Appeal No. 2020/0179-0183

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

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

Appellants

-and-

THE FINANCIAL CONDUCT AUTHORITY

Respondents

-and-

HISCOX ACTION GROUP

Intervener

Appeal No. 2020/0177-0178

AND BETWEEN:

THE FINANCIAL CONDUCT AUTHORITY

Appellant

-and-

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

Respondents

-and-

HISCOX ACTION GROUP

Intervener

WRITTEN SUBMISSONS OF HISCOX ON

THE FORM OF DECLARATIONS

The bundle references used at the hearing in November are adopted. Paragraphs of the Court's judgment are referred to as follows: J§.*

A. Introduction

1. A draft Declarations Document has been filed with the Court that highlights:

    a. The FCA's contested proposed text in red; and
    b. Insurers' contested proposed text in blue.

2. Hiscox makes submissions in support of the blue text applicable to it and against the inclusion of the red text (which is not always offered simply as an alternative to the blue text). The submissions are made by reference to the paragraphs of the draft, although it should be noted, with regard to §17.4A and B of the draft Declarations, that Hiscox's primary position is that no declaration should be made listing examples of "restrictions imposed", save where there is agreement between the parties (see §15 below). Hiscox understands that to have been the Court's intention in J§124, and submits that the Court was right to leave those matters for subsequent tribunals that will have the benefit of the relevant factual material before them.

3. A number of points made by Insurers/Hiscox are made to provide clarification and to assist readers of the Declarations. This reflects the fact that, as was the case after the High Court judgment, interested parties not directly involved in these proceedings (policyholders, insurers, and subsequent tribunals including the Financial Ombudsman Service) will look to the Declarations as a helpful guide to the Court's conclusions on important points.

4. Hiscox understands that the FCA's proposals have been made in consultation with HAG and assumes this has particularly been the case with regard to §17 of the draft Declarations.

B. Paras 7A[1], 10A, 11.1, 11.2 and 11.4

5. Hiscox adopts Insurers' common submissions on these paragraphs.

[1] And the references thereto in paras 5 – 7.

C. Para 17.3

6. Hiscox's proposed text ("*inability is not a matter of the extent to which*…" etc.) should be included. It reflects part of the Court's conclusion as to what constitutes an "*inability to use*". In objecting to its inclusion during attempts to agree the form of Declarations, the FCA has recognised that the words come from J§135, but has suggested that this paragraph merely records Hiscox's submission. It is correct that J§135 records Hiscox's submission. However, as Hiscox reads the judgment, in J§136 and J§137 the Court subsequently accepted that part of the submission which it is proposed be included in §17.3 of the Declarations.[2]

D. Para 17.4

7. Hiscox's proposals should be included and the FCA's rejected.

8. First, including the addition of the red word "*also*" (as the FCA suggests) would be inconsistent with the Court's judgment and/or risk misleading readers of the Declarations.

9. As Hiscox reads the Court's judgment:

    a. In J§121 the Court lays down a unitary test for where an instruction from a public authority may amount to a "*restriction imposed*" despite not having the force of law, i.e. that the instruction is (i) "*in mandatory terms*" and (ii) "*in clear enough terms to enable the addressee to know with reasonable certainty what compliance requires*".

    b. On the basis of this unitary, twofold test, a mandatory instruction given "*in the anticipation that legally binding measures will follow*" (as discussed in J§117) falls within the meaning of "*restrictions imposed*", but the test does not restrict the term "*restrictions imposed*" "*to [either] an exercise or threatened exercise of legal power*".

    c. In J§117 to J§120, the Court is merely setting out the reasoning by which it reaches the conclusions and the twofold test it sets out in J§121. It is not suggesting that

2 "*136. We agree with the court and Hiscox that an inability of use has to be established…137. …In the first situation, there is a complete inability…In the second situation, there is a complete inability…To that extent the question is indeed binary.*"

the situation considered in J§117 (or indeed that considered in J§120) is subject to some different test.

10. If Hiscox's reading is correct, the FCA's proposed inclusion of the word "*also*" would risk misleading the reader into wrongly concluding that the circumstances described in J§117 are somehow subject to a different test to that laid down in J§121 when, in fact:

    a. J§117 is simply an example of a case that meets the test in J§121; and

    b. J§121 lays down a universal test for "*restrictions imposed*" applicable to any circumstances where a public authority has given an instruction to businesses that does not have the force of law.

11. Second, Hiscox's proposed words "*and does not need to do so in the limited circumstances set out below*" make clear that the test in J§121 must be met for something that does not have the force of law to be within "*restrictions imposed*".

12. Third, Hiscox's proposed words "*although in most cases they would be*" are drawn directly from J§128. Their inclusion is appropriate and will assist subsequent tribunals in applying the test in J§121.

13. Fourth, as to the last sentence of this paragraph, Hiscox's proposed words "*but it is likely that it will be difficult for Category 3 and Category 5 businesses which were allowed to remain open to demonstrate the requisite inability to use*" should be retained. They are drawn directly and faithfully from J§144 which specifically refers to Category 3 and Category 5 businesses. In exchanges over the Declarations, the FCA (after consulting with HAG which includes many businesses in those categories) has suggested that the words should not be included, saying that the fact that Regulation 6 will rarely cause an inability to use is already addressed. This is not a good reason for not including the additional wording proposed. Making clear that particular categories of business are likely to have difficulty demonstrating an inability to use is entirely consistent with the purpose of the Declarations specifically and these proceedings generally, the aim of which has been to help provide as much guidance as possible to as many interested parties as possible on key issues. Clarity is particularly

valuable on this point because a high proportion of Hiscox policyholders are Category 5 businesses.

