

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
CLAIM NO: FL-2020-000018

Neutral Citation: [2020] EWHC 2448 (Comm)

BETWEEN:

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

Appellants

-and-

THE FINANCIAL CONDUCT AUTHORITY

Respondent

-and-

[(1)HOSPITALITY INSURANCE GROUP
ACTION]

(2) HISCOX ACTION GROUP

Intervener

Appeal Nos. 2020/0177-0178

AND BETWEEN:

THE FINANCIAL CONDUCT AUTHORITY

Appellant

-and-

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

Respondents

-and-

[(1) HOSPITALITY INSURANCE GROUP
ACTION]

[Intervener]

STATEMENT OF FACTS AND ISSUES

A. The Facts

1. Documents are cross-referenced in this Statement as (Judgment [paragraph number]) and/or (Appendix {bundle/document number/page number}).
2. The parties¹ agreed the facts upon which the case at first instance was to be determined in a series of agreed fact documents (Appendix {C/43-45} and {D/6-14}), with assumed fact patterns to be used as illustrations.
3. The factual background is therefore essentially agreed between the parties and it is only necessary to set out the history of the disease and the government response to it prior to the trial to put into context the relevant issues in this appeal (Judgment, [9]).
4. On 31 December 2019, the World Health Organization (“**WHO**”) was informed of pneumonia cases of unknown cause in the city of Wuhan, in the Hubei province in China (Judgment, [10]) (Appendix {C/43/1866})².
5. On 12 January 2020, the WHO announced that a novel coronavirus had been identified in samples obtained from cases in China. This announcement was subsequently recorded by Public Health England (“**PHE**”). The virus was named severe acute respiratory syndrome coronavirus 2, or SARS-CoV-2, and the associated disease was named COVID-19 (Judgment, [10]).
6. On 22 January 2020, the UK Department of Health and Social Care (“**Department of Health**”) and PHE issued a statement to the effect that the coronavirus situation was being constantly monitored. The risk level was raised from “*very low*” to “*low*”. At this stage, there were no confirmed cases in the UK. On 28 January 2020, the UK Foreign Office advised against travel to Wuhan. On 30 January 2020, the risk level was raised again, this time from “*low*” to “*moderate*” (Judgment, [11]) (Appendix {C/43/1866}).

¹ Save for the HAG, who participated as an intervener below and was not involved in negotiating and agreeing the Assumed Facts/List of Issues at first instance.

² All Appendix references to be confirmed once the Appendix index has been agreed.

7. On 30 January 2020, the WHO declared the outbreak of COVID-19 a “*Public Health Emergency of International Concern*” (Judgment, [12]) (Appendix {C/43/1867}).
8. On 31 January 2020, the Chief Medical Officer for England confirmed that two patients had tested positive for COVID-19 in England (Judgment, [13]) (Appendix {C/43/1867}).
9. On 10 February 2020, the Health Protection (Coronavirus) Regulations 2020 were introduced by the Secretary of State for Health and Social Care, pursuant to powers under the Public Health (Control of Disease) Act 1984 (“**the 1984 Act**”). In broad terms, the regulations provided for the detention and screening of persons reasonably suspected to have been infected or contaminated with COVID-19. The regulations were subsequently repealed on 25 March 2020 by the Coronavirus Act 2020 (Judgment, [14]) (Appendix {C/43/1867}).
10. On 22 February 2020, COVID-19 was made a “*notifiable disease*”, and SARS-CoV-2 made a “*notifiable organism*”, in Scotland by amendment to the Public Health etc. (Scotland) Act 2008. (Judgment, [15]) (Appendix {C/43/1869}).
11. On 25 February 2020, the UK Government announced that travellers from certain locations including Hubei province should self-isolate at home regardless of whether they had any symptoms. On the same day, the UK Government published guidance for employers and businesses about sanitisation and other matters (Judgment, [16]) (Appendix {C/43/1869}).
12. On 27 February 2020, the first case of COVID-19 was confirmed in Northern Ireland (Judgment, [16]) (Appendix {C/43/1870}).
13. On 28 February 2020, the first case was confirmed in Wales (Judgment, [16]) (Appendix {C/43/1870}).
14. On 29 February 2020, COVID-19 was made a notifiable disease in Northern Ireland by amendment to the Public Health Act (Northern Ireland) 1967 (Judgment, [16]) (Appendix {C/43/1870}).
15. On 1 March 2020, the first case of COVID-19 was confirmed in Scotland. On 2 March 2020, the UK recorded the first death of an individual who had tested positive for COVID-19, although the first death from COVID-19 was publicly announced by the Chief Medical Officer for England on 5 March 2020 (Judgment, [17]) (Appendix {C/43/1870}).

