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

Appeal No. 2020/0179-0184

BETWEEN:

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

Appellants

-and-

THE FINANCIAL CONDUCT AUTHORITY

Respondent

[(1) HOSPITALITY INSURANCE GROUP ACTION]

[Intervener]

-and-

(2) HISCOX ACTION GROUP

Intervener

Appeal No. 2020/0177-0178

AND BETWEEN:

THE FINANCIAL CONDUCT AUTHORITY

Appellant

-and-

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

Respondents

-and-

[(1) HOSPITALITY INSURANCE GROUP ACTION]

[Intervener]

(2) HISCOX ACTION GROUP

Intervener/Appellant

FCA'S WRITTEN CASE
ON ITS APPEAL

A. INTRODUCTION

1. This is the leapfrog appeal in the COVID-19 business interruption test case, probably the most important insurance decision of the last decade, and a decision of substantial importance to many thousands of businesses who are watching the progress of this case with, in some cases, desperate interest.

2. The FCA (putting the arguments of insureds) is Respondent to extensive appeals from the insurers on which the Court will have received numerous written Appeal Cases alongside this one, following a first instance decision of Flaux LJ and Butcher J by Judgment on 15 September 2020 and final Orders made following a consequentials hearing on 2 October 2020. That Judgment and those Orders paved the way for many insurance policies to pay indemnities on COVID-19 business interruption claims, after dismissing the insurers' key arguments on causation and the scope of the insured peril in relation to many of the policies, as well as finding for the FCA on various other points relating to coverage triggers and exclusion clauses.

3. But the FCA was not successful on all points, and amongst the points on which the FCA was unsuccessful, there are four that provide substantial obstacles to indemnity for a large number of insureds. For each of the four Grounds, the Court took something away with one hand after giving more substantially and in detail with the other. These four Grounds address inconsistencies and errors that crept in to a lengthy and impressive Judgment covering a huge range of issues across a large number of policies led by 21 lead wordings of eight insurers. The FCA asks the Supreme Court to correct those inconsistencies and errors.

4. Grounds 1 to 3 relate almost entirely to prevention of access/hybrid wordings, and if unreversed may have the effect of reducing the commercial utility of such wordings almost to vanishing point for many insureds. Ground 4 relates to QBE2-3[1] disease wordings, which the Court misconstrued so as to be inapplicable to a wide outbreak, when they should have construed them as they correctly construed QBE1[2] and all other disease wordings:

[1] QBE2 appears at {C/13/824}. QBE3 appears at {C/14/934}.
[2] QBE1 appears at {C/12/715}.

4.1. The first issue (**Ground 1**) is whether, in adjusting a claim, an insurer can in principle reduce the indemnity payable where one element of a composite insured peril, for example the COVID-19 outbreak in the United Kingdom, has caused a reduction in revenue prior to the policy being triggered by the occurrence of other elements of the composite peril (e.g. public authority action responding to the COVID-19 emergency), notwithstanding that: (a) the Court below has held (correctly) that an insurer cannot reduce the indemnity merely because but for the composite insured peril there would still have been present certain elements of that peril reducing revenue during the indemnity period; and (b) the Court below disapproved the key High Court decision relied upon by insurers, *Orient-Express Hotels Ltd v Assicurazioni Generali SpA* [2010] EWHC 1186 (Comm), [2010] Lloyd's Rep IR 531[3].

The Order and Judgment below permit the 'trends' or 'circumstances' clauses on which the Defendants relied in this regard to operate in a way which may dramatically reduce cover under prevention of access and hybrid clauses for a large portion of claims[4], and is contrary to their commercial purpose and/or to the intentions of the parties.

4.2. The second issue (**Ground 2**) is whether prevention of access/hybrid wordings requiring 'actions' of a public authority (or that restrictions have been 'imposed' or closure 'enforced') are triggered by instructions or advice of Government falling short of legislation and not having the force of law. This issue determines whether a business which was explicitly told to close, or whose customers were told to avoid it, by Prime Ministerial statements to the nation, can claim under these wordings. The Order and Judgment below give an uncommercially and over-formalistically narrow scope to these clauses.

4.3. Ground 2 interacts with Ground 1 because it is especially when operating together that the two points underlying these grounds may reduce the cover for prevention of access/hybrid wordings (and do so, it may be argued by insurers, almost to zero). The Court below's approach to the issue underlying Ground 2 has the effect of delaying the date of the trigger until the date of legislative reaction to COVID-19 and so shortens the period of indemnity. However, Ground 1 dramatically aggravates this by allowing insurers to argue for a reduction of the *extent* of the indemnity (for post-trigger losses)

[3] {E/31/921}.

[4] Irrespective of the outcome of this appeal, the FCA should not be taken to accept that the lower Court's findings and declarations on the Pre-Trigger Peril Point permit a reduction of the indemnity to the degree and in the range of cases that the insurers appear to contend, or to be making statements of how the FCA considers the Court's findings if the appeal is dismissed should be applied. This appeal is without prejudice to any particular disputes that the FCA or insureds and insurers may have as to how the lower Court's findings are to be applied in a particular case including what if any pre-trigger peril elements can amount to a trend or other circumstance.

by reference to pre-trigger COVID-19 effects, such that the effects of all the pre-legislative COVID-19 responses (by Government and others) are not only not covered (because pre-trigger) but reduce the cover after the trigger date. It is the combination of the issues underlying Grounds 1 and 2 that mean that an insurer may assert that a business ordered to close by the Government, or that closed voluntarily due to the effects of COVID-19 on business and inessential journeys, may recover nothing even after being mandated to close by legislation.

4.4. The third issue (**Ground 3**) is whether business interruption wordings requiring 'prevention of access' or 'inability to use' are satisfied by partial rather than total closure of the business or premises. This issue determines whether (for example) a restaurant that is prohibited from feeding customers on its premises, but can continue to send food by delivery service and does so, can claim under these wordings. Again, the Order and Judgment below give an uncommercially narrow scope to these common clauses that are intended to cover interference with the operation of businesses through the insured premises including where it falls short of total cessation.

4.5. The fourth issue (**Ground 4**) is whether, in contrast to all the other disease clause wordings which the Court considered, QBE2-3 were only intended to cover local-only outbreaks and, if so, how the counterfactual is to be applied when calculating the indemnity (including by reference to 'trends' or 'circumstances' clauses). For example, where cover is triggered by the occurrence of a notifiable disease within a 25-mile radius of the premises, is the insured covered only to the extent interruption was caused by the disease within that area? The Court below wrongly concluded that, as the sole exceptions to all the other disease wordings before it, QBE2-3 were only intended to cover local-only outbreaks and that the counterfactual should assume the occurrence of COVID-19 beyond the policy area. This point is the flipside of the Insurers' appeals to the effect that the Court was right about QBE2-3 and wrong about all other disease clauses.

B. GROUND 1: PRE-TRIGGER PERILS

5. It is the combination of two factors in this case that raise the novel causation-related points.

6. The first is that the insurance being considered is business interruption ("**BI**") insurance (which has not previously been considered in any detail by the Supreme Court or House of Lords). The standard coverage under BI insurance is that triggered by property damage but extensions provide additional cover against other causes of BI. Counterfactual issues do not typically arise where the indemnity is for the value of property damaged at a particular moment in time by a

fire, flood or similar.[5] In contrast, as the authors of Mance et al (eds), *Insurance Disputes* (3rd edn, 2011) observe at para 19.132 (emphasis added): "*A business interruption extension to an all risks property policy is quite different from the rest of the policy, which would usually deal with tangible, identifiable forms of property and any material loss sustained at a fixed point in time. The business interruption extension is concerned with intangibles and hypotheticals, namely the effect of damage on trading results which might have materialised over a future period had the damage not occurred.*"[6]

7. The second factor, as identified by the Court below, is the composite nature of the prevention of access and hybrid clauses, requiring as the trigger for cover a combination of events and circumstances, such as prevention of access due to public authority action which is itself due to an emergency likely to endanger life. This raises two related key issues of causation and indemnity measurement:

   7.1. The first (largely resolved in the FCA's favour) is a question of how one conceives of the insured peril for causation purposes. Insurers contended below for the application of a "but for" test both as the primary causation test (notwithstanding that, as the Court rightly held, the appropriate test is that mandated by section 55(1) of the Marine Insurance Act 1906[7], namely to identify the proximate cause) and by invoking trends clauses (which do pose a "but for" question). They also sought by the "but for" test to create competing causes out of what the Court rightly held were causes which fell within the ambit of the insured risk or peril and cannot be separated out into competing causes for indemnity purposes. In particular, insurers sought (erroneously) to deploy a "but for" test so as to confine the indemnity in the case of a composite peril by separating the prevention of access or applicable government restriction from the COVID-19 outbreak and emergency and treating the latter as part of the counterfactual. This can usefully be called **the Counterfactual Point**. It matters because many businesses may have suffered a reduction in turnover in consequence of COVID-19 during the period after the policy was triggered, even had there been no closure advice or the 21 and 26 March Regulations[8] (i.e. no trigger of the policy) (e.g. Judgment [344]), albeit calculating the amount of any such reduction would be a complex exercise and may in many cases be impossible. (A related point arises on disease clauses requiring the occurrence of disease within a distance of the premises: does one ask what loss would not have resulted but

