 That some of the trends clauses only provide for "*upwards adjustment of the loss*" [sic].[384] It has belatedly been recognised by the FCA that the upwards adjustment is of the sum insured.[385]

380. Both the general point and all these points of detail are, on examination, baseless, for the reasons set out below. All the trends clauses are applicable and their effect is simply to confirm that all that is removed in the counterfactual are the consequences of the insured peril; the FCA's reference to them "*contemplating something extraneous*" is without foundation and wrong.

381. There are two main variants of these clauses in Hiscox 1-4.

First main variant

382. This variant provides:

> "*The amount we pay for loss of income or loss of gross profit will be amended to reflect any special circumstances or business trends affecting your activities either before or after the loss,*

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381 The square bracketed words appear in some trends clauses {**A/2/45**}.

382 POC §75.3 {**A/2/44**}, where the relevant policies are listed. FCA Skeleton §§401-405 {**I/1/148-149**}.

383 POC §75.4 {**A/2/44**}: as there set out this applies to all Hiscox 1 wordings {**B/36**} to {**B/42**} with one exception, Recruitment BI-8671 {**B/40**}. FCA Skeleton §§ 406-409 {**I/1/149-150**}.

384 POC §75.4 {**A/2/44**} as there set out this applies to all Hiscox 1 wordings {**B/36**} to {**B/42**} and one Hiscox 4 policy, Policy 20155 {**B/71**}. FCA Skeleton §§ 408-410 {**I/1/150**}.

385 FCA Skeleton §408 {**I/1/150**}.

in order that the amount paid reflects as near as possible the result that would have been achieved if the ***insured damage, insured failure*** *or restriction had not occurred*."[386]

383. This variant applies to Hiscox 2-3 and all but one Hiscox 4[387]. Certain examples of this type of clause, however, do not refer to restrictions at all.[388] Thus, of the three detailed points taken by the FCA referred to in §379 above, the one based on lack of the word "*restriction*" is potentially applicable to some policies with this clause, but the other two points do not apply.

384. The FCA divides this variant into two types depending upon whether "*restriction*" occurs or not[389].

Second main variant

385. This variant provides:

> "*[1] Provided that* ***you*** *advise* ***us*** *of* ***your*** *estimated annual* ***income****, or estimated annual* ***gross profit*** *if applicable, at the beginning of each* ***period of insurance****, the* ***amount insured*** *will automatically be increased to reflect any special circumstances or [business] trends affecting* ***your activities****, either before or after the loss. [2] The amount that* ***we*** *will pay will reflect as near as possible the result that would have been achieved if the* ***insured damage*** *had not occurred.*
>
> *[3]* ***Your*** *schedule will show if business trends cover applies and the additional percentage amount.*" (Sentence numbers are added)

386 There are minor and immaterial variations, save for the fact referred to in the following paragraph that some clauses do not refer to restrictions at all. These variations are identified in Annex 2.

387 {**B/43**} to {**B/70**}, the exception being Policy 20155 {**B/71**}.

388 Policy 15779 {**B/46**}, Venues BI-7103(2) {**B/49**}, Golf BI-9102 {**B/59**}, Gunsmiths BI-8006 {**B/8**}, Covernotes BI-10272 {**B/68**}, Policy 20155 {**B/71**}.

389 FCA Skeleton §403 {**I/1/149**} (without "*restriction*") and §410 {**I/1/150**} (with "*restriction*").

386. This variant (with immaterial variations)[390] applies to all Hiscox 1 with one exception[391] and to one Hiscox 4 policy[392]. All three of the FCA's detailed points potentially apply to this clause.

387. Hiscox will begin by addressing the first main variant, and in that context address (i) the FCA's general point about the effect of the clause; and (ii) the point about the lack of reference to "*restriction*" in some clauses.

First main variant - (i) general point

388. The clause expressly requires an amendment to the amount paid to reflect special circumstances or trends affecting the insured's activities before or after the loss, with the objective that the amount paid reflects "*as near as possible the result that would have been achieved if the restriction had not occurred*".

389. The wording and its objective are quite clear and explicit: to identify what would have happened had the restriction not occurred. This means simply removing the consequences of the restriction and the restriction alone and seeing what the result would be. Any other construction is not possible. The express objective is to ensure that the amount paid reflects as nearly as possible the result that would have been achieved if the "*restriction*", which is shorthand for the insured peril, had not occurred.

390. The FCA's answer to this does not bear examination.

391. The first point made by the FCA is that the "*purpose of the clause is not to exclude the natural and probable (if not inevitable result) of the peril that has resulted in loss to the insured.*"[393] That begs the question as to what is the insured peril, and what loss has been caused in consequence of the insured peril. It is correct that the clause is not designed to exclude loss which has resulted from the insured peril: to identify that loss is the very purpose of the clause. But to

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390 Addressed in Annex 2.

391 {**B/36**} to {**B/42**} the sole exception is the Recruitment BI-8671 which has a trends clause the form of which is different to all the other wordings in the these proceedings: "*For **your** loss of **income** or loss of **fees**, the **amount insured** will be automatically increased by 33% to reflect any special circumstances or business trends affecting **your activities**, either before or after the loss. The amount that **we** will pay will reflect as near as possible the result that would have been achieved if the **damage**, restriction, failure or **cyber attack** had not occurred.*" As to this wording the arguments in relation to the second main variant about "*upwards adjustment only*" {**B/40/5**} in §§409-415 especially §415 below and the general point in §§417-420 below apply.

392 Policy 20155 {**B/71**}. This wording refers to "*insured failure*" as well as "*insured damage*".

393 POC §76 {**A/2/45**}.

the extent that the FCA is suggesting, as it must be, that the purpose of the clause is not to exclude (uninsured) loss which would have occurred anyway, this is wrong and has no linguistic or principled basis. That is exactly what the clause is doing. It says so. One cannot escape the clear words of the clause. Moreover, the trends clause only reflects what is in any event the correct position as a matter of principle.

392. The second point made by the FCA is that the trends clauses "*contemplate 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*."[394] This is adhered to in the FCA Skeleton.[395] This again simply ignores the clear terms of the clause which seek to reflect the position if the insured peril, not other matters, such as COVID-19, had not occurred. It is an insuperable difficulty for the FCA's case in this context, as in causation generally, that COVID-19 is not an insured peril; nonetheless it refers in this context to COVID-19 as being "*the insured peril in its broad sense*".

393. The FCA does not explain what it means by "*extraneous*", but there is no basis for introducing it as a qualification. The trends clause is seeking to carve out those effects on the business which are not due to the insured peril, and which would have occurred anyway. In the following paragraph of the POC[396], the FCA introduces the concept of events "*interlinked*" with the insured perils and it seems [397] that "*extraneous*" is seeking to identify events which are not "*interlinked*". This is not satisfactory or coherent. The insured peril is defined, and Hiscox is not insuring "*interlinked*" events. Once again the FCA's shibboleth is incanted in the place of an analysis of the contractual bargain. Furthermore, in the FCA Skeleton, an example[398] is given which demonstrates (again) that the FCA invites the court to identify the key question as "*what revenue would the business have [been] turning over had there been no murder?*".

394. Hiscox's argument is strongly supported by ***Orient-Express*** {**J/106**}. The Joint Skeleton on Causation makes detailed submissions on the effect and significance of ***Orient-Express*** {**J/106**}, and these are not repeated here. Hiscox confines itself to these points.

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394 POC §76 {**A/2/45**}.

395 FCA Skeleton §412 {**I/1/151**}.

396 POC§77 {**A/2/45**}.

397 FCA Skeleton §§271 {**I/1/106-107**}, 412 {**I/1/151**}, 413 {**I/1/151**}.

398 FCA Skeleton §413 {**I/1/151**}.

394.1 The arbitral tribunal held that the trends clause there meant that the correct counterfactual was an undamaged hotel in a damaged city, notwithstanding, of course, that the cause of the damage to the hotel and the damage to the city were interlinked – they were in fact the same. The FCA would no doubt say that they could not be separated.[399] But they were.

