Claim No: FL-2020-000018

<u>IN THE HIGH COURT OF JUSTICE</u>
<u>BUSINESS AND PROPERTY COURTS</u>
<u>COMMERCIAL COURT (QBD)</u>
<u>FINANCIAL LIST</u>
<u>FINANCIAL MARKETS TEST CASE SCHEME</u>
BETWEEN

THE FINANCIAL CONDUCT AUTHORITY

Claimant

-and-

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

Defendants

DEFENCE OF THE FOURTH DEFENDANT ("HISCOX")

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1. For ease of reference, the headings, nomenclature and abbreviations in the Particulars of Claim are adopted herein, but without any admission as to their appropriateness or correctness. References are to paragraph numbers in the Particulars of Claim, unless otherwise indicated.

2. Further, and by way of preliminary matters:

    2.1. The FCA's invariable approach to the policies is to plead words in the relevant insuring clauses in isolation. Although, inevitably because of the form of the Particulars of Claim and the need to respond to it in this Defence, Hiscox has largely to plead in the same way, the words in the clauses must be read as a whole (and in the context of the policies) and Hiscox is not to be taken as endorsing the FCA's approach.

    2.2. Further, as pleaded by the FCA itself in paragraph 2, this test case concerns questions of construction and principle, and to the extent that controversial matters of fact are alleged, they cannot be resolved.

2.3. Although Hiscox has agreed in the Framework Agreement to avoid duplication as far as practicable and has sought to do so, the nature of the FCA's pleading, in particular the compendious nature of many of the relevant allegations against multiple insurers, makes the avoidance of duplication difficult. As far as possible below, Hiscox pleads only to those allegations that specifically concern it and/or Hiscox 1-4.

<u>A. Summary</u>

3. Paragraphs 1 and 2 are admitted; it is averred that the case is not to decide controversial allegations of fact. As reflected in the Framework Agreement, Hiscox supports the mutual objective of seeking to achieve the maximum clarity for the maximum number of policyholders.

4. Further, Hiscox notes that the FCA characterises the essential issue in the test case as being whether business interruption losses <u>arising from the COVID-19 pandemic</u> are covered. That is indeed the issue, and the answer is that they are not covered, because the COVID-19 pandemic is not an insured peril, for the reasons set out in this Defence.

5. Paragraph 3 is noted.

<u>Summary of Hiscox's Defence</u>

6. The FCA starts from the false premise that the policies are to be construed on the presumption that they should provide an indemnity for losses due to COVID-19, and thus approaches the case on the basis of a presumption that there ought to be coverage. This infects all aspects of its case. The whole of paragraph 4 is but one example.

7. Hiscox 1-4 need to be construed, contrary to the FCA's approach, with no predisposition in favour of (or indeed against) coverage, and without any presumption that they cover pandemics or their consequences. The correct questions are, first, whether or not on the facts which occurred there was in principle an insured peril and, secondly, whether that insured peril in principle caused the losses sustained.

8. As is typical of business interruption policies, Hiscox 1-4 cover specifically defined and carefully delimited insured perils. Pandemics and their consequences are not an insured peril.

9. There are moreover many indications in Hiscox 1-4 that the parties did not intend, especially in the context of non-damage business interruption, that the policies would provide cover in respect of a national or global pandemic or any similar broad and pervasive event. The coverage relating to cyber attacks is one example of this.

10. The FCA seeks to mount an argument, in paragraph 4.2, on the basis of the absence of an exclusion of pandemics. Arguments based on the absence of an exclusion are always weak and usually (as here) circular. That is especially so here, where there is obviously no cover for pandemics themselves, and pandemics are not an insured peril. The specific example relied upon (in the Hiscox Cancellation and Abandonment cover (present in only some policies)) is clearly explicable by the all risks nature of that cover, and in fact supports the parties' objective intention not to extend the cover to such risks.

11. The essence of the cover provided by Hiscox 1-4, so far as material, is against certain specified mandatory actions by government or other public authority, in certain limited circumstances and subject to certain conditions, which have the effect of interrupting the insured's business. There is no cover against the reasons underlying those mandatory actions, or beyond the scope or in the absence of those mandatory actions.

12. The FCA ignores the distinction, which both exists in fact and which is also required by the policy wording, between the various types of government or authority response, particularly and most critically between mandatory regulations or orders on the one hand and mere guidance and advice on the other. The FCA purports in paragraph 4.1 to characterise the entire government response to COVID-19, beginning in January 2020,[1] as one indivisible, monolithic subject-matter, notably using the question-begging word "*intervention*", which appears in no Hiscox policy, and appears to be used for no better reason than to blur the distinction between what is covered by Hiscox 1-4 and what is not. This supposed unitary intervention, according to the FCA, has all the necessary effects under the policies to yield cover, and satisfies all policy "*triggers*", such as interruption, denial of and hindrance in access imposed, and restrictions imposed, under Hiscox 1-4 and the other Defendants' policies, for all businesses, even if they were not ordered to close at all or in their entirety, on the alleged basis that businesses were not able to operate "*normally*". None of this is correct, and pays no attention to the actual words used in the policies. By way of example only, an inability to operate normally is simply not a relevant concept for Hiscox 1-4; it is an

[1] All dates stated in this Defence are in 2020, unless otherwise indicated.

impermissible gloss. Hiscox 1-4 only respond to mandatory regulations or orders, as the policy wording (e.g. by the use of the words "*imposed*" and "*restrictions*") makes clear, and even then only to regulations or orders with specific effects.

Non-Damage Denial of Access (**"NDDA"**) clauses (Hiscox 1-2 and Hiscox 4)

13. The principal points are these:

13.1. There was no "*incident*". An "*incident*" denotes a specific, small-scale, identifiable physical event of short temporal duration and limited geographical extent (as reinforced by the requirement for it to be within a one mile radius – or in some Hiscox 2 policies within the "*vicinity*" of the premises). This is also clear in particular from (i) the fact that the business interruption cover is an adjunct to property cover; (ii) the other special covers under the same stem;[2] and (iii) the other matters, e.g. murder/suicide, falling under the Public Authority clause. The FCA's primary case (paragraph 43) is, startlingly, that there was an "*incident*" on 3 March (on the grounds that on that date an action plan was announced by the UK government and there were 176 cases of COVID-19) or 12 March (when the UK government designated the risk level as high, and a week after the first UK COVID-19 death). The FCA's alternative case (also paragraph 43) is that there was an incident when a person with COVID-19 was within a mile or the vicinity of the premises. This is wrong: a person with an illness is not an "*incident*".

13.2. The "*incident*" has to be within the one mile radius of the premises. An event which is only incidentally within and entirely or preponderantly outside the radius is not an "*incident*" within the radius.

13.3. The word "*imposed*" connotes something mandatory, in the sense of something which has the force of law, and compliance with which is compulsory. Only a denial or hindrance of access which is mandatory is relevant; government advice, instructions or announcements are not relevant.

13.4. There was, in any event, no denial of access or hindrance within the meaning of the clause. None of the matters relied on by the FCA including Regulation 2 of the 21 March Regulations and/or Regulations 4 and 5 of the 26 March Regulations requiring

[2] By the "stem", Hiscox denotes the words "*We will insure you for* ***your*** *financial losses and other items specified in the schedule, resulting solely and directly from an interruption to [****your activities****]/[****your business****] caused by…*".

closure of certain premises or cessation of business was capable of amounting to a denial of or hindrance in access. Alternatively, there could be no denial of or hindrance in access except as regards those businesses forced to close premises or to cease business. Whether or not there was an actual denial of or hindrance in access in an individual case may be a question of fact.

13.5. Any denial of access or hindrance has to result from what happens within the one mile radius or within the vicinity; even if paragraphs 13.1 to 13.4 above were all incorrect, the denial of or hindrance in access was indisputably not imposed as a result of what occurred within a one mile radius of any particular premises, but as a result of nation-wide conditions.

13.6. The insured would also need to prove an incident within the one mile radius or the vicinity at the relevant time, before the imposition of the relevant regulations (by reason of the words "*an incident which results in*…" and the fact that causes precede effects). This indisputable requirement in fact serves to highlight the inapplicability of the clause to the present situation.

Public Authority clauses

14. The principal points are these:

14.1. The clause refers to "***your** inability to use*". The inability must be that of the insured itself, not its customers. Inability to use means that the insured is physically or legally unable to use the insured premises for the purpose of its business activities; advice, guidance or anything non-mandatory is not sufficient to render an insured unable to use its premises. Inability is not qualified by words such as "wholly" or "partially". The question is simply: can the insured use the premises for its business activities or not? The fact (if it be the case) that the insureds' customers are prevented from using the premises is outwith the cover.

14.2. The insured's "*inability to use the insured premises*" must be "*due to restrictions imposed by a public authority*". The word "*imposed*", as stated in paragraph 13.3 above, means that the restrictions must be mandatory. Advice and guidance are insufficient. Further, to be within the clause, "*restrictions*" must have the effect of (i) the insured being (ii) unable to use (iii) the insured premises. The only regulations which could have this effect are Regulation 2 of the 21 March Regulations and Regulations 4 and 5 of the 26 March

Regulations, which require closure of premises/cessation of business with limited exceptions and which directly prevent the use of the insured premises for business purposes. Neither mere guidance or advice, nor other mandatory regulations, and in particular Regulations 6 and 7 of the 26 March Regulations which deal with restriction of movement or meetings, prevented use of the premises by the insured. Indeed, neither of these have any effect on the premises as such at all. Whether there is an actual inability to use in a given case may be a question of fact.