[5] The indemnity is measured by valuing the property *at the date of the incident*, primarily by reference to the insured's intention for the property *immediately before and at the date of the incident*: *Sartex Quilts & Textiles Ltd v Endurance Corporate Capital Ltd* [2019] EWHC 1103; [2019] Bus LR 2255 at paras 57 and 76, {E/36/1010} at 1022 and 1027, affirmed [2020] EWCA Civ 308, [2020] BLR 379, {E/37/1046}. The insurer's breach is in the very occurrence of the property damage to the property: [2020] EWCA Civ 308 at para 35.
[6] {E/48/1375}.
[7] {E/6/94}.
[8] The 21 March Regulations appear at {E/2/12}. The 26 March Regulations appear at {E/3/17}.

for the broader disease, or only that part of the disease that was within the 25 miles/1 mile of the premises with the disease beyond this area still present?)

7.2. The second (which gives rise to FCA appeal Ground 1) arises from the fact that different elements of the peril will emerge and the clauses contemplate that they will emerge sequentially rather than all at the same instant. That necessarily means that at least one of the elements of the peril (i.e. the disease or the emergency) will already have been present and may have affected revenue prior to the cover being triggered with the 'full house' of all the elements of the combined peril. Should this affect recovery? This can usefully be called the **Pre-Trigger Peril Point**.[9] It matters because some businesses may have suffered a reduction in turnover in consequence of the COVID-19 pandemic before any closure advice or the 21 and 26 March Regulations, i.e. before the trigger of prevention of access or hybrid policies for many insureds: Judgment [344].

The Court's treatment of the Counterfactual Point

8. The Counterfactual Point was the biggest point of dispute at trial, was resolved largely in the FCA's favour, and forms the lion's share of the insurers' appeal. The Court will no doubt receive detailed Cases from the insurers seeking to undermine the Court below's core conclusion after the two-week trial, to which the FCA will respond in its Respondent's written case. However, given its relationship to the Pre-Trigger Peril Point (Ground 1 of the FCA's appeal), it is also necessary here briefly to recap the Court's findings on the Counterfactual Point. On this point, the Court found the following:

9. First, the causation issues *"largely answer themselves*" [110, 164] once one has construed the scope of the insured peril i.e. the events and effects intended to be covered by the policy's indemnity. That answers the but for test counterfactual question, "*but for what?*" [530, 387].

10. Second, for the majority of disease clauses[10], where the disease must occur or manifest within 25 miles/1 mile for the policy to respond, the insured peril is the "*the effects of COVID-19 both within the particular radius and outside it*" [532, also 110, 142-3]. As a matter of construction, "*the essence of the fortuity covered is the Notifiable Disease, which has come near, rather than specific local occurrences of the disease*" [102] and "*is not confined to the effects only of the local occurrence of a Notifiable Disease*" [107, 142, 160-1, 227]. The cover is for a broader disease "*if it has been manifested within 25 miles*", the reference to the disease manifesting at the premises or within 25 miles merely being "*adjectival*" limiting the class of notifiable diseases covered [226-7]. That having been found, the occurrence

[9] Called rather imprecisely 'the Quantum Point' in the FCA's Grounds of Appeal.
[10] Argenta1 ({C/5/259}), MSAmlin1-2 ({C/10/502},{C/11/599}), QBE1 ({C/12/715}), RSA3-4 ({C/16/1200},{C/17/1293}), i.e. all except QBE2-3 ({C/13/824},{C/14/934}), as to which the FCA appeals in Ground 4.

of the disease outside the relevant area cannot be an alternative uncovered independent cause that can defeat an argument that the insured peril caused the interruption [110, 144, 148, 164, 191, 229]. The disease must "*make a local appearance*" [109]—it must be a disease "*which has come*" [142] or "*of which there was an occurrence*" [161] within the area—but "*there is cover… 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 the disease, from the date when the disease occurred in the relevant 25 mile radius*" [113, 122]. It would be contemplated that there may be public authority responses to disease extending outside the local area which could not be intended to be separated out in any causation enquiry [110, 144, 162-164, 228] and an insured should not be in a better position if the government had not acted nationally, but instead left it to individual decisions based on or influenced by local incidence of the disease [162].

11. Third, for hybrid clauses,[11] the cover is against the fortuity of a situation in which all the elements of the "*composite*" peril (inability to use the premises, restrictions imposed by a public authority, the underlying national outbreak of COVID-19) that led to the restrictions are present [278]. All of these interconnected elements including COVID-19 and its consequences "*should be removed from the counterfactual*" [278, 298, 305, 531]. This includes the entire disease because (as with disease clauses) the cover is for the results of the disease inside and outside the area, not only of the cases within the relevant defined area [296]. It would be contrary to the intentions of the parties to assume no public authority restrictions but that the national outbreak and other (non-qualifying) government and other responses to it continued, the disease being an "*essential element of the insured peril and of what the insured has covered itself against*" [279], the cover being illusory if it only indemnified the amount by which public authority restrictions themselves increased loss beyond that due to the presence of the disease and its other consequences [281], and the exercise of separating the disease being unrealistic, artificial and impossible [279-280 and 282].

12. Fourth, for some of the prevention of access and similar wordings,[12] as with the hybrid wordings, all the inextricably linked elements of the "*composite*" peril (prevention or hindrance, government action, the underlying emergency of COVID-19) must be stripped out for the counterfactual [348, 387-8, 476, 530]. This includes the pandemic 'emergency' [348], and the government action, which is part of the peril and does not merely qualify a peril of prevention or hindrance of access [385], and because the action insofar as it impacts upon the premises cannot be separated from the action as it applies to the rest of the country: rather they are "*one and the same*"

[11] Hiscox1-4 (hybrid) ({C/6/360}, {C/7/407}, {C/8/433},{C/9/464}), RSA1 ({C/15/1114}), RSA4 (enforced closure) ({C/17/1293}).
[12] Arch1 ({C/4/192}), Ecclesiastical1.1-2 ({D/1/1},{D/2/121}) (obiter because of the exclusion clause which is not appealed by the FCA), RSA4 (prevention of access – non damage).

[476]. The contrary approach was artificial and impractical [348, 388]. (For the other prevention of access wordings,[13] the Court determined against the FCA that the cover extended only to the effects of a localised event and not a broader pandemic, meaning national restrictions did not trigger cover, although the general principles as to the counterfactual remained the same but the wider issues of composite perils did not arise [417, 437, 444, 467, 502].)

13. Fifth, 'trends' or 'circumstances' clauses must be manipulated to apply to non-damage BI cover even where their literal wording is inapt to do so (e.g. because it refers to damage) [120, 167-8, 198, 240, 275, 297, 346, 380, 387].[14] But the quantification machinery is not part of the delineation of cover or intended to disallow a prima facie covered loss, and is instead intended to put the insured in the position had the insured peril not occurred; it would be contrary to principle to include an element of the insured peril in the counterfactual [121-2, 148, 168, 199, 241, 386, 475]. These conclusions are recorded in Declarations 11.4(a) and 13.

14. Sixth, (obiter) for the purposes of a property damage BI cover (including an all risks policy such as in *Orient-Express Hotels*), the insured peril is not merely property damage, nor is it interruption resulting from property damage, but it is interruption resulting from property damage caused by one of the insured perils under the material damage cover (the hurricane in *Orient-Express Hotels*) [345, 523, 525]. The entire peril including the fortuity that caused the damage had to be stripped out when considering rival causes and what would have happened but for the insured peril, including when applying trends or other circumstances clauses [527]. The decision in *Orient-Express Hotels*, which decided that the cause of the damage should be retained in the counterfactual, therefore must be doubted [529].

15. These findings were given effect in Declarations 10-11.2.

The Court's treatment of the Pre-Trigger Peril Point

16. In contrast with the extensive submissions and Judgment reasoning devoted to the Counterfactual Point, the Pre-Trigger Peril Point received relatively little attention at trial from the insurers or the Court.