394.2 The trends clause in ***Orient-Express*** {**J/106/1**} provided:

> "…*adjustments shall be made as may be necessary to provide for the trend of the Business and for variations in or special circumstances affecting the Business either before or after the Damage or which would have affected the Business had the damage not occurred so that the figures thus adjusted shall represent as nearly as may be reasonably practicable the results which but for the Damage would have been obtained during the relative period after the Damage*."

394.3 That clause is materially indistinguishable from the clauses under consideration here. Of particular note are the concluding words "…*so that the figures thus adjusted shall represent as nearly as may be reasonably practicable the results which but for the Damage would have been obtained during the relative period after the Damage*." {**J/106/4**}. The explicit purpose is the same as in the trends clauses under consideration: to arrive at the results which would have been obtained but for the "*Damage*", i.e. but for the insured peril.

394.4 Of particular note in the present context is that Hamblen J rejected the "*extraneous*" point: he held[400] that nowhere in the trends clause did it state that, in order to fall within it, the variation or circumstance had to be something completely unconnected with the Damage (the insured peril) in the sense that it had an independent cause to the cause of Damage and he said that {**J/106/11**}.:

> "…*The assumption required to be made under the Trends clause is "had Damage not occurred" not "had Damage and whatever event caused the Damage not occurred*".

395. The general point made by the FCA, therefore, is bad in principle and is contrary to authority.

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399 POC §53.2 {**A/2/35**}.

400 §57 {**J/106/11**}.

(ii) Lack of express reference in some instances to "restriction"

396. The FCA's point that the clause is inapplicable based on the absence of express reference to "*restriction*" is a bad one, and the FCA Skeleton[401] simply does not begin to grapple with the obvious problems inherent in such an argument.

397. Looked at objectively, there could be no reason whatever why the parties would not want the trends clause to apply equally to a claim under those clauses in the BI section which do not require insured damage as to a claim under those that do. The FCA offers no reason. It is important to note in this context that although in this case the trends clause works against the insured, the trends clause might well work in favour of an insured in other circumstances.

398. Indeed, the idea that one approach to the ascertainment of loss was intended in respect of the special covers in the BI section dependent upon insured damage and another to those where damage was not a requirement simply cannot be right. The FCA's argument is literalism run riot.

399. Even looked at on its own, the clause must be intended to apply to the NDDA and Public Authority clauses. However, this position is confirmed when one looks at other provisions in the relevant covers. In this context, Hiscox relies on the definition of Indemnity Period and the Under Insurance provisions set out in §150.4 above.[402] Both these clauses[403] refer to "*restriction*" in all cases where the word "*restriction*" is absent from the trends clause.[404]

400. It is inconceivable that the objective intention of the parties was that, although the Indemnity Period provision and the Under Insurance provision, which both affect the ascertainment and calculation of loss, would apply to the NDDA and Public Authority clauses, the trends clause would not.

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401 FCA Skeleton §§401-405 {**I/1/148-149**}.

402 The terms of these provisions are not identical in every policy, but all variants of each clause refer to "*restriction*".

403 Policies 15779 {**B/46**}, Venues BI-7103(2) {**B/49**}, Golf – BI-9102 {**B/59**}, Gunsmiths BI -8006 {**B/8**}, Covernotes BI-10272 {**B/68**}.

404 Policies 15779 {**B/46**}, Venues BI-7103(2) {**B/49**}, Golf - BI-9102 {**B/59**}, Gunsmiths BI -8006 {**B/8**}, Covernotes BI-10272 {**B/68**}. These are the first main variant policies without restrictions. The Indemnity Period definition and Under Insurance provision appear also in all the second main variant policies. In fact the term *"restriction"* is in the definition of Indemnity period in all the Hiscox wordings and in all the Under Insurance Provisions (where the wordings have one, which is in all but five instances Office BI-15410 {**B/47**}, Office BI-11335 {**B/54**}, Electrical contractors BI-10117 {**B/64**}, Retail BI-15447 {**B/69**} and Bowling Clubs 15480 {**B/70**}.

401. Objectively, the likely reason for the failure to refer to "*restriction*" expressly in some trends clauses is that the trends clause derived from an old form before the BI section included non-damage covers and that it had simply not been updated. Once more it is necessary in this context to repeat the caution, referred to in the construction section in §48-51 above, about the way in which insurance contracts are put together, sometimes without regard to perfect consistency.

402. It is a further strong point in support of Hiscox's argument that "*restriction*" must have been intended to be included that there is also no reference to "*insured failure*"[405] in the trends clause; yet it appears in the Indemnity Period and Under Insurance clauses. Again, it cannot intentionally have been left out; there would be no purpose in the omission.

403. There is no difficulty, as a matter of construction, in reading "*or restriction*" into the clause after "*insured damage*". It is in no way heterodox to do so to correct an obvious mistake.

404. Brightman LJ held in ***East v Pantiles Plant Hire Ltd*** (1981) 263 EG 6 {**K/67/1**} that:

> "*It is clear on the authorities that a mistake in a written instrument can, in limited circumstances, be corrected as a matter of construction without obtaining a decree in an action for rectification. Two conditions must be satisfied: first, there must be a clear mistake on the face of the instrument; secondly, it must be clear what correction ought to be made in order to cure the mistake. If those conditions are satisfied, then the correction is made as a matter of construction.*"

405. In ***Chartbrook Ltd v Persimmon Homes Ltd*** (referred to in §222 above) Lord Hoffmann (at §§23 & 24 {**J/103/14**}) accepted Brightman LJ's two conditions for the "*correction of mistakes by construction*" with two qualifications that had been explained in an earlier case by Carnwath LJ.[406] The qualifications were (i) that correction of mistakes is not a separate exercise from construction; and (ii) that one was not confined to the face of the written instrument, as opposed to background or context, in ascertaining whether there was a mistake. Thus:

> "23. *Subject to two qualifications, both of which are explained by Carnwath LJ in his admirable judgment in KPMG LLP v Network Rail Infrastructure Ltd [2007] Bus LR 1336 , I would accept this statement, which is in my opinion no more than an expression of the common sense view that we do not readily accept that people have made mistakes in formal documents. The first qualification is that "correction of mistakes by construction" is not a*

405 "*Insured failure*" is relevant to Equipment Breakdown cover – see §239 above.

406 ***KPMG LLP v Network Rail Infrastructure Ltd*** [2007] Bus LR 1336 §50 {**K/131/16**}.

separate branch of the law, a summary version of an action for rectification. As Carnwath LJ said, at p 1351, para 50:

> *"Both in the judgment, and in the arguments before us, there was a tendency to deal separately with correction of mistakes and construing the paragraph 'as it stands', as though they were distinct exercises. In my view, they are simply aspects of the single task of interpreting the agreement in its context, in order to get as close as possible to the meaning which the parties intended."*

24. The second qualification concerns the words "on the face of the instrument". I agree with Carnwath LJ, paras 44–50, that in deciding whether there is a clear mistake, the court is not confined to reading the document without regard to its background or context. As the exercise is part of the single task of interpretation, the background and context must always be taken into consideration."

406. Lord Hoffman went on to say that there was no limit to the amount of red ink or verbal re-arrangement permitted if it was clear that something had gone wrong and objectively clear what the parties meant: see §222 above.