16. On 3 March 2020, the UK Government announced an “*action plan*” setting out its response to the COVID-19 outbreak (Appendix {C/23/1733}). That plan set out information that was known at the time about the virus and its spread, as well as the UK’s preparations for infectious disease outbreaks (Appendix {C/23/1738}). It included discussion of four phases of the response: “*contain*”, “*delay*”, “*research*” and “*mitigate*” (Judgment, [18]).
17. On 4 March 2020, the UK Government published guidance titled “*Coronavirus (COVID-19): What is social distancing?*” on the PHE Public Health Matters blog. It referred to the Government’s action plan from the previous day and the possibility of introducing social distancing measures. It asked people to think about how they could minimise contact with others (Judgment, [19]) (Appendix {C/43/1871}).
18. On 5 March 2020, the Scientific Advisory Group for Emergencies (“**SAGE**”) held a meeting, the minutes of which record that there was epidemiological and modelling data to support the implementation of isolation measures for people with symptoms (and their families) within one to two weeks, and then for vulnerable people roughly two weeks after that. On the same day, 5 March 2020, COVID-19 was made a notifiable disease, and SARS-CoV-2 made a “*causative agent*”, in England by amendment to the Health Protection (Notification) Regulations 2010 (“**the 2010 Regulations**”). On 6 March 2020, the same followed for Wales by amendment to the Health Protection (Notification) (Wales) Regulations 2010 (Judgment, [20]) (Appendix {C/43/1872}).
19. By 6 March 2020, COVID-19 was therefore a notifiable disease across the UK. Notifiable diseases are diseases in respect of which medical professionals and others have statutory responsibilities to notify public authorities. In England, the notification regime is established by the 1984 Act together with the 2010 Regulations (Judgment, [21]).
20. On 11 March 2020, the WHO declared COVID-19 to be a pandemic (Judgment, [22]) (Appendix {C/43/1874}).
21. On 12 March 2020, the UK Government announced that it was moving from the “*contain*” phase to the “*delay*” phase of its action plan and raised the risk level from “*moderate*” to “*high*” (Appendix {C/26/1770}). Those with symptoms were told to self-isolate for 7 days (Judgment, [23]).
22. On 13 March 2020, SAGE held a meeting, the minutes of which record that “*SAGE now believes there are more cases in the UK than SAGE previously expected at this point ... The science*

suggests that household isolation and social distancing of the elderly and vulnerable should be implemented soon” (Judgment, [24]) (Appendix {C/27/1773}).

23. On 16 March 2020, there was a further SAGE meeting, the minutes of which record that “*SAGE advises that there is clear evidence to support additional social distancing measures be introduced as soon as possible*” (Appendix {C/28/1777}). The same day, the UK Government published guidance on social distancing (Appendix {C/30/1786}). The guidance advised vulnerable people to avoid social mixing and to work from home where possible. The advice included that large gatherings should not take place (Judgment, [25]).
24. On 16 March 2020, the Prime Minister, the Rt Hon Boris Johnson MP, made a statement to the British public (Judgment, [26]) (Appendix {C/29/1783}). The statement included the following:

“Last week we asked everyone to stay at home if you had one of two key symptoms: a high temperature or a new and continuous cough. Today, we need to go further, because according to SAGE it looks as though we’re now approaching the fast growth part of the upward curve. And without drastic action, cases could double every 5 or 6 days.

So, first, we need to ask you to ensure that if you or anyone in your household has one of those two symptoms, then you should stay at home for fourteen days. That means 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. If necessary, you should ask for help from others for your daily necessities. And if that is not possible, then you should do what you can to limit your social contact when you leave the house to get supplies. And even if you don’t have symptoms and if no one in your household has symptoms, there is more that we need you to do now.

So, second, now is the time for everyone to stop non-essential contact with others and to stop all unnecessary travel. We need people to start working from home where they possibly can. And you should avoid pubs, clubs, theatres and other such social venues. It goes without saying, we should all only use the NHS when we really need to. And please go online rather than ringing NHS 111. Now, this advice about avoiding all unnecessary social contact, is particularly important for people over 70, for pregnant women and for those with some health conditions ...

So third, in a few days' time – by this coming weekend – it will be necessary to go further and to ensure that those with the most serious health conditions are largely shielded from social contact for around 12 weeks ...

And it's now clear that the peak of the epidemic is coming faster in some parts of the country than in others. And it looks as though London is now a few weeks ahead. So, to relieve the pressure on the London health system and to slow the spread in London, it's important that Londoners now pay special attention to what we are saying about avoiding non-essential contact, and to take particularly seriously the advice about working from home, and avoiding confined spaces such as pubs and restaurants.

Lastly, it remains true as we have said in the last few weeks that risks of transmission of the disease at mass gatherings such as sporting events are relatively low. But obviously, logically as we advise against unnecessary social contact of all kinds, it is right that we should extend this advice to mass gatherings as well. And so we've also got to ensure that we have the critical workers we need, that might otherwise be deployed at those gatherings, to deal with this emergency. So from tomorrow, we will no longer be supporting mass gatherings with emergency workers in the way that we normally do. So mass gatherings, we are now moving emphatically away from.”

25. On 17 March 2020, the Chancellor of the Exchequer, the Rt Hon Rishi Sunak MP, announced financial measures for businesses in response to COVID-19 (Judgment, [27]) (Appendix {C/43/1879}).
26. On 18 March 2020, SAGE held a further meeting, the minutes of which record that “SAGE considers that the UK is 2 to 4 weeks behind Italy in terms of the epidemic curve” and that school closures should occur as soon as practicable. According to the minutes, SAGE advised that the measures that had already been announced should have a “significant effect, provided compliance rates are good and in line with the assumptions”. In respect of social distancing, SAGE advised that it should be based on places of leisure, such as restaurants and bars, and indoor workplaces (Judgment, [30]) (Appendix {C/31/1803}).
27. On 18 March 2020, the Prime Minister made a further announcement (Judgment, [31]) (Appendix {C/32/1807}). The statement included the following:

“I want to repeat that everyone – everyone – must follow the advice to protect themselves and their families, but also – more importantly – to protect the wider public. So stay at

home for seven days if you think you have the symptoms. Remember the two key symptoms are high temperature, a continuous new cough.