14. It is not anticipated that the clarificatory words in the blue text in the penultimate sentence ("*including any falling within 17.4A*") will be controversial; they should not be.

E. Para 17.4A

15. The first point on this paragraph is whether, in the absence of agreement between the parties, the Court should make any further declaration as to what amounted to "*restrictions imposed*" beyond what it is proposed be said in §17.4. Hiscox says not; it offers to agree the version of §17.4A in blue text, but otherwise all arguments over which public authority statements or measures were "*restrictions imposed*" (and moreover the ambit of such restrictions) should be resolved by argument before other tribunals that will have the advantage of specific fact patterns before them that this Court has not had.

16. The FCA and HAG, however, seek an extensive declaration to the effect that "*non-exhaustive*" examples of "*restrictions imposed*" include:

    a. Selected parts of the assortment of announcements and documents that made up the "*general measures*" (J§109) and "*specific measures*" (J§110), each of which the red text version of §17.4A characterises indiscriminately as an "*instruction*" (red text §17.4A(a) to (e), (g) and (h));

    b. "*The Prime Minister's instruction to stay at home and instruction not to gather in public given on 23 March 2020"* (red text §17.4A(f)); and

    c. Regulation 2 of the 21 March Regulations and Regulations 4, 5, 6 and (most notably) 7 of the 26 March Regulations (red text §17.4A(i)).

17. Hiscox first explains why it says the Court should not accept the FCA's and HAG's invitation to determine whether particular matters were "*restrictions imposed*", in circumstances where, as Hiscox understands it, the Court has left the issue, absent agreement, for decision by subsequent tribunals (J§124). However, in case the Court does decide to address them in the declarations, Hiscox also makes submissions on whether the

FCA's proposed list of examples in the red text version of §17.4A constitute "*restrictions imposed*".

The Court should not make any further declaration as to what amounts to "*restrictions imposed*", beyond what Hiscox has offered to agree.

18. The FCA's ambitions in respect of §17.4A appear to have shifted and developed. Until 8 February 2021 (5 days after the date on which they had originally agreed the parties would file submissions on the draft declarations) the FCA simply sought a declaration to the effect that **all** the general **and** specific measures were "*restrictions imposed*". This was surprising, since it evidently ignored the Court's statement that the argument was "*clearly stronger in relation to the latter*" (J§124). On 8 February 2021, however, a new and even more surprising draft order was served by the FCA with the red text version of 17.4A that appears before the Court. That version contains some matters (e.g. 17.4A(f)) which were not even included in either the general or the specific measures.

19. The Court should reject the request that it consider making further Declarations of the kind sought. The limits of the Court's judgment are clear, and it is the function of the Declarations to give effect to that judgment, not to expand it, *a fortiori* in a whole raft of ways, all of which – to the extent not obviously wrong – would require further consideration and argument. There is nothing unusual or surprising in the Supreme Court, especially in a test case like the present, which was heard on an expedited timetable and with extremely compressed opportunities for argument, to leave some points open for subsequent decision by other tribunals. If the Court is (improbably) persuaded to enlarge the judgment beyond its terms, then the FCA's proposed enlargements are unjustified.

20. First, with regard to the general and specific measures (which are the basis of the vast majority of the red text §17.4A), Hiscox understands the Court to have ruled that whether these amounted to "*restrictions imposed*" is something that must be argued before other tribunals, unless the parties agreed (as Hiscox has offered to do in respect of two of the specific measures, following the Court's indication in J§124, and despite no movement in the positions of the FCA and HAG). Hiscox's understanding is based on J§108 and J§124. At J§108, the Court recorded how the FCA had already argued before it on appeal that "*cover was triggered by what it terms the "general measures" and the "specific measures"*". Then at J§124, after analysing and setting out its conclusion as to the correct approach to determining when an instruction may be within "*restrictions imposed*", the Court declined to rule on the

FCA's arguments in that regard, instead stating that whether the general or specific measures were encompassed by the correct approach "*should be left over for agreement or further argument*". That this was the Court's approach could hardly be clearer.

21. Second, and for good measure, leaving this issue to be argued before subsequent tribunals was and is the right and fair course where:

    a. The evidence before the Court, based on the agreed facts at trial, was not assembled with the purpose of answering the test as formulated in the Court's judgment. It is, for example, relevant to consider how a particular measure was received by those to whom it was directed in testing whether it can be said that "*the public would reasonably understand [that it] had to be complied with*"[3] Evidence of widespread behaviour inconsistent with such an understanding would point strongly against a measure being within "*restrictions imposed*"[4].

    b. Further, once "*restrictions imposed*" extend beyond measures having the force of law (as the Court has said it does), it is also relevant to consider, in relation to any given statement or action relied on as within "*restrictions imposed*", other statements or actions by the Government or public authorities, and how they relate to and compare with that relied on, and the full context of the statement; one cannot assess how a reasonable person would interpret statements or actions in a relative vacuum. There has not been any detailed consideration along these lines; this was not the function of the test case. The case has proceeded by reference to high-level agreed facts, assembled at some haste for the purpose of deciding broad questions of principle. The parties have not been required to assemble evidence or factual material of the kind that might bear on a more specific question as to the status of words used in a particular Government statement. Such a detailed exercise cannot now be performed in this case.

    c. The Court did not receive written or oral submissions at the appeal hearing on whether particular general or specific measures fell within "*restrictions imposed*" by

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3 J§120.