407. Thus, provided it is clear what was objectively intended, as it is, there is no issue about reading the words "*or restriction*" as being contained in the clause after "*insured damage*". It is abundantly clear here that that is what the parties intended. In the forbidden Latin, the omission is a simple *falsa demonstratio.*

The second main variant

408. The second main variant is repeated for convenience:

> "*[1] Provided that* ***you*** *advise* ***us*** *of* ***your*** *estimated annual* ***income****, or estimated annual* ***[fees][gross profit]*** *if applicable, at the beginning of each* ***period of insurance****, the* ***amount insured*** *will automatically be increased to reflect any special circumstances or [business] trends affecting* ***your activities****, either before or after the loss. [2] The amount that* ***we*** *will pay will reflect as near as possible the result that would have been achieved if the* ***insured damage*** *had not occurred.*
>
> *[3]* ***Your*** *schedule will show if business trends cover applies and the additional percentage amount.*" (Numbers in [ ] added for convenience) [407]

(i) Optional and upwards only adjustment

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407 An example of this wording is the in the Hiscox 1 Recruitment BI- 16216 {**B/41/6**}. Annex 2 addresses variations in the trends clauses.

409. As stated in §379 above, the FCA argues that the clause is inapplicable because it is (i) optional; and (ii) provides only for upwards adjustment of the loss. Both these are manifestly bad points.

Optional

410. As regards the "optional" point, the entire clause is physically part of the relevant policies. The only part that is optional in any sense is the first (numbered [1]) sentence. The critical sentence for current purposes is the second (numbered [2]) sentence.

411. That second sentence is clearly incorporated into the policies, not just physically but as part of the contract. It is in materially the same language as used in the other variant: it similarly provides that Hiscox will pay an amount to reflect as near as possible the result that would have been achieved but for the occurrence of the insured peril. It deals with the basis of assessment of loss.

412. What the option is concerned with is an increase, at the beginning of each period of insurance, in the amount insured not, necessarily, the amount paid. The insured stipulates for the amount insured to rise if trends have that effect. Of course, under the normal (first main variant) clause, upwards trends are taken into account, but a significant upwards trend might fall foul of the limit on the sum insured. What the option does, therefore, is to increase the amount insured, where appropriate.

413. What the option does not do is to alter the basis on which loss is calculated. The second sentence makes this clear; the basis of assessment remains the same whether or not the option is exercised. The second sentence therefore has a function and purpose whether or not the option is exercised. If the option is not exercised, this does not mean that the whole clause is irrelevant. The second sentence stands as part of the contract.

414. If, contrary to §§409-413 above and 415 below, the second sentence is in some way not legally to be regarded as part of the contract, its inclusion in the policy (albeit on a contingent basis) can nonetheless be taken into account as a part of the exercise of construction as embodying the parties' objective intention as to how loss would be calculated.

Upwards adjustment only

415. The FCA's point that the clause only allows for upwards adjustment is clearly wrong, for the reasons explained above. The option relates to an increase in the amount insured, not the

amount paid. In many cases, the trend causing the increase in the amount insured will be likely to increase payment. But this is not invariably so, and there is nothing in the wording mandating that it is. All that the option is doing is ensuring that the insured will not be deprived, in an appropriate case, from full recovery by the fact that an upwards trend has meant that the sum insured is inadequate.

(ii) Lack of express reference to "restriction"

416. The same arguments apply here as in relation to the first main variant and the conclusion is the same.

The FCA's general point

417. The FCA's point of principle arising from the inclusion of the trends clause is the same as that addressed in §§388-395 above.

418. It is the second sentence of trends clause which contains the critical words as to the approach to loss:

> *"The amount that* ***we*** *will pay will reflect as near as possible the result that would have been achieved if the* ***insured damage*** *had not occurred."*

419. That is the sentence which contains the "*but for*" element and makes it clear that what is removed for the purposes of ascertaining the counterfactual are the consequences of the peril insured.

420. All the arguments which are put forward above in support of the effect of the first variant apply here.

(3) "*Solely and Directly*"

421. The stem (repeated for ease of reference) 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…*"

422. Hiscox's primary submission is that the words "*solely and directly*" govern the whole relationship between the insured peril, which commences with "*interruption*" and continues through to each of the special covers branching off the stem, and the loss. They do not

merely govern the relationship between "*interruption*" and "*loss*". Hiscox refers to this as the syntactical issue.

423. Even if this is not the case, however, Hiscox contends that losses which were concurrently (in either sense) caused both (i) by the interruption (caused by (e.g.) inability to use due to restrictions etc.) and (ii) by the broader effects of COVID-19 itself are clearly not "*solely*" caused by the former. It follows that they are not recoverable. The insured's business would have sustained the losses even if it had not itself been interrupted (because people would have stayed at home, gone out less and had their behaviour altered in any event). The result is the same as in the preceding paragraph.

424. The effect of the word "*solely*" is thus to rule out losses concurrently caused (in either sense) by other non-excluded causes of loss. This alters the default position where (not the present situation) there are two proximate interdependent causes of loss. In such a case, as decided in ***The Miss Jay Jay*** [1987] 1 Lloyd's Rep 32 {**J/66**}, the insured can generally recover. The word "*solely*" reverses that position.

425. For the reasons already given in §372 above, the word "*solely*" makes no difference in the case of loss caused by concurrent independent causes, one covered and one not. Such loss is not covered anyway, on general principles.

426. However, the word "*solely*" would also have this effect in the case of two concurrent independent causes of loss, one being the insured peril and one an uninsured cause, in the event that Hiscox and the other Insurers were wrong in the submission made in §372 above and in the Joint Skeleton on Causation. In that event, the word "*solely*" would make it clear that loss concurrently caused by an insured peril and a non-insured peril was not covered.

427. It is contended by HAG[408] and the FCA[409] that the effect of the words "*solely and directly resulting from*" is only that the financial losses must result solely and directly from the interruption, and that that is not the same thing as saying the interruption to business activities must arise solely and directly from an inability to use due to restrictions imposed by a public authority. HAG argues that the words "*solely and directly*" could and would have been placed elsewhere in the sentence, for example, after "*caused*" so that it read "an

408 HAG Skeleton §68 {**I/3/26**}.

409 FCA Skeleton §391 {**I/1/144**}. The authority there cited offers no support for the FCA's position.

interruption caused solely and directly by", if that were the result which was objectively sought to be achieved.

428. For reasons already given in §423 above, this argument does not assist HAG or the FCA. It is a red herring.

429. The submissions made by the FCA in §394 of its Skeleton {**I/1/145-147**} as to proximate cause, on the assumption it is correct in the above syntactical argument, are arguments of fact as to the proximate cause, and are muddled, but they demonstrate why, as stated in §423 above, Hiscox does not need to be right on the syntactical point. §394.1 {**I/1/145**} treats as self-evident that all of the insureds' losses from COVID-19 resulted from the interruption itself. If that were right, it is surprising that the FCA has expended so much energy in seeking to prove that disease is the insured peril, and that it is for all the consequences of the disease that insurers must pay. Of course, the FCA is not right, and COVID-19 is on any common sense view a proximate cause of insureds' losses. §394.2 {**I/1/145-146**} is infected with the idea that the disease is the insured peril in its broad sense[410] and implicitly recognises it as a proximate cause, but says that it should not be treated as such, because of the FCA's A+B+C+D fallacy, which is repeated. §394.3 {**I/1/146**} treats the interruption itself as the proximate cause, and invites the factual conclusion that if one takes away the interruption (not the cause of the interruption), one is left with very little. Of course, one is left with COVID-19 and all its other impacts. It is the FCA itself that characterises this case as being about the consequences of COVID-19.[411]

430. In any event, the FCA's and HAG's syntactical argument is flawed and unrealistic.

430.1 It is of significance that "*solely and directly resulting from*" comes before the word "*interruption*", which indisputably begins the description of the insured peril; what follows is part of the insured peril. As a matter of substance, it is therefore plain that the intention is that "*solely and directly resulting from*" should govern the relationship between the whole of the insured peril and the loss.

430.2 Placing "*solely and directly*" before "*interruption*" and not before "*caused*" is the only sensible way to achieve the position linguistically that "*solely and directly*" governs all

410 FCA Skeleton §412 {**I/1/151**}.

411 POC §1 {**A/2/3**}.

that follows. It would be cumbersome and unusual to have "*solely and directly resulting from*" repeated before "*caused by*".

