This Order replaces the Order sealed on 17 May 2021

IN THE SUPREME COURT OF THE UNITED KINGDOM

13 July 2021

Before:

Lord Reed
Lord Hodge
Lord Briggs
Lord Hamblen
Lord Leggatt

Financial Conduct Authority (Appellant) *v* Arch Insurance (UK) Ltd and others (Respondents)
Hiscox Action Group (Appellant) *v* Arch Insurance (UK) Ltd and others (Respondents)
Argenta Syndicate Management Ltd (Appellant) *v* Financial Conduct Authority and others (Respondents)
Royal & Sun Alliance Insurance Plc (Appellant) *v* Financial Conduct Authority and others (Respondents)
MS Amlin Underwriting Ltd (Appellant) *v* Financial Conduct Authority and others (Respondents)
Hiscox Insurance Company Ltd (Appellant) *v* Financial Conduct Authority and others (Respondents)
QBE UK Ltd (Appellant) *v* Financial Conduct Authority and others (Respondents)
Arch Insurance (UK) Ltd (Appellant) *v* Financial Conduct Authority and others (Respondents)

AFTER CONSIDERATION of the submissions filed by the parties in relation to the Declarations made by the High Court on 16 October 2020

THE COURT ORDERED that those Declarations be varied as set out in the

Annex to this Order, the terms in this Order reflecting those used in the judgment, in particular the categories at paragraph 36 and the general measures and specific measures at paragraphs 109 – 110.

Registrar
13 July 2021

ANNEX

Updated form of the High Court Declarations Order dated 16 October 2020 as varied by the Supreme Court

A. Paragraphs 1-2, 4, 8-9, 13, 14.2-14.3, 15.2-15.3, 16, 18.1-18.2, 18.4, 20.3, 21, 22, 23,24.2, 24.4, 25.2, 25.4, 26.2, 26.4, 27.4, 28, 31.3, 32, 33 of this Order remain as per the High Court Declarations Order because they were not appealed to the Supreme Court.

B. Paragraphs 14.1, 15.1, 17.1, 20.1, 24.1, 25.1, 26.1, 27.1, 29.1 and 30.1 of this Order were not appealed to the Supreme Court but cross-refer to paragraphs of this Order which were appealed.

C. Paragraphs in this Order which are not mentioned by number in paragraphs A and B above are affirmed or varied by the Supreme Court in the form set out below.

Disease

1. COVID-19 is a human infectious or contagious disease, and became notifiable on 5 March 2020 in England and on 6 March 2020 in Wales, within Argenta1, Hiscox1-4 (hybrid clauses), MSAmlin1-2 (disease clauses), QBE1-3, RSA1 (hybrid clause) and RSA3-4 (disease clauses).

2. However, COVID-19 is deemed under RSA4 (disease clause) to have been a notifiable disease since 31 December 2019.

3. There was an occurrence of COVID-19 on 5 March 2020 in England and on 6 March 2020 in Wales within Hiscox1-3 (hybrid clauses).

4. COVID-19 occurred within the "Vicinity" (as defined in RSA4) of all premises in England and Wales on 31 January 2020 (RSA4, disease clause).

5. Subject to paragraph 7A below, there was COVID-19, and COVID-19 was "sustained" or "occurred" within a given radius of the premises in Argenta1, Hiscox4 (hybrid), QBE2-3 and RSA3, wherever a person or persons contracted COVID-19 so that it could be diagnosed, whether or not it was verified by medical testing or a medical

professional and/or formally confirmed or reported to the PHE and whether or not it was symptomatic, and was/were within that radius of the premises at a time when they could still be diagnosed as having COVID-19.

6. Subject to paragraph 7A below, there was "*illness sustained by any person resulting from*" COVID- 19 within a radius of 25 miles of the premises in MSAmlin1-2 (disease clauses), when any such person was infected with and/or was suffering from COVID-19, whether or not they were diagnosed with COVID-19, and were within that radius of the premises at a time when they could still be diagnosed as having COVID-19.

7. Subject to paragraph 7A below, COVID-19 was "manifested" within QBE1 and RSA1, within a radius of 25 miles of the premises, wherever a person displayed symptoms of, or was diagnosed with, COVID-19 and was/were within a 25 mile radius of the premises.