Whole household to stay at home for 14 days if one member in that household thinks he/ she has the symptoms. Avoid all unnecessary gatherings – pubs, clubs, bars, restaurants, theatres and so on and work from home if you can. Wash your hands. [...]

And we come today to the key issue of schools where we have been consistently advised that there is an important trade off. [...]

So looking at the curve of the disease and looking at where we are now – we think now that we must apply downward pressure, further downward pressure on that upward curve by closing the schools.

So I can announce today and Gavin Williamson making statement now in 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. I will explain what I mean by the vast majority of pupils.

The objective is to slow the spread of the virus and we judge it is the right moment to do that.

But of course, as I've always said, we also need to keep the NHS going and to treat the number of rising cases. So we need health workers who are also parents to continue to go to work.

And we need other critical workers with children to keep doing their jobs too – from police officers who are keeping us safe to the supermarket delivery drivers, social care workers who look after the elderly and who are so vital. We will be setting out more details shortly about who we mean in these groups.

So we therefore need schools to make provision for the children of these key workers who would otherwise be forced to stay home. And they will also need to look after the most vulnerable children.

This will mean there will of course be are far fewer children in schools and that will help us to slow the spread of the disease. [...]

So we are simultaneously asking nurseries and private schools to do the same, and we are providing financial support where it is needed. [...]"

28. On 20 March 2020, the Prime Minister made a further announcement (Judgment, [32]) (Appendix {C/33/1814}). The statement included the following:

"...I want to thank everyone for following the guidance we issued on Monday:

to stay at home for 7 days if you think you have the symptoms,

for 14 days if anyone in your household has either of the symptoms- a new continuous cough or a high temperature.

To avoid pubs bars, clubs and restaurants.

To work from home if at all possible.

Keep washing your hands...

...I am confident that, in time, the UK economy is going to bounce back.

Of course it is.

But I must be absolutely clear with you: the speed of that eventual recovery depends entirely on our ability, our collective ability, to get on top of the virus now.

And that means we have to take the next steps, on scientific advice and following our plan, we are strengthening the measures announced on Monday which you will remember.

And of course people have already made a huge effort to comply with those measures for avoiding unnecessary social contact.

But we need now to push down further on that curve of transmission between us.

And so following agreement between all the formations of the United Kingdom, all the devolved administrations, we are collectively telling, telling cafes, pubs, bars, restaurants to close tonight as soon as they reasonably can, and not to open tomorrow.

Though to be clear, they can continue to provide take-out services.

We're also telling nightclubs, theatres, cinemas, gyms and leisure centres to close on the same timescale.

Now, these are places where people come together, and indeed the whole purpose of these businesses is to bring people together. But the sad things [sic] is that today for now, at least physically, we need to keep people apart.

And I want to stress that we will review the situation each month, to see if we can relax any of these measures.

And listening to what I have just said, some people may of course be tempted to go out tonight. But please don't. You may think you are invincible, but there is no guarantee you will get mild symptoms, and you can still be a carrier of the disease and pass it on to others. So that's why, as far as possible, we want you to stay at home, that's how we can protect our NHS and save lives."

29. On 20 March 2020, the Chancellor of the Exchequer announced a Coronavirus Job Retention Scheme which included the furloughing of workers and other financial assistance (Judgment, [33]) (Appendix {C/43/1886}).

The 21 March Regulations

30. On 21 March 2020, the Health Protection (Coronavirus, Business Closure) (England) Regulations 2020 (“**the 21 March Regulations**”) were made by the Secretary of State for Health and Social Care pursuant to powers under the 1984 Act. Equivalent provisions were introduced in Wales under the Health Protection (Coronavirus, Business Closure) (Wales) Regulations 2020 (Judgment, [34]) (Appendix {C/43/1888}). The relevant provisions of the 21 March Regulations include those set out at paragraphs [35]-[37] of the Judgment.

Further developments in March 2020

31. On 22 March 2020, the Prime Minister announced the next stage of the UK Government’s plan, which included “*shielding*” measures for vulnerable people and advising the public to stay 2 metres apart even when outdoors (Appendix {C/34/1818}). The guidance for people to stay 2 metres apart was reiterated by PHE the following day (Judgment, [38]) (Appendix {C/35/1834}).
32. On 23 March 2020, there was a further SAGE meeting, the minutes of which provide that “*high rates of compliance for social distancing will be needed to bring the reproduction number below one and to bring cases within NHS capacity*”. The reproduction number, or “*R*”, is a reference to the average number of secondary infections produced by 1 infected person. The minutes

also record that “Public polling over the weekend on behaviour indicated significant changes but room for improvement in compliance rates” (Judgment, [39]) (Appendix {C/36/1837}).

33. On 23 March 2020, the Prime Minister made an announcement (Judgment, [40]) (Appendix {C/37 /1842}). This included the following:

“it’s vital to slow the spread of the disease...