430.3 The argument that "*solely and directly*" can be divorced from the cause is given false visual support by the necessary division of the stem and each special cover. Each special cover branches off the stem. However, one has to read the stem as partnering with and running seamlessly into each cause enumerated in the special covers. There is, for example, no comma after "*your activities*", nor does the sentence end at "*your activities*", to be followed by some separate wording dealing with qualifying interruptions. There is one single and composite insured peril as regards each special cover.

430.4 It is not commercial or logical to link "*solely and directly*" just to the relationship between the interruption and the loss. As stated, the insured peril starts with "*interruption*". Interruption is a necessary ingredient but objectively the critical issue is whether the insured peril as a whole is the sole and direct cause of the loss. No commercial or rational reason can be suggested as to why insurers would not be prepared to countenance concurrent causes in relation to interruption, but would be prepared to countenance concurrent causes as regards the cause of the interruption. This would be a most surprising thing to do.

431. None of these points is considered or dealt with by the FCA or HAG; beyond relying on the position of the words "*solely and directly*" in the clause, and an irrelevant Canadian authority.[412]

432. Although it will be unnecessary for the court, for reasons already stated, to engage with this authority, Hiscox's contention as to the grammatical operation of the "*solely and directly*" phrase is supported by the decision of the Court of Appeal of Queensland in ***PMB Australia Ltd v MMI General Insurance Ltd & Ors*** [2002] QCA 361 {**K/102**}, in relation to a wording in an insurance policy with significant similarities to Hiscox 1-4.

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412 According to FCA Skeleton §391-393 {**I/1/144-145**}, the Canadian decision (***Ontario Inc v Intact Insurance*** {**J/131**}) yields the "*clear implication*" that, despite the presence of the words "*solely and directly*", the rule in ***The Miss Jay Jay*** {**J/66**} "*applies to its full extent*" here. The case does not stand as authority for or support any such proposition, so that it is unnecessary for Hiscox to deal with the convoluted argument in FCA Skeleton §393 {**I/1/145**}, which proceeds on the assumption that it does. Even in that event, however, deducing the true meaning of the trends clause by reference to what the Ontario Superior Court of Justice said about a different provision in a differently worded BI policy seems ambitious.

433. In ***PMB*** {**K/102**} the insured supplied peanuts. One consignment, supplied to a customer for use in the manufacture of peanut butter, was found to have been contaminated by salmonella which caused an outbreak of poisoning in Victoria. The plant was shut down by the appellant assured and thoroughly cleaned, and new processing systems were implemented following the involvement of the Queensland Department of Health and a set of departmental recommendations. The disruption lasted for over a year. The assured claimed under a business interruption policy which provided for an indemnity period of one year. The main trigger of cover was material damage, but the policy contained an extension clause that provided cover in respect of {**K/102/4**}:

> "…*loss directly resulting from interruption of or interference with the business carried on by the Insured at the premises in consequence of:*
>
> *(i) Closing of the whole or part of the premises by order of a Public Authority as a result of an outbreak of a notifiable human infectious or contagious disease or consequent upon defects in the drains and/or other sanitary arrangements at the premises;*
>
> *(ii) Murder or suicide occurring at the premises;*
>
> *(iii) Injury, illness or disease arising from or likely to arise from or traceable to foreign or injurious matter in food or drink provided from or on the premises.*"

434. Like the present Hiscox stem, the policy there stipulated, as a pure matter of language, a stricter causal link between the interruption and the loss, and a less strict causal link between the interruption and the cause of the interruption.

435. The premises were not in fact closed down by an order within (i) but on the appellant's own initiative, "*albeit no doubt in response to departmental concern*".[413] The insurers paid a substantial part of the claim pursuant to paragraph (iii) above, namely the part that was referable to the particular instance of contamination. However, insurers refused to indemnify the insured for costs that related to preventing a fresh outbreak of contamination; those losses resulted from a "*new awareness*", arising from the fact of the original outbreak, of the risk of salmonella contamination within such production processes.[414]

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413 Judgment §7 {**K/102/4**}.

414 Judgment §3 {**K/102/3**}.

436. A unanimous Court of Appeal of Queensland (Chief Justice de Jersey giving the main judgment), upheld this decision. It rejected a submission by the insured that the effect of the extension clause was that {**K/102/5**}:

> "*10. …There having been an interruption to the business "in consequence of" illness arising from foreign matter in food provided from the premises, it became a matter of identifying, or as it was put by Mr Gee QC in submissions, "measuring" losses "directly resulting from" that interruption. It was not appropriate at that stage of the enquiry, he submitted, to discriminate between losses referable to the immediate outbreak, and losses referable to accommodating the so-called new awareness of the risk of contamination: there having been a relevant interruption, all losses resulting from or connected with that interruption should be regarded as falling within the scope of the indemnity….*"

437. Rather, the Chief Justice held that {**K/102/5**}:

> "*11. The composite question arising under the extension clause is what loss directly resulted from the interruption to the business in consequence of the contamination. Breaking that question into parts may lead to error…*
>
> *12. …It is, I consider, compelling to conclude that losses "directly" resulting from interruption "in consequence of" the contamination should be limited to those particularly referable to the specific instance of contamination, and not extend more broadly to the cost of addressing possible further such outbreaks at another future time or elsewhere.*"

438. The court's finding was that the causation formulation in the policy, requiring losses to result directly from contamination, covered only specific instances of contamination and did not extend to the cost of preventing further outbreaks, although the awareness of risk which led to the costs of those preventative measures arose from the specific outbreak.

439. The wording in Hiscox 1-4 is stronger than that in *PMB*, in that Hiscox's wording requires that the insured's losses should "*solely and directly*" result from an interruption to the insured's business caused by specific events, not just that they should "*directly*" result from an interruption. This, if anything, strengthens the central point to be taken from *PMB* in this context which is that the relevant clause should not be broken down for causation purposes into separate parts, but be treated as being subject to a composite test of causation that is governed by the words "*solely and directly*".

(4) Conclusion on causation

440. The counterfactual proposed by Hiscox is correct. The result is that the great majority of losses suffered by the insured will not be covered, because they fail the "but for" test, and would have been sustained anyway, even if the insured peril and its consequences had not occurred. In any event, the insureds' losses were not "*solely*" caused by the interruption.

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Annex 1

FEATURES OF THE HISCOX WORDINGS

1. In all the Hiscox policies, the business interruption section is an adjunct to property cover. Hence, in addition to including *"special definitions"* applicable to the business interruption section, all the wordings have *"property"* in the title and adopt the *"property definitions"*.

Hiscox 1

2. The lead wording appears at {**B/6/1**} .[1] In this lead wording the clauses at the centre of the coverage arguments provide as follows:

> *"**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:…*
>
> ***3. Non-damage denial of access***
>
> *an incident occurring during the **period of the insurance** within a one mile radius of the **insured premises** which results in a denial of access or hindrance in access to the **insured premises,** imposed by any civil or statutory authority or by order of the government or any public authority, for more than 24 consecutive hours;…*
>
> ***13. Public authority***
>
> *…**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**."*[2]

3. In common with this lead wording, all the Hiscox 1 wordings:

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1 Retail BI-16105

2 {**B/6/40**} to {**B/6/41**}

3.1. Set out in positive terms *"What is Covered"* with a structure that uses a 'stem' from which branch a series of numbered clauses that each (i) form an extension of a sentence commenced by the 'stem' and (ii) detail the terms of a cover, e.g. "*1. Financial losses from insured damage…2. Denial of access…3. Non-damage denial of access…*".;

3.2. Use the same words in the stem (i.e.*"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*** *cause by:…"*).

3.3. Have a relatively long series of numbered clauses each setting out a special cover. The length of this series varies from 12 (e.g. in one of the Recruitment BI-8761 wordings)[3] to 16 (the number in the lead wording)[4] with the differences generally reflecting the nature of the business to which the wording relates. For example, the Specialist Retail-16105 lead wording includes a special cover in respect of *"online market places"*[5] as those may be used by such a businesses, but unsurprisingly the most common, Professions BI- 16089 does not include such a cover. The special covers in each wording are summarised in the Table at Annex 2.