4 Hiscox notes in this regard that Annex 1 to HAG's skeleton argument before the High Court asserted that "*of the 369 [HAG intervenors], the significant majority were only unable to use their Insured Premises from the end of 23 March 2020 onwards.*"

reference to the approach which it has decided is the correct one. The submission of written arguments on the point after judgment is not a satisfactory substitute, and (it is suggested) was never contemplated by the Court.

22. Third, the principles relevant to determining whether a public authority measure falls within "*restrictions imposed*" are already addressed in some detail in §17.4 of the Declarations and also, of course, in the Court's judgment. Specific examples of what is or is not within "*restrictions imposed*" are not necessary to explain these principles.

23. Fourth, giving examples by way of a declaration may lead later tribunals into error rather than assist. In the absence of a fully reasoned judgment dealing with each measure in the red text version of §17.4A by reference to the principles expounded in the Court's judgment, later tribunals will be obliged to surmise, possibly wrongly, why this Court concluded on the application of the principles in the judgment that a particular statement or document did or did not fall within "*restrictions imposed*".

24. Fifth, a declaration listing a variety of measures as non-exhaustive examples of "*restrictions imposed*" risks giving what may be a misleading impression that there may have been many other non-statutory "*restrictions imposed*" beyond the general and specific measures and aspects of the 23 March 2020 announcement of the Prime Minister. However, the FCA and HAG have only specifically identified as "*restrictions imposed*" the matters referred to as the general and specific measures in these proceedings. That risk extends not only to other pronouncements and documents from March 2020 that may subsequently be identified by policyholders as potential "*restrictions imposed*", but also to the myriad of subsequent pronouncements and documents issued by public bodies during the course of the response to the pandemic.

25. Sixth, there are specific objections to including Regulations 6 and 7 within a list of examples of "*restrictions imposed*". With regard to Regulation 6, there is no need for anything to be said in §17.4A, because the proposed text of §17.4 already states that "*Regulation 6 is* ***capable of being*** *a "restriction imposed"*". The emphasised words are to be noted. Whether in fact Regulation 6 falls within "*restrictions imposed*" in any particular case will depend upon the specific content of the Regulation, which is not an absolute regulation but is subject to numerous qualifications, and how it specifically impacts on the relevant policyholder's

ability to use its premises, noting that the Court accepted (J§144) that it would be a rare case where that impact amounts to an "*inability to use*". As to Regulation 7, for reasons expanded upon in §§67 to 69 below, it would be wrong, or at least inappropriate, for the Court to make any declaration given the history of these proceedings.

26. Seventh, whether or not a particular measure amounts to "*restrictions imposed*" only relates to one element of the composite peril insured by Hiscox. In particular, any such restriction must also cause an "*inability to use*" the relevant insured premises. The Court's judgment made specific findings as to whether Regulation 6 of the 26 March 2020 Regulations could cause an inability to use; these provide clear guidance to insurers, policyholders, and subsequent tribunals. Given its ruling at J§124 that whether the other measures before it amounted to "*restrictions imposed*" was something to be left over for further argument (before other tribunals, on Hiscox's understanding), the Court rightly did not give similar guidance as to whether those measures were capable of causing an "*inability to use*". It would not be appropriate, and may mislead policyholders, insurers and subsequent tribunals, for the Court now to make declarations as to whether or not given measures fall within "*restrictions imposed*" without also addressing the closely related question of whether such measures are capable of causing an "*inability to use*". Hiscox's position is that, consistent with J§124, both questions are now for subsequent tribunals.

27. Accordingly, there should be no other declaration as to what amounted to "*restrictions imposed*" beyond what Hiscox is prepared to agree, the extent of which is reflected in the blue text version of 17.4A. The Declarations should otherwise not determine whether the other steps were "*restrictions imposed*", leaving it instead to other tribunals to decide on more detailed arguments and material, where the test which is being applied is known in advance.

28. The Court will note that by the blue text in §17.4A, Hiscox agrees only that some of the specific measures were capable of being "*restrictions imposed*" namely:

    a. The instruction to close schools referred to in the Prime Minister's announcement on 18 March 2020 (referred to in J§110(i)). In fact, that announcement did not itself contain any instruction to schools to close (the most it says is "…*we think now that we must apply downward pressure, further downward pressure on that upward curve by*

closing the schools")[5] and so does not itself meet the Court's test for "*restriction imposed*", but Hiscox is prepared to agree in relation to this measure because the announcement described the instructions being given to schools by the Government on that day and refers to a statement in the House of Commons by the Minister for Education that schools would remain closed (other than for children of key workers) after shutting their gates on Friday 20 March 2020; and

b. The Prime Minister's instruction to Category 1 and Category 2 businesses to close on 20 March 2020 (referred to in J§110(ii)), **but only** if and insofar as businesses in these categories were subsequently required to close by the 21 March Regulations. The declaration requires qualification in this way because a number of Category 2 businesses were not closed by the 21 March Regulations and were only later included in the 26 March Regulations (e.g. nail salons, hairdressers, playgrounds and outdoor markets): see J§36(i) and (ii) and also §40.2 of the Statement of Facts and Issues.[6] Alternatively, it should be made clear that those Category 2 businesses that were not subsequently made subject to the 21 March Regulations cannot have suffered any "*inability to use*" as a result of the 20 March instruction**.**

29. For the avoidance of doubt, Hiscox has no objection in principle to the Declarations being amended to say expressly that Regulation 2 of the 21 March Regulations and Regulations 4 and 5 were "*restrictions imposed*" (referred to in the red text at 17.4A(i)). However, given both the proposed terms of §17.4 of the Declaration and the terms of the Court's judgment, this is unnecessary.