17. The core point advanced by the FCA was that once the policy was triggered, and all the elements of the composite insured peril including the COVID-19 pandemic are stripped out of any

[13] Hiscox (NDDA clause), MSAmlin1-3 ({C/10/502}, {C/11/599},{D/3/223}) (AOCA clause), RSA2.1-2.2 ({D/4/317},{D/5/383}) Zurich1-2 ({C/18/1355},{C/19/1415}). The FCA is not appealing this finding on the scope of the insured peril for these wordings.

[14] The FCA had argued at trial that a subset of the trends or circumstances clauses or quantum machinery, because referring to 'damage', did not apply at all to the claims in issue. That argument was rejected and the FCA does not appeal on that issue.

counterfactual under a trends clause (as the Court correctly found arises under the Counterfactual Point), that must necessarily require removing the effects of elements of the peril for the purposes of quantification of the loss in the period following the triggering of the policy, even if those effects pre-dated the trigger.[15] Given that the parties intended that the 'full house' be stripped out even though some of the loss post-trigger may have happened if one element of the composite peril remained, it should make no difference that that one element caused losses prior to the trigger date.[16]

18. Accordingly, the fact that a business had already closed or had reduced revenue pre-trigger as a result of COVID-19 does not prevent or reduce recovery as the combined peril trigger displaces or absorbs the effects of all the separate elements of that peril.[17] The pre-trigger revenue lost is irrecoverable, but once the policy is triggered, the element of the peril that pre-dated the trigger ceases to be a competing cause for the purposes of quantification of the indemnity. This follows in part from the parties' intention, as the policy contemplated an emerging/developing peril that would have existed before the full combination was in place.[18] It is also necessarily the case where the effect on the pre-trigger revenue was the direct anticipation of the insured peril combination itself, for example customers staying away from a hotel as a hurricane approaches.[19]

19. The Pre-Trigger Peril Point was addressed in only a few short sections of the Judgment, paragraphs [349-351] and [388-9],[20] and then in Declaration 11.4. The Court concluded as follows:

    19.1. Although all elements of the composite peril must be stripped out of the counterfactual (the Counterfactual Point), a pre-trigger COVID-19-related downturn was a 'trend or circumstance' which affected the business before the insured peril had occurred. Accordingly, the trends clauses within the policies required the adjustment of the revenue figure for the corresponding 2019 period to replicate that pre-trigger COVID-

[15] FCA trial skeleton [313] ({D/20/1605}.

[16] In the rarer cases in which the default quantum machinery measure takes into account a pre-trigger period that includes the effects of the disease (e.g. standard turnover from a period immediately before the trigger, rather than the equivalent period in the previous year), the trends or circumstances clause should be used to remove the effect on turnover of that element of the peril (FCA trial skeleton [313], Trial Day2/124 ({D/27/1637}). This would be on the basis that the true and relevant trend of the business for the purposes of the clause is that reflected by the turnover absent the pre-trigger impact of the element of the composite insured peril.

[17] FCA trial skeleton [267] ({G/138/2387}.

[18] Trial Day2/123 ({D/27/1637}), Trial Day3/14-15, 17-19 ({D/28/1639-1640}). See also the example given at Trial Day8/77-78 ({D/32/1649}).

[19] Trial Day3/54 ({D/28/1641}).

[20] As well as confirming at [173-4] that although no party was arguing that pre-trigger (because pre-notifiable) losses were recoverable, the Court would not rule on the point. (This point was covered in the Hong Kong *New Harbourview* case discussed below.)

19 downturn when calculating the figure for which the insured is to be indemnified [351].[21]

19.2. The FCA's argument that the parties' intention must have been to strip out when calculating loss during the indemnity period all of the emergency including its pre-trigger effects was "*fallacious*" (Judgment [351], although the fallacy was never identified) and would allow recovery of "*losses both before and after the occurrence of that insured peril*" (Judgment [351], although recovery of losses before the occurrence of the insured peril was no part of the FCA's submissions).

19.3. Although the amount of the pre-trigger downturn could be continued in the post-trigger calculation as a trend or circumstance to reduce the indemnity, that downturn could not be increased by reference to an inquiry more broadly as to the extent to which the COVID-19 without the prevention of access would have caused loss in any event. This was explained in the very important last sentence of Judgment [389]:[22]

> "It would be no answer for insurers to argue that the real cause of the loss of income [the drop from 80% of 2019 income at the date of trigger to 10% after the trigger] was the economic effect of the pandemic rather than the closure of the church on the advice of the government, as the prevention or hindrance of access by the government action is inextricably bound up with the emergency and its social and economic effects."

19.4. Hence it was ordered in Declaration 11.4 (of which the FCA challenges paragraphs (c)-(d)):

> "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 had not occurred;
>
> (b) What amounts to a trend or circumstance will be a question of fact and construction of the policy terms in each case, and may require an upwards or downwards adjustment;
>
> (c) If there was a measurable downturn in the turnover of a business due to COVID-19 before the insured peril was triggered, then it is in principle appropriate (subject to (b) above) for the counterfactual to take into account the continuation of that measurable downturn and/or increase in expenses as a trend or circumstance (under a trends clause or similar) in calculating the indemnity payable in respect of the period during which the insured peril was triggered and remained operative. Further, the downturn will only apply to the extent that as a matter of fact the downturn would have continued during the indemnity period if the insured peril had not been triggered; and
>
> (d) Any such continuation must be at no more than the level at which it had previously occurred."

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[21] Both the Arch and Ecclesiastical1.2 policies use a standard revenue measured by the same period as the indemnity period in the previous year, as the Court implicitly acknowledged in Judgment [344] and [389] when referring to the equivalent period in the previous year. See further paras 39ff below. The comments related to Arch and Ecclesiastical but at the consequentials hearing it was confirmed by the Court that the intention was that these comments applied to all wordings: Consequentials Day1/3-4 ({D/33/1650}).

[22] Which sentence was a rejection of a point made by Mr Kealey QC for Ecclesiastical Day4/87-8 ({D/29/1645}), and Day6/70 ({D/30/1646}).

The implications of the Pre-Trigger Peril Point

20. The significance of the Pre-Trigger Peril Point depends upon the extent to which there was a "*measurable downturn in the turnover of the business due to COVID-19 before the insured peril was triggered*" (Declaration 11.4(c)). Its effect is therefore exacerbated by the findings appealed by FCA Grounds 2 and 3. It is mainly relevant to hybrid and prevention of access wordings, because pure disease clauses will be triggered much earlier in March upon the occurrence of the disease within a certain distance of the premises.

21. For example, businesses may well have suffered a downturn or may have closed on 16 March 2020 when people were told by the Prime Minister to avoid pubs, clubs, theatres and social venues, work from home, and avoid all inessential shopping and travel (Judgment [26]), on 18 March when the Prime Minister announced the closure of schools (Judgment [31]), on 20 March (a day before the 21 March Regulations[23]) when the Prime Minister announced the closure of cafes, pubs, bars, restaurants (save for takeaway) and nightclubs, theatres, cinemas, gyms and leisure centres from that evening (Judgment [32]), and on 23 March (three days before the 26 March Regulations[24]) when people were instructed to stay at home save for infrequent necessary shopping, necessary travel to work, medical needs and exercise (Judgment [40]).

22. Yet, because of the Court finding that many Hiscox, MS Amlin and RSA (and Zurich) policies are only triggered by mandatory legal requirements that they close, i.e. by the 21 March or 26 March Regulations, and not by Government instructions to that effect, then subject to the outcome of Ground 2 of the FCA appeal the Court's findings on the Pre-Trigger Peril Point mean that a pub or restaurant or theatre can only claim for the amount by which the closure under the 21 or 26 March Regulations decreased their revenue beyond any fall already suffered due to people being told to avoid them on 16 March 2020 and then their being ordered to close on 20 March 2020. Indeed, a business that closed on 20 March 2020 when given the Prime Minister's (non-binding) instruction do so might be said to get *nothing*, whereas a business that ignored and would have continued to ignore that instruction could claim all or most of its loss when shut down by the 21 March 2020 Regulations. Similarly, holiday accommodation businesses that closed following the prohibition on inessential travel on 16 March and then the lockdown on 23 March 2020 are liable to face an argument that their indemnity be reduced, perhaps even to zero, by virtue of having suffered a downturn in revenue before the policy-triggering prohibition in the 26 March Regulations.

[23] {E/2/12}.
[24] {E/3/17}.

23. The Court below said that this conclusion followed from the trends or circumstances clauses which, although typically referring to (property) "Damage", needed to be manipulated to also apply to the non-damage insured perils at issue. Trends clauses allow the indemnity payable to be adjusted in certain circumstances. Each trends clause before the Court needs to be considered separately but they all have three elements to them:[25]

23.1. The indemnity should be adjusted to provide for the trend of the business.

23.2. The indemnity should also be adjusted to provide for variations in or other circumstances affecting the business, and which (i) take place before or after the insured peril, or (ii) would have affected the business had the insured peril not occurred.