3.4. Include within their series of numbered clauses both a Non Damage Denial of Access ("NDDA") clause and a Public Authority clause, each in the same form as the Lead Wording.

4. All apart from one of the Hiscox 1 wordings (Trades BI-16107)[6], also have a numbered list of additional covers. While numbered as if they form part of the same series as the BI clauses, these are self-contained clauses that are not subject to the 'stem' and do not concern business interruption. They are numbered under a side-lined title "**Additional cover**" and introduced by the words *"The following are also provided up [to] the amount stated in the schedule"* ("**Additional Covers**"). The number Additional Covers varies from 2 to 5, but cover in respect of *"Hacker damage"* and "*Employees' lottery win"* is always included. These appear numbered as 17 to 19 in of the Hiscox 1 Lead Wording {**B/6/40**} . The Additional Covers for each wording are summarised in the Table at Annex 2.

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3 Recruitment BI- 8761 {**B/40/1**}

4 {**B/6/40**}

5 {**B/6/42**}

6 {**B/42/1**}

5. In four[7] of the eight Hiscox 1 wordings, the Additional Covers include cover in respect of *"Cancellation and abandonment"* (numbered 19 of the Lead Wording).[8]

6. All but one of the Hiscox 1 wordings includes a trends clause that (with immaterial variations)[9] provides as follows:

> *"Provided that* ***you*** *advise* ***us*** *of* ***your*** *estimated annual* ***income****, or estimated annual* ***gross profit*** *if applicable, at the beginning of each* ***period of insurance****, the* ***amount insured*** *will automatically be increased to reflect any special circumstances or business trends affecting* ***your activities****, either before or after the loss. The amount that* ***we*** *will pay will reflect as near as possible the result that would have been achieved if the* ***insured damage*** *had not occurred.*
>
> ***Your*** *schedule will show if business trends cover applies and the additional percentage amount."*[10]
>
> (Trends Clause 1 in the Table at Annex 2.)

7. The anomalous trends clause in Hiscox 1 appears in the Recruitment BI- 8671, which provides:

> *"For* ***your*** *loss of* ***income*** *or loss of* ***fees****, the* ***amount insured*** *will be automatically increased by 33% to reflect any special circumstances or business trends affecting* ***your activities****, either before or after the loss. The amount that* ***we*** *will pay will reflect as near as possible the result that would have been achieved if the* ***damage****, restriction, failure or* ***cyber attack*** *had not occurred."*[11]
>
> (Anomalous Trends Clause 1 in the Table at Annex 2.)

Hiscox 2

8. As illustrated by the lead wording,[12] and in common with the Hiscox 1 wordings, all the Hiscox 2 wordings:

   8.1. Set out in positive terms *"What is Covered"* with a structure that uses a 'stem' from which branch a series of numbered clauses that each (i) form an extension of a sentence commenced by the 'stem' and (ii) detail the terms of a cover;

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7 Professions BI-16089, Retail BI- 16105, Technology BI- 16101 and Recruitment BI- 8761

8 For example at {**B/6/43**}

9 Which are addressed in Annex 2.

10 This wording is from Professions BI-16089 at {**B/36/6**}

11 The first substantive paragraph at {**B/40/5**}

12 Salon BI- 18680 {**B/7/1**}

8.2. Use materially the same words in the 'stem' as Hiscox 1, save that some refer to ***"your business"*** rather than ***"your activities"*** (an immaterial difference)[13]

8.3. Include a Public Authority clause.

9. However, there are some notable differences between the Hiscox 1 wordings and the Hiscox 2 wordings:

9.1. The Hiscox 2 wordings generally have shorter, in many cases far shorter, lists of numbered clauses beneath the 'stem'.[14] The lead wording has only 5 and the most common Professions BI-6001 wording has only 6, namely, *"Financial losses from insured damage…Denial of access…Suppliers… Public utilities…Public authority…Equipment breakdown"*[15] The covers for each Hiscox 2 wording are summarised in the Table at Annex 2.

9.2. Only five of the Hiscox 2 wordings include an NDDA clause.[16] These are all policies held by businesses concerned with sports and leisure or operating venues. Two of these NDDA clauses, rather than providing that the relevant *"incident"* must occur *"within a one mile radius of the* ***insured premises****"* state that the incident must occur *"within the vicinity of the* ***insured premises****"*.[17]

9.3. In all the Hiscox 2 wordings, the key subclause of the Public Authority clause refers simply to *"…an occurrence of a* ***notifiable human disease****"*. This, however, is a difference of style not substance because the words in bold are defined in the Hiscox 2 wordings as a *"any human contagious disease, an outbreak of which must be notified to the local authority"*[18], i.e. the words written out in full in the relevant part of the Public Authority clause for both Hiscox 1 and 3 (and one of the Hiscox 4 wordings).

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13 For example, the Lead Wording for Hiscox 2 {**B/7/25**}

14 Thirteen wordings have 6 or fewer covers, one has 7, two have eight, five have 9, and two have 10.

15 {**B/45/2**}

16 Sports and Leisure BI-16258 {**B/43/1**} , Sports leisure BI-11431{**B/62/1**} 16725 WD-HSP-UK-GEO-PYZ(4)(1) {**B/48/1**} Venues BI-7103 WD-CCP-UK-PVB(2) {**B/49/1**} and Venues BI-7103 WD-VEN-UK-PYZ (3) {**B/50/1**}

17 Sports and Leisure BI-16258 {**B/43/1**} , Sports leisure BI-11431 {**B/62/1**}

18 See for example the Lead Wording for Hiscox 2 {**B/7/24**}

9.4. In eight of the Hiscox 2 wordings, the Public Authority clause consists of only four subclauses, omitting *"defects in the drains or other sanitary arrangements"*.[19]

9.5. Only four of the twenty-three Hiscox 2 wordings include Additional Covers. Of these, only two have the Cancellation and Abandonment Additional Cover, the Booksellers BI- 12578 and the Golf- BI- 9102, which together account for a total of only 91 policyholders.

10. Further, and it appears this is the main reason they have been grouped together by the FCA, the Hiscox 2 wordings all use a trends clause that is worded differently to Hiscox 1. Ignoring obviously immaterial variations,[20] in twenty cases, this trends clause provides as follows:

> *"The amount* ***we*** *pay for loss of* ***income*** *or loss of* ***gross profit*** *will be amended to reflect any special circumstances or business trends affecting* ***your business****, either before or after the loss, in order that the amount paid reflects as near as possible the result that would have been achieved if the* ***insured damage*** *or restriction had not occurred."*[21]
>
> (Trends Clause 2 in the Table at Annex 2)

11. The remaining four wordings in Hiscox 2 differ in that they refer expressly only to *"if the* ***insured damage*** *had not occurred"*[22] of "*if the* ***damage*** *had not occurred"*[23] and omit reference to *"restrictions"* (like the Lead Wording for Hiscox 3).

<u>Hiscox 3</u>

12. The Lead Wording in Hiscox 3, accounting for the overwhelming majority of the policies held in this group, is the Gunsmiths BI 8006 wording.[24]

13. It appears that the FCA may have grouped these policies together because they all (i) use a trends clause in the style used by the Hiscox 2 wordings, <u>but</u> (ii) do not use the defined term *"**notifiable human disease**"* in the subclause of the Public Authority Clause.