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5 **{C/32/1807}**.

6 "*…40.2* ***Category 2****: businesses listed in Part 2 of Schedule 2 to the 26 March Regulations, such as cinemas and theatres. This category was affected by Regulation 4(4) of the 26 March Regulations. This list expanded the earlier list in Part 2 of the Schedule to the 21 March Regulations, that subset being affected by Regulation 2(4) of the 21 March Regulations.*" **{B/1/12}**.

Submissions if the Court does intend to determine whether other measures were "restrictions imposed"

30. If the Court is persuaded that it should at this stage enter upon a determination of which matters in the red text version of declaration 17.4A were examples of "*restrictions imposed*", Hiscox submits for the reasons set out below that the Court should:

    a. Make the declaration proposed in blue text for §17.4A;

    b. Expressly declare that the matters in the red text draft of §17.4A(a), (b), (c) (save as to the instruction to schools to close as agreed by Hiscox), (e), (f), (g) and (h) were **not** "*restrictions imposed*". The terms in which Hiscox asks that such a declaration be made are set out in blue text as a potential §17.4B of the Declarations. For the avoidance of doubt, the blue text §17.4B is only sought by Hiscox in the event the Court decides to determine what measures were or were not "*restrictions imposed*". The reasons why Hiscox says that these were not "*restrictions imposed*" are set out below in §§34 to 70. It is essential that the Court gives a negative declaration of the kind proposed in §17.4B if it concludes any measure does not fall within "*restrictions imposed*". A list that only refers to what it has accepted **is** a restriction imposed would otherwise give the misleading impression that it was still realistic to argue that any of the general or specific measures were "*restrictions imposed*". That would undermine the purpose of this litigation by forcing insurers to re-argue in later disputes points resolved in their favour. The Hiscox draft §17.4B takes a similar approach to that suggested by RSA in relation to §27.3A of the draft Order.

    c. Not make any declaration in §17.4A(i) to the effect that Regulation 6 or Regulation 7 was an example of "*restrictions imposed*". The reasons for this are set out further in §§67 to 69 below.

31. Further, if and insofar as the Court determines that it should declare that any non-statutory instruction subsequently given statutory force was an example of "*restrictions imposed*" (e.g. what the FCA term (in the red text 17.4A (f)) the "*instruction to stay at home*" on 23 March 2020, later given force by Regulation 6: see red text §17.4A(f)), it should also declare clearly

that such restrictions and (also) their effect on an insured's ability to use premises cannot have been more extensive than the subsequent legislation, and that they did not endure beyond such legislation coming into force. This is essential to prevent opportunistic arguments that a carelessly-phrased Government statement preceding legislation had some continuing, independent and potentially even more extensive effect than the statutory measure in which it was later embodied. The addition of this clarification will avoid absurdity and should be uncontroversial. The effect of these non-statutory measures should at most have been to bring forward the date on which the restrictions subsequently embodied in legislation could have affected an insured. So any Order which includes declarations to the effect that matters beyond those agreed by Hiscox were "*restrictions imposed*" should include the wording at sub-paragraph (c) of Hiscox's (blue text) paragraph 17.4A in relation to any matters which subsequently became the subject of regulations. That is to say, by reference to the numbering in the FCA's red text 17.4A: sub-paragraphs (a), (f), (g) other than as regards 2 metre distancing, and (h).

32. Further, any Order declaring matters beyond what Hiscox agrees are capable of being "*restrictions imposed*" should make clear in its opening words that the matters are **capable of being** restrictions imposed, not that they are. Otherwise there is a risk of creating a misleading effect that they are definitely "*restrictions imposed*" within the meaning of the clause in any given case. The way to do this is to begin any such Order with the opening words of Hiscox's (blue text) 17.4A : "*The following were also capable of amounting to "restrictions imposed"…"*

33. Hiscox sets out below its submissions on each of the FCA's proposed examples of "*restrictions imposed*" by reference to the relevant subparagraph of the red text version of §17.4A.

<u>Responses to the FCA's proposed non-exhaustive examples of "restrictions imposed"</u>

17.4A(a): *"The Prime Minister's instruction to stay at home, and instruction not to gather in public socially or at mass gatherings, given on 16 March 2020"* (<u>General Measure J§109(i)</u>)

34. There were no "*restrictions imposed*" by the Prime Minister's statement on 16 March 2020 **{C/29/1783}**. It is one of the general measures in relation to which the Court has already indicated the arguments in favour of it being a restriction imposed are weaker than others (J§124).

35. First, the statement gave no instruction in "*mandatory terms*". It gave advice or at most made requests that people were at liberty to ignore. It asked people to avoid activities, it did not even purport to prohibit them. Any reasonable policyholder would have understood this. If policyholders chose to heed the advice or to do what was asked, such a choice cannot be attributed to anything mandatory about the terms of the statement:

    a. The Prime Minister said only that "*you should avoid pubs, clubs, theatres…"* He did not even say that you must not go to pubs, go to clubs, go to theatres, merely that they should be avoided. It was clear that one could still visit them. Further he did not even ask, let alone require, pubs and clubs to close. It is common knowledge that many pubs and clubs remained open, and people carried on attending pubs, clubs and similar venues after 16 March 2020.

    b. He referred explicitly to his requests that people stop unnecessary travel, avoid social contact and social venues, work from home where possible, and not join large gatherings as mere advice:

    "*…this advice about avoiding all unnecessary social contact…it's important that Londoners now pay special attention to what we are saying…and to take particularly seriously the advice about working from home, and avoiding confined spaces such as pubs and restaurants*"*…as we advise against unnecessary social contact of all kinds, it is right that we should extend this advice to mass gatherings as well*".

    c. In a statement made to the nation as a whole, he referred to elements of the advice being "*particularly important for people over 70, for pregnant women and for those with some health conditions*", and requested Londoners "*to take particularly seriously the advice about working from home, and avoiding confined spaces such as pubs and restaurants.*" Requests to specific groups to take particular heed of the advice given is inconsistent with an expectation that compliance was required by everyone to whom it was addressed.