23.3. The adjusted figures should represent, as nearly as possible or as nearly as practicable, the results which would have been obtained in the period after the insured peril, had the insured peril not occurred.[26]

Inconsistency with the Counterfactual Point

24. The clash with the Counterfactual Point is immediately obvious. For example, at Judgment [278-9] (discussing the Hiscox1-4 hybrid clause) the Court said (emphasis added):

> "278. As to how the counterfactual is to be applied, whether it is being considered for the purposes of considering the losses which the insured can claim, either as a matter of application of the insuring clause, or pursuant to the "trends clause", we consider that the exercise must give effect to the insurance effected. This means assuming that the insured peril did not occur. The insured peril is a composite one, involving three interconnected elements: (i) inability to use the insured premises (ii) due to restrictions imposed by a public authority (iii) "following" one of (a) to (e), relevantly (b) an occurrence of an infectious or contagious disease. What the insured is covering itself against is, we consider, the fortuity of being in a situation in which all those elements are present. In answering the counterfactual question as to what would have been the position of the insured's business but for the occurrence of the insured peril, it is accordingly necessary to strip out all three interconnected elements, including in this instance the national outbreak of COVID-19.
>
> 279. We do not consider that it would give effect to the intentions of the parties for the assumption to be that there were no mandatory government restrictions and no inability to use the premises as a result specifically of such restrictions, but that the national outbreak of the disease and other governmental responses to it, and the economic and social consequences of these, were assumed to have been the same as occurred. That would not, in our judgment be how a reasonable person would understand what was agreed. It would involve an unrealistic and artificial exercise, and one which fails to recognise that the occurrence of the disease is an essential element of the insured peril, and of what the insured has covered itself against."

25. Yet the effect of the rulings on the Pre-Trigger Peril Point, and Declaration 11.4(c)-(d), is that although the triggering mandatory government restriction will be removed, the national

[25] The trends clauses are at Judgment [90], [127], [151], [181], [206], [246], [249], [253], [287], [338], [378-379] and [454]. The Hiscox trends clauses differ, both from those of other insurers and among themselves.

[26] The Court should also note that in its consequentials hearing skeleton, at the post-judgment hearing and subsequently in correspondence, Hiscox has said that it will not treat the closure of a business in response to a Government announcement that businesses must close, which was in fact a precursor to legislation requiring closure, as being a 'special trend' or 'circumstance' within its trends clauses. This is addressed below.

outbreak and government and public responses to it may still be included in the counterfactual if they happened to exist prior to the trigger date. This is contrary to the findings set out above (and throughout the Judgment) as to what the parties must have intended, and to Declaration 11.2:

> "The correct counterfactual when calculating an indemnity is to assume that once cover under the policy is triggered none of the elements of the insured peril were present, which:…
>
> (b) for prevention of access clauses, means (for example) no prevention or hindrance, no government action and no emergency; and
>
> (c) for hybrid clauses means (for example) no inability to use the premises, no public authority restrictions and no COVID-19 in the UK."

26. It is no less a direct conflict—indeed, an introduction of incoherence into the Judgment—because the Declaration provides that the pre-trigger downturn has to be "*measurable*" (Declaration 11.4(c)) and can only be used to reduce revenue "*at no more than the level at which it had previously [i.e. pre-trigger] occurred*" (Declaration 11.4(d)).

27. The part of Judgment quoted in paragraph 19.3 above reveals the incoherence, which nowhere did the Court seek to explain. There the Court contemplated that of the drop from 80% to 10% of the 2019 income, an insurer could not argue that any of it was the effect of the pandemic rather than closure of the church or advice of government, *unless those things had occurred pre-trigger and had a measurable effect*. Is it said that the reasonable objective reader would understand that the parties intended that the insured be able to recover even if it could not show that parishioners not coming to the church during the trigger period was due to the restriction imposed rather than due to the pandemic (as the Court found), *but not if* the insurers could prove this point by relying on the fact that the parishioners had stopped coming to the church during a pre-trigger pandemic period due to the pandemic? Why? On what basis is this said to be the reasonable interpretation? With every indemnity the focus is on the revenue post-trigger as compared to what it would have been absent the insured peril (as the Court explained that concept in relation to composite perils). So, is the Pre-Trigger Peril Point a rule of evidence and is that why the prior level of revenue downturn is a cap (Declaration 14(d))? This is wrong and unprincipled. Is the reasonable reader said to be able to glean this distinction from the wording of the trends or circumstances clause (which was the mechanism the Court relied on for its conclusion), and to read the word 'trend' or 'other circumstance' as including the underlying disease or emergency itself despite the Court confirming that such clauses were not intended to apply to elements of the insured peril?

28. First, as the Court rightly found, the apparent intention of the parties was that once the fortuity of the combination of the composite peril was present, all the elements had to be stripped out. Notwithstanding insurers' extensive arguments on the point (repeated over many hundreds of

pages of written submissions and days of oral argument, with numerous variants as to what element of the peril ought to be singled out as 'the essence of the peril'), the Court rightly held that it was not intended that the cover would only be for the amount by which the final element—the interruption due to public authority action—made things worse. It was not intended that the insured should have to prove what business it would have done in a world without the public authority restriction but with the underlying disease. That would not be what a reasonable person would understand had been agreed.

29. Thus the Court's findings necessarily mean that for the post-trigger period the parties intended that the insured recover for losses that would have occurred even without the public authority restrictions. That is inherent in the conclusion on the Counterfactual Point. The parties intended that once there was interruption and the rest of the composite peril, there be no inquiry into the relative causative impacts of the separate elements of the composite peril. There will always be a possible counterfactual scenario where the underlying emergency or disease occurred but the public authority did not react; but the parties did not intend those causes to be separable or distinguishable for the purposes of causation, once the trigger was engaged. That is not merely an implication of what the Court found, it is the very thing that the Court found.

30. This reflects the parties' intention and is the sensible approach: a customer may have had the choice to attend or stay away prior to the restriction being imposed, and may even have probably stayed away, but the restriction removes that choice and makes the staying away definite, which is why it was imposed.[27] Insofar as the restriction requires closure, it similarly removes from the business owner the choice as to whether to close or remain open. It makes sense for the insured to be entitled to an indemnity, after the public authority has closed the venue, without having the indemnity reduced by reference to customers who might have stayed away anyway or by reference to how the insured might have operated its business due to the very same emergency that caused the public authority intervention. That will, of course and in any event, very often be impossible to ascertain.

Timing and inextricability

31. Second, there was a rare lapse of analysis when the Court considered the Pre-Trigger Peril Point. It seemed to believe that stripping out all elements of the insured peril from the trigger date forwards was to award pre-trigger losses. For example, at Judgment [351] the Court stated that if the disease were stripped out despite a pre-trigger downturn "*the policyholder would in fact recover*

[27] As the FCA argued at trial, Day8/76:3-24 ({D/32/1648}).

for its losses both before and after the occurrence of that insured peril" (rejecting Mr Edelman QC's contention that there was no award of pre-trigger losses, noted at Judgment [350]).[28]

32. But this is simply wrong. To take a simple example: there is a disease in week 1 in 2020 which causes a downturn to 70% of the revenue in the equivalent week in 2019. The policy is then triggered at the end of week 1 (say, by relevant public authority order), closing the premises and causing a drop in revenue in week 2 to 5% of the revenue in the equivalent week in 2019. Stripping out all elements of the composite peril during the indemnity period starting in week 2, including the disease, means indemnifying for 95% of 2019 revenue for week 2. That necessarily includes stripping out such part of the 95% as would have resulted anyway if there had been some but not all of the composite peril—such as the disease. But the fact that in week 1 the disease alone caused a 30% downturn does not mean that the 95% award for week 2 is awarding pre-trigger losses. The pre-trigger loss of 30% is not indemnified: there is no award for week 1 and that lost revenue is simply uninsured. What is being indemnified is the lost revenue in week 2 including (necessarily) the continuation of the part of the peril that existed pre-trigger—the disease. The measurable 30% week 1 reduction is some evidence—although not particularly good evidence as people's reactions and the commercial landscape changed rapidly—of what reduction there would have been in week 2 had there been a continued disease but no public authority intervention. *But that is evidence of an irrelevance because all of the composite peril elements must be removed and there is no need, even were it possible (which it is not) accurately to separate out the amount by which the disease alone would have caused lost revenue.*

33. As to this last point, part of the rationale for the correct conclusion that the parties would not have intended the disease to be separated from the prevention of access is that it cannot be done. In the words of the Judgment, their connection is "*inextricable*", "*both as a matter of legal analysis and as a matter of practical reality*" [348, 388, 389]. The fact that they emerged sequentially so one element was acting on the business without the other *in a different week* does not make extrication either justified or practically possible in week 2, post-trigger.