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19 15779 WD-HSP-UK-BG-PHAR-PYI(1) {**B/46/1**} Office BI- 11335 {**B/54/2**} Office BI (Package)-7620 {**B/55/2**} Property BI- 10199 {**B/56/2**} Opticians BI- 9280 {**B/58/2**} Golf BI-9102 {**B/59/2**} Masonic Hall- BI-10883 {**B/60/2**} and Electrical contractors BI- 10117 {**B/64/2**}

20 Addressed in Annex 2.

21 See for example the lead wording at {**B/7/24**}

22 Venues BI7103 WD-CCP-UK-PVB(2) {**B/49/3**}

23 15779-WD-HSP-UK-BG-PHAR-PYI(1) {**B/46/3**} and Golf-BI-9102 {**B/59/3**}

24 {**B/8/1**}

14. Otherwise, the lead wording in Hiscox 3 strongly resembles the shorter Hiscox 2 wordings, save that;

    14.1. It has a separate clause providing for cover in respect of loss of gross profit and outstanding debt *"resulting solely and directly from an interruption to* ***your business*** *caused by* ***insured damage*** *to your* ***contents****, or the building or any other property used by* ***you*** *at the business premises."*[25]

    14.2. It then sets out the cover in respect of matters not related to damage to the insured's property by using a 'stem' in materially the same form as in Hiscox 1 and Hiscox 2. There are only four clauses concerning this kind of cover, they are in respect of: *"Premises access…Suppliers…Public Utilities… Public authority".*[26]

    14.3. Like some of the Hiscox 2 wordings, it has only four subclauses in the Public Authority clauses, omitting *"defects in the drains or other sanitary arrangements".* This is the case for all but one of the Hiscox 3 wordings.[27]

15. None of the Hiscox 3 wordings have an NDDA clause.

16. The trends clause used in the Hiscox 3 lead wording (and in Covernotes BI 10272 wording)[28] refers only to damage:

> *"The amount* ***we*** *pay for loss of* ***income*** *or loss of* ***gross profit*** *will be amended to reflect any special circumstances or business trends affecting* ***your business****, either before or after the loss, in order that the amount paid reflects as near as possible the result that would have been achieved if the* ***damage*** *had not occurred."*[29]

(Trends Clause 2* in the Table at Annex 2)

17. The other trends clauses in Hiscox 3 say *"if the* ***insured damage*** *or restriction had not occurred"* (emphasis added) (i..e Trends Clause 2 in the Table at Annex 2)

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25 {**B/8/29**}

26 {**B/8/29**}

27 The only one also including *"defects in drains or other sanitary arrangements"* is the Cricket Club BI-14174 {**B/66/2**}

28 {**B/68/**1}

29 {**B/8/30**}

Hiscox 4

18. The Hiscox 4 wordings have been grouped together because they all contain an express geographical limit in the subclause of the Public Authority clause that concerns the occurrence of a disease. In particular, as will be seen from the Lead Wording for Hiscox 4, the clause 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 business*** *caused by:*
>
> *…Public authority 7.*
>
> ***your*** *inability to use the business premises due to the restrictions imposed by a public authority during the period of insurance following:*
>
> *…b an occurrence of a* ***notifiable human disease***[30] *within one mile of the* ***business premises****;…"* (emphasis added)[31]

19. Only one of the Hiscox 4 wordings contains an NDDA clause.[32]

20. As to the form of the trends clause in Hiscox 4:

    20.1. All but one, including the Lead Wording, use a trends clause in the style of Hiscox 2 that expressly refers to amending the amount paid by insurers to reflect *"the result that would have been achieved if the…restriction had not occurred"*. (emphasis added); and

    20.2. One wording has the same trends clause as the Hiscox 1 wordings.[33]

30 Defined in the same way as Hiscox 2. This definition is used in all but one of the Hiscox 4 wordings., namely 20155- WD-HSPX-UK-TIOFAD-PYI(1) at {**B/71/1**}

31 {**B/9/35**}

32 Bowling Clubs- 15480 {**B//70/1**}

33 20155 WD-HSPC-UK-TIOFAD-PYI(1) {**B/71/1**}

Annex 2: Hiscox Wordings Table

Notes

This Annex

A. Sets out in Tabular form in respect of each Hiscox Wording:

1. Whether the Public Authority Clause has five or four subclauses (i.e. no clause re: drains and sanitary arrangements (**5/4**).
2. Whether the wording includes an NDDA cover (**Y**/**N**) and, if does, whether it is one that refers to *"vicinity"* rather than within one mile ("**V**").
3. The kind of trends clause it has: Trends Clause 1, Trends Clause 2, Trends Clause 2* (i.e. one that does not expressly refer to *"restriction"* and the Anomalous Trends Clause (**1**, **2**, **2* or A**).
4. The business interruption special covers.
5. The additional covers (if any).

The numbers/letters in **bold** above indicate the abbreviation used in the Table.

B. Sets out the main variants of the trends clauses.

C. Sets out the immaterial variants of the trends clauses.

The Trends Clauses (NB. Immaterial variations to the precise wording of the trends clauses are set out after the Table)

Trends Clause 1 **("1")** This trends clause is in the following form:

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

Trends Clause 2 **("2")** This trends clause is in the following form:

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

Trends Clause 2* **("2*")** This trends clause is in the following form and only expressly refers to **insured damage** omitting *"or restriction"*

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

Anomalous Trends Clause **("A")** This trends clause is a single Hiscox 1 wording- the Recruitment BI – 8671

> *For* ***your*** *loss of* ***income*** *or loss of* ***fees****, the* ***amount insured*** *will be automatically increased by 33% to reflect any special circumstances or business trends affecting* ***your activities****, either before or after the loss. The amount that* ***we*** *will pay will reflect as near as possible the result that would have been achieved if the* ***damage****, restriction, failure or* ***cyber attack*** *had not occurred."*[1]

[1] {**B/40/5**}

Tab	Wording	PAC 5/4	NDDA Y/N/vicinity	BT 1/ 2/2*/A	BI covers	Additional Covers
Hiscox 1						
{B/6/1}	Retail BI - 16105 **LEAD WORDING**	5	Y	**1**	1. Financial losses from insured damage 2. Denial of access 3. NDDA 4. Bomb threat 5. Loss of Attraction 6. Unspecified Customers 7. Specified Customers 8. Unspecified suppliers 9. Specified Suppliers 10. Public Utilities 11. Telecoms & Internet 12. Online market places 13. Public Authority 14. Cyber-Attack 15. Equipment breakdown 16. Loss of Licence	17. Hacker damage 18. Employee's Lottery Win 19. Cancellation & abandonment
{B/36/1}	Professions BI – 16089	5	Y	**1**	Same as Lead, but <u>No</u>: - Loss of Attraction - Online market places - Loss of Licence	Same as Lead + Key Persons
{B/37/1}	Venues BI - 16110	5	Y	**1**	Same as Lead but <u>No:</u> - Failure of safety equipment - Online Market Places	Hacker Damage Employee's Lottery Win
{B/38/1}	Technology BI - 16101	5	Y	**1**	Same as Lead but <u>No</u>: - Loss of Attraction - Online market places - Loss of licence	Same as Lead + Key persons

{B/39/1}	Not for Profit BI - 16097	5	Y	**1**	Same as Lead but <u>No</u>: - Online market places	Same as Lead + death of patron
{B/40/1}	Recruitment BI – 8671	5	Y	**A**	Same as Lead but: - Instead of unspecified and specified customers and suppliers, just has customers and suppliers cover - Has Swedish Derogation cover - Only has Internet service providers cover not Telecoms & Internet - No Online market places - No Equipment breakdown - No Loss of Licence	Same as Lease + Key persons and Outstanding debts
{B/41/1}	Recruitment BI - 16216	5	Y	**1**	Same as Lead, but <u>No</u>: - Loss of Attraction - Online market places - Loss of Licence	Same as Lead + Key persons
{B/42/1}	Trades BI - 16107	5	Y	**1**	Same as Lead, but <u>No</u>: - Loss of Attraction - Online market places - Cyber-Attack - Loss of Licence	None
Hiscox 2						
{B/7/1}	Salon BI – 18680 **LEAD WORDING**	5	N	**2**	1. Financial losses from insured damage 2. Denial of access 3. Suppliers 4. Public Utilities 5. Public authority	None
{B/43/1}	Sports and Leisure BI – 16258	5	Y/V	**2**	1. Financial losses from insured damage 2. Denial of access 3. NDDA- *viciinty* 4. Bomb Threat 5. Suppliers	None