7A. There was no "occurrence" or "manifestation" of COVID-19, and COVID-19 was not "sustained", within a given radius of the premises for the purposes of Argenta1, Hiscox4 (hybrid), MSAmlin1-2 (disease clauses), QBE1-3 and RSA1 and 3 merely by reason of the fact that a person travelled through that geographical area and had no contact with anyone living in the area.

8. **Prevalence**

8.1. What evidence may prove actual prevalence will vary depending on the factual context, and for the purposes of different policies (for example, some policies have a relevant policy area of 3.14 square miles (in the case of a one mile radius) or 1,963.5 square miles (in the case of a 25 mile radius), as well as the particular timing and location of a claim. Different inferences might be drawn from a combination of underlying data in different contexts.

8.2. The burden of proof is on policyholders to prove the presence of Covid-19 within the relevant policy area. The following types of evidence could be used in principle to discharge that burden on policyholders to prove the presence of COVID-19 within the relevant policy area on a particular date:

(a) specific evidence of a case or cases of COVID-19 in a particular location

within the relevant policy area;

(b) data published by NHS England on a daily basis recording the number of individuals who died in NHS Hospital Trusts in England after testing positive for COVID-19 ("NHS Death Data"), where an NHS Hospital Trust has recorded such a death on a particular date and:

(i) all hospitals in that Trust are within the relevant policy area; and

(ii) since inferences can be drawn from the NHS Death Data as to when COVID- 19 was present in that NHS Hospital Trust, an inference may be able to be drawn that COVID-19 was present in the relevant policy area at a particular date (this may be more obvious in some circumstances than others, for example if an individual died in early March 2020 after testing positive for

COVID-19, it is *prima facie* likely that COVID-19 was present in the local area at the time of death);

(c) weekly data published by the Office of National Statistics recording the number of deaths that have occurred in England and Wales each week by local authority or health board where the death certificate mentions COVID-19 ("ONS Death Data"):

(i) where the local authority or health board was entirely within the relevant policy area; and

(ii) taking into account all of the deaths involving COVID-19 in a particular week in a particular local authority or health board area, as representing active cases in that local authority or health board area on (at the latest) the first day of that week (and it may be that the deaths in a particular week can safely be treated as active cases many days before the beginning of that week but additional evidence would be required on that).

(d) data published by the UK Government recording the number of daily lab-confirmed positive tests of COVID-19 in a particular nation, region, UTLA

or LTLA ("Reported Cases"):

(i) taking into account the Reported Cases on a particular date in a particular nation, region, UTLA or LTLA together with the Reported Cases two to three days either side of that day as being active on that particular date in that nation, region, UTLA or LTLA; and

(ii) when taking into account the Reported Cases in a particular LTLA or LTLAs, the LTLA or LTLAs are entirely within the relevant policy area;

(e) a distribution-based analysis – albeit absolute precision is not required to discharge the burden of proof – to demonstrate the geographical distribution of COVID-19 cases (where the policyholder relies on ONS Death Data or Reported Cases in an LTLA or another reporting area, and the relevant policy area is entirely within, or intersects, the LTLA or another reporting area);

(f) given the likely true number of cases of COVID-19 in the UK in March 2020 was much higher than that shown in the Reported Cases, an undercounting analysis – albeit absolute precision is not required to discharge the burden of proof – to

demonstrate the likely number of actual cases of COVID-19 in the relevant policy area.

8.3. The particular types of underlying data pleaded by the FCA (specific evidence, NHS Death Data, ONS Death Data and Reported Cases) are in principle capable of demonstrating the presence of COVID-19 and may discharge the burden of proof if they are the best available evidence in a particular case.

8.4. The true number of individuals who have been infected with COVID-19 on or by relevant dates in March 2020 in a regional, UTLA or LTLA Zone is at least as great as the number of Reported Cases for those dates for that Zone, although the cumulative totals make no allowance for those individuals who have recovered from COVID-19.

8.5. The FCA cannot use the above types of evidence or distribution-based analysis or undercounting analysis or other methodologies to establish any rebuttable presumption.

Public authority action

9. The UK Government is a government, governmental authority or agency, public authority, competent public authority, civil authority, competent civil authority, competent local authority and/or statutory authority within the different wording to this effect in Wordings (Arch1, Ecclesiastical1.1-1.2, Hiscox1-4, MSAmlin1-3, RSA2.1-2.2, RSA4, Zurich1-2).