And that’s why 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. Because the critical thing we must do is stop the disease spreading between households. That is why people will only be allowed to leave their home for the following very limited purposes:

- *shopping for basic necessities, as infrequently as possible*
- *one form of exercise a day - for example a run, walk, or cycle - alone or with members of your household;*
- *any medical need, to provide care or to help a vulnerable person; and*
- *travelling to and from work, but only where this is absolutely necessary and cannot be done from home.*

That’s all - these are the only reasons you should leave your home.

You should not be meeting friends. If your friends ask you to meet, you should say No. You should not be meeting family members who do not live in your home. You should not be going shopping except for essentials like food and medicine - and you should do this as little as you can. And use food delivery services where you can. If you don’t follow the rules the police will have the powers to enforce them, including through fines and dispersing gatherings.

To ensure compliance with the Government’s instruction to stay at home, we will immediately:

- *close all shops selling non-essential goods, including clothing and electronic stores and other premises including libraries, playgrounds and outdoor gyms, and places of worship;*
- *we will stop all gatherings of more than two people in public – excluding people you live with;*
- *and we'll stop all social events, including weddings, baptisms and other ceremonies, but excluding funerals.*

No Prime Minister wants to enact measures like this.

I know the damage that this disruption is doing and will do to people's lives, to their businesses and to their jobs.

And that's why we have produced a huge and unprecedented programme of support both for workers and for business.

And I can assure you that we will keep these restrictions under constant review. We will look again in three weeks, and relax them if the evidence shows we are able to.”

34. On 23 March 2020, the UK Government issued guidance to businesses about closures. The advice included that it would be an offence to operate in contravention of the 21 March Regulations and that businesses in breach of the regulations would be subject to prohibition notices and potentially unlimited fines (Judgment, [41]) (Appendix {C/38/1845}).
35. On 24 March 2020, the UK Government issued guidance to holiday accommodation providers to the effect that they should have taken steps to close for commercial use and to remain open only for limited prescribed purposes, for example supporting key workers or homeless people (Judgment, [42]) (Appendix {C/39/1851}).
36. On 25 March 2020, the Coronavirus Act 2020 was passed. The Act applies across the UK, although different provisions have come into force in different nations at different times. In broad terms, the Act provides for emergency arrangements in relation to health workers, food supply, inquests and other matters. Sections 37 and 38, and Schedules 16 and 17, of the Act provide the Secretary of State with power to give temporary directions to close “educational institutions”, though to date that power has not been exercised (Judgment, [43]) (Appendix {C/43/1892}).

The 26 March Regulations

37. On 26 March 2020, the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (“**the 26 March Regulations**”) were made by the Secretary of State for Health and Social Care pursuant to powers under the 1984 Act. Similar provisions were introduced in Wales under the Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020, in Scotland under the Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020, and in Northern Ireland under the Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020 (Judgment, [44]) (Appendix {C/43/1895}).
38. The 26 March Regulations revoked most of the 21 March Regulations and introduced a more expansive regime for business closures. The 26 March Regulations also introduced new prohibitions, in Regulation 6(1) against people leaving the place where they were living “without reasonable excuse” (Regulation 6(2) provided a non-exhaustive list of reasonable excuses); and in Regulation 7, which prohibited gatherings in public places of more than two people other than in limited circumstances. Regulation 3 of the 26 March Regulations provided that the Secretary of State was to review the need for restrictions and requirements imposed by the Regulations at least once every 21 days, with the first review being carried out by 16 April 2020 (Judgment, [46], Appendix {C/43/1895}).
39. The relevant provisions of the 26 March Regulations include those set out at paragraphs [46]-[52] of the Judgment.

Categories of business into which policyholders fall

40. For the purposes of the proceedings, the parties adopted a categorisation of businesses in light of the 21 March Regulations and the 26 March Regulations as follows:
- 40.1 **Category 1:** businesses listed in Part 1 of Schedule 2 to the 26 March Regulations, such as cafes and restaurants. This category was affected by Regulation 2(1) of the 21 March Regulations and Regulation 4(1) of the 26 March Regulations.
- 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.

- 40.3 **Category 3:** businesses listed in Part 3 of Schedule 2 to the 26 March Regulations, such as food retailers and pharmacies. This category was excluded from the scope of Regulation 5(1) of the 26 March Regulations.
- 40.4 **Category 4:** businesses offering goods for sale or for hire in a shop, or providing library services, such as retail stores, not listed in Part 3 of Schedule 2 to the 26 March Regulations. This category was affected by Regulation 5(1) of the 26 March Regulations.
- 40.5 **Category 5:** businesses not mentioned in the 21 March Regulations or the 26 March Regulations at all, including professional service firms such as accountants and lawyers, as well as construction and manufacturing businesses.
- 40.6 **Category 6:** businesses providing holiday accommodation, which were affected by Regulation 5(3) of the 26 March Regulations.
- 40.7 **Category 7:** places of worship, which were affected by Regulation 5(5) of the 26 March Regulations, together with nurseries and schools (Judgment, [53]).
41. During the course of the trial, the Court below was provided with a table of “Categories of Business by Policy”, which set out information (rather than formal evidence) that Insurers provided to assist the Court in obtaining a general understanding of which Categories of business were insured under the various Insurers’ policies (Appendix {C/46/1951}).
- Subsequent developments between April and July 2020*
42. On 4 April 2020, the Secretary of State for Health and Social Care designated local councils, including district councils, county councils and London borough councils, as “*relevant persons*” and “*authorised persons*” under the enforcement provisions in the 26 March Regulations. Specifically, local councils were empowered to take action and issue fixed penalty notices under Regulations 8 and 10 for the enforcement of Regulations 4 and 5. They were also empowered under Regulation 11 to bring proceedings for an offence under Regulations 4 and 5 (Judgment, [54]) (Appendix {C/43/1897}).
43. On 16 April 2020, the restrictions in the 26 March Regulations were continued for a further three-week period (Judgment, [55]) (Appendix {C/43/1898}).