Emerging perils

34. Indeed, and thirdly, the Court's approach would be absurd given that disease perils are necessarily emerging ones, as the Court itself explained at Judgment [104-106]. This is directly contemplated by the nature of the triggers, especially for hybrid/prevention of access clauses: the emergence of the disease or the underlying emergency will necessarily pre-date the public authority response.

[28] See also Day3/57:3-4 ({D/28/1642}).

35. With such an emerging peril, actions taken pre-trigger by an insured may often actually be in anticipation of the composite peril that triggers the cover. Some people may obey an instruction reacting to the spread of the disease knowing that it will or may be backed by law imminently but is not yet, such as closing or staying away from premises pursuant to Prime Ministerial instructions on 20 and 23 March where those instructions became law in the 21 and 26 March Regulations, one and three days later respectively. Hiscox alone of the insurers has confirmed that it will treat those earlier instructions as anticipatory of the later Regulations (notwithstanding that those instructions were less than explicit about the Regulations to come), the other insurers refusing to confirm that.[29] When pressed at the consequentials hearing as to why it had done so, Mr Gaisman QC responded: "*It may not have a legal basis in your Lordships' judgment, it may be the consequence of orthodox loss-adjusting principles, or it may just be common sense. Who knows?*".[30] This response is not surprising: there is no basis in the Judgment or Declarations for treating this sort of anticipation as being any different to any other pre-trigger downturn associated with the disease/emergency, and indeed it is not clear on what basis it would be treated differently. Hiscox may now say this cause of a pre-trigger downturn is too tied up with the insured peril to be a 'trend' or 'circumstance', but quite apart from the difficulty of an insured proving that had the Regulations not come later the announcement would not have been made a few days earlier, looked at another way this is simply a pre-trigger effect of one element of the insured peril (the disease) before the full composite peril has occurred to trigger cover.

36. The obvious appropriateness of this concession by Hiscox therefore reveals a difficulty with the Judgment and Declarations. Hiscox's concession is consistent with the FCA's case that the Court was wrong on the Pre-Trigger Peril Point. In any event, the concession amounts to a recognition that objectively the trends clauses cannot sensibly have been intended to operate in relation to pre-trigger downturn in the way the Court held.

37. Further, it is instructive to consider the emerging peril issue as applicable to *Orient-Express Hotels*[31] because by its nature a hurricane (unusually for a peril that causes physical damage) can also be an emerging peril. In the case of a hurricane, customers may stay away, public authorities may impose curfews, and businesses may close and board up their premises, before the hurricane hits. This occurred in *Orient-Express Hotels*. Hurricane Katrina made landfall in Louisiana on 29 August 2005 and in anticipation of the arrival of the hurricane there was a curfew and evacuation measures in the New Orleans area on 27-28 August 2005. This would have predated the hotel

[29] Hiscox's concession in its consequentials skeleton [35.2] ({D/25/1631}). See further the discussion at the consequentials hearing Day1/43-64 ({D/33/1651-1656}), and the other insurers reserving their rights (i.e. not making a concession) at Day1/69-70 {D/33/1657}.
[30] Consequentials hearing Day1/64 {D/33/1656}.
[31] {E/31/921}.

being damaged.[32] Whilst these measures were anticipatory of the hurricane hitting New Orleans, they are not specifically anticipatory of the insured hotel premises themselves being hit (which is the insured peril and had not yet arisen) but the insured hotel will likely have taken its own precautionary measures, such as evacuating the hotel, cancelling bookings and boarding up doors and windows.

38. The Court below correctly confirmed at Judgment [527] that on the facts of *Orient-Express* "*the counterfactual was one where both the damage to the hotel and the hurricanes and their effect generally were to be stripped out*", and the hurricane was an "*integral part of the insured peril*" [526-7]. It was confirmed elsewhere that trends or circumstances clauses should not allow inclusion of part of the insured peril [121, 475]. Yet the Court's approach to the Pre-Trigger Peril Point would appear to allow (in *Orient-Express Hotels*) an adjustment to bring in a downturn due to curfew and evacuation and any precautionary measures taken by the insured that pre-dated the property damage (i.e. the broader pre-trigger effects of the hurricane).[33] Of course, if the hurricane changed course at the last minute and the hotel remained undamaged, no indemnity would be available. But the question is whether, if the hurricane does hit, the indemnity for the post-damage loss of turnover should be reduced by reference to the hotel's turnover reduction in the days prior to the hurricane's arrival due to anticipatory measures, at least for the period during which those precautions would have taken place until the hurricane had passed by without hitting. On the Court's approach to the Pre-Trigger Peril Point in relation to COVID-19 it should. But, contrary to the Court's (correct) conclusions as to *Orient-Express*, this would involve taking into account the effect of the hurricane for post-trigger losses.

<u>This result is not required by the trends clauses</u>

39. The wordings all contain quantification machinery,[34] which typically designates the counterfactual revenue for the purposes of the indemnity by reference to an earlier period. For the majority of the selected wordings,[35] the indemnity is expressed to be measured by comparing the actual revenue earned with the revenue in a period that corresponds to the indemnity period but a calendar year earlier (which is typically called the 'standard revenue').[36] This prior period is

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[32] See further Crawfords, *Business Interruption Considerations in Hurricane Claims: A Complex Calculation for Adjusters* (18 July 2006 (https://web-files.crawco.com/Documents/SharedWeb/StormAnalysis/7_18_06crawfordhurricanewp.pdf) {F/58/1260}.

[33] As the Court seemed to intend: Consequentials hearing Day1/61-63 ({D/33/1656}).

[34] The Court found that quantification machinery, often with trends or circumstances clauses, applied to all the wordings (see above paragraph 9).

[35] Arch, Argenta, Ecclesiastical1.2, MSAmlin1-3, QBE1-3, RSA3-4. The exceptions are Hiscox 1-4, Ecclesiastical 1.1 and RSA1-2 (which contain no provision specifying the counterfactual turnover).

[36] The position is similar but slightly different as regards the other element of the counterfactual calculation, apart from the revenue: the rate of gross profit. That is typically measured by taking the full financial year preceding the trigger (as in Arch, Hiscox1-4, MSAmlin3, QBE1-3, RSA3, Zurich1-2). (The exceptions are Ecclesiastical 1.1 and RSA1-2, which contain no

a deliberately selected period that captures a business's seasonality (spring turnover figures are used for a spring indemnity period) and is also deliberately clean of the insured peril even when an emerging peril. By this mechanism, an insured whose business shut from March to July 2020 compares actual revenue with revenue from March to July 2019, a pre-COVID-19 period. Accordingly, the majority of the wordings expressly give an answer to the Pre-Trigger Peril Point as follows: pre-trigger elements of the peril are disregarded.

40. The only route in such wordings to reducing revenue for a pre-trigger COVID-19 downturn is the trends or circumstances clause.[37] For example, the trends clause in MSAmlin1 is contained within the definition of 'standard turnover' as follows (bold definitions removed):

> "The turnover during that period in the 12 months immediately before the date of the damage which corresponds with the indemnity period to which adjustments will be made as necessary to provide for the trend of the business and for variations in or other circumstances affecting the business had the damage not occurred, so that the figures adjusted represent as nearly as may be reasonably practicable the results which but for the damage would have been obtained during the relative period after the damage."

41. The Court found (Declaration 14(c)) that such clauses could (indeed, in some cases must[38]) be used to make an adjustment to the standard turnover/rate of gross profit otherwise applicable to introduce pre-trigger COVID-19 downturn into the indemnity period as a modification to the (prior year) standard turnover and rate of gross profit.

42. The purpose and effect of such clauses and the ambit of what is contemplated, as a matter of construction, by "trends" or "circumstances", will be explored more fully in the FCA's Respondent's written case given that it is an important aspect of the insurers' appeal on the Counterfactual Point. However, the essence of the FCA's case is that the only thing the trends or circumstances clauses relate to on their proper construction is the vicissitudes of business life, extraneous to the insured peril, that would render the turnover or gross profit in the stipulated prior period an unfair predictor of that during the indemnity period. The examples given by commentators are of a heavy advertising drive during the prior year that will not be repeated this year, or of a strike this year that did not occur during the prior year.[39] A further example might be a restaurant which was closed by the 21/26 March Regulations, but whose star chef was always intending to leave on 1 April 2020, or whose rent was already set to rise.