Causation and trends clauses

10. In Argenta1, MSAmlin1-2 (disease), QBE1-3, RSA1, RSA3, and RSA4 (disease clause) in order to show that loss from interruption of the insured business was proximately caused by one or more occurrences (or, in the case of QBE1 and RSA1, manifestations) of COVID-19 within the relevant policy area covered by the clause, it is sufficient to prove that the interruption was a result of Government action taken or continued in response to cases of COVID-19, which included at least one case of COVID-19 within the relevant policy area covered by the clause and which had occurred by the date of such Government action.

10A. The prevention of access and hybrid clauses in Arch1, Hiscox 1-4 and RSA1, indemnify the policyholder against the risk (and only against the risk) of all the elements of the insured peril acting in causal combination to cause business interruption loss, regardless of whether the loss was concurrently caused by other (uninsured but non-excluded) consequences of the COVID- 19 pandemic which was the underlying or originating cause of the insured peril. If all the elements of the insured peril are present, but the insured peril is not a proximate cause of loss

and the sole proximate cause of the loss is the COVID-19 pandemic (see paragraph 244 of the Judgment), then there is no indemnity.

11. In Arch1, Argenta1, MSAmlin1-2 (disease), Hiscox1-4 (hybrid clauses), QBE1-3, RSA1, RSA3 and RSA4 (Disease clause, Enforced Closure clause, and Prevention of Access –

Non Damage clause):

11.1. Once cover under the policy is triggered, losses do not fall to be reduced by reason of rules of factual or proximate causation, or under the trends or similar clauses, or otherwise, by reason that but for the insured peril losses would have been suffered (after the date on which cover is triggered) anyway as a result of COVID-19 (including outside any relevant policy area), and/or any consequences of it (including via the authorities' and or the public's response thereto), including any one or more elements of the insured peril acting separately or in combination that are arising from the same original cause, COVID-19.

11.2. The correct counterfactual when calculating the quantum of those losses proximately caused by the insured peril is to assume the absence of both (i) the insured peril and (ii) the circumstances arising out of the same underlying or originating cause (namely the COVID-19 pandemic).

11.3. [Deliberately blank]

11.4. As to the proper application of the trends clauses declared applicable in declaration 13 below:

(a) The object of the quantification machinery (including any trends clause or provision) in the policy wording is to put the insured in the same position as it would have been in if the insured peril and circumstances arising out of the same underlying or originating cause had not occurred;

(b) Matters related to, inextricably linked to or connected with the insured peril in the sense that they arise out of the same underlying or originating cause (and so, in this case, the COVID-19 pandemic and its consequences) are not trends or circumstances;

(c) If there was a downturn in the turnover of a business due to COVID-19 before the insured peril was triggered, then it is not permissible for the counterfactual to take into account the continuation of that downturn as a trend or circumstance (under a trends clause or similar). Instead, the assumption should be made that pre-

trigger losses caused by the COVID-19 pandemic would not have continued during the operation of the insured peril.

12. [Deliberately blank].

13. The trends clauses contained in the business interruption sections of all the Wordings are applicable to claims under the item(s) of additional cover or extension(s) of cover in those policies considered here (save, in the case of QBE1-3, insofar as inconsistent with more specific provisions as to quantification).

Arch

14. As regards Arch1:

14.1. Declarations 10A and 11 above are repeated.

14.2. From 3 March 2020 there was an emergency likely to endanger life.

14.3. Each of the matters pleaded in the Amended Particulars of Claim (**APoC**) sub-paragraphs 18.4, 18.6-18.7 (second and third sentences), 18.9-18.10, 18.14-18.24, and
18.26 was actions or advice of government.