44. On 28 April 2020, the Secretary of State for Health and Social Care, the Rt Hon Matt Hancock MP, responded to a question in a daily press conference in the following terms (Judgment, [55]) (Appendix {C/41/1858}):

“There was a big benefit, I think, as we brought in the lockdown measures, of the whole country moving together. We did think about moving with London and the Midlands first, because they were more advanced in terms of the number of cases, but we decided that we are really in this together, and the shape of the curve, if not the height of the curve, has been very similar across the whole country. It went up more in London but it’s also come down more, but the broad shape has been similar, which is what you’d expect, given that we’ve all been living through the same lockdown measures. The other thing to say is that it isn’t just about the level, it’s also about the slope of the curve, and if the R goes above one anywhere, then that would eventually lead to an exponential rise and a second peak and an overwhelming of the NHS in that area unless it’s addressed, so although the level of the number of cases is different in different parts, the slope of the curve has actually been remarkably similar across the country, so that argues for doing things as a whole country together.”

45. On 10 May 2020, the Prime Minister made an announcement in respect of lifting restrictions in stages over the coming months. The text of the Prime Minister’s statement is set out at Judgment, [56] (Appendix {C/42/1859}).
46. On 11 May 2020, the UK Government published a “*recovery strategy*” (Judgment, [57]) (Appendix {C/43/1903}).
47. The 26 March Regulations, and their equivalents in Wales, Northern Ireland and Scotland, were amended on several occasions. For example, on 13 May 2020, Category 3 businesses, that is those businesses listed in Part 3 of Schedule 2, were expanded to include garden centres and outdoor sports courts. Similarly, on 1 June 2020, that list was expanded further to include outdoor markets and certain showrooms (Judgment, [58]).
48. On 3 July 2020, the Secretary of State made the Health Protection (Coronavirus, Restrictions) (Leicester) Regulations 2020 (“**the Leicester Regulations**”), which required certain types of businesses in Leicester to close as a result of a rise in COVID-19 cases within that city. The Leicester Regulations came into force on 4 July 2020. They were revoked on 3 August 2020.

49. On 4 July 2020, the 26 March Regulations were revoked and replaced with more limited restrictions in the Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020 in England (“**the 4 July Regulations**”). The 26 March Regulations remain in force, however, in relation to offences committed in contravention of those regulations between 26 March 2020 and 4 July 2020 (Regulation 2(2) of the 4 July Regulations) (Judgment, [60]).

B. The Proceedings

The background to the Proceedings

50. The FCA and the eight Defendants agreed a “*Framework Agreement*” (Appendix {D/15/1550}) which came into force on 1 June 2020 (referred to in Judgment [2]), by which the parties agreed that the FCA would commence proceedings for declaratory relief on an expedited basis to seek to achieve as much clarity as possible regarding COVID-19 business interruption coverage issues for the maximum number of policyholders possible, with the FCA representing the interests of policyholders for the purposes of such proceedings. The parties agreed to bear their own costs.
51. The FCA commenced proceedings in the High Court (Commercial Court, Financial List) on 9 June 2020.
52. On 16 June 2020, Butcher J heard the first CMC, admitted the Claim to the Financial Markets Test Case Scheme, and gave directions for an expedited trial (referred to in Judgment, [3]).
53. At a second CMC on 26 June 2020, the Court acceded to the applications of the Hiscox Action Group and the Hospitality Insurance Group Action to join the proceedings as interveners. Evidence was given on behalf of the Hiscox Action Group that makes up 369 businesses spanning multiple sectors and are parties to contracts of insurance which are underwritten by Hiscox.³ The members of the Hospitality Insurance Group Action have given evidence that they are parties to contracts of insurance which are either written by QBE, or written by a non-party insurer (Aviva Insurance Limited) on wordings which are on materially identical or similar terms to wordings written by RSA.⁴

³ Witness Statement of Richard Leedham dated 23 June 2020, para 8.

⁴ Witness Statement of Sonia Campbell dated 19 June 2020, para 2.1.

54. The proceedings below were heard by Flaux LJ and Butcher J sitting as a Divisional Court of the Commercial Court, Queen’s Bench Division over eight days from 20th to 23rd July and from 27th to 30th July 2020. This panel was permitted by [2.5(d)] of the Test Case Scheme because the case was one of particular importance or urgency.
55. The Judgment of Flaux LJ and Butcher J was handed down on 15 September 2020. The Judgment is at [2020] EWHC 2448 (Comm) (Appendix {C/3/30}). The Court made an order on 2 October 2020, following a ‘consequential’ hearing which sets out various declarations giving effect to the Judgment (Appendix {C/1/1}).