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default calculation machinery.) Thus an insured whose business shut from March to July 2020 calculates loss by a rate of gross profit calculated on the prior financial year (which could be any period but will probably usually be the year to April 2019 or the year to December 2019, both pre-COVID-19 periods).

[37] Arch, Argenta, Ecclesiastical1.2, MSAmlin1-3, QBE1-3 and RSA3-4 wordings. Ecclesiastical 1.1 and RSA1-2 do not contain a default machinery and merely ask what would have been earned but for the peril, although RSA1-2 does refer to the need to take account of trends or circumstances. Hiscox1-4 do not include default standard turnover machinery but do include a default rate of gross profit which Hiscox1-3 provide can be adjusted for trends or circumstances.

[38] See Judgment [351] that the clause "*precludes*" omission of pre-trigger perils.

[39] *Insurance Disputes* para 19.157, {E/48/1375}.

43. It is therefore wrong to treat an element of an emerging composite peril, arising pre-trigger, as a trend or circumstance, for several reasons.

44. First, although the Court gave no consideration to what could amount to a 'trend' or 'circumstance', a pre-trigger occurrence of an element of the insured peril cannot qualify because it is not extraneous to the insured peril (see further Judgment [347] as to the sorts of trends contemplated) but rather part of it.[40] To take in an element of the peril goes beyond what these clauses are intended and empowered to do, and is contrary to the logic of the Counterfactual Point that all elements of the peril should be removed for the purposes of the counterfactual and such clauses do not licence inclusion of "*any part of the insured peril*" [121, 475], and the disease and its effects are (per the Counterfactual Point, and see paragraphs 10-13 above) expressly found to be part of the insured peril. There would be no reason for a reasonable reader to conclude that although the clause (to the extent manipulated to apply to the insured peril in question, as the insurers argued and the Court found) does not contemplate the post-trigger effect of any element of a composite insured peril as falling within the ambit of a "trend" or "circumstance" for the purposes of the clause, the opposite is true for the pre-trigger effect of an element of that composite insured peril. The reasonable reader would conclude that it must have been intended that the effect of an element of the composite insured peril would not fall to be treated as a "trend" or "other circumstance" under the clause at all, consistent with the overall commercial purpose of such clauses, being to address matters extraneous to the insured peril.

45. Second, this runs counter to the Court's own clear finding that the quantification machinery was not intended to make irrecoverable a loss that prima facie was recoverable without it, i.e. to alter the position vis-à-vis the effect of the insured peril on the counterfactual (see above paragraph 13 above).

46. Third, the trends clauses expressly say that their purpose is to put the insured in the same position as it would have been if the insured peril had not occurred (as the Court accepted – Judgment [121]). For Arch, the Court manipulated the word "Damage" in the trends provision leaving it to say that the "*adjusted figures will represent, as near as possible, the results which would have been achieved during the same period had the Prevention of access to the Premises due to the actions or advice of government due to an emergency which is likely to endanger life not occurred*".[41] But by including pre-peril downturns in the calculation of losses, the indemnity being provided is <u>not</u> that which would have been achieved without the insured peril (as it should be); it is that which would have been

[40] And a few days or week or two of pre-trigger COVID-19 effect is in any event inapt to comprise a 'trend'.
[41] Judgment [346].

achieved without the insured peril but capped by reference to the level of turnover as affected by an element of the insured peril immediately before the composite peril was triggered. That result is not required by the wording (indeed, it is the contrary result which is required).

47. Finally, and while this will be explored more fully in the FCA's Respondent's written case, the history of such trends clauses is also important, as it reveals their genesis and commercial purpose. They were originally developed in relation to consequential loss provisions when consequential loss cover came to be added to property damage cover, only later evolving from 'consequential loss insurance' into 'business interruption insurance'.[42] That archaeology is still evident from the vestigial terminology of the quantum machinery itself, which require manipulation to be applied to non-damage covers because, as Hiscox put it, "*the trends clause derived from an old form before the BI section included non-damage covers*".[43] The property damage history is important because in the vast majority of property damage cases (fire, floods etc) the peril emerges suddenly and cannot and will not affect a business before causing the damage.[44] The perils in question in this case are of a very different type. They are composite perils; they do not cause damage to the insured's property, therefore providing a free-standing BI cover unlike the BI cover for property damage, which essentially provides a supplementary indemnity for consequential loss associated with the material damage indemnified under the material damage section; and they have an element that the insuring clause itself contemplates will emerge prior to the other elements. Insurers here are therefore seeking to apply the trends clauses to a very different type of peril in a way which goes beyond their original and underlying commercial purpose, namely to address matters extraneous to the insured peril (e.g. the fire or flood which damaged the premises). In addition to such manipulation as is necessary to apply a trends clause to these insuring clauses at all, insurers also need the Court to construe any reference to a trend or other circumstance or suchlike so as to adjust the indemnity so as to reflect the effect of the element of the insured peril that the insuring clause itself contemplates will emerge prior to the other elements. This is a step too far in the construction exercise, going beyond what the purpose and scope of operation of the trends clause would have been when applied to a simple property damage case and beyond such manipulation as was necessary simply to cause the trends clause to apply to the insuring clause.

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[42] Honour & Hickmott, *Principles and Practice of Profits Insurance* (3rd edn, 1966), Chapter 1, sections 1, 3, 8-11 and Appendix 2 ({E/46/1224-1364}); Birds, Lynch and Paul, *MacGillivray on Insurance Law* (14th edn, 2018) para 33-001 fn1 {E/44/1214}.
[43] Hiscox trial skeleton [401] ({D/21/1617}).
[44] Some wider natural disasters such as hurricanes form an exception to this as they can be seen coming.

The decision of *New World Harbourview Hotel v Ace Insurance*[45] does not support the Court's conclusion

48. That brings us to the Hong Kong decision of *New World Harbourview*, which arose out of the 2003 SARS outbreak. SARS had emerged in Hong Kong on 21 February 2003 but only became notifiable in 27 March 2003. The insured claimed losses dating from 9 March 2003, arguing in effect that the reference to a notifiable disease should be read as 'a disease which later becomes notifiable'. The central holding (at all court levels) was to reject this argument: cover under a notifiable disease clause does not arise until the disease is notifiable. Losses attributable to the disease outbreak prior to the date of notifiability—pre-trigger losses—were not covered (as the Court correctly summarised at Judgment [349]). The FCA did not contend otherwise in the present case (see Judgment [173-4]), seeking and obtaining declarations of cover only from the date on which the disease was made notifiable.[46]

49. What was termed the 'fourth issue' at first instance in *New World Harbourview* related to the quantum machinery and pre-trigger perils. That quantum machinery appears to provide that the counterfactual revenue was the revenue in the year immediately preceding the trigger—the 'Standard Turnover'—presumably pro-rated for the loss period.[47] Accordingly, as was not disputed at the date of the first instance hearing in that case,[48] the Standard Turnover necessarily included a period of downturn due to SARS before it became a notifiable disease and so triggered the policy. Both the first instance and Court of Appeal judges explained this as simply being a consequence of the "*clear terms*" of the definition of Standard Turnover as being the 12 months immediately preceding the trigger (emphasis added): "*[i]t is what the parties bargained for and agreed. The parties had to draw the line somewhere for the purposes of comparing what a business earned before and after the advent of an infectious disease and of measuring the business' consequent loss due to the disease's occurrence. They chose to draw the line at the date when actual damage covered by the insurance is incurred. As we have seen, cover was not triggered until 27 March 2003. Standard Revenue must accordingly be assessed by reference to a business' prior revenue up to at least that date.*"[49]

[45] [2011] Lloyd's Rep IR 230 (Court of First Instance of Hong Kong) {E/28/898}, CACV 97/2010 (Hong Kong Court of Appeal) {E/29/906}, [2012] Lloyd's IR Rep 537 (Court of Final Appeal of Hong Kong) E/30/914.
[46] Save for RSA4 which it is agreed expressly backdates the cover to the date of emergence of the disease even if prior to it being notifiable: see Declaration 2.
[47] See the definitions of Loss Period, Standard Revenue and Reduction in Revenue quoted in para 57. The Reduction in Revenue definition is not very clear. On one reading one takes the part of the Standard Revenue corresponding to the Loss Period, i.e. a clean period exactly a year earlier, as in the wordings in the instant case. However, the parties and court (see para 75) seem to have read it as requiring that the Standard Revenue for the whole immediately preceding year is used to derive the counterfactual revenue during the Loss Period (found to be 180 days by issue 3: paras 56 and 70), which is why issue 4 mattered to the parties.
[48] See para 73.
[49] Reyes J at first instance: para 79, {E/28/904}. Rogers VP in the Court of Appeal: para 23, {E/29/912}. The point was not appealed to the Court of Final Appeal, as noted in para 9 of that Court's judgment: {E/30/916}.