14.4. There was prevention of access to the premises due to the actions or advice of a government due to an emergency which was likely to endanger life (the COVID-19 outbreak) if access to all or a discrete part of the premises, or access to the premises for all purposes or for the purpose of carrying on a discrete part of the policyholder's business activities, was completely stopped from happening or made impossible. Accordingly, this will be satisfied:

(a) For those businesses (in any Category) which were completely stopped by the 21 March or 26 March Regulations from accessing all or a discrete part of their premises or accessing their premises for the purpose of carrying on all or a discrete part of their business activities;

(b) For Category 1 businesses which were completely stopped by the 20 March statement, 21 March or 26 March Regulations from accessing all or a discrete part of their premises or accessing their premises for the purpose of carrying

on all or a discrete part of their business activities;

(c) For Category 2 businesses which were completely stopped by the 20 March statement, 21 March or 26 March Regulations from accessing all or a discrete part

of their premises or accessing their premises for the purpose of carrying on all or a discrete part of their business activities;

(d) For Category 4 businesses which were completely stopped by Regulation 5 of the 26 March Regulations from accessing all or a discrete part of their premises or accessing their premises for the purpose of carrying on all or a discrete part of their business activities;

(e) For Category 7 businesses (places of worship) which closed in response to the 23 March statement; and

(f) For Category 7 businesses (nurseries and educational establishments) which were completely stopped by the 18 March statement from accessing all or a discrete part of their premises or accessing their premises for the purpose of carrying on all or a discrete part of their business activities.

14.5. As to the advice, instructions and regulations as to social-distancing, self-isolation, lockdown and restricted travel and 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) ("**the Social Distancing and Related Action**"):

(a) It is possible for Regulation 6 to result in a prevention of access to the insured's premises, although such cases are likely to be rare.

(b) Otherwise, there was no prevention of access to the premises due to the actions or advice of a government due to an emergency which was likely to endanger life (the COVID-19 outbreak) as a result of the Social Distancing and Related Action.

Argenta

15. As regards Argenta1:

15.1. Declarations 1, 5, 10 and 11 above are repeated.

15.1A Extension 4(d) in Argenta 1 provides cover for business interruption proximately caused by any cases of COVID-19 that occur within a radius of 25 miles of the insured premises. See declaration 10 above as to what is required by proximate causation for these purposes.

15.2. As for the meaning of "interruption":

(a) The advice, instructions and/or announcements pleaded at APoC paragraphs 46 and 49 were capable of causing an interruption to the business of policyholders.

(b) It is a matter of fact to be determined in each case whether there was "interruption" to the business of policyholders by reason of the 16 March statement.

(c) The 21 March Regulations were capable of causing an 'interruption' to the business of policyholders located in England, insofar as those policyholders operated a bar and/or restaurant in their accommodation and insofar as such business was otherwise continuing, this being a matter of fact to be determined in each case.

(d) The 26 March Regulations (and equivalent Regulations in Wales) caused an 'interruption' to the business of policyholders located in England and Wales insofar as such businesses were otherwise continuing and insofar as bookings did not fall within any of the exceptions.

15.3. As for exclusions:

(a) If there was an occurrence of COVID-19 within a radius of 25 miles of the premises, those premises were directly affected by the occurrence within the meaning of Exclusion (iii).

(b) The Micro-Organism Exclusion Clause does not apply to the disease clause.

Ecclesiastical

16. As regards Ecclesiastical1.1-1.2:

16.1. In relation to the provision in Ecclesiastical1.1-1.2 excluding "*closure or restriction in the use of the premises due to the order or advice of the competent local authority as a result of an occurrence of an infectious disease*" ("**the infectious disease carve-out**"):

(a) "*competent local authority*" means whichever authority is competent to impose the relevant restrictions in the locality on the use of the premises, including central government;

(b) The actions of the government in response to COVID-19, including the 20 and 23 March government advice and the 21 March and 26 March Regulations, were "*the order or advice of the competent local authority as a result of an occurrence of an infectious disease*"; and

(c) Accordingly, the infectious disease carve-out applies and there is no cover in respect of the closure of or restriction in the use of the premises.

16.2. There was an emergency which could endanger human life from 12 March 2020.

16.3. If the infectious disease carve-out did not apply and there were cover, declaration 11 above would be applicable.

Hiscox

17. As regards Hiscox 1-4 (hybrid clauses):

17.1. Declarations 1, 3, 10A and 11 above are repeated as regards Hiscox1-3, and declarations 1, 5, 10A and 11 above are repeated as regards Hiscox4.

17.2. As regards Hiscox 1-4, *"*interruption*"* includes interference or disruption, not just a complete cessation of the insured's *"*business*"* or *"*activities*"*. Whether there has been such an "interruption" is a matter of fact in each case; it may be partial or even slight, but it will only be relevant if it has a material effect on the financial performance of the business.