					6. Public utilities 7. Public authority 8. Loss of Licence 9. Pollution restricting use	
{B/44/1}	Showtime BI - 11492	5	N	**2**	1. Financial losses from insured damage 2. Denial of access 3. Suppliers 4. Locations 5. Property in Storage 6. Public utilities 7. Public authority 8. Equipment breakdown	None
{B/45/1}	Professions BI - 6001	5	N	**2**	1. Financial losses from insured damage 2. Denial of access 3. Suppliers 4. Public utilities 5. Public authority 6. Equipment breakdown	None
{B/46/1}	15779 WD-HSP-UK-BG-PHAR-PYI(1)	5	N	**2***	1. Self-contained damage clause 2. Premises Access 3. Suppliers 4. Public utilities 5. Public authority 6. Customers	None
{B/47/1}	Office BI - 15410	5	N	**2**	1. Financial losses from insured damage 2. Denial of access 3. Suppliers 4. Public utilities 5. Public authority 6. Equipment breakdown	None
{B/48	16725 WD-HSP-UK-GEO-PYZ(4)(1)	5	Y	**2**	1. Financial losses from insured damage 2. Denial of access 3. NDDA 4. Bomb Threat 5. Suppliers 6. Public utilities	None

					7. Public authority 8. Failure of safety equipment 9. Loss of attraction 10. Equipment breakdown	
{B/49/1}	Venues BI - 7103 WD-CCP-UK-PVB(2)	5	Y	**2***	1. Financial losses from insured damage 2. Denial of access 3. NDDA 4. Bomb Threat 5. Suppliers 6. Public utilities 7. Public authority 8. Failure of safety equipment 9. Loss of attraction	None
{B/50/1}	Venues BI - 7103 WD-VEN-UK-PYZ (3)	5	Y	**2**	1. Financial losses from insured damage 2. Denial of access 3. NDDA 4. Bomb Threat 5. Suppliers 6. Public utilities 7. Public authority 8. Failure of safety equipment 9. Loss of attraction 10. Equipment breakdown	None
{B/51/1}	Charity BI - 9248	5	N	**2**	1. Financial losses from insured damage 2. Denial of access 3. Bomb Threat 4. Suppliers 5. Public utilities 6. Public authority 7. Loss of attraction 8. Customers 9. Equipment breakdown	10. Death of patron
{B/52/1}	Booksellers BI - 12578	5	N	**2**	1. Financial losses from insured damage 2. Denial of access 3. Suppliers 4. Public utilities	7. Employees' lottery win 8. Cancellation and abandonment

					5. Public authority 6. Loss of attraction	
{**B/53/1**}	Clinic and Surgery BI - 16777	5	N	**2**	1. Financial losses from insured damage 2. Denial of access 3. Suppliers 4. Public utilities 5. Public authority 6. Equipment breakdown	None
{**B/54/1**}	Office BI - 11335	4	N	**2**	1. Financial losses from insured damage 2. Denial of access 3. Suppliers 4. Hosting services 5. Failure of public utilities 6. Public authority	1. Locum cover 2. Unauthorised use of public utilities
{**B/55/1**}	Office BI (Package) – 7620	4	N	**2**	1. Financial losses from insured damage 2. Denial of access 3. Suppliers 4. Public utilities 5. Public authority	None
{**B/56/1**}	Property BI - 10199	4	N	**2**	1. Financial losses from insured damage 2. Denial of access 3. Suppliers 4. Public utilities 5. Public authority 6. Motor vehicles	None
{**B/57/1**}	BI -11905 Octopus	5	N	**2**	1. Financial losses from insured damage 2. Denial of access 3. Suppliers 4. Public utilities 5. Public authority	None
{**B/58/1**}	Opticians BI – 9280	4	N	**2**	1. Financial losses from insured damage 2. Denial of access 3. Suppliers 4. Public utilities 5. Public authority	None

{**B/59/1**}	Golf - BI – 9102	4	N	**2***	1. Self-contained damage clause 2. Premises access 3. Suppliers 4. Public utilities 5. Public authority	B. Key persons C. Cancellation and abandonment
{**B/60/1**}	Masonic halls BI – 10883	4	N	**2**	1. Financial losses from insured damage 2. Denial of access 3. Suppliers 4. Public utilities 5. Public authority	None
{**B/61/1**}	CSA - BI – 13500	5	N	**2**	1. Financial losses from insured damage 2. Denial of access 3. Suppliers 4. Customers 5. Public utilities 6. Public authority 7. Equipment breakdown	None
{**B/62/1**}	Sport leisure BI - 11431	5	Y/V	**2**	1. Financial losses from insured damage 2. Denial of access *3.* NNDA- *vicinity* *4.* Bomb Threat 5. Suppliers 6. Public utilities 7. Public authority 8. Loss of licence 9. Pollution restricting use	None
{**B/63/1**}	BI - OM - 13754	5	N	**2**	1. Financial losses from insured damage 2. Denial of access 3. Suppliers 4. Public utilities 5. Public authority 6. Equipment breakdown	None

{B/64/1}	Electrical contractors BI - 10117	4	N	**2**	1. Self-contained damage clause 2. Premises access 3. Suppliers 4. Public utilities 5. Public authority 6. Contract sites	None
Hiscox 3						
{B/8/1}	Gunsmiths 8006 **LEAD WORDING**	4	N	**2***	1. Self-contained damage clause 2. Premises access 3. Suppliers 4. Public utilities 5. Public authority	None
{B/65/1}	Cleaners BI – 8358	4	N	**2**	1. Self-contained damage clause 2. Premises access 3. Suppliers 4. Public utilities 5. Public authority	None
{B/66/1}	Cricket Club BI – 14174	5	N	**2**	1. Financial losses from insured damage 2. Denial of access 3. Bomb threat 4. Suppliers 5. Public utilities 6. Public authority 7. Failure of floodlights, underground heating and computerised turnstiles 8. Loss of club premises certificate	9 Death of a Patron 10. Employee's lottery win
{B/67/1}	Media and entertainment BI – 9519	4	N	**2**	1. Financial losses from insured damage 2. Denial of access 3. Location 4. Suppliers 5. Public utilities 6. Public authority	None

{B/68/1}	Covernotes BI – 10272	4	N	**2***	1. Self-contained damage clause 2. Premises access 3. Suppliers 4. Public utilities 5. Public authority	None
Hiscox 4						
{B/9/1}	Retail BI – 15299 **LEAD WORDING**	5	N	**2**	1. Financial losses from insured damage 2. Denial of access 3. Suppliers 4. Public utilities 5. Internet and online market places 6. Cyber-attack 7. Public authority 8. Loss of attraction 9. Equipment breakdown	10. Hacker damage 11. Employees' lottery win 12. Cancellation and abandonment
{B/69/1}	Retail BI - 15447	5	N	**2**	1. Financial losses from insured damage 2. Denial of access 3. Suppliers 4. Public utilities 5. Internet and online market places 6. Cyber-attack 7. Public authority 8. Loss of attraction 9. Equipment breakdown	10. Hacker damage 11. Employees' lottery win 12. Cancellation and abandonment
{B/70/1}	Bowling Clubs 15480	5	Y	**2**	1. Financial losses from insured damage 2. Denial of access 3. NDDA 4. Bomb threat 5. Suppliers 6. Public utilities 7. Public authority 8. Loss of licence 9. Loss of attraction 10. Equipment breakdown	11. Employees' Lottery Win 12. Cancellation and abandonment