36. Notably, even those with symptoms of COVID-19 were only told "*we need to ask you to ensure that…you stay at home for fourteen days*". They were asked that "*if possible you should not go out even to buy food or essentials, other than for exercise, and in that case at a safe distance from others.*"

The contrast between this and the advice that others in the population merely "*avoid*" certain activities is significant.

37. Second, the 16 March 2020 statement, unsurprisingly because it was only advice, cannot be said to have been in clear enough terms to enable addressees (or at least the general public without symptoms) to know with reasonable certainty what compliance required.

38. Third, to accept that the 16 March 2020 statement constituted "*restrictions imposed*" would be inconsistent with this Court's conclusion that it did not cause a prevention of access to relevant insured businesses (J§154) within the meaning of the Arch wording. On this point, this Court approved the reasons in §328 of the High Court's judgment, where the judges remarked that:

> *"…the 16 March advice of the Prime Minister about working from home where possible, social distancing and avoiding going to pubs or clubs prevented access to insured premises. That advice did not in any sense cause a prevention of access to any premises, as can be demonstrated by the example of pubs. As we discussed with Mr Lockey QC in the course of argument, for the rest of the week after 16 March, there seems to have been something of a "booze-fest" with people making the most of going to pubs before the anticipated instruction to close which came with the government advice on 20 March that pubs should close."* **{C/3/127}**

39. Fourth, the fact that his previous statements had been neither mandatory nor required compliance was acknowledged by the Prime Minister himself in his later statement on 23 March 2020 in which (despite lacking a legal basis) he adopted a very different tone:

> "*…we have been asking people to stay at home during this pandemic.*
> *And though huge numbers are complying – and I thank you all – the time has now come for us all to do more.*
> *From this evening I must give the British people a very simple instruction- you must stay at home.*
> *…people will only be allowed to leave their home for the following very limited purposes…*
> *…If you don't follow the rules the police will have the powers to enforce them…*" **{C/37/1842}**

40. The threat of enforcement in the last sentence above (absent from both the statements of 16 and 18 March 2020) was significant. It made this later instruction one that (unlike its predecessors) would reasonably be understood to require compliance.

41. Finally, in opposition to the so-called "*instruction not to gather in public socially or at mass gatherings*" Hiscox relies on the arguments it raises in §§67 to 69 below in relation to the proposed inclusion of Regulation 7 in the red text §17.4A(i).

17.4A(b): "*The UK Government's instruction on 2-metre distancing given in its publication "COVID-19: guidance on social distancing and for vulnerable people" on 16 March 2020"* (General Measure J§109(ii))

42. Given 2-metre distancing advice cannot have caused an "*inability to use*" insured premises of the kind required by the Hiscox public authority clause, whether the guidance issued on 16 March 2020[7] amounted to "*restrictions imposed*" may be academic. However and in any event, it did not do so. It is another general measure in respect of which the Court has said that the arguments in favour of it falling within "*restrictions imposed*" are weaker.

43. First, unlike the other general measures (the "*stay at home instruction*" and the "*prohibition against gatherings*"), which each foreshadowed legislation (Regulation 6 and 7 respectively), 2 metre distancing was never embodied in legislation. It was only ever guidance and was widely and correctly understood as such. It was reasonably regarded on all sides as inherently unenforceable.

44. Second, the 16 March 2020 guidance made very clear (not least in its title) that it was only giving guidance and not purporting to give a mandatory instruction of any kind:

> "…*COVID-19: guidance on social distancing*" **{C/30/1788}**
> …*This guidance is for everyone. It advises on social distancing measures we should all be taking*…*Avoid non-essential use of public transport*…*Avoid large gatherings, and gatherings in smaller public spaces such as pubs, cinemas, restaurants*…*Avoid gatherings with friends and family*…*Everyone should be trying to follow these measures as much as is pragmatic*…*This advice is likely to be in place for some weeks*…" **{C/30/1790-1791}**

[7] **{C/30/1786}.**

45. Third, the "*2 metre instruction*" was only referred to once in the 16 March document, at the end of a list under the heading "*How do you look after your mental wellbeing?"* where it said: "*Keep your windows open to let in fresh air, get some natural sunlight if you can, or get outside into the garden. You can also go for a walk outdoors if you stay more than 2 metres from others.*" **{C/30/1793}**. It was not included in the "*Summary of advice*" table at the end of the document, which said only that those between 0-69 years were "*Advised against*" social mixing in the community and having friends and family to the house and those 70+ were "*Strongly advised against*" such activities **{C/30/1794**}.

46. Fourth, in contrast to the Prime Minister's various announcements and the 21 and 26 March Regulations, the 16 March 2020 guidance was not something of which all policyholders could reasonably be either expected or presumed to be aware. One would have to seek it out if one wished to consider it. Howsoever phrased, a relatively unpublicised document of this kind that fell short of legislation (where presumptions as to knowledge of legislation are legitimate), cannot sensibly be said to be one that a policyholder would reasonably understand required compliance.