14.3. An "*occurrence*" must be local and specific to the insured, its business or business activities or the premises. This is plain in particular from (i) the fact that the business interruption cover is an adjunct to property cover; (ii) the other special covers under the same stem; and (iii) the other matters, e.g. murder/suicide falling under the Public Authority clause.

Interruption

15. The word "*interruption*" is in the stem common to both clauses. "*Interruption*" is used, not "*interference*". It requires a cessation or stop. It is not sufficient that the insured's business activities have become more inconvenient or burdensome or difficult to perform, or are subjected to external limitations or are less profitable. A constriction in flow is not an interruption. The FCA's assertion that a business has been interrupted if it cannot operate "*normally*" or its usual activities cannot continue is self-evidently wrong. It follows that a business that continues in part is in principle not interrupted, though the final arbiter of whether a business was interrupted will be the tribunal of fact.

Causation

16. As regards the true and/or proximate cause(s) of the losses claimed:

16.1. As to much of the losses, the cause is the pandemic of COVID-19, including the impact which COVID-19 had on economic activity and public confidence.

16.2. As to at least the great majority of the losses claimed, the causes are the pandemic of COVID-19 including the impact which it had on economic activity and public confidence, together with those government measures taken in response which did not form part of the insured peril.

16.3. An insured may be able to prove that part of the loss which it has sustained was caused by an insured peril, but the burden of proof is on it to do so.

16.4. The loss proximately caused by the limited insured perils under Hiscox 1-4, (as distinct from COVID-19 and its impact on the economy and public confidence, and the government measures taken in response, nearly all of which fall outside the NDDA and Public Authority clauses), will have been minimal.

16.5. As further stated in paragraph 17 below, an insured under Hiscox 1-4 must, in order to recover, be able to show that that loss was solely and directly caused by an insured peril.

17. For losses to be recoverable under Hiscox 1-4, given the policies' insuring clauses and the use of the words "*resulting solely and directly from*", the single proximate cause of the losses must be the insured peril. That is broadly an interruption caused by denial of or hindrance in access to the premises, or an inability to use insured premises, in either case due to mandatory restrictions imposed by the authorities, and themselves creating the denial of or hindrance in access to the premises, or an inability to use insured premises. If, as the FCA appears to assert, the only proximate cause of the losses is the supposed unitary fact of COVID-19, or alternatively COVID-19 and all the consequent government responses of whatever kind, this is not covered as an insured peril. The FCA is driven to merge the explicitly stated (and limited) insured perils, government action falling outwith those insured perils and the underlying or background causes of both because without this (impermissible) merger, it is obvious that Hiscox 1- 4 do not respond. The extreme nature of its case is a consequence and an implicit recognition of its difficulty.

18. The FCA's assertion that one cannot and should not distinguish between various causes, in particular (i) the disease on the one hand and the public authority action in consequence on the other and (ii) mandatory business closure or cessation orders on the one hand and less stringent, non-binding measures on the other, is contrary to common sense and the ordinary use of language, without logical basis and pays no respect to the actual definitions and delimitations of the insured perils in Hiscox 1-4. Hiscox has not insured against the disease, but only against government or other authority action of a specified nature. Hiscox has not insured against advice or guidance but only against mandatory regulations or orders of a certain kind. The FCA's goal-driven approach is contrary to the elementary principle

that parties to contracts assume only the obligations which they have agreed to assume by the language which they have used.

19. The words "*resulting solely and directly from*", referred to above, make clear that the "*interruption caused by*" the relevant matter has to be the sole, not concurrent in any sense, cause of the loss.

20. Where loss is caused by COVID-19 or the consequences of COVID-19 falling outside those matters covered by the policies (in essence interruption caused by the requisite type of mandatory government action), there is no cover.

21. In any event, where there are concurrent independent causes of loss, one of which is not an insured peril, the loss is as a matter of law not covered. The nature and measure of the indemnity in principle requires the court to ask what would have happened <u>had the operative insured peril(s) not occurred</u>. It is the language of the policy which defines the ambit of the insured peril(s), and it is the operative peril(s) which must be subtracted in order to determine the measure of indemnity. This flows from (i) general principles of causation involving the "but for" test; (ii) the nature of indemnity insurance; (iii) the loss of income clause; and (iv) the trends clauses.

22. COVID-19, including its impact on the economy and public confidence, was an independent cause of much of the losses claimed, and COVID-19, including its impact on the economy and public confidence and the government measures short of the relevant mandatory regulations or orders forming part of the insured peril, were an independent cause of at least the great majority of the losses claimed.

23. The correct counter-factual (in answer to the question "what would have happened but for the insured peril?") is, broadly, losses caused by COVID-19 and its impact on the economy and public confidence and government measures, but subtracting the insured peril(s), i.e. the mandatory government regulations or orders causing an interruption because of denial of or hindrance in access and/or inability to use. Those losses would have been suffered in any event, and are therefore not recoverable.

24. Alternatively, if Hiscox is wrong as to the ambit of the insured peril, the losses caused by COVID-19 and its impact on the economy and public confidence and such, if any, of the government measures as do not constitute part of the insured peril are not recoverable.

25. The FCA stigmatises the counterfactuals in paragraphs 23 and 24 above as unrealistic. They are no such thing. A situation in which COVID-19 and its economic impact occurred, but without mandatory government measures falling within the insured perils in Hiscox 1-4 (i) is easy to envisage; (ii) actually happened in the UK in 2020 before mandatory action; (iii) might have continued in the UK in 2020, as in the case of previous pandemics, and as many commentators urged should happen; (iv) happened in Sweden; and (v) is likely to happen again when mandatory regulations or orders are lifted.

26. The FCA's case on the correct counterfactual, namely that it requires the assumption of no government intervention <u>and no COVID-19</u>, is obviously wrong. It ignores the limited ambit of the insured perils, and turns the cover into insurance against pandemics, which are indisputably not a covered peril.

27. The FCA's goal-driven attempts to eliminate COVID-19 from the counterfactual on the grounds that causes are interlinked, or that it cannot have been intended that one strips out the government action from the underlying cause of that action, or that it is absurd to do so, ignore the limited definition of the insured peril(s) and are not legitimate or justified in principle. They tend further to illustrate that the insurance was not objectively intended to cover the present situation.

28. The trends clauses are not aimed only at extraneous or independent matters. The point that some trends clauses refer only to insured damage does not make them inapplicable. They must have been objectively intended to refer to restrictions as well. Where there is an option as regards the trends clause and irrespective of the option being exercised, this does not prevent the second sentence of such clauses being part of the cover or being an admissible aid to ascertainment of the parties' objective intentions. Nor does the fact that some clauses only provide for upwards adjustment.

29. The very fact that the FCA proposes the extremely elaborate methods of proof posited in Section F, apparently on the basis that unless recourse is to be had to them, an insured could not prove an incident or occurrence within the relevant radius or vicinity, serves to demonstrate that Hiscox 1-4 were never objectively intended to apply to a situation such as the present. The types of local and specific incidents and occurrences which Hiscox 1-4 in fact cover would not require such elaborate methods of proof.

30. Further and in any event, those suggested methods are subject to various flaws, and cannot be accepted.

31. Hiscox now pleads to the summary of the FCA's case set out in paragraph 4, to the extent not dealt with above, but this is subject to the more detailed points in the balance of this Defence, and is not to be taken as limiting those points.

32. As to paragraph 4.1, Hiscox repeats paragraph 12 above.

33. As to paragraph 4.2, Hiscox repeats paragraph 10 above.

34. As to paragraph 4.3,

    34.1. The first sentence is denied. Hiscox repeats paragraphs 17, 18 and 21 above.

    34.2. The second sentence is denied. Hiscox repeats paragraphs 26-27 above.

    34.3. The third sentence, which refers to "*the losses*" (which are unspecified) and which both (i) uses the Public Authority clauses in Hiscox 1-4 as a purported example, and (ii) entirely inaccurately and question-beggingly describes them as "*disease clauses*", rather than Public Authority clauses, as they are expressly termed in Hiscox 1-4, is denied for the reasons set out below.

35. As to paragraph 4.4, the first sentence is very general, but insofar as aimed at Hiscox NDDA clauses (Hiscox 1, 2 and 4) and Hiscox Public Authority clauses (Hiscox 1-4, noting that only Hiscox 4 has an express Public Authority clause distance limit), there was no "*trigger*". As to the second and third sentences, Hiscox pleads below to the specific declarations sought. No Hiscox policy was capable of being "*triggered*" by a nationwide event. Hiscox repeats paragraphs 13.1, 13.2, 13.5 and 14.3 above.

36. As to paragraph 4.5, it is again very general and does not correctly characterise the nature of Hiscox 1-4, about which Hiscox pleads below. That notwithstanding, paragraph 4.5 is denied. The word "*within*" has a clear meaning: it does not mean "*outside*" (as alleged).

Furthermore, the insured perils require the event which occurred within the specified distance or vicinity of the premises to be the cause of the loss.