The Policies

56. There were 21 “*lead*” policies considered by the Court below: one issued by D1 (“Arch 1”), one issued by D2 (“Argenta 1”), two issued by D3 (“Ecclesiastical 1.1” and “Ecclesiastical 1.2”), four issued by D4 (“Hiscox 1”, “Hiscox 2”, “Hiscox 3” and “Hiscox 4”), three issued by D5 (“MSA 1”, “MSA 2” and “MSA 3”), three issued by D6 (“QBE 1”, “QBE 2” and “QBE 3”), five issued by D7 (“RSA 1”, “RSA 2.1”, “RSA 2.2”, “RSA 3” and “RSA 4”), and two issued by D8 (“Zurich 1” and “Zurich 2”) (Judgment, [7]) (Appendix {C/4-19} and {D/1-5}).
57. The Court divided the clauses before it as follows (the identification below is not intended to influence the interpretation of those clauses but is adopted for convenience only):
- 57.1 ‘Disease clauses’ - those triggered by the occurrence of disease alone, typically within a certain distance of the insured premises (see further Judgment [80]-[81]).
- 57.2 ‘Prevention of access clauses’ - those triggered by public authority intervention preventing or hindering access to, or use of (or similar), the premises (see further Judgment [306]).
- 57.3 ‘Hybrid clauses’ - those which contain elements of disease clauses and prevention of access clauses (see further Judgment [242]).

C. Issues for the Supreme Court to decide

The FCA

58. The FCA has permission to appeal on four issues:

- 58.1 Whether and the extent to which pre-trigger COVID-19 related negative effects on revenue should be taken into account to reduce the indemnity;
- 58.2 Whether prevention of access and hybrid wordings are triggered by actions without force of law (i.e. Government actions beyond the 21 and 26 March 2020 Regulations) [(the relevant terms being “restrictions imposed” (in Hiscox1-4 ‘hybrid’), a denial or hindrance in access “imposed” (in Hiscox1, 2 and 4 NDDA and MSAmclin2 AOCA), “action” (in MSAmclin1 AOCA and Zurich1-2), “closure or restrictions” (in RSA1), and “enforced closure” (in RSA4 ‘enforced closure’ clause))];
- 58.3 The extent of the prevention or denial of access, interruption, closure, restriction or inability to use required by the prevention of access and hybrid wordings. Whether they require total closure of the business, and whether a fundamental change by closure of a part of the business for which the premises is used (such as eat-in or shop-in services) or prohibition on a substantial part of the customer base (such as all children other than vulnerable children or those of key workers), can be sufficient [(the relevant terms being “prevention” or “denial” of access (in Arch1, Hiscox1, 2 and 4 NDDA, MSAmclin1-2 AOCA, and Zurich1-2), “interruption” (in MSAmclin2 AOCA), “inability to use” (in Hiscox1-4 ‘hybrid’ clause), or “closure or restrictions placed on the premises” (in RSA1))]; and
- 58.4 Whether QBE 2-3 only provide cover for the consequences of disease within the policy limit.

Arch

59. Arch has permission to appeal on four issues:
- 59.1 Whether the Court erred in its construction of the GLAA Extension in the Arch wording, in particular in concluding that the insured peril was a “composite peril” which included three elements, namely (1) the prevention of access (2) the action of government; and (3) the emergency or incident.
- 59.2 Whether, having held correctly that the emergency was not an insured peril under the Arch wording and that social distancing advice and Regulation 6 of the 26 March 2020 Regulations did not prevent access to insured premises, the Court was wrong to hold that where insured premises were required to close, the losses

which could be recovered would include losses which the policyholder would have suffered in any event, i.e. if it had remained open, by reason of the emergency and by the social distancing advice and by Regulation 6, none of which were insured perils

- 59.3 Whether the Court erred in its construction and/or application of the trends clause in the Arch wording; and
- 59.4 Whether the Court erred in suggesting that the decision of Hamblen J in *Orient-Express Hotels Ltd v Assicurazioni Generali SpA* [2010] Lloyd's Rep I.R 531 was wrongly decided and/or should not be followed.

Argenta

60. Argenta has permission to appeal on six issues:

- 60.1 Whether the Court misstated the scope of the insured peril in extension 4(d) of Argenta 1 by suggesting that the business interruption itself forms part of that insured peril, in addition to occurrences of COVID-19 within 25 miles of the insured premises;
- 60.2 Whether the Court erred by concluding that the words “*as a result of*” in extension 4(d) in Argenta 1 do not require occurrences of COVID-19 within 25 miles of the insured premises to be a proximate cause of the business interruption;
- 60.3 Whether the Court’s conclusions concerning the ‘disease clauses’ in QBE 2-3 are inconsistent with the Court’s conclusions concerning the scope and effect of extension 4(d) in Argenta 1;
- 60.4 Whether the Court erred in holding that all occurrences of COVID-19 within 25 miles of all insured premises are part of an ‘indivisible cause’, constituted by Covid-19;
- 60.5 Whether the Court erred in holding that each occurrence of COVID-19 in the UK was an independent, equally effective cause of the loss sustained by policyholders (including as a consequence of the national restrictions imposed by the UK Government); and

- 60.6 Whether the Court erred in suggesting that the decision of Hamblen J in *Orient-Express Hotels Ltd v Assicurazioni Generali SpA* [2010] Lloyd's Rep. I.R. 531 was wrongly decided and should not be followed.