17.4A(c): "*The Prime Minister's instruction to schools to close, instruction to stay at home, and instruction not to gather in public given on 18 March 2020*" (General Measures J§109(i) and (iii) and Specific Measure 110(i))

47. In this proposed subparagraph, the FCA mixes up two of the general measures with a specific measure: namely the "*stay at home instruction*" (J§109(i)) and the "*prohibition against gatherings*" (J§109(iii)), with the specific measure relating to schools (J§110(i)).

48. As set out in §28(a) above, Hiscox has offered to agree a declaration that the specific measure relating to schools is capable of falling within "*restrictions imposed*", even though the statement did not in fact give any instruction in mandatory terms, but rather described what was being said to schools. However, Hiscox rejects the suggestion that the 18 March 2020 statement imposed any other restriction.

49. So far as both staying at home and avoiding gatherings were concerned, the Prime Minister's statement of 18 March 2020 was couched in materially the same terms as his 16 March 2020 statement. Indeed, his reference to such matters was only in passing and on any view did not convert his previous statement of 16 March 2020 into mandatory terms.

He simply asked the public to "…*follow the advice to protect themselves and their families, but also – more importantly – to protect the wider public…Avoid all unnecessary gatherings – pubs, clubs, bars, restaurants, theatres and so on and work from home if you can. Wash your hands.…"* **{C/32/1807}**

50. Further, as set out above in relation to his announcement of 16 March 2020, the Prime Minister himself acknowledged that his previous statements had been neither mandatory nor required compliance when making his statement on 23 March 2020.

51. Finally, again in opposition to the so-called "*instruction not to gather in public*" Hiscox relies on the arguments it raises in §§67 to 69 below in relation to the proposed inclusion of Regulation 7 in the red text §17.4A(i).

17.4A(d): "*The Prime Minister's instruction to Category 1 and Category 2 businesses to close given on 20 March 2020*" (Specific Measure J§110(ii))

52. As set out in §28(b) above, Hiscox has offered to agree that this instruction is capable of falling within "*restrictions imposed*" (see §17.4A(b) in blue text), subject to the important qualifications required to make clear that there cannot have been any "*restriction imposed*" in respect of Category 2 businesses that were not subject to the 21 March Regulations and that the instruction cannot have been more extensive or less qualified than nor had any existence beyond the 21 March Regulations coming into force.

17.4A(e): "*The Prime Minister's instruction on 2-metre distancing given on 22 March 2020"* (General Measure J§109(ii))

53. Hiscox repeats *mutatis mutandis* what it says in §§42 to 46 above regarding the reference to 2-metre distancing within the guidance on 16 March 2020 in response to 17.4A(b)

54. Further, the Prime Minister's comment regarding 2-metre distancing in his appearance on 22 March 2020 did not amount to "*restrictions imposed*". He did say (among other things) "*you have to stay two metres apart…"* **{C/34/1818}**, but reading those words in the context of both his previous statements and his statement on 22 March 2020 itself makes clear that he was not converting previous statements on 2-metre distancing into a mandatory instruction:

> "*…please follow the advice and don't think that fresh air in itself automatically provides some immunity. You have to stay two metres apart; you have to follow the social distancing advice. …And I say this now – on Sunday evening – take this advice seriously, follow it, because it is absolutely crucial…Always remember that in following this advice- and I know how difficult that is...You are doing your bit in following this advice to slow the spread of this disease."* **{C/34/1818-1819}**

55. Read in context, it cannot fairly be said that any reasonable policyholder would have understood either the 16 March 2020 document (had they known of its existence) or the comments on 2-metre distancing in the 22 March 2020 announcement to have been making the 2-metre distancing advice mandatory, so that compliance with them was required (as opposed to highly desirable). This is so even if one takes the 16 March 2020 document and the 22 March 2020 announcement in combination, rather than alone.

17.4A(f): "*The Prime Minister's instruction to stay at home and instruction not to gather in public given on 23 March 2020"*

56. This is not contained within either the general measures or the specific measures set out in J§109 and J§110, and therefore should not be in the Declarations, the purpose of which is to record the Court's conclusions, not expand them.

57. If the Court nevertheless intends to make a declaration regarding the Prime Minister's announcement on 23 March 2020 **{C/37/1841}**, it should declare that it does not fall within "*restrictions imposed*". The other iterations of the "*stay at home instruction*" and "*prohibition against gatherings*" referred to in J§109 are all general measures, where the Court has already indicated that the arguments in favour of them being a restriction imposed are weaker (J§124). The Court should take the same approach to this statement.

58. However, if the Court is minded to make a declaration that the "*instruction*" to "*stay at home*" given on 23 March 2020 amounted to "*restrictions imposed*", as set out more generally in §31 above, it is important that the Court makes clear in any declaration it may make in relation to the 23 March 2020 announcement that its effect was at most to bring forward the imposition of the restriction later embodied in Regulation 6. It should also be made clear

that an insured will find it just as difficult as in relation to Regulation 6 to demonstrate that any alleged restriction on leaving home imposed on 23 March 2020 caused an "*inability to use*" its premises. Should the Court therefore decide to declare that the "*stay at home*" instruction in the Prime Minister's announcement on 23 March 2020, to the extent that it was subsequently embodied in Regulation 6, amounts to "*restrictions imposed*", it should make a consequential amendment to the final sentence of Declaration 17.4, such that it includes the following additional green text:

"*Cases in which Regulation 6 and/or the Prime Minister's instruction to stay at home given on 23 March 2020 would have caused an "inability to use" the insured's premises would be rare; whether there were such cases is a question of fact[, but it is likely that it will be difficult for Category 3 and Category 5 business which were allowed to remain open to demonstrate the requisite inability to use]*."