B. Introduction

37. Paragraph 5 is noted and it is admitted that the FCA is the conduct regulator of the Defendants.

38. Paragraph 6 is admitted and averred. Hiscox will refer to the same as necessary.

39. Paragraph 7 is admitted, save that to the extent that the Particulars of Claim allege disputed issues of fact, those are neither within the Framework Agreement nor suitable for the Financial Markets Test Case Scheme.

The Parties

40. Paragraph 8 is admitted.

41. Paragraph 9 is admitted as regards Hiscox.

42. Paragraph 10 and Annexe 1 are admitted as a broadly accurate summary of the position.

C. The policy wordings and applicable law

43. Paragraph 11 is admitted.

44. Paragraph 12 is admitted, insofar as it is alleged that each of the policies within a particular Hiscox type, e.g. Hiscox 1, had materially identical cover clauses, by which is understood those clauses containing the insured perils. (The NDDA cover in some Hiscox 2 policies contains the words "*within the vicinity*" rather than "*within a one mile radius*", as set out in Schedule 4 to the Particulars of Claim. Such difference is immaterial for the purposes of this case.)

45. Paragraph 13 is noted. In Annex 1 of this Defence, Hiscox pleads to the declarations sought in relation to Hiscox 1-4 in Schedule 4.

46. Paragraph 14 is noted.

47. As to paragraph 15, it is admitted that the parties are seeking to agree a list of Questions for Determination and an Issues Matrix and it is admitted and averred that neither is

intended to be a statement of case or formal list of issues for the Court. The issues in dispute in this action will be defined by the statements of case.

48. As to paragraph 16, the first sentence is admitted. The second sentence is noted.

D. COVID-19 and the public authority response to it

49. Paragraph 17 is admitted, save that it is denied that steps taken by the UK authorities have interrupted many businesses and their activities within the meaning of Hiscox 1-4.

50. As to Paragraph 18, although Hiscox pleads to each of the sub-paragraphs thereof below, by doing so it does not accept the relevance thereof. It is admitted that the paragraph contains some core events relating to COVID-19 and the public authority response to them. Sub-paragraphs 18.1, 18.2, 18.3 (first sentence), 18.5, 18.7, 18.8, 18.15, 18.16, 18.18 to 18.21, and 18.23 to 18.26 are admitted.

51. As to the second sentence of paragraph 18.3, the response to paragraph 21 and following is repeated (see paragraph 63 and ff. below).

52. As to paragraph 18.4, it is admitted that the Health Protection (Coronavirus) Regulations 2020/129 ("**the 2020/129 Regulations**") came into force on 10 February and were repealed on 25 March as alleged but their effect is not accurately summarised.

53. The first sentence of paragraph 18.6 is admitted, save that the guidance given on 3 March was, as asserted, limited to certain businesses (including in particular healthcare businesses).

54. As to the second sentence of paragraph 18.6, it is denied, if it be alleged, that the guidance referred to suggested that social distancing measures would certainly be advised in the future. The guidance said such measures "*may be needed*" and said that a date for the introduction of such guidance could not be given.

55. As to paragraph 18.9, it is admitted that the Prime Minister made a public statement on 16 March and that it contained the statements quoted, but in his speech the Prime Minister expressly described what he was asking people to do as advice: *"…this advice about avoiding all unnecessary social contact… we advise against unnecessary social contact of all kinds …"*

56. Paragraph 18.10 is admitted. The Chancellor of the Exchequer had already announced a package of financial measures to support businesses affected by COVID-19 in his budget speech in the House of Commons on 11 March.

57. It is admitted that the statements quoted in paragraphs 18.11 to 18.13 were made. They are irrelevant. Hiscox notes footnote 2 (which mistakenly refers to paragraphs 18.21 to 18.23), and the confirmation that the FCA does not seek to prove that any matter was agreed between insurers and the Government. Given this confirmation, Hiscox does not plead in detail to these paragraphs, save that (i) it is denied that anything was agreed; and (ii) it is denied that it was incumbent on Hiscox to inform the Government if it disagreed with the statements quoted; the FCA has failed to plead any basis for such an obligation.

58. As to paragraph 18.14, as set out in paragraph 61.7 below, schools remained open to vulnerable children and children of critical workers. They were not, at least to that extent, closed.

59. Paragraph 18.17 is admitted, save that:

59.1. The Prime Minister first said that gatherings of more than two people would be prohibited and that people would be required to stay at home (in the absence of reasonable excuse) on the evening of 23 March.

59.2. No legislation was passed requiring people to stay at home (in the absence of reasonable excuse), or prohibiting gatherings of more than two people, until the 26 March Regulations.

59.3. Save as pleaded below in relation to Wales and Scotland, there has never been more than advice that people should observe two-metre social distancing.

60. Paragraph 18.22 is admitted, save that the direction that particular Welsh businesses should have regard to guidance issued by Welsh ministers (which guidance could incorporate codes of practice or other documents published by, for example, trade bodies) was only introduced by an amendment to The Health Protection (Coronavirus Restrictions (Wales)) Regulations ("**the Welsh Regulations**") made on 7 April.

61. As to Paragraph 19, it is denied that the scheme of the Government guidance or announcements was expressly to "*prohibit*" conduct in relation to businesses. As to the effect of the alleged impact of the 21 and the 26 March Regulations upon the categories of business identified:

61.1. As to category 1, paragraph 19.1 is admitted.

61.2. As to category 2, paragraph 19.2 is admitted.

61.3. As to category 3, other than in Wales after 7 April, and contrary to what is alleged, there was never an obligation upon businesses in this category to comply with mere guidance or advice. At most such guidance and advice would be relevant to consideration of whether other legal obligations not associated with COVID-19 had been discharged. Even in Wales, after amendment on 7 April, Regulation 7A of the Welsh Regulations only required particular businesses that remained open *"to have regard to guidance issued by Welsh Ministers about reasonable measures to be taken to ensure that a distance of 2 metres was maintained between persons"*. Save as aforesaid, paragraph 19.3 is admitted.

61.4. As to category 4, paragraph 19.4 is admitted.

61.5. As to category 5,

61.5.1. Hiscox repeats *mutatis mutandis* paragraph 61.3 above as to the absence of obligation upon businesses in this category to comply with mere guidance or advice.

61.5.2. It is admitted and averred that these businesses were not required to close; the fact is, although the FCA avoids saying so, that they were permitted to stay open.

61.5.3. Save as above, paragraph 19.5 is admitted.

61.5.4. For information, the large majority of Hiscox policyholders under Hiscox 1-4 are in category 5.

61.6. As to category 6, paragraph 19.6 is admitted.

61.7. As to category 7, paragraph 19.7 is admitted, save to emphasise that insofar as schools and nurseries did provide care for vulnerable children and/or critical workers, they did not at any point close and, while the power to give directions to restrict attendance or close schools was granted to the Secretary of State by section 37 and Schedule 16 of the Coronavirus Act 2020, no such direction was given.

E. The Defendants' refusal of cover

62. As to paragraph 20, the first sentence is admitted. The reasons why Hiscox is entitled to decline some claims are pleaded in this Defence. As to the second sentence, it is admitted that Hiscox relies upon some of the grounds pleaded in sub-paragraphs 20.1 to 20.6, subject to what is pleaded herein. Save as aforesaid, no admissions are made.

  62.1. As to sub-paragraph 20.1, the first sentence is admitted and averred as regards Hiscox 1-4. The second sentence is noted.

  62.2. As to sub-paragraph 20.2, the first sentence is admitted and averred. The second sentence is noted.

  62.3. As to sub-paragraph 20.3, as regards the first sentence it is admitted and averred that Hiscox asserted that, properly construed, its policies did not respond to policyholders' claims in the relevant circumstances and, in doing so, correctly asserted that its policies did not provide cover in the case of pandemics. Hiscox submits that this is self-evidently the case. Otherwise, the first sentence of paragraph 20.3 is denied. The second sentence is noted.

  62.4. Hiscox does not plead to sub-paragraph 20.4.

  62.5. As to sub-paragraph 20.5, the first sentence is admitted as a broad summary of the point. The second sentence is noted.

  62.6. As to sub-paragraph 20.6, the first sentence is admitted as a broad summary of the point. The second sentence is noted.

F. Prevalence of COVID-19 in the UK

63. As regards the purported reservation of rights in paragraph 21 this reservation has now been superseded by the ruling of Butcher J at the first CMC on 16 June.

64. As to paragraph 22, it is admitted that some Hiscox policies expressly state a relevant area surrounding the insured premises in the form of a specific distance ("*within a one mile radius*"), and that some Hiscox 2 policies use the phrase "*within the vicinity*". It is admitted that the size of the former area and, if, which is not admitted as regards Hiscox 2, the Court

concludes that "*vicinity*" means or connotes a specific distance, that the size of the area can be calculated by a circle with the specified radius and the insured premises at the centre.

65. As to paragraphs 23 to 28, Hiscox adopts the pleading of the Seventh Defendant to those paragraphs. Hiscox pleads the further additional points:

65.1. As to paragraph 23, it is denied that "*evidence of a hospital or care home without a registered death*" would without more amount to such proof.