Hiscox

61. Hiscox has permission to appeal on eight issues:

- 61.1 Whether the essence of the composite insured peril under the Public Authority clause in Hiscox 1-4 was restrictions imposed by a public authority, and the indemnity provided by it only in respect of loss caused in a causal combination by each of the four elements of the insured peril, (i) an interruption (ii) caused by an inability to use the premises (iii) due to restrictions imposed by a public authority (iv) following an occurrence of a relevant disease (COVID-19). Whether, accordingly, COVID-19 and its other consequences were to be included in the counterfactual or stripped out for the purposes of assessing loss, save to the extent that COVID-19 caused loss in causal combination with the other elements of the insured peril.
- 61.2 Whether the trends clauses in Hiscox 1-4 made clear that, save to the extent that it caused loss as part of and in causal combination with the other elements of the insured peril under the Public Authority clause, COVID-19 and its consequences were to be taken into account for the purposes of the counterfactual;
- 61.3 Whether the decision of Hamblen J in *Orient-Express Hotels Limited v Assicurazioni Generali SpA* [2010] EWHC 1186 (Comm); [2010] Lloyd's Rep IR 531 was wrong and/or is distinguishable from the present case.
- 61.4 Whether the words "*solely and directly*" in the stem have the effect that the indemnity provided by the Public Authority clause in Hiscox 1-4 is only in respect of loss solely and directly caused by the four elements of the insured peril operating in causal combination.
- 61.5 Whether, with regard to the Public Authority clause in Hiscox 4, a public authority response should be regarded as "*following*" an occurrence of COVID-19 within a one-mile radius of insured premises provided only that it is temporally posterior to the local occurrence and the response was in response to an outbreak of which the local occurrence formed a part, or whether the response must

causally and not merely temporally follow an occurrence within a one-mile radius of the relevant premises.

- 61.6 Whether there was an “*occurrence*” for the purposes of Hiscox 1-3 on 5 March 2020 upon COVID-19 becoming a notifiable disease, or whether in this context an occurrence means something limited, local, small scale and specific to the insured. In turn, whether any relevant restrictions imposed were “*following*” an “*occurrence*” of notifiable disease within the meaning of those words in Hiscox 1-3.
- 61.7 Whether “*interruption*” in the stem of the Hiscox 1-4 policies means complete cessation. If not, what does it mean? In particular, does it extend any and all disruption and interference or require a very significant interference with the effectiveness of an insured’s business activities.
- 61.8 Whether Regulation 6 of the 26 March Regulations was capable of being a “*restriction imposed*” within the meaning of the Public Authority clause of Hiscox 1-4.

MS Amlin

62. MS Amlin has permission to appeal on three issues:
- 62.1 Whether the Court erred in its construction of the words “... *any notifiable disease within a radius of twenty five miles of the **Premises***” in the ‘disease clauses’ in MSA 1 and MSA 2 and whether it ought to have concluded that the disease clauses (i) only provided cover in respect of an insured’s premises for the business interruption consequences of a person or persons within the 25-mile radius of those premises sustaining illness resulting from COVID-19, and (ii) did not provide cover in respect of an insured’s premises for the business interruption consequences of COVID-19 nationally provided merely that there was one person or persons with COVID-19 within the 25-mile radius;
- 62.2 Whether the Court erred in law in its conclusions as to (i) the meaning of the word “*following*” in the ‘disease clauses’ in MSA 1 and MSA 2; and/or as to (ii) its causal effect between (on the one hand) interruption of or interference with the insured business at the insured premises and (on the other hand) “*any notifiable disease within a radius of twenty five miles of the **premises***” in

circumstances where the former would have occurred irrespective and in the absence of the latter; and

- 62.3 Whether the Court erred in law in its approach to the so-called “trends clauses” and/or the correct counterfactual to be applied when calculating an indemnity under the ‘disease clauses’ in MSA 1 and MSA 2; and whether the Court erred in law in holding that *Orient-Express Hotels Ltd v Assicurazioni Generali* [2010] Lloyd’s Rep IR 531 was distinguishable as a matter of principle and/or was wrongly decided.

QBE

63. QBE has permission to appeal on four issues:

- 63.1 Whether the Court erred by holding that the QBE1 Disease Clauses should be construed as requiring the causal link “*between the interruption and interference with the business on the one hand and the notifiable disease on the other provided it has been ‘manifested’ by a person within a 25 mile radius*” and should not be construed as saying “*the interference has to result from the particular cases(s) in which the disease is manifested within the 25 mile radius*”;
- 63.2 Whether the Court erred in law by wrongly identifying the “*relevant insured peril*” in the QBE1 Disease Clauses as including the “*interruption and interference with the business*” in addition to the (1) the “*manifestation*” of; (2) a notifiable disease; (3) at the insured premises or within 25 miles of the insured premises;
- 63.3 Whether the Court erred in holding that QBE “*clearly cannot... contend that the occurrence of the disease elsewhere, or the reaction to it, are to be regarded as separate causes*” and instead finding that “*the occurrence of the diseases within the area was part of an indivisible cause constituted by COVID-19*” or, alternatively, that “*each of the cases of the disease was an independent cause, and they were all equally effective in producing the government response*”;
- 63.4 Whether the Court erred in law in its approach to the trends clauses and to the proper application of counterfactuals for the purposes of such clauses and by holding that the decision in *Orient-Express Hotels Ltd v Assicurazioni Generali SpA* [2010] Lloyd’s Rep. I.R. 531 was distinguishable and/or should not be followed.