50. Thus the default measure for the counterfactual turnover under the quantum machinery in that case included pre-trigger effects of the disease, i.e. before it became a notifiable disease, simply by reason of taking the year up to the trigger. That was the measure chosen by the parties. In the present case the quantum machinery chosen by the parties excludes such pre-trigger effects,[50] and therefore giving effect to the line drawn by the parties in the quantum machinery *excludes* rather than *includes* pre-trigger effects in the current case, hence insurers' need to rely on the trends clauses to adjust the quantum machinery. There was also a distinction in the nature of the peril, in that the policy in *New World Harbourview* was only triggered by a notifiable disease, whereas the composite perils in these policies contemplate a sequence of events, starting with the disease/emergency. The Court failed to recognise these distinctions, purporting to rely on/be consistent with that decision (Judgment [349-351]).

51. In *New World Harbourview* there was, as here, also a trends or circumstances provision that could potentially have been relied upon so as to alter the default position. The insured could have sought to rely on it to *take out* the pre-trigger SARS effects that otherwise fell within standard turnover on the basis that the pre-notifiability effect of the disease was so closely associated with the insured peril, given that a disease has first to emerge and be perceived as a potential threat in order to be made notifiable (as happened in the UK with COVID-19), that its effect on the turnover should not be treated as part of the trend of the business, with the true trend therefore being the level of turnover without the effect of the disease. But the insured did not make that argument. The headnotes in the Lloyd's Rep IR reports cited above suggest that it was held at first instance that (emphasis added) "*in determining the amount of loss as compared with standard revenue in the 12 months prior to 27 March 2003, it was permissible to adjust standard revenue upwards so as to take account of the impact of SARS in the period leading up to 27 March 2003*" but that is not borne out by the first instance judgment (as quoted at paragraph 49 above).[51] This error is carried through to the treatment in text books of this aspect of the decision.[52] And in contrast to the insured not relying on that clause in *New World Harbourview*, in the present case the insurers seek to argue, and the Court found, that the trends clauses can be used to *introduce* the pre-trigger COVID-19 effects that otherwise do not form part of the standard turnover. Rather than giving any force

[50] See paragraphs 39ff above. The exception is that Hiscox1 has a counterfactual turnover measure that looks to the period 'immediately prior to the loss', but only where the business is in its first trading year.

[51] The provision was noted at para 76 but the argument and conclusions in paras 72 to 80 turned only on the mechanical definition of Standard Turnover—hence the concession noted at para 73—rather than on whether SARS was a trend or circumstance. Hence per Rogers VP in the Court of Appeal at paras 22-3 { E/29/912}: "*[The judge] did so because he considered that the period of 12 months immediately preceding the date of Damage was the 12 months prior to 27 March 2003… The judge appreciated that on such reckoning Standard Revenue would include a period when there may have been a downturn in income despite the fact that the notifiable period had not commenced. Nevertheless, I can see no other way of applying what the judge referred to as the clear terms of the definition in clause 13.4. In my view, the judge was right.*"

[52] Roberts, *Riley on Business Interruption Insurance* (10th edn, 2016) at para 15.23 ({E/50/1429}); Merkin, *Colinvaux's Law of Insurance* (12th edn, 2019) at para 24-105 ({E/49/1376}).

to the chosen standard turnover definition excluding pre-trigger peril effects (as in *New World Harbourview* the definition included them), the Court jumped to the conclusion that the trends clause somehow *"precludes"* (Judgment [351]) the exclusion of pre-trigger peril effects.

52. It is the FCA's case that, whilst the Court could take the view that one must stop at the standard turnover and rate of gross profit definitions chosen by the parties even if they include some pre-trigger effects (which was the result in *New World Harbourview*, albeit without consideration of the potential impact of the trends clause), and that the trends or circumstances clauses should not be used to override that in this context, *if* the trends or circumstances clause is to have any effect here, it must be only to remove pre-trigger peril effects where the standard turnover or rate of gross profit definitions otherwise include them. In other words, to adjust so as to ensure that the counterfactual profit is 'clean' of all insured peril elements. This is what the FCA argued at first instance.[53] It arises for those few wordings that contain no default turnover to adjust (Hiscox 1-4 and RSA1-2[54]), and for the other wordings only if, e.g., the prior financial year of a business (from which rate of gross profit is taken) happened to end after COVID-19 was having effects but prior to the policy being triggered.

'Safety valves'

53. It should not be thought that the approach advanced by the FCA leads to unrealistic results.

54. First, it is still necessary to satisfy the composite peril in order to the trigger the policy in the first place. This includes satisfying the causal connectors within the composite peril. For example, the RSA3 disease clause requires interruption or interference *following* occurrence of a notifiable disease at the premises or within 25 miles (Judgment [85]). 'Following' imports some causal connection (Judgment [96]) and is satisfied where the disease including the occurrence within 25 miles forms part of a wider picture which dictated the public authority response which led to the interruption or interference (Judgment [111]). However, if the public authority response was instigated before the disease was within 25 miles of the premises, the response did not follow the disease including within 25 miles, and so the wording is not triggered until (the FCA would say) the public authority response is continued pursuant to the wider picture including the disease within 25 miles—i.e. the public authority response is expressly or impliedly reviewed/renewed/continued/extended. This point was reserved by Declaration 11.3. But the important point for present purposes is that the FCA's position on the counterfactual and pre-trigger perils does not affect the question of when the peril is triggered.

[53] FCA trial skeleton [313] ({D/20/1605}); Day2/124 ({D/27/1637}).
[54] And Ecclesiastical 1.1.

55. Second, there may be situations where one has to distinguish similar underlying outbreaks when considering the scope of the insured peril, to identify the particular outbreak that caused the interruption. If a restaurant has food poisoning episodes every month (an underlying condition of the restaurant due to poor sanitation), and the public authority ultimately shuts it down because of one episode, then whilst the insured peril includes the most recent episode that leads to the shutdown and that needs to be taken out of the counterfactual, it may on the facts be appropriate to leave unadjusted the standard turnover from the previous year that includes a depression due to prior instances of food poisoning. The same may be true of an underlying or recurring problem with vermin. The FCA accepted as much at trial.[55] This does not, however, arise in the case of single emerging incident such as the COVID-19 outbreak (in contrast with discovery by the local authority of a pre-existing underlying condition, such as the presence of vermin). Nor would it arise in respect of unrelated but repeated incidents, *e.g.* a reduced indemnity caused by a fire in January 2018 should be removed for the purposes of calculating the counterfactual indemnity for an unrelated fire in January 2019.

56. Third, there remains a proximate cause requirement between the loss and the interruption or interference with the business. An example which insurers deployed at trial (by reference to the Ecclesiastical 1.1 "Parish Plus" form of insuring clause designed for churches) was of the loss of a donation to a church insured against loss directly resulting from interruption or interference with the business of the church in consequence of the prevention or hindrance of access or use of the premises by any government action due to an emergency which could endanger human life. The insurers' hypothesis was of the church insured's loss of a regular donation due to the donor having to close his/her restaurant due to the impact of COVID-19. On the basis of what appeared to be insurers' hypothesis that this was some freestanding regular donation not directly associated with the donor actually attending church, the FCA's answer to this was and remains that such a loss would likely not be recoverable because it would not have the requisite causal connection with the interruption or interference of the "business" of the church in consequence of the composite insured peril.[56] This answer would apply whether the donation ceased before or after the triggering of the insuring clause. Either way, following the triggering of the insuring clause, insurers would be entitled to an adjustment of any pre-trigger revenue figure used for the purposes of calculating post-trigger losses to reflect the fact of the loss of a repeat donation which had nothing to do with access to or use of the insured's premises, and which was not proximately caused by the insured peril and so irrecoverable.

[55] Day1/121:3-9 ({D/26/1636}).
[56] Day1/112:11-20 ({D/26/1635}).

57. The basic position remains that it is contrary to the parties' intention to seek to extricate the inextricable (as the Court found these elements of the peril to be), by pulling apart the elements of the peril. Even if, absent restrictions on the premises, ordinary customers of a café or shop had started to and/or would have stayed away due to their own COVID-19 illness or fear, the parties nevertheless would have intended the insured's losses in relation to those customers to fall within the indemnity from the date of the restrictions. That is the essence of the Court's finding on the Counterfactual Point that what is insured is not merely the incremental amount by which the public authority action increased loss. The same ought to apply to the pre-trigger impact of an element of the peril that would have been recoverable had such impact occurred post-trigger only. This ties in with the commercial purpose of trends clauses and the proper construction of the words "trends" and "circumstances" in this context as having been intended only to encompass matters extraneous to the insured peril which can be described as the vicissitudes of commercial life.