{**B/71/1**}	20155 WD-HSPX-UK-TIOFAD-PYI(1)	5	N	**1**	1. Financial losses from insured damage 2. Denial of access 3. Bomb threat 4. Loss of attraction 5. Unspecified customers 6. Unspecified suppliers 7. Public utilities 8. Telecommunications and internet 9. Public authority 10. Loss of licence 11. Equipment breakdown	None

Immaterial Variations to the Trends Clauses 1, 2 and 2*

Trends Clause 1**:**

1. Hiscox 1, Recruitment BI-16216 states: "*Provided that you advised **us** of **your** estimated annual **income**, or estimated annual **fees** if applicable.*"{**B/41/6**}
2. Hiscox 4, 20155 WD-HSPX-UK-TIOFAD- PYI(1) states : "*Provided that **you** advise **us** of **your** estimated annual **gross profit**…*" and *"if the **insured damage** or **insured failure** had not occurred*" {**B/71/4**}
3. Hiscox 1 lead wording Retail BI- 6105 refers just to *"special circumstances or trends"*, not *"special circumstances or business trends"* {**B/6/45**}. So do the Venues BI- 16110, Technology BI-6101 and Hiscox 4 wording 20155- WD-HSPX-UK-TIOFAD-PYI(1).

Trends Clause 2:

1. In the ten Hiscox 2 wordings with the Equipment breakdown special cover it states "…*if the **insured damage, insured failure** or restriction had not occurred*…". (E.g. Professions BI- 6001 {**B/45/3**})
2. In one Hiscox 2 policy the clause refers to just *"…if the **damage** or restriction had not occurred…"* (Electrical contractors BI-10117) {**B/64/2**}
3. Two Hiscox 4 wordings that have the Cyber-attack special cover (including the lead) state "…*if the **insured damage, insured failure, cyber-attack** or restriction had not occurred*…". (Retail BI-15299 {**B/9/37**} , Retail BI-15477 {**B/69/4**}
4. One Hiscox 4 wording, that has loss of licence cover, states: *"*"…*if the **insured damage, insured failure, loss of licence** or restriction had not occurred*…" (Bowling Clubs 15480 {**B/70/5**}
5. On occasion, consistent with the rest of the policy, the clause refers to "***your activities***" rather than "***your business***" (E.g. Charity BI- 9248 {**B/51/3**}
6. On occasion, the clause refers just to "*The amount **we** pay for loss of income will be amended…"* (E.g. Office BI- 11335 {**B/54/3**})

Trends Clause 2***:**

1. In two Hiscox 2 wordings and two Hiscox 3 wordings (including the lead) the clause states just *"…if the **damage** had not occurred…"* (E.g. Golf BI- 9102 {**B/59/3**}

Annex 3

The insured specific/local nature of other Hiscox BI special covers and Additional Covers

	Cover Title	Insured specific factor required by the cover (emphases added)	Reference
	Special Covers		
1.	Swedish derogation	Damage[1] at the premises of customers *"from whom **you** source or provide personnel under a Swedish Derogation contract…"*	**{B/40/2}**
2.	Pollution restricting use	Pollution or contamination *"at any premises used for the purposes of **your** activities"*	**{B/43/3}** **{B/62/3}**
3.	Locations	Insured damage to a location where *"**you** are licensed or have a contract to carry out a performance"*[2]	**{B/44/2}**
4.	Property in storage	Insured damage at a third party's premises where *"property is stored by **you**"*	**{B/44/2}**
5.	Failure of safety equipment	Failure of safety equipment at "*[t]he space **you** occupy at the premises shown in the schedule…includ[ing] any outbuildings **you** occupy on the same premises…"*[3]	**{B/48/2}** **{B/49/2}** **{B/50/2}**
7.	Hosting services	Insured damage at one of *"**your** off site information technology hosting services"*	**{B/54/2}**
8.	Motor vehicles	Insured damage to *"motor vehicles which **you** utilised for the purposes of **your business**…"*	**{B/56/2}**
9.	Contract sites	Insured damage to property at the premises or sites of *"**your** customers within the United Kingdom with whom at the time of the **insured damage you** have agreed under a contract or trading relationship to supply goods or services"*	**{B/64/2}**
10.	Failure of floodlights, underground heating and computerised turnstiles	Accidental failure of any floodlight, underground heating system or computerised turnstile *"at **the insured premises**…"*	**{B/66/2}**
11.	Loss of club premises certificate	Forfeiture of *"**your** club premises certificate at the **insured premises** due to licencing regulations or the refusal to renew **your** club premises certificate at the **insured location**…*	**{B/62/2}**

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1 *"…provided the damage is not otherwise excluded by the buildings, contents or other property section of this **policy**"* **{B/40/2}**

2 Definition of *"**Location**"* **{B/44/6}**

3 Definition of *"**Venue**"* **{B/48/5}**

12.	Location	Insured damage at the premises of any location where *"**you** have a contract to carry out **your business**"*[4]	**{B/67/2}**
	Additional Covers		
13.	Key persons	Cover for expenses incurred in replacing one of *"**your** directors, partners, trustees, in-house counsel or senior managers in actual control of **your** operations…"*[5] if they suffer accidental bodily injury or contract an illness which lasts for more than 28 days.	**{B/36/4}** **{B/38/5}** **{B/40/4}** **{B/41/4}**
14.	Outstanding debts	*"**We** will insure **you** for any of **your** outstanding debts which **you** are unable to recover as a direct result of **insured damage** to **your** accounting records."*	**{B/40/4}**
15.	Death of patron	*"**We** will reimburse **you** for the … costs **you** incur to amend any of **your** printed literature or websites that refer to **your** patron"* as a result of their: death, being subjected to a criminal investigation, or offending public taste.	**{B/51/2}** **{B/66/2}**
16.	Locum cover	"*If an **insured person** suffers accidental bodily injury or contracts an illness, we will pay **you** for the expense **you** incur in hiring a **locum**…"* An "***insured person***" is defined as: *"Any of **your** directors or partners…while they are working on behalf of **your business** or commuting to or from **your business**."*[6]	**{B/54/2}**
17.	Unauthorised use of public utilities	Unauthorised use of utilities by a third party causing financial loss to the insured. It is clear that the services so used must be ones for which the insured is liable to pay.	**{B/54/2}**
18.	Key person Golf BI-9102	Cover if a *"**key person**"* suffers accidental bodily injury or contract an illness which lasts for more than 14 days. A key person being defined as *"Any: a. of **your principal** golf professionals or PGA gold professionals; or b. partner or director or senior manager in actual control of **your** operations…"*	**{B/59/2}**

1. These special and additional covers have the same characteristics by way of limiting factors as are set out in paragraph 211 of the skeleton, which control Hiscox's exposure to broad risks. Namely:

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4 Definition of "***Location***" **{B/67/4}**

5 Definition of *"**Key Person**"* **{B/36/4}**

6 Definition of *"**insured person**"* **{B/54/1}**

1.1. The need for insured damage or pollution or failure at the insured premises: Pollution restricting use, Failure of safety equipment, Failure of floodlights etc, Motor Vehicles, and Outstanding debts.

1.2. Where there is cover caused by insured damage away from the premises, the existence of a pre-exiting contractual relationship or similar connection on the part of the insured: Swedish Derogation, Locations, Property in storage, Hosting services, Contract sites, and Location.

1.3. In the case of the covers concerning illness, injury, death etc, that the person whose misfortune underpins the cover either manages the insured, or is of importance to its operations: Key persons, Death of patron, Locum cover and Key person (Golf BI-9102).

1.4. In the case of (non-damage) Loss of club premises certificate cover, a very close nexus is required, namely loss of a certificate held by the insured in respect of the insured premises:

1.5. In the case of the (non-damage) Unauthorised use of public utilities cover, a very close nexus is again required, namely use of utilities for which the insured is liable to pay.