17.3. As regards Hiscox1-4, inability to use has to be established; an impairment or hindrance in use is not sufficient. The requirement for an "inability to use" is

satisfied if the policyholder is unable to use the whole or a discrete part of its premises for either the whole or a discrete part of its business activities. There is only cover for that part of the business for which the premises or relevant part cannot be used. Whether there has been an "inability to use" in any given case is a question of fact.

17.4. As regards Hiscox 1-4 (hybrid), "restrictions imposed" by a public authority would be understood as ordinarily meaning mandatory measures "imposed" by the authority pursuant to its statutory or other legal powers. A restriction does not always have to have the force of law for it to come within the meaning of "restrictions imposed". An instruction given by a public authority may amount to a "restriction imposed" if, from the terms and context of the instruction, compliance with it is required, and would reasonably be understood to be required, without the need for recourse to legal powers. For such an instruction to amount to a "restriction imposed" it would need to be in mandatory terms and in clear enough terms to enable the addressee to know with reasonable certainty what compliance requires. A mandatory instruction given by a

public authority in the anticipation that legally binding measures will follow shortly afterwards, or will do so if compliance is not obtained, is capable of being a "restriction imposed". "Restrictions imposed" do not necessarily have to be directed to the insured or the insured's use of premises. Regulation 6 is capable of being a "restriction imposed". Whether such restrictions caused an inability to use is a question of fact. Cases in which Regulation 6 would have caused an "inability to use" the insured's premises would be rare; whether there were such cases is a question of fact.

17.5. As regards Hiscox1-3, the word "following" imports some sort of causal connection and the "restrictions" imposed must follow the "occurrence" of a notifiable disease. As regards Hiscox1-3 any relevant restrictions imposed 'followed' the "occurrence" of COVID-19 as a notifiable disease on 5 March 2020 in England and 6 March 2020 in Wales.

17.6. As regards Hiscox4 "restrictions imposed" "followed" an "occurrence" of COVID-19 within one mile of the insured's premises if they were both temporally posterior to that particular local "occurrence" and were a response to

COVID-19.

18. As regards Hiscox1-2 and Hiscox4 (NDDA clauses):

18.1. The NDDA clauses in Hiscox1-2 and Hiscox4 do not provide cover in respect of business interruption losses caused by the restrictions imposed by the government in response to the national COVID-19 pandemic.

18.2. The national COVID-19 pandemic was not and is not an "incident" and nor is it "an incident occurring…within a one mile radius of the insured premises" (Hiscox1-2 and Hiscox4) nor "an incident occurring…within the vicinity of the premises" (Hiscox2). Nor is there an "incident" if someone infected with COVID-19 so that it is diagnosable is present within a one mile radius (Hiscox1-2 and Hiscox 4) or vicinity (Hiscox2).

18.3. As regards Hiscox 1-4, *"interruption"* includes interference or disruption, not just a complete cessation of the insured's *"business"* or *"activities"*. Whether there has been such an "interruption" is a matter of fact in each case.

18.4. The cause of the imposition of the restrictions was the pandemic which cannot be described as an "incident".

19. As regards Hiscox 1-4 (hybrid), subject to any terms of the policy that permit recovery after restrictions have ceased, e.g. as to the definition of the indemnity period, an insured cannot

claim in respect of loss sustained before the commencement or after the cessation of insured peril.

MSAmlin

20. As regards MSAmlin1-2 (disease clauses):

20.1. Declarations 1, 6, 8 and 11 above are repeated.

20.2. Accordingly, MSAmlin1-2 (disease clauses) provide cover for business interruption proximately caused (in the sense set out in declaration 10 above) by any cases of COVID-19 that occur within a radius of 25 miles of the insured premises.

20.3. If cover were available for COVID-19 business interruption claims on the basis of "any notifiable disease within a radius of twenty five miles of the premises" in MSAmlin1-2 disease clauses (quoted at 178 and 183 of the High Court Judgment), the "Pollution and contamination" exclusion clause in MSAmlin 1-2 would not apply to exclude such cover.

21. As regards MSAmlin1 (AOCA clause):

21.1. The cover afforded under MSAmlin 1 (AOCA Clause) is narrow, localised cover.

21.2. The undefined term "vicinity" in MSAmlin 1 (AOCA Clause) has a local connotation of the neighbourhood of the premises, and the entire UK cannot be described as in the "vicinity" of any insured premises.