65.2. As to paragraph 26, the Cambridge Analysis also proceeds (amongst others) on an assumption as to the true extent of mortality in the UK from COVID-19 and further does not consider the distinction or potential distinction between people who died whilst suffering from COVID-19 and those who died of COVID-19.

65.3. As to paragraph 28, there is no basis for introducing the concept of Reported Cases by UTLA or LTLA zone as a mode of proof of an "*incident*" or "*occurrence*" within the Relevant Policy Area.

G. Assumed facts

66. As to paragraph 29, the Assumed Facts (i.e. as attached to the Particulars of Claim at Annexe 2), their content and their purpose, are still the subject of discussion and potential agreement and are not settled. Further, the FCA has stated (paragraph 73 of its Skeleton Argument for the first CMC, which mirrors almost exactly paragraph 30 of the Particulars of Claim) that "*….the FCA does not seek declarations by reference to assumed facts or such sample scenarios - it is thus not necessary for the court to decide issues by reference to any specific fact patterns as if they were fictional or test claims, but it may wish to refer to them to add clarity to its judgment*." Further, allegations are made in paragraph 29 in relation to assumed facts relating to policyholders termed "*policyholder assumed facts*" and "*policyholder facts*", neither being defined. The former do not appear to be the same as the Assumed Facts. In all these circumstances the purpose of paragraph 29 and its presence in the Particulars of Claim is unclear and Hiscox reserves the right to plead further, if necessary, as and when the above points are clarified.

67. Paragraph 30 is noted.

H. <u>Policy Intention</u>

68. As to paragraph 31, it is admitted and averred that the policies are to be construed objectively. Neither party's subjective intentions are relevant or admissible.

69. As to paragraph 32, it is denied that the matters pleaded make any difference to the Court's objective approach to construction or to the substantive construction of the policies, but as regards Hiscox 1-4 it is admitted that (so far as material to the present case) they were standard form policies as opposed to individually negotiated covers.

70. Save as indicated below, paragraph 33 is denied.

    70.1. The first sentence purports to allege that, unless insurers "*do define and exclude from their cover epidemics and pandemics*", the parties are to be assumed to have objectively intended that the insurance should cover them. This argument is false and circular.

    70.2. The exclusion from Cancellation and Abandonment cover cited from Hiscox 1-2 and Hiscox 4 is admitted, but the alleged significance is denied. The absence of an exclusion is only even potentially relevant if the relevant part of the policy could otherwise be regarded as covering such a risk. As regards the relevant insuring clauses in Hiscox 1-4, this was not the case.

    70.3. As regards the Hiscox policies, the exclusion in relation to the Cancellation and Abandonment cover is clear objective evidence that Hiscox was not prepared to cover such risks. The Cancellation and Abandonment cover (where applicable) is offered in the Business Interruption section, is a particular type of cover, and is therefore subject to different considerations. It responds in respect of an "*unforeseen incident or event*" and is essentially an all risks cover, so that the presence of the exclusion quoted is understandable, in order to put the matter beyond doubt; it is consistent with an intention not to cover such risks.

    70.4. There is no basis for the allegation that Hiscox "*elected*" not to include a pandemic exclusion.

71. As to paragraph 34, this is an example of the FCA's presumption of cover for pandemics and erroneous approach to construction. The question is not whether or not there is any "*admissible objective intention on the part of [the insurers] to exclude or not to cover pandemics…*" It is admitted and averred that the right question is whether or not Hiscox 1-4 respond in the

circumstances, and that that is a question of construction of the policies as a whole, which are to be approached without any presumption in favour of or against cover. It is denied, if alleged, that Hiscox has ever contended otherwise. The objective intention of Hiscox and the policyholders not to cover pandemics and their consequences is apparent from a proper construction of Hiscox 1-4.

72. As to paragraph 35, and the FCA's intention to rely upon the *contra proferentem* rule as necessary or appropriate, the reference to a "*rule*" is inaccurate: it is at most a principle of construction and, to the extent it survives at all, its application is of very limited scope. As regards Hiscox 1-4, it has no application or relevance, as there is no ambiguity.

I. <u>The disease trigger</u>

73. Hiscox does not plead to paragraph 36.1. Paragraphs 36.2 and 36.3 are admitted as regards Hiscox 1-4.

74. Paragraph 37.1 is admitted as regards Hiscox 1-4**.**

75. Save that it is admitted that there is no express reference to any vicinity in the Public Authority clauses in Hiscox 1-3, paragraph 38 is denied. There was no "*occurrence*" on 5 March within the meaning of the Public Authority clauses when COVID-19 was made a notifiable disease. Without prejudice to the generality of the foregoing, this was for the following reasons.

    75.1. The Hiscox Business Interruption insurance is an adjunct to property cover in the case of all the representative wordings. This necessarily implies that it covers events which relate to and are specific to the insured, the insured business or the insured property itself.

    75.2. The wording and nature of the matters covered by the other Special Covers offered under the same stem yields the same conclusion. By way of example only at this stage, the Cyber Attack cover expressly requires targeting of the insured alone, and exclusion 1.b excludes cover available in relation to a computer virus "*which indiscriminately replicates itself*" or is "*disseminated on a global or national scale*" unless created by a "*hacker*", defined as someone who maliciously targets the insured.

    75.3. The wording and nature of the other matters covered under a. and c. to e. of the Public Authority clause yields the same conclusion.

75.4. The wording of the Public Authority clause itself yields the same conclusion.

75.5. The "*occurrence*" within the meaning of the policy denotes a small-scale event which must be local and/or specific to the insured, its business, activities or premises.

76. Hiscox does not plead to paragraphs 39 and 40.

J. <u>Presence of the disease within a certain distance from the premises</u>

77. As to paragraph 41:

77.1. It is denied that there was an occurrence of COVID-19 for the purposes of the Public Authority clause in Hiscox 4 (the only policy referred to in this paragraph) whenever a person or persons had contracted COVID-19 such that it was diagnosable, whether or not it was in fact verified by medical testing or a medical professional and/or formally confirmed or reported to PHE and whether or not it was symptomatic. Unless the disease had been medically verified, the requirements of the Public Authority clause as regards "*occurrence*" would not be met. This is another example of the FCA proposing unorthodox methods of proof, which have no support in Hiscox 1-4 and which only serve further to show that they were not objectively intended to cover the present pandemic.

77.2. Hiscox does not plead to sub-paragraphs 41.1 or 41.2.

77.3. In relation to paragraph 41.3,[3]

77.3.1. As to the first sentence of paragraph 41.3, paragraph 77.1 above is repeated.

77.3.2. The second sentence is denied, save that it is admitted and averred that it may be proven on particular or individual facts that there was or was not an occurrence of a notifiable disease as required by the policy within the Relevant Policy Area.

77.3.3. As to the third sentence, it would only apply if (i) there was an occurrence as pleaded in sub-paragraph 77.1 above; (ii) if, which is not admitted, any relevant

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[3] In paragraph 41.4, it is pleaded that paragraph 41.3 applies *mutatis mutandis* to Hiscox 4, the Public Authority clause in which refers to an occurrence of a notifiable disease within one mile of the business premises. Accordingly, Hiscox pleads to paragraph 41.3 as if it referred to Hiscox 4.

local authority or other zone was less than one mile across; (iii) the zone was the right shape and/or (iv) the premises were at the centre of it.

77.4. Hiscox does not plead to paragraph 41.5.

78. As to paragraph 42, it is denied that all the advice and actions referred to in paragraph 18 were "*imposed*". "*Imposed*" in Hiscox 1-4 Public Authority and NDDA clauses connotes something mandatory. Only regulations or orders with the force of law, compliance with which is compulsory, are matters capable of being "*imposed*" within the meaning of that word in those clauses. Much of the advice and actions referred to in paragraph 18 do not comprise matters which were or could be "*imposed*". It is admitted and averred that the advice and actions were not limited to particular areas and were not in response to any incident or occurrence in any particular area; no admission is made as to the reason for that in general or in relation to any particular action or advice.

79. The first sentence of paragraph 43 does not refer to any particular time. It is admitted that COVID-19 is a highly contagious disease with a non-negligible risk of fatality when contracted. Save as aforesaid, the first sentence is not admitted.

80. As to the second sentence of paragraph 43, the allegation so far as material to Hiscox is that there was on 3 March, 12 March or such other date as the Court may determine an "*incident*" within the meaning of the Hiscox 1-2 and Hiscox 4 NDDA clauses "*…everywhere in the UK which necessarily included in the vicinity of the UK premises (Hiscox 2…) and within 1 mile (Hiscox 1-2, Hiscox 4…)…".* That allegation is denied. In particular but without limitation to the generality of that denial:

80.1. The word "*incident*" denotes in itself some specific, small-scale, identifiable physical event of short temporal duration and limited geographical extent.

80.2. Further, the relevant clauses refer to the incident "*occurring within [a one mile radius] / [the vicinity] of the* ***insured premises***" from which it is clear that the incident referred to must be within, not within and without, the one mile radius or the vicinity. The very fact of the one mile radius and vicinity limitation reinforces the meaning of "*incident*".

80.3. Further, Hiscox repeats sub-paragraphs 75.1 to 75.5 above, with necessary changes.

80.4. The matters described as having occurred on 3 and 12 March were not incidents within the meaning of Hiscox 1-4.

80.5. The pleading of "*or such other date as the Court may determine*" is vague, but something that is "*everywhere in the UK*" is not an "*incident*" for the purpose of the Hiscox NDDA clauses.