RSA

64. RSA has permission to appeal on seven issues:

- 64.1 Whether the Court wrongly construed the insured peril as a “composite peril” of interruption or interference with the Business during the Indemnity Period following/due to a disease event, as opposed to the disease event and whether, having done so, the Court wrongly dispensed with the requirement that the peril, alternatively, the disease event, must be the (or a) proximate/effective cause of the loss.
- 64.2 Whether the Court wrongly concluded that any proximity requirement in RSA1 and 3 was no more than an adjectival qualification with the consequence that, provided there was at least one case of the disease in the relevant geographical area, the policies would respond to the national pandemic.
- 64.3 Whether the Court was wrong to conclude that General Exclusion L in RSA3 did not exclude claims arising from an epidemic (namely the COVID-19 epidemic/pandemic).
- 64.4 Whether the Court was wrong to conclude that proximate causation (or, for RSA 3 and if different from proximate causation, the causal relationship specifically required by the word “*following*”) was established by the occurrence (or, for RSA 1, the manifestation) of a case of COVID-19 within a radius of 25 miles from the insured premises; or whether it should have concluded that an occurrence (or, for RSA 1, the manifestation) of COVID-19 within 25 miles of the premises was neither a factual (i.e. ‘but for’) nor legal (i.e. effective/proximate) cause of the loss.
- 64.5 Whether the Court adopted the wrong counterfactual by concluding that it was necessary to strip out the entirety of the COVID-19 pandemic and or the authorities’ and/or public’s response thereto from the counterfactual.
- 64.6 Whether the Court wrongly concluded that the relevant counterfactual should exclude consideration of any business interruption referable to COVID-19 within the UK after the indemnity period began and whether the Court should have concluded that losses which would have been suffered in the absence of the peril insured against, even if related to the COVID-19 pandemic, could not be

recovered whether by reason of a conventional approach to causation or by reason of the trends and/or quantification provisions in RSA1 and RSA3.

- 64.7 Whether the Court was wrong to conclude that *Orient-Express Hotels Ltd v Assicurazioni Generali SpA* [2010] EWHC 1186 (Comm) could be distinguished and/or was wrongly decided and/or wrongly declined to follow it.

HAG

65. HAG has permission to appeal on three issues:

- 65.1 Whether the Court erred in holding that a measurable, pre-trigger downturn in turnover due to COVID-19 can in principle be taken into account for the purposes of quantifying the level of indemnity when applying the Business Trends clauses in Hiscox 1-4.
- 65.2 Whether the Court erred in holding that the words “*restrictions imposed*” in Hiscox 1-4 are only satisfied by something mandatory with the force of law, of which the only relevant such matters were those promulgated by statutory instrument; or whether it should have concluded that “*restrictions imposed*” can be satisfied by an instruction from a public authority given in mandatory and imperative terms.
- 65.3 Whether the Court erred in holding that “*inability to use*” in Hiscox 1-4 was only satisfied if use was “*sufficiently nugatory or vestigial*”, that it was not satisfied if the insured was “*being hindered in using*”, and/or not able “*to use all of the premises*”, and/or by reason of “*any and every departure from their [i.e. the insured premises] normal use*”, and that cases in which Regulation 6 would have caused an “*inability to use*” would be rare; or whether the Court should have held that there is an “*inability to use*” where the insured is materially unable to use the insured premises for its normal business purposes, and the question of whether Regulation 6 caused an “*inability to use*” is inherently fact-sensitive and there is no presumption that such cases would be rare.

Signed by Counsel for all parties:

Colin Edelman

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COLIN EDELMAN QC
Devereux Chambers
For the Financial Conduct Authority

J&C

.....
JOHN LOCKEY QC
Essex Court Chambers
For Arch Insurance (UK) Limited

Simon Salzedo

.....
SIMON SALZEDO QC
Brick Court Chambers
For Argenta Syndicate Management Limited

Andrew Wales

.....
ANDREW WALES QC
7 King's Bench Walk
For Ecclesiastical Insurance Office plc

J. Gaisman

.....
JONATHAN GAISMAN QC
7 King's Bench Walk
For Hiscox Insurance Company Limited

Andrew Wales

.....
ANDREW WALES QC
7 King's Bench Walk
For MS Amlin Underwriting Limited

Mj Crane

.....
MICHAEL CRANE QC
Fountain Court Chambers
For QBE UK Limited

David Turner

.....
DAVID TURNER QC
4 New Square
For Royal & Sun Alliance Insurance plc

Andrew Rigney

.....
ANDREW RIGNEY QC
Crown Office Chambers

For Zurich Insurance plc



.....
BEN LYNCH QC

Fountain Court Chambers

For Hiscox Action Group