21.3. The matters relied on by the FCA, including the government action in imposing the 21 March and the 26 March Regulations in response to the COVID-19 pandemic, were not "*following a danger or disturbance in the vicinity of the premises*".

21.4. Accordingly, there is no cover under the MSAmlin1 (AOCA clause) in respect of business interruption losses caused by the action of the government taken in response to the national COVID-19 pandemic. There will only be cover if in a particular case the risk of COVID-19 in the vicinity (in the sense of neighbourhood) of the insured premises, as opposed to the country as a whole, led to qualifying public authority action preventing access and all other coverage requirements in MS Amlin 1 (AOCA clause) are met.

21.5. If cover were available for COVID-19 business interruption claims on the basis of the "Action of competent authorities clause" (quoted at 419 of the High Court Judgment),

the "Pollution and contamination" exclusion clause in MSAmlin1 would not apply to exclude such cover.

22. As regards MSAmlin2 (AOCA clause):

22.1. The national COVID-19 pandemic was not and is not an "incident", nor was it or is it an "incident within a one mile radius" of the insured premises. Nor was or is

there an "incident" if someone with COVID-19 is present within a one mile radius.

22.2. MSAmlin2 (AOCA Clause) provides narrow, localised cover intended to insure local events or incidents which occur within the one mile radius.

22.3. As to causation:

(a) The cause of the imposition of restrictions was the national COVID-19 pandemic, which was not "*an incident*".

(b) The FCA cannot establish that the national restrictions imposed in response to COVID-19 were caused by "*an incident*".

22.4. Accordingly, there is no cover under the MSAmlin 2 (AOCA clause) in respect of business interruption losses caused by the action of the government taken in response to the national COVID-19 pandemic.

22.5. If cover were available for COVID-19 business interruption claims on the basis of the "Prevention of access – non damage" clause (quoted at 420 of the High Court Judgment), the "Pollution and contamination" exclusion clause in MSAmlin2 would not apply to exclude such cover.

23. As regards MSAmlin3:

23.1. COVID-19 falls within "*injury*".

23.2. The government action in response to COVID-19 (including the 21 March and 26 March Regulations):

(a) Amounted to "*action by a competent public authority*".

(b) May amount to hindrance of use of the premises, this being a question of fact in each case;

(c) Was not taken "*following threat or risk of damage or injury in the vicinity of the premises*".

23.3. The undefined term "vicinity" in MSAmlin3 has a local connotation of the neighbourhood of the premises, and the entire UK cannot be described as in the "vicinity" of any insured premises.

23.4. The cover provided under MSAmlin3 is narrow, localised cover.

23.5. Accordingly, there is no cover under MSAmlin3 in respect of business interruption losses caused by the action of the government taken in response to the national COVID- 19 pandemic. There will only be cover if in a particular case the risk of COVID-19 in the vicinity (in the sense of neighbourhood) of the insured premises, as opposed to the country as a whole, led to qualifying public authority action hindering use, and all other coverage requirements in MS Amlin 3 are met.

QBE

24. As regards QBE1:

24.1. Declarations 1, 7, 8, 10, 11 and 13 above are repeated.

24.2. Human action and/or intervention including those measures listed in APoC paragraphs 46 and 47, including the Social Distancing and Related Action, could in principle cause interference with the insured business.

24.3. QBE1 provides cover for business interruption loss proximately caused (in the sense set out in declaration 10 above) by any cases of COVID-19 that are manifested within a radius of 25 miles of the insured premises.

24.4. The "Pollution" exclusion clause does not apply to the disease clause.

25. As regards QBE2:

25.1. Declarations 1, 5, 8, 10, 11 and 13 above are repeated.

25.2. Human action and/or intervention including those measures listed in APoC paragraphs 46 and 47, including the Social Distancing and Related Action, could in principle cause interference with the insured business.

25.3. QBE2 provides cover for business interruption loss proximately caused (in the sense set out in declaration 10 above) by any cases of COVID-19 that occur within a radius of 25 miles of the insured premises.