81. As to the third sentence of paragraph 43, the allegation so far as material to Hiscox is that there was an "*incident*" within one mile of the premises or the vicinity, whenever it is proven that a person with COVID-19 had been present within a mile of the premises or within the vicinity, respectively. That allegation is denied. A person with an illness being within a certain distance of a location is not an "*incident*" within the meaning of Hiscox 1-2 and Hiscox 4. Paragraph 80 above is repeated.

82. Further as to the third sentence of paragraph 43:

82.1. It is not admitted that "*vicinity*" in the Hiscox policies has same meaning as in the RSA4 policy.

82.2. It is denied, insofar as intended to be alleged, that there was an "*incident*" within the meaning of the Hiscox policies or that there was an incident within the "*vicinity*" as alleged in paragraphs 41.5 (a) or (b), even if the matters set out therein are proved.

82.3. Further or alternatively, if "*vicinity*" does have the same meaning in the Hiscox policies as the RSA4 policy, the plea in paragraph 82.2 above would still be good.

K. Public authority advice and regulations

83. As to paragraph 44:

83.1. Sub-paragraph 44.1 is denied. It does not accurately reflect the wording of Hiscox 1-2 and Hiscox 4, which contain no reference to "*actions*" or "*advice*". The relevant part of the wordings (including relevant variants) is as follows: "… *an incident occurring during the* ***period of the insurance*** *within [a one mile radius]/[the vicinity] of the [****insured premises****]/[business premises] which results in a denial of access or hindrance in access to the* ***insured premises****/ [business premises]* <u>*imposed by*</u> *any civil or statutory authority or by order of the government or any public authority, for more than 24 hours*".[4]

[4] In this Defence, emphasis by underlining is supplied, unless indicated otherwise.

83.2. What is therefore necessary is that the denial of or hindrance in access be imposed. The only matters in paragraph 18 which were imposed by order of the government or any public authority are those matters which are mandatory, that is to say have the force of law and compliance with which is compulsory, not actions falling short of this, or advice.

83.3. Sub-paragraph 44.2 is denied as regards Hiscox 1-4. It does not accurately reflect the terms of the Public Authority clause in Hiscox 1-4, which provides: "***your*** *inability to use the* ***insured premises*** *due to restrictions imposed by a public authority during the* ***period of insurance*** *following: … an occurrence of any human infectious or human contagious disease, an outbreak of which must be notified to the local authority*".[5]

83.4. What is therefore necessary under the Public Authority clause are "*restrictions*", not action or advice. The "*restrictions*" must be (i) as to the use of the insured premises; and (ii) have the effect of the insured being unable to use those premises. The only matters in paragraph 18 which are capable of being such "*restrictions*" are Regulation 2 of the 21 March Regulations and Regulations 4 and 5 of the 26 March Regulations and their equivalents in Wales.[6]

83.5. The FCA's inapt phrase "*actions or advice … imposed*" in paragraph 44.2 speaks for itself.

83.6. As to sub-paragraphs 44.3 and 44.4, sub-paragraphs 83.1 and 83.2, with necessary changes, are repeated.

83.7. Hiscox does not plead to sub-paragraph 44.5.

84. Given that in paragraph 43, the FCA impliedly alleges that the definition of "*vicinity*" in RSA 4 applies to Hiscox 2, paragraph 45 is denied. Hiscox repeats paragraph 82 above.

L. Interruption or interference

85. As to paragraph 46:

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5 In some policies the last 18 words are replaced by the defined term "***notifiable human disease***", but that expression is defined in the same terms as the 18 words.

6 I.e. Regulation 2 of The Health Protection (Coronavirus, Business Closure) (Wales) Regulations 2020/326 and Regulations 4 and 6 of The Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020/353. References to Regulations 2, 4 and 5 hereafter include references to their Welsh equivalents. Northern Ireland and Scotland are outside the jurisdiction.

85.1. It is noted that the allegations are confined to all cases "*for which access to or use of the premises by the owners/employees/customers was material to the trading of the business*". It is not clear what "*material*" is intended to encompass, or whence it derives, but "*material to the trading of the business*" is not a concept relevant to Hiscox 1-4.

85.2. It is not the case that there is an interruption to a business or to the insured's business activities whenever access to the premises by the owners/employees/customers is material to trading and such access is denied or hindered. Moreover, in the case of the Public Authority clause, interruption is only relevant in the present case assuming the insured's inability to use the insured's premises, and it is denied, if it be intended to allege, that a mere "*material*" effect on the trading of the insured's business could constitute either an inability to use or an interruption.

85.3. The government measures referred to in the opening part of paragraph 46, did not amount in any case to a denial of access or hindrance in access as alleged in sub-paragraphs 46.1 or 46.3, as regards Hiscox 1-2 and Hiscox 4. None of the matters alleged in paragraph 18, including without limitation Regulation 2 of the 21 March Regulations or Regulations 4 and 5 of the 26 March Regulations, had the effect of denying or hindering access to the premises. Alternatively, there could be no denial of or hindrance in access except as regards those businesses forced to close premises or to cease business by those Regulations.

85.4. The government measures alleged in the opening part of paragraph 46 did not give rise to an "*inability to use*" as alleged in paragraph 46.2 as regards Hiscox 1-4. In order for there to be an inability to use the insured premises, such inability to use the premises must be the inability of the <u>insured</u>, not its customers, and the insured's inability must be an inability to use the <u>insured premises</u>. Inability (*a fortiori* given the term "*imposed*") involves some legal or physical obstacle which means that the insured cannot do something. That inability must be due to restrictions as to the insured premises imposed by a public authority. As pleaded in paragraph 14.2 above, of the matters alleged in paragraph 18 only Regulation 2 of the 21 March Regulations and Regulations 4 and 5 of the 26 March Regulations are capable of amounting to "*restriction*s" within the meaning of the Public Authority clause in Hiscox 1-4, and then only to the extent that they require closure of insured premises and/or cessation of the business carried on therefrom. Only in such circumstances could there be an "*inability*

to use" within the meaning of the clause. Accordingly the Public Authority clause could not apply to businesses in Categories 3 or 5 as set out in paragraph 19.

85.5. Hiscox does not plead to sub-paragraphs 46.4 to 46.7.

85.6. As to the further compendious plea in sub-paragraph 46.8, Hiscox repeats the above sub-paragraphs. Whether or not there was an interruption to the insured's business or business activities within the meaning of Hiscox 1-4 is a separate question from whether or not there was "*inability to use*" the insured premises within the meaning of the Public Authority clause or a denial of or hindrance in access to the insured premises within the NDDA clauses in Hiscox 1-2 and 4. The one does not necessarily follow from the other. It is averred that an "*interruption*" within the meaning of Hiscox 1-4 requires a cessation of the insured's business or business activities. A constriction in flow is not an interruption. Moreover, "*interference*" which is a well-known and available element of some Business Interruption cover is not mentioned. Paragraph 46.8 is accordingly denied.

85.7. Further or alternatively, in relation to businesses not forced to cease and premises not forced to close by the specific Regulations referred to in paragraph 85.4 above, none of the matters alleged in the first 3 lines of paragraph 46 prevented owners or employees travelling to work where it was not reasonably possible to do that work at home. Accordingly:

85.7.1. If that work could not reasonably be done at home but had to be done at the insured premises, there was no inability to use or denial of or hindrance in access within the meaning of Hiscox 1-4.

85.7.2. If the work could reasonably be done at home, the insured's business or business activities will not have sustained an interruption within the meaning of Hiscox 1-4.

85.8. In any event, whether or not as regards any particular business a finding can be made of any of "*denial of … or hindrance in access*", "*inability to use*" or "*interruption*" involves or may involve questions of fact as regards that business, which cannot be resolved in this action.

86. As to paragraph 47:

86.1. The only potentially relevant "*order*" for Hiscox 1-4 was any regulation or order which was mandatory, that is to say which had the force of law and compliance with which was compulsory. Of the matters referred to in the opening part of paragraph 47, only Regulation 2 of the 21 March Regulations and Regulations 4 and 5 of the 26 March Regulations are potentially relevant to Hiscox 1-4.

86.2. The opening part of paragraph 47 is far too broad in seeking to allege in principle an "*interruption*" or "*inability to use*" or "*denial of … or hindrance in access*" in the case of take away/mail order/online businesses, unless they were already pre-COVID-19 wholly take-away/mail order or online businesses.

86.3. As to sub-paragraphs 47.1 and 47.3, none of the matters alleged in the opening part of paragraph 47 was or imposed a denial of or hindrance in access to the premises within the meaning of Hiscox 1-2 or Hiscox 4. There was no order not to access premises and access to the premises was not hindered or impeded. Alternatively, there could be no denial of or hindrance in access except as regards those businesses forced to close premises or to cease business pursuant to the Regulations referred to in paragraph 86.1 above.

86.4. As to sub-paragraph 47.2, it is admitted that Regulation 2 of the 21 March Regulations and Regulations 4 and 5 of the 26 March Regulations could cause an "*inability to use*" within the meaning of Hiscox 1-4.