If the Court is minded to find that any earlier "*stay at home*" statement amounts to "*restrictions imposed*", the same point applies.

59. The Prime Minister's announcement read in full did not in fact give a "*very simple instruction*" to "*stay at home*" (as he said at one point). On the contrary, he clearly alluded to: anticipated legislation (i.e. the 26 March Regulations), exceptions to the stay at home instruction later contained within Regulation 6,[8] and enforcement powers being granted to the police (as they were in the 26 March Regulations).

60. Finally, again for reasons set out in §§67 to 69 below in response to red text §17.4A(i), Hiscox does not accept that the Court should declare that Regulation 7 fell within "*restrictions imposed*" and therefore, there should be no declaration that what the Prime Minister said in his speech of 23 March 2020 about not gathering in public amounted to "*restrictions imposed*". If, however, the Court concludes that this was the case, it ought also to make clear that (i) the 23 March 2020 announcement at most brought forward the imposition of the restriction later embodied in Regulation 7 and had no wider effect after that Regulation came into force (Hiscox refers to the general submissions it makes in this

[8] "*…people will only be allowed to leave their home for the following limited purposes: - shopping for basic necessities, as infrequently as possible…any medical need…travelling to and from work, but only where this is absolutely necessary and cannot be done from home.*" **{C/37/1842}**.

regard in §31 above), and (ii) any restriction on gathering in public cannot have caused an "*inability to use*" insured premises, which would inevitably be private.

17.4A(g): "*Public Health England's instruction on 2-metre distancing, instruction to stay at home, and instruction not to gather in public given in its publication "Keeping away from other people: new rules to follow from 23 March 2020" on 23 March 2020"* (General Measures J§109(i) to (iii))

61. The PHE document issued on 23 March 2020 **{C/35/1829-1830}** was a document that people had actively to seek out if they wanted to read it, most obviously by searching the internet. It is not a document that any reasonable policyholder could be expected to know or be presumed to know existed. Further, it amounted to little more than a very high-level public information leaflet summarising in an overly simplistic way what had been said elsewhere in the Prime Minister's announcement and (at least so far as staying at home and not gathering in public were concerned) what was at that point anticipated would be expected to be embodied in legislation.

62. Accordingly, even if a reasonable policyholder was aware of its existence, it would not have considered the PHE document to be one that "*required*" compliance, nor was it "*in clear enough terms to enable the addressee to know with reasonable certainty what compliance requires*."[9] At most it would have caused them to explore if there was anything underlying the PHE document that did require compliance in clear terms. It did not, therefore, impose any restriction.

63. Finally, in opposition to the so-called "*instruction not to gather in public*", Hiscox relies on the arguments it raises in §§67 to 69 below in relation to the proposed inclusion of Regulation 7 in the red text §17.4A(i).

17.4A(h): "*The UK Government's instruction to Category 6 businesses to close given in its publication "COVID 19 advice for accommodation providers" on 24 March 2020"* (Specific Measures J§110(iii))

64. The document containing this instruction, issued on 24 March 2020, was not a mandatory instruction. It was expressly headed "*COVID-19 advice for accommodation providers*"

9 J§121.

{C/39/1851}. It did say that Category 6 businesses "*should now take steps to close*" but did not (at least itself) state that this was mandatory. Further, the document must be read in the light of the fact that (i) Category 6 businesses had not been closed by the 21 March Regulations;[10] and (ii) they were not mentioned in the Prime Minister's statement of 23 March 2020 **{C/37/1842}**. In that context, not all reasonable policyholders would have considered the 24 March 2020 document to be mandatory if (which cannot be assumed) they were aware of its existence.

17.4A(i): "*Regulation 2 of the 21 March Regulations, and Regulations 4, 5, 6 and 7 of the 26 March Regulations"*

65. So far as this proposed declaration concerns Regulation 2 of the 21 March Regulations and Regulations 4 and 5 of the 26 March Regulations, Hiscox of course accepts these were capable of being "*restrictions imposed*" (to those businesses that were the subject of them). It has always accepted that. Nevertheless, given the terms of the Court's judgment and what is proposed be said in §17.4, it is unnecessary to refer to these or any other regulations in a further paragraph of the Declaration, the focus of which is upon non-legislative statements. There are further objections to any reference to Regulation 6 and Regulation 7.

66. As to Regulation 6, on both parties' proposed text this regulation is already expressly referred to in the proposed §17.4. That paragraph is carefully phrased ("*is capable of being a "restriction imposed*") to reflect the fact that while in some cases Regulation 6 may be a relevant restriction imposed, in others it will not be and, moreover, it is likely to be a rare case in which it caused an "*inability to use*". Including Regulation 6 in a subsequent list of examples of "*restrictions imposed*" risks obscuring these important points.