25.4. The "Pollution" exclusion clause does not apply to the disease clause.

26. As regards QBE3:

26.1. Declarations 1, 5, 8, 10, 11 and 13 above are repeated.

26.2. Human action and/or intervention including those measures listed in APoC paragraphs 46 and 47, including the Social Distancing and Related Action, could in principle cause interference with the insured business.

26.3. QBE3 provides cover for business interruption loss proximately caused (in the sense set out in declaration 10 above) by any cases of COVID-19 that occur within a radius of 1 mile of the insured premises.

26.4. The "Micro-organism risks" and "Pollution or Contamination" exclusion clauses do not apply to the disease clause.

RSA

27. As regards RSA1:

27.1. Declarations 1, 7, 10, 10A and 11 above are repeated.

27.2. "Closure or restrictions placed on the premises" need not always have the force of law. An instruction given by a public authority may amount to "closure or restrictions placed on the premises" if, from the terms and context of the instruction, compliance with it is required, and would reasonably be understood to be required, without the need for recourse to legal powers. For such an instruction to amount to "closure or restrictions placed on the premises" it would need to be in mandatory terms and in clear enough terms to enable the addressee to know with reasonable certainty what compliance requires. A mandatory instruction given by a public authority in the anticipation that legally binding measures will follow shortly afterwards, or will do so if compliance is not obtained, is also capable of being "closure or restrictions placed on the premises". There was "closure or restrictions placed on the premises" for any business in Category 6 from 26 March 2020 as a result of Regulation 5(3) 26 March Regulations.

27.3. Accordingly, there is cover under RSA1 for Category 6 businesses from 24 March 2020 for any business interruption following COVID-19, by reason of closure or

restrictions placed on the Premises, where COVID-19 was "manifested" within 25 miles of the insured premises on or before 24 March 2020.

27.4. The "Pollution and Contamination" exclusion clause does not apply to the disease clause.

28. As regards RSA2.1-2.2:

28.1. The word "*vicinity*" connotes neighbourhood, the area surrounding the premises. The UK cannot be described as the "*vicinity*" of the insured premises.

28.2. There could only be cover if the insured could demonstrate that an emergency by reason of COVID-19 in the vicinity of the insured premises led to the national actions or advice of the government.

28.3. Each of the matters pleaded at APoC sub-paragraphs 18.8-18.9, 18.14, 18.15(b), 18.16 (the 21 March Regulations), 18.17-18.19, 18.21 (the 26 March Regulations), 18.22, and
18.26 was actions or advice of a competent Public Authority within RSA2.1-2.2.

28.4. There was "actions or advice… which prevents or hinders the use or access to the Premises":

(a) In principle by reason of the 20, 21, 23, 24 and/or 26 March measures pleaded in APoC paragraph 47 with respect to any businesses ordered to close the premises in full or in part.

(b) From 20 March for businesses which closed part of their business (such as an eat- in part of a restaurant) following the 20 March statement.

(c) From 21 or 26 March where Regulation 2 of the 21 March Regulations or Regulations 4 and 5 of the 26 March Regulations required the business to close.

(d) From 26 March, depending on the particular facts of the case, if and to the extent that Regulation 6 of the 26 March Regulations prohibited a potential customer from visiting non-essential retail premises at all or only permitted that customer to do so for the purposes of essential purchases.

28.5. The matters relied on by the FCA, including the government action in imposing the 21 March and the 26 March Regulations in response to the COVID-19 pandemic, were not "*actions or advice… due to an emergency likely to endanger life or property in the vicinity of the Premises*".

28.6. There will be cover if in a particular case a COVID-19 emergency in the vicinity of the premises, as opposed to the country as a whole, led to qualifying public authority action or advice.

28.7. Exclusion (b) in Extension F, RSA2.1-2.2, does not limit cover only to where access to the premises was prevented.

28.8. Exclusion (e) in Extension F, RSA2.2, is a financial limit of £10,000 for any loss as a result of infectious or contagious diseases.

28.9. The "Pollution and Contamination" exclusion clause in RSA2.2 does not apply to the disease clause.

29. As regards RSA3:

29.1. Declarations 1, 5, 10 and 11 above are repeated.

29.2. Accordingly, there is cover under RSA3 for any business interruption which an insured can show resulted from COVID-19, including by reason of the actions, measures and advice of the government, and the reaction of the public in response to COVID-19, from the date when the disease occurred in the relevant 25 mile radius of the insured premises.