86.5. Hiscox does not plead to sub-paragraphs 47.4 to 47.7.

86.6. As to sub-paragraph 47.8, Hiscox repeats paragraph 85.7 above.

86.7. Sub-paragraphs 85.7 and 85.8 above are repeated.

87. As to paragraph 48, the repetition of paragraphs 18.11 to 18.13 is noted but the relevance is denied.

88. Hiscox does not plead to paragraph 49.

M. Exclusions

89. As to paragraph 50, Hiscox does not contend that any generally operative exclusions apply and notes the last sentence of paragraph 50.

90. Hiscox does not plead to paragraphs 51 and 52.

N. Causation

91. Paragraph 53 is denied.

91.1. As to paragraph 53.1, the supposed single proximate or dominant cause of all the losses (wrongly assumed all to be caused by the same thing in the FCA's formulation) is in truth a portmanteau of different causes. The supposed unitary cause has not been identified on any objective basis, but has been fashioned for the purposes of maximising recovery.

91.2. As to much of the losses, the true or proximate cause is the pandemic of COVID-19, including the impact which COVID-19 had on economic activity and public confidence.

91.3. As to at least the great majority of the losses claimed, the causes are the pandemic of COVID-19 including the impact which it had on economic activity and public confidence, together with those government measures taken in response which did not form part of the insured peril.

91.4. An insured may be able to prove that part of the loss which it has sustained was caused by an insured peril, but the burden of proof is on it to do so.

91.5. The loss proximately caused by the limited insured perils under Hiscox 1-4, (as distinct from COVID-19 and its impact on the economy and public confidence, and the government measures taken in response, nearly all of which fall outside the NDDA and Public Authority clauses), will have been minimal.

91.6. An insured under Hiscox 1-4 must, in order to recover, be able to show that that loss was "*solely and directly*" caused by an insured peril.

92. Paragraph 53.2 is denied. On the contrary, one can separate out and treat as distinct the different causes there identified, which, it is averred, are not exhaustive as to possible causes of loss.

93. The approach of the FCA yields the obviously incorrect result that there is no difference in the amounts payable under (i) Hiscox 1-4, which contain carefully defined insured perils

and provide an indemnity only to the extent of loss which would not have occurred but for the occurrence of those perils; and (ii) the policies of a hypothetical insurer which covered all the consequences of pandemics in the broadest and most explicit terms.

94. As to paragraph 54, the allegation that there was a national pandemic is admitted but is unspecific as to timing.

95. As to the sub-paragraphs of paragraph 54:

   95.1. Sub-paragraph 54.1 is denied. As regards Hiscox NDDA cover and without prejudice to Hiscox' case as to the meaning of "*incident*" and "*imposed*" (in paragraphs 78 and 80 to 82 above), the Hiscox NDDA cover requires an incident within a particular radius or vicinity. Further, the imposition of the denial of or hindrance in access has to <u>result</u> from the incident <u>within</u> the one mile radius or vicinity. This did not happen here. Since any imposition would have resulted from events at a nation-wide level, there is no cover.

   95.2. Paragraph 54.2 is denied. Hiscox repeats paragraph 70 above. Amongst other points, the supposed necessity for other wording or an exclusion or carve-out presupposes that the cover would otherwise extend as alleged by the FCA. There is no need for it, if the cover does not so extend.

   95.3. Paragraph 54.3 is denied. The fact that there is reference to denial of or hindrance in access "*imposed… by order of the government*" in the Hiscox NDDA wording in Hiscox 1 -2 and Hiscox 4 does not mean the policies contemplate cover in the case of a wide-area/national pandemic; Hiscox repeats paragraph 95.1 above.

96. Paragraph 55 is denied. It is a further example of the FCA approaching interpretation (wrongly) by presuming the existence of cover. The Hiscox Public Authority clause (Hiscox 1-4) requires, amongst other things, restrictions imposed by a public authority following an occurrence of a notifiable disease. It is clear from the structure of the clause that it is the restrictions causing the interruption which matter. It is therefore incorrect to treat the cover as "*premised*" on disease, but even if it is formally correct, there is no absurdity as alleged. The absurdity argument can only be put forward if the assumption is made that there ought to be coverage in relation to the current pandemic. The Public Authority clause properly construed is intended to and can and does provide coverage in many situations.

97. As to paragraph 56:

97.1. The first sentence is denied. General reference to and invocation of the contracting parties' intentions assumes what it seeks to establish and is without basis. Hiscox 1-4 cover losses "*solely and directly*", i.e. proximately and only, caused by the relevant insured peril(s) and provide an indemnity on that basis and to that extent. It is that which is the contracting parties' intention. The supposed "*indivisible and interlinked strategy and package of national measures*" are manifestly no such thing, as, for example, paragraph 18 and the different stages of the chronology there set out and pleaded to above show. (Such a chronology moreover only records the events to date. Presumably, on the FCA's case, the "*indivisible and interlinked strategy and package of national measures*" extend indefinitely into the future.) More importantly, for the purposes of determining questions of causation under policies which provide limited cover under defined insuring clauses, the FCA's omnibus approach to the events which occurred is particularly inappropriate, and obviously is put forward simply to maximise cover. The question is which if any insured perils occurred under any of Hiscox 1-4. Any counterfactual should and must look at what would have happened but for such insured perils as occurred, since that is the only way of giving effect to the parties' presumed intention that the policies should provide an indemnity no wider and no narrower than the ambit of the insured perils.

97.2. The second sentence of paragraph 56 is denied. It is not an accurate characterisation of what happened. The only measures "*imposed*" were laws (including regulations) which were mandatory, that is to say, which had the force of law and compliance with which was compulsory. Further the distinction between mandatory closure or cessation and advisory or guidance measures is a common-sense one which is reflected in the policy wording – e.g. "*imposed*" as pleaded above and "*restrictions*".

97.3. As to sub-paragraph 56.1, and as set out in paragraph 55 above, in his address on 16 March the Prime Minister described his statements as advice. It was not mandatory in the above sense or at all, and did not purport to be; it is of no relevance as a trigger for Hiscox and is not an insured peril. The fact that different matters are addressed in one speech or at one time or in one Act of Parliament or one statutory instrument does not make them the same; nor does it make them the same trigger or same insured peril for the purposes of Hiscox 1-4.

97.4. As to sub-paragraphs 56.2 to 56.4, sub-paragraph 97.3 above is repeated, with necessary changes, in relation to the Chancellor of the Exchequer's statement on 17 March and the Prime Minister's addresses on 20 and 23 March. Further as to sub-paragraph 56.2, nothing there or in paragraphs 18.11 to 18.13 is relevant to the construction of Hiscox 1-4.

97.5. As to sub-paragraph 56.5, it is admitted that the Health Protection (Coronavirus Restrictions) (England) (2020) is one statutory instrument and that it contains provisions requiring closure of certain businesses and restricting movement and gatherings. It is denied that it comprises one set of restrictions. Some of the restrictions were carried forward from the 21 March Regulations. Further and in any event, the third sentence of paragraph 97.3 above is repeated. The same admission and denial, with necessary changes, applies to the Health Protection (Coronavirus Restrictions) (Wales) 2020.

97.6. Sub-paragraph 56.6 is admitted, but the relevance of matters being dealt with together in one Act is denied for the reasons set out above.

97.7. As to paragraph 56.7, it is admitted and averred that not all businesses were subject to mandatory closure and that others were simply subject to Government advice. The second and third sentences are admitted. It is denied that mandatory closure can be equated with advice or closure following advice, either at all or for the purposes of Hiscox 1-4.

97.8. As to paragraph 56.8, the paragraph again proceeds on a presumption of cover in the current situation and argues from that premise. To the extent that there are difficulties with separation of local and non-local actions, this indicates the cover was not intended to cover the present type of situation. The "but for" counterfactual and causation look at what would have happened had the insured peril not occurred, because under indemnity insurance the obligation of the insurer is to hold the insured harmless against loss caused by the insured peril.

98. As to Paragraph 57:

98.1. The paragraph makes general allegations about multiple causes. It is assumed that it is intended to refer to multiple causes of loss, although that is not specified. The

paragraph does not identify what causes of loss are being referred to and is to that extent too vague to be understood.

98.2. Further, the paragraph and the entire Particulars of Claim proceed wrongly on the basis that loss is unitary and indivisible as to cause and/or as to cause over time and in other respects, notwithstanding mention of various potential types of loss in the FCA's draft Assumed Facts.

98.3. Yet further, the paragraph appears to make allegations of actual fact which depend on the circumstances of any particular case.

98.4. A concurrent interdependent cause of loss occurs where there are two or more proximate causes of loss neither (or none) of which would have been sufficient to cause the loss on their own. A concurrent independent cause of loss is where each is sufficient to cause the loss on its own. What matters is the function of a cause as a cause of loss.

98.5. Under Hiscox 1-4, what was covered was loss "*resulting solely and directly from*" the insured peril, and thus loss or any part of it that was caused by concurrent interdependent or independent causes, was not part of the indemnity contracted for, and is not covered.

98.6. Further, as a matter of law and in any event, if there are concurrent independent causes of any element of insured loss, one insured and one (or more) not insured <u>or</u> excluded, the insured is not entitled to recover such loss.