67. As to Regulation 7, it would be wrong, or at least inappropriate, for the Court to make any declaration either way to the effect that this did or did not amount to "*restrictions imposed*". Whether it is remains an open question given the history of these proceedings:

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10 Restrictions had only been placed on their ability to serve food and drink on the premises, which expressly did not include the provision of room service, see Regulation 2(2) of the 21 March 2020 Regulations **{E/2/13}**.

a. Hiscox submitted at trial that the only restrictions capable of being "*restrictions imposed*" were Regulation 2 of the 21 March Regulations and Regulations 4 and 5 of the 26 March Regulations.[11] The High Court, however, concluded that Regulation 6 was also capable of being a restriction imposed, albeit it would be a rare case that it would cause an "*inability to use*" (a conclusion upheld by this Court).[12] It said nothing about whether Regulation 7 fell within "*restrictions imposed*" in its judgment.

b. Paragraph 17.4 of the High Court's Declarations stated: "*Social Distancing and Related Action (save for Regulation 6) otherwise were and are not "restrictions imposed".*"[13] "*Social Distancing and Related Actions*" was defined in §14.5(b) of the High Court's Declarations as "*advice, instructions and regulations as to social-distancing, self-isolation, lockdown and restricted travel activities, 'staying-at-home' and home-working given on 16 March 2020 and on many occasions subsequently (including Regulation 6 of the 26 March Regulations and as set out in paragraphs 18.9, 18.14, 18.15(b), 18.16 to 18.24, and 18.26 of the APoC)".*[14] This definition included the 26 March Regulations, which were referred to in §18.21 of the Amended Particulars of Claim. Accordingly, the High Court's Declarations did not declare that Regulation 7 constituted "*restrictions imposed*", let alone a relevant one. Its Declarations only extended to saying Regulations 4, 5, and 6 were or were capable of being "*restrictions imposed*".

c. This was recognised in the FCA's Appellant's Case, which summarised the High Court's conclusion as being that the words "*restrictions imposed*" "*mean something mandatory that has the force of law (the only relevant such matters being the restrictions in Regulation 2 of the 21 March Regulations and Regulations 4, 5 and potentially 6 of the 26 March Regulations)*…".[15] Regulation 7 was not mentioned. Moreover, the appeals of

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11 High Court Judgment: §265 **{C/3/111}**.

12 High Court Judgment: §270 **{C/3/111}**.

13 **{C/1/13}**.

14 **{C/1/10}.**

15 FCA Appellant's Case: §64.1 **{B/2/53}**. The High Court's conclusions were summarised in similar terms in §25 of HAG's Appellant's Case: "…*The Judges erred in holding that "restrictions imposed" within Hiscox 1-4 meant only something "mandatory that has the force of law", and that the only relevant such matters were those promulgated by statutory instrument, and in particular, Regulation 2 of the 21 March Regulations, and Regulations 4, 5 and 6 of the 26 March Regulations."* **{B/3/85}.**

the FCA and HAG in relation to "*restrictions imposed*" concerned the Court's conclusion that "*restrictions imposed*" had to have the force of law and **not** upon its conclusion as to which of the 21 and 26 March Regulations was relevant. Indeed, so far as Hiscox has been able to determine, the only reference to Regulation 7 in the FCA's Appellant's Case was in relation to the third of the "*general measures*", termed the "*prohibition against gatherings*" (J§109(iii)), and it did not feature in oral or written argument.

68. Had the High Court concluded that Regulation 7 was capable of being a relevant "*[restriction] imposed*" within the meaning of Hiscox 1-4, Hiscox would have appealed in respect of such a conclusion, as it did in relation to Regulation 6, in relation to which the Court acknowledged, although rejecting them, that Hiscox's arguments were cogent: J§125-128. A serious point arises as to whether Regulation 7 could fall within "*restrictions imposed*", which has simply not been explored. Hiscox's policyholders operated business premises which were private, albeit members of the public will generally have had an implied licence to access them for the purposes of that business. It would not be right to characterise such premises as "*a public place*" affected by Regulation 7 **{E/3/21}**. Certainly, it would not be right to characterise Regulation 7 as or as capable of being "*restrictions imposed*" without much more serious argument and consideration. Hiscox would also wish to argue alternatively, that even if Regulation 7 could in some way be regarded as a restriction imposed, the fact that it is a rare case that Regulation 6 will have caused an inability to use must entail that it is an even rarer case where Regulation 7 could be said to have caused an inability to use, given the insured premises were private.

69. Accordingly, no specific declaration should be made either way with regard to Regulation 7. If it is, it should be that Regulation 7 could not fall within "*restrictions imposed*". If the Court nonetheless determines that a declaration should be made to the effect that Regulation 7 may fall within "*restrictions imposed*", it should be made clear that it is **capable** of being such a restriction, not that it is. It should also be made clear that it will be a very rare case that it will have caused an "*inability to use*" within the meaning of Hiscox 1-4.

<u>Conclusion on the red text version of 17.4A</u>

70. Save for those that Hiscox has agreed, none of the general or specific measures were "*restrictions imposed*". Alternatively, none of them could have become such before 23 March

2020. Moreover, and for the avoidance of doubt, it should be made clear in the Declarations that that insofar as any of the measures were "*restrictions imposed*", and to the extent that they were subsequently embodied in legislation (e.g. Regulations 6 and 7), their ambit and effect could not have been greater than such legislation nor endured beyond such legislation coming into force.

Para 19

71. The retention of this paragraph unamended ought to be uncontroversial. It correctly identifies a point of timing and the duration of the insured peril, making clear that an insured cannot recover for loss sustained before or after the cessation of the insured peril. It was common ground at first instance and on appeal that pre-trigger losses could not be claimed as such.[16] Nothing in this Court's judgment renders the proposed words incorrect.

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12 February 2021

16 FCA Appellant's case: §31 to 32 **{B/2/39-40}**.