29.3. General Exclusion L does not exclude claims arising out of the COVID-19 epidemic.

30. As regards RSA4 (Disease clause):

30.1. Declarations 1, 2, 4, 10 and 11 above are repeated.

30.2. There is cover for losses caused by interruption of or interference with the insured business as a result of COVID-19 (including the governmental reaction thereto pleaded at APoC sub-paragraphs 18.9, 18.14, 18.15(d), 18.16 to 18.24 and 18.26 and the public reaction thereto) occurring in England and Wales.

31. As regards RSA4 (Enforced Closure clause):

31.1. While advice, exhortations or social distancing and stay at home instructions do not constitute "enforced closure of an Insured Location", an instruction need not always have the force of law to amount to an "enforced closure". An instruction given by a public authority may amount to an "enforced closure" if, from the terms and context of the instruction, compliance with it is required, and would reasonably be understood to be required, without the need for recourse to legal powers. For such an instruction to amount to an "enforced closure" it would need to be in mandatory terms and in clear enough terms to enable the addressee to know with reasonable certainty what compliance requires. A mandatory instruction given by a public authority in the anticipation that legally binding measures will follow shortly afterwards, or will do so if compliance is not obtained, is also capable of being an "enforced closure".

31.2. There was "enforced closure of an Insured location by any governmental authority or agency or a competent local authority for health reasons or concerns occurring within the Vicinity of an Insured Location":

(a) For those businesses which were required to close all or part of their premises by the 21 March or 26 March Regulations; and

(b) By reason of the 20, 21, 23, 24 and/or 26 March measures pleaded in APoC paragraph 47 with respect to any businesses instructed (in the sense set out in Declaration 31.1) to close the premises in full or in part.

31.3. The March 2020 enforced closures were imposed by the government for "health reasons or concerns" which occurred within the Vicinity of all Insured Locations.

32. As regards RSA4 (Prevention of Access – Non Damage clause):

32.1. Each of the matters pleaded at APoC sub-paragraphs 18.8- 18.9, 18.14, 18.15(b), 18.16 (the 21 March Regulations), 18.17-18.19, 18.21 (the 26 March Regulations), 18.22, and
18.26 was actions or advice of a governmental authority or agency.

32.2. The actions and advice pleaded at APoC sub-paragraphs 18.9, 18.14, 18.15(b), 18.16 to 18.24, and 18.26 of the APoC were in the Vicinity of all premises in the

UK.

32.3. There were "actions or advice of the…governmental authority or agency in the Vicinity of the Insured Locations … which prevents or hinders the use or access to the Premises":

(a) By reason of the 20, 21, 23, 24 and/or 26 March measures pleaded in APoC paragraph 47 with respect to any businesses which closed or which were ordered to close the premises in full or in part (such as the eat-in part of a restaurant).

(b) If the Social Distancing and Related Actions, depending on the facts of the case, hindered the use of Insured Premises, for example because they prohibited a potential customer from visiting non-essential retail premises at all or only permitted that customer to do so for the purposes of essential purchases.

Zurich

33. As regards Zurich1-2:

33.1. The undefined term "*vicinity"* has a local connotation of the neighbourhood of the premises and connotes an immediacy of location; the whole of the UK cannot be described as in the "vicinity" of the insured premises;

33.2. The phrase "*a danger or disturbance in the vicinity of the Premises*":

(a) contemplates an incident specific to the locality of the premises;

(b) indicates that this is narrow localised cover; and

(c) does not indicate a continuing, countrywide state of affairs;

33.3. Accordingly, there could only be cover if the risk of COVID-19 in the vicinity (in that sense of neighbourhood – see declarations 33.1 and 33.2 above) of the insured premises, as opposed to in the country as a whole, led to qualifying civil authority action preventing access to those premises; and

33.4. None of the matters relied upon by the FCA, including the government action in imposing the 21 and 26 March Regulations in response to the COVID-19

pandemic, constitute action taken following a danger or disturbance in the vicinity of the premises.

33.5. If cover were available for COVID-19 business interruption claims on the basis of the Action of Competent Authorities clause (quoted, in respect of Zurich 2, at 479 of the High Court Judgment), the "Pollution or contamination" exclusion clauses in Zurich 1- 2 would not apply to exclude such cover.