99. As to paragraph 58:

99.1. As a matter of general insurance law it is admitted and averred that concurrent interdependent proximate causes of loss do not prohibit recovery, all other things being equal, if one proximate cause is insured and the other causes are uninsured.

99.2. That position may be modified by contract and in the case of Hiscox 1-4 there was such a modification as pleaded in paragraph 98.5 above, with the effect that the insurance indemnifies only against loss "*solely and directly*" caused by the insured peril, not loss concurrently caused by the insured peril and another cause.

99.3. Save as aforesaid paragraph 58 is denied.

100. As to paragraph 59, what the "*causal relations*" are between is not specified, but paragraph 59 is denied in any event. Each of Hiscox 1-4 requires (amongst other things) loss "*solely and directly resulting from"* the insured peril meaning, proximately and only caused by the insured peril, not some lesser causal linkage. The relevant counterfactual is what the position would have been had the insured peril not occurred.

101. As to paragraph 60 it is averred that the word "*following*" in the Hiscox 1-4 Public Authority clause has a temporal meaning only, and connotes an event which is "*part of the factual background*".

Denial of access and public authority restriction clauses

102. As to paragraph 62,

102.1. As to "*interruption*", which is the only relevant term for Hiscox 1-4, Hiscox repeats paragraphs 85 to 87 above. The interruption alleged is wholly unspecified, and the paragraph is too vague to that extent

102.2. As to inability to use, Hiscox repeats paragraphs 83 and 85 to 87 above.

102.3. As to "*incident*", Hiscox repeats paragraphs 80 to 82 above.

102.4. The paragraph simply cites "*inability to use*" and "*incident*" does not accurately reflect the wording which follows, in either of the Public Authority clauses or NDDA clauses in Hiscox 1-4. One cannot in the context of causation separate those terms from what follows them.

102.5. Without prejudice to the foregoing, there was as regards the NDDA clauses no interruption caused by any "*incident*" within the meaning of Hiscox 1-2 or Hiscox 4 in any case. Further, no denial of or hindrance in access was imposed as a result of an "*incident*" within a one mile radius of the premises. As regards the Public Authority clauses, there could, potentially and depending on the facts, be an interruption caused by an inability to use the premises within the meaning of the clause, if Regulation 2 of the 21 March Regulations or Regulations 4 and 5 of the 26 March Regulations required closure of the premises or cessation of the relevant business.

103. Hiscox does not plead to paragraph 63.

104. Paragraph 64 is denied as regards Hiscox 1-2 and Hiscox 4.

104.1. The relevant authority action is an unspecific term; Hiscox repeats paragraph 86 above as to the only potentially relevant "*authority action*" for the purposes of Hiscox 1-2 and Hiscox 4, which are the policies the subject of this paragraph.

104.2. It is denied that the relevant authority action was itself an "*incident*".

104.3. It is denied, in any event, that there was an "*incident*" which was everywhere including within the vicinity of the premises (Hiscox 2) and within 1 mile of them (Hiscox 1-2, Hiscox 4).

104.4. Hiscox repeats paragraphs 80 to 82 above.

105. Paragraph 65 is denied.

105.1. The wording of paragraph 65 does not reflect the wording of Hiscox 1-4.

105.2. As pleaded above, the imposition of the denial of or hindrance in access must result from the incident within the one mile radius or vicinity so that, if which is denied, an incident within the meaning of Hiscox 1-2 or Hiscox 4 could be both within and without the one mile radius or vicinity of the premises, the imposition had to result from the incident insofar as within the one mile radius or vicinity. This did not occur.

105.3. Hiscox repeats paragraphs 85 to 86 above as to denial of or hindrance in access, and paragraphs 80 to 82 above in relation to an "*incident*" within 1 mile of and the vicinity of the premises.

106. Paragraph 66 is denied.

106.1. The term "*inability to use*" is unspecified and appears to assert a matter of fact. As to "*inability to use*", Hiscox repeats paragraphs 83, 85 and 86 above.

106.2. Further, Hiscox repeats paragraphs 85 and 86 above as to "*restrictions*", and paragraphs 75 and 77 above as to (i) "*occurrence*" and (ii) "*within one mile* ".

Disease clauses

107. Paragraph 67 is denied. The correct approach is to ascertain, as a matter of construction, what the insured peril covers. There was no need for insurers to incorporate an exclusion of "*a pandemic/epidemic*" in Hiscox 1-4, since none was necessary.

108. Paragraphs 68 and 69, the latter of which adopts paragraph 68 *mutatis mutandis* in relation to Hiscox 4, are denied. Without prejudice to the generality of that denial:

    108.1. The potentially relevant public authority "*action*" was only Regulation 2 of the 21 March Regulations and Regulations 4 and 5 of the 26 March Regulations. Paragraphs 85 and 86 above are repeated.

    108.2. Paragraphs 85 to 87 above are repeated as to "*interruption*", the sole relevant term, and paragraphs 75 and 77 above are repeated as to "*occurrence*".

    108.3. It is not admitted that any public authority action "*follow[ed]*" in point of time an occurrence of a notifiable human disease within one mile of the business premises.

    108.4. As to paragraphs 28.2, 41.3 and it is assumed paragraph 41.4, which are repeated by the last sentence of paragraph 68, Hiscox repeats, respectively paragraphs 65 and 77.3 above.

109. Hiscox does not plead to paragraph 70.

Cause of loss

110. Paragraph 71 is denied.

    110.1. The "*assumed loss*" referred to is not identified or explained. Various types of loss are referred to in the FCA's draft Assumed Facts, but it is not clear if they are intended to be referred to here.

    110.2. The assumed loss is, in any event, treated as indivisible in all respects, which is an unjustified assumption and is or may be incorrect in all or many cases; different loss may have been caused by different causes or by a combination of different causes and the causes of loss suffered at one time may be different from losses suffered at other times.

110.3. Paragraph 71 as pleaded involves an allegation of fact, namely, as regards Hiscox 1-4, that the assumed loss "*resulted solely and directly from*" the interruption "*to*" (not "*with*" as pleaded) the business or insured's activities, which it is alleged was the only or main proximate cause of loss.

110.4. It is assumed that by "*main*" proximate cause it is intended to mean the only legally relevant proximate cause.

110.5. Without prejudice to the foregoing, Hiscox repeats paragraph 16 above.

111. Paragraph 72 is denied.

111.1. Hiscox repeats paragraph 107 above and repeats as necessary the various paragraphs above dealing with the different elements of the Public Authority clause, which is not in all respects accurately reflected in paragraph 72.

111.2. It is denied that there can be no "*realistic*" counterfactual but that set out as the FCA's primary case as set out in paragraphs 4.3 and 77, namely a situation in which there was no COVID-19 in the UK and no Government advice, orders, laws or other measures in relation to COVID-19.

111.3. The allegation that the disease will always, by definition, have occurred in addition to the "*orders and advice*" does not mean that Hiscox' approach would leave the cover with no realistic scope in "*any*" or even a majority of situations. On the contrary, the cover would apply in all situations contemplated by the Public Authority clause. Supposing, for example, an outbreak of legionnaire's disease or rat infestation at the premises, or a murder in the same street, it is likely that it will be the restriction rather than the outbreak or murder itself that will be the sole and direct cause of the loss. Further, if and insofar as the outbreak or murder itself causes people to stay away, such losses are not and should not be covered under the Public Authority clause, because that clause (as its title suggests) insures against interruption to the business caused by the requisite type of mandatory government action. The FCA's argument is looking solely at the situation which has occurred and, if anything, highlights and reinforces the fact that the cover was not intended to apply in this situation.

112. Hiscox does not plead to paragraph 73.

The "but for" test and trends clauses

113. Paragraph 74 is denied.

113.1. As to the first sentence, the question is whether the insurer has contracted to indemnify against the loss. There is no reason why the "but for" test should not be applied. The indemnity in any indemnity insurance and Hiscox 1-4 is against losses caused by the insured peril, which requires the court to ask what would have happened, if the insured peril had not occurred. This follows from in particular but without limitation the following:

113.1.1. General principles of causation which require that, with minimal exceptions not applicable here, the "but for" test is to be applied as a necessary condition of recovery. It is not absurd or contrary to common sense to apply it, as alleged or at all.

113.1.2. The nature of indemnity insurance, which does not require insurers to hold an insured harmless against losses which would have been suffered if the insured peril had not occurred.

113.1.3. The fact that the application of any other test fails to give effect to the parties' presumed intention that the policies should provide an indemnity no wider and no narrower than the ambit of the insured perils.

113.1.4. The "*loss of income*" clause in Hiscox 1-4, which necessarily implies a "but for" test; the clause is silent as to the counterfactual contemplated by "*the income it is estimated you would have earned during that period*", but the counterfactual can only be the income it is estimated the insured would have earned during that period in the absence of the insured peril. There is no other possibility.

113.1.5. The explicit language of all of the trends clauses in Hiscox 1-4, which are set out in Schedule 4 to the Particulars of Claim.

113.2. As to the second sentence, the correct operation of the "but for" test requires considering the position "but for" the insured peril. The FCA's position wrongly runs together both (i) events or matters which are interlinked or interdependent *inter se* and (ii) interdependent or independent <u>causes of loss</u>. The question of "realism" or "artificiality" ignores the ambit of the insured perils, begs the question and/or assumes

cover. In any event, a counterfactual which, for example, assumes no restrictions of the type relevant to Hiscox 1-4 but the existence of COVID-19 and its impact on the economy and public confidence and/or other government restrictions and guidance or advice, is not unrealistic or artificial, as to which Hiscox pleads further in paragraph 119 below.

114. As to paragraph 75:

114.1. Hiscox does not plead to sub-paragraphs 75.1 and 75.2.

114.2. As to paragraph 75.3, on the true construction of the policies in question, the trends clauses are not limited to physical/property damage but are to be read as including a reference to (amongst other things) restrictions. Hiscox will rely in particular but without limitation on the trends clauses (including other trends clauses), the nature of the cover, the relevant insuring clause, the opening words of the "*How much we will pay*" clause, the loss of income clause under the "*How much we will pay*" clause, and the under-insurance clause. As to the plea that the trends clauses in Hiscox 1 apart from 8671 are optional, the same is admitted as regards the first sentence of the trends clause; the second (and most relevant) sentence of the trends clause, however, ("*The amount that* ***we*** *will pay* [etc]…") is incorporated and applicable or is, in any event, an aid to construction.

114.3. Paragraph 75.4 is denied as regards Hiscox 1 and Hiscox 4 (20155). Without prejudice to the generality of that denial, Hiscox relies upon the second sentence of the trends clauses in each case and the other matters referred to in paragraph 114.2 above.

114.4. As to paragraph 75.5, all trends clauses in Hiscox 1-4, not just those identified in sub-paragraph 75.5, are applicable to non-damage cover and all are relevant to the causation issue. None are inapplicable or otherwise irrelevant (e.g. on alleged grounds of providing for upwards adjustment only).

115. Paragraph 76 is denied.

115.1. Paragraph 114.4 above is repeated.

115.2. The express purpose of the trends clauses in Hiscox 1-4 is to ensure that the amount paid reflects as near as possible the result which would have been achieved if the

insured peril had not occurred. The trends clauses are not limited or qualified to refer to "*extraneous*" or "*independent"* matters in the way the FCA suggests.

116. As to paragraph 77, the proper counterfactual for the purposes of the causation test generally and under the applicable trends clauses is what would have happened but for the relevant insured peril(s). The counterfactual set up in paragraph 77, which seeks completely to erase the occurrence of COVID-19 in the UK, and therefore all Government advice, orders, laws or other measures in relation to it, ignores the limited insured peril(s) under Hiscox 1-4. The FCA's formulation conflates (i) insured perils and things which are not insured perils; (ii) the insured peril(s) and the underlying cause of the insured peril(s). Further, it would not be relevant even if other matters were in some senses and from some perspectives capable of being described as "*interlinked*" if (i) those other matters are not the insured peril(s); (ii) those other matters caused loss; and (iii) it is possible, as it is, to conceive of a counterfactual in which the insured peril(s) did not occur.

117. The proper counterfactual is not therefore, as alleged by the FCA, one which assumes an absence of all the matters identified in paragraph 77. The proper counterfactual for Hiscox 1-4 is one which assumes the existence of COVID-19 in the UK, its impact on the economy and public confidence, and government measures. All that is subtracted for the purposes of the counterfactual is the mandatory restrictions resulting in the inability to use or denial of or hindrance in access causing interruption, as covered by Hiscox 1-4.

118. Alternatively, if and to the extent Hiscox is wrong in any of its submissions about the ambit of the insured peril(s), that which is subtracted for the purposes of the counterfactual is enlarged accordingly and to that extent.

119. As to the FCA's allegation that any counterfactual other than its own is not "*realistic*", it is averred that:

119.1. The proper (for Hiscox 1-4) counterfactual as pleaded in paragraph 117 above is easily imagined and not far-fetched.

119.2. It actually happened in the UK as regards COVID-19, prior to the mandatory Regulations, as to which Hiscox rely on the matters set out in RSA's proposed additional Agreed Facts in this respect.

119.3. It occurred in relation to the previous flu pandemics 1957 and 1968-9 in the UK, as to which Hiscox relies on the matters set out in its proposed additional Agreed Facts Document 7 and the supporting materials in this respect as sent to the FCA on 17 June.

119.4. It was not inevitable that the UK government would take the mandatory steps which it did, and there were and are powerful voices urging the government to do no such thing.

119.5. In broad terms, which are all that is relevant, the Hiscox counter-factual occurred in Sweden in relation to COVID-19, as to which Hiscox relies on the facts set out in its proposed additional Agreed Facts Document 6 sent to the FCA on 17 June. Even in the absence of relevant mandatory measures, many businesses in Sweden may have experienced business or trading losses. As to this and for the avoidance of doubt, Hiscox does not seek to prove in the Test Case that any particular number of businesses in Sweden suffered such losses, or the amount of any losses, or there was in fact a reduction in economic activity of any actual amount in Sweden, but rather that there may have been a reduction of some amount, and that businesses may have suffered such losses.

119.6. The Hiscox counterfactual will almost certainly happen again after the mandatory regulations are lifted.

120. Further, the matters pleaded in paragraph 119 above are relevant to the question whether all the losses sustained by insureds are subject to the same causal analysis, as to which paragraph 98.2 above is repeated.

121. Paragraph 78 is denied. As regards Hiscox 1-4, the valuation of loss does fall to be reduced on the basis of the counterfactual pleaded in paragraph 117 above and on the basis that at least the great majority of losses would have been suffered but for the occurrence of the insured peril.

122. Further, the proximate cause test in itself and the effect of the wordings of Hiscox 1-4, including the "*solely and directly*" provision, prevent or reduce cover on the same basis as set out in the previous paragraph.

123. Paragraph 79 is denied and is in any event likely to be of no or minimal significance as regards Hiscox 1-4 because of the very small area of the putative "island".

O. Cover

124. As to paragraph 80:

(1) Sub-paragraphs 80.1 to 80.4 are denied.

(2) Sub-paragraph 80.5 is noted.

P. Declarations

125. As to the FCA's entitlement to the declarations sought and so far as they concern Hiscox and in each case for the reasons pleaded above:

125.1. Declaration (1): entitled.

125.2. Declarations (3), (6), (7), (8), (9), (10), (11) a, b, c and h, (12) a, b, c and h, (15), (16), (17), (18): not entitled.

125.3. Declaration (19): Hiscox pleads to the particular declarations sought in the Annex 1 hereto.

125.4. Hiscox does not plead to the balance of the declarations sought, which do not concern it.

126. In the premises the FCA is not entitled to the relief claimed or any other relief.

127. Save as is expressly admitted or not admitted herein, each and every allegation in the Particulars of Claim is denied as if the same were herein set out and traversed *seriatim*.

JONATHAN GAISMAN QC

ADAM FENTON QC

MILES HARRIS

HARRY WRIGHT

The Fourth Defendant believes that the facts stated in this Defence are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

I am duly authorised by the Fourth Defendant to sign this Defence.

Signed:

Full name: Joanna Margaret Page

Position or office held: Partner, Allen & Overy LLP

DATED this 23rd day of June 2020

ANNEX 1 – Hiscox's response to Schedule 4 of the Particulars of Claim

Hiscox 1 (Hiscox type 1 of 4)

1. As to the first bullet point, Hiscox repeats paragraphs 3 to 72 of the Defence.

2. The second bullet, relating to Section I, is denied. Hiscox repeats paragraphs 73 to 76 of the Defence.

3. The third bullet, relating to Section J, is denied. Hiscox repeats paragraphs 77 to 82 of the Defence.

4. The fourth bullet, relating to Section K, is denied. Hiscox repeats paragraphs 83 to 84 of the Defence.

5. The fifth bullet, relating to Section L, is denied. Hiscox repeats paragraphs 85 to 88 of the Defence.

6. The sixth bullet, relating to Section N, is denied. Hiscox repeats paragraphs 91 to 123 of the Defence.

7. In the circumstances, the FCA is not entitled to any of the declarations sought.

8. As to the table summarising some of the policy provisions and declinature letters, the policies and provisions cited are admitted. Hiscox will refer to the full wordings of the policies as necessary. It is admitted that the Declinature letters 1 and 2 are examples of letters sent by Hiscox, that they provided, amongst other things, as alleged, and that they were sent by Hiscox.

Hiscox 2 (Hiscox type 2 of 4)

9. Paragraphs 1 to 6 of this Annex 1 are repeated (*mutatis mutandis*).

10. In the circumstances, the FCA is not entitled to any of the declarations sought.

11. Paragraph 8 of this Annex 1 is repeated (*mutatis mutandis*).

Hiscox 3 (Hiscox type 3 of 4)

12. Paragraphs 1, 2 and 4 to 6 of this Annex 1 are repeated (*mutatis mutandis*).

13. In the circumstances, the FCA is not entitled to any of the declarations sought.

14. Paragraph 8 of this Annex 1 is repeated (*mutatis mutandis*).

Hiscox 4 (Hiscox type 4 of 4)

15. Paragraphs 1 to 6 of this Annex 1 are repeated (*mutatis mutandis*).

16. In the circumstances, the FCA is not entitled to any of the declarations sought.

17. Paragraph 8 of this Annex 1 is repeated (*mutatis mutandis*).