C. GROUND 2 (THE FORCE OF LAW POINT) AND GROUND 3 (THE TOTAL CLOSURE POINT)

Introduction

58. Grounds 2 and 3 are distinct grounds of appeal, but since both are concerned with the correct construction of aspects of the triggers for coverage in the hybrid clauses and certain of the prevention of access clauses, it is convenient to address the two Grounds in tandem. That is the approach adopted here, taking the clauses in the order in which they were considered in the Judgment (save where clauses are so similar that addressing them together is warranted).

59. The common issue that arises in relation to these clauses under Ground 2 is whether it is only the imposition of legally binding measures (in this case, the 21 March and 26 March Regulations[57]) which could satisfy the requirement for "*restrictions imposed*" in Hiscox1-4 (hybrid)[58], "*closure or restrictions placed*" in RSA1 (hybrid)[59], "*enforced closure*" in RSA4[60], "*action*" in MS Amlin1[61] (AOCA[62]) and Zurich1-2[63] (AOCA), and a denial or hindrance in access "*imposed*" in Hiscox1, 2 and 4 (NDDA[64]) and MS Amlin2[65] (AOCA). The Court below decided that only

[57] {E/2/12}, {E/3/17}.
[58] {C/6/401}, {C/7/431}, {C/8/462}, {C/9/499}.
[59] {C/15/1129}.
[60] {C/17/1321}.
[61] .{C/10/566}.
[62] 'Action Of Competent Authorities'.
[63] {C/18/1405}, {C/19/1448}.
[64] 'Non-Damage Denial of Access'.
[65] {C/11/646}.

restrictions with the force of law are sufficient. It was wrong to do so, and this Court is asked to correct that error.

60. Under Ground 3, the common issue is whether only an almost complete (as opposed to partial) inability to use premises for the purposes of the existing business could qualify as an "*inability to use*" the premises in Hiscox1-4 (hybrid) and whether only the total (as opposed to partial) closure of premises for the purposes of the existing business could qualify as "*prevention*" or "*denial*" of access in Arch1[66], Hiscox 1, 2 and 4 (NDDA), MS Amlin1-2 (AOCA) and Zurich1-2 (AOCA), and as "*interruption*" in MS Amlin2 (AOCA). The Court below decided that only a near total inability to use premises (in relation to the hybrid clauses) and only total closure (in relation to the prevention of access clauses) will satisfy the triggers in issue under Ground 3. Again, that conclusion was wrong, and this Court is asked to correct the error.

61. There are three general and three specific categories of measure which are relevant for these Grounds. The three general measures are relevant to all categories of business (the '**General Measures**'). They are:

61.1. The 'stay at home instruction', *viz.* the instruction to stop all unnecessary travel and social contact, to work from home and avoid social venues, initially made by Prime Minister in his announcements of 16 March 2020[67] and 18 March 2020,[68] then contained in the document published by Public Health England ('**PHE**') on 23 March 2020 called "*Keeping away from other people: new rules to follow from 23 March 2020*",[69] before being given statutory force by Regulation 6 of the 26 March Regulations;

61.2. The '2-metre instruction', *viz.* the instruction to stay more than 2-metres from others, initially contained in guidance dated 16 March 2020[70] and repeated on many occasions thereafter, for example in the Prime Minister's announcement on 22 March 2020[71] and PHE's "*Keeping away from other people*" document;[72] and

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[66] {C/4/227}.
[67] "*… now is the time for everyone to stop non-essential contact with others and to stop all unnecessary travel. We need people to start working from home where they possibly can. And you should avoid pubs, clubs, theatres and other such social venues*". {C/29/1783}.
[68] "*I want to repeat that everyone – everyone – must follow the advice to protect themselves and their families, but also – more importantly – to protect the wider public… Avoid all unnecessary gatherings – pubs, clubs, bars, restaurants, theatres and so on and work from home if you can*". {C/32/1807}.
[69] "*From 23 March 2020 there are 3 important new rules everyone must follow to stop coronavirus spreading… The first rule is that you must stay at home. You should only leave your home* ***if you really need to****…*" (emphasis in the original). .{C/35/1829-1830}
[70] "*This guidance is for everyone. It advises on social distancing measures we should all be taking… You can also go for a walk outdoors if you stay more than 2 metres from others".* {C/30/1790, 1793}.
[71] "*You have to stay two metres apart; you have to follow the social distancing advice*". {C/34/1818}.
[72] "*If you leave your home, you must stay at least 3 steps (2 metres) away from other people*". {C/35/1834}.

61.3. The prohibition against gatherings, initially contained in guidance dated 16 March 2020[73] and repeated by the Prime Minister in his announcement on that day,[74] repeated by PHE's "*Keeping away from other people*" document,[75] and given statutory force by Regulation 7 of the 26 March Regulations.

62. The specific measures are (i) the instruction to schools to close by the Prime Minister on 18 March 2020, (ii) the instruction to Category 1 and Category 2 businesses to close by the Prime Minister on 20 March 2020,[76] and (iii) the instruction to Category 6 businesses on 24 March 2020 that they "*should now take steps to close for commercial use as quickly as is safely possible*" ('**the Specific Measures**').[77]

Hiscox1-4 (hybrid): Grounds 2 and 3

The decision of the Court below

63. Ignoring immaterial differences, the 'hybrid' cover clauses in Hiscox1-4[78] are in the following terms (the only significant variation being the inclusion of a one-mile requirement in Hiscox4[79]):

"**What is covered**	**We** will insure **you** for **your** financial losses and other items specified in the schedule, resulting solely and directly from an interruption to **your activities**[80] caused by:…
Public authority	13. **your** inability to use the **insured premises** due to restrictions imposed by a public authority during the **period of insurance** following:…
	b. an occurrence of any human infectious or human contagious disease, an outbreak of which must be notified to the local authority"

64. There were numerous points in issue at the trial regarding the correct construction of this clause. On most of these the Court below found in the FCA's favour (Hiscox's appeals from those decisions are identified in grounds 4 to 8 of its appeal). However, the Court also found and declared, incorrectly:

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[73] "*In line with the social distancing guidance it is advised that large gatherings should not take place*". {C/30/1795}

[74] "*logically as we advise against unnecessary social contact of all kinds, it is right that we should extend this advice to mass gatherings as well… So from tomorrow, we will no longer be supporting mass gatherings with emergency workers in the way that we normally do. So mass gatherings, we are no moving emphatically away from*". {C/29/1784}

[75] "*From 23 March 2020 there are 3 important new rules everyone must follow to stop coronavirus spreading… The third rule is that people must not meet in groups of more than 2 in public places unless they live together [or] their job means that they have to*". {C/35/1829, 1832}

[76] "*following agreement between all the four nations of the United Kingdom, all the devolved administrations, We are collectively telling, telling cafes, pubs, bars, restaurants to close tonight as soon as they reasonably can, and not to open tomorrow. Though to be clear, they can continue to provide take-out services. We're also telling nightclubs, theatres, cinemas, gyms and leisure centres to close on the same timescale*". {C/33/1815}

[77] {C/39/1851}

[78] Judgment [246-253].

[79] In Hiscox4, sub-paragraph b is in the following terms: "*an occurrence of a* ***notifiable human disease*** *within one mile of the* ***business premises***".

[80] This phrase is used in Hiscox 1. In Hiscox 2, 3 and 4 the phrase is "**your business**".

64.1. That the words "*restrictions imposed*" in Hiscox1-4 (hybrid) mean something mandatory that has the force of law (the only relevant such matters being the restrictions in Regulation 2 of the 21 March Regulations and Regulations 4, 5 and potentially 6 of the 26 March Regulations); and that guidance, exhortation and advice given by the Government and the Prime Minister, including as to social distancing, do not count as "*restrictions imposed*";[81] and

64.2. That the words "*inability to use*" in Hiscox1-4 (hybrid) mean:[82]

> "…something significantly different from being hindered in using or similar. There will not be an "inability to use" the insured premises merely because an insured cannot use all of the premises and equally there will not be an inability to use the insured premises by reason of any and every departure from their normal use. Partial ability to use the premises might be sufficiently nugatory or vestigial as to amount to an "inability to use" the premises, depending on the facts."

As an explanation of the meaning of "*inability to u*se" this is less than clear, but it is evident from the final sentence that the Court envisaged that only a total or near total inability to use the premises would qualify, and that a policyholder's inability to use even a very large part of the insured premises may not qualify.

Ground 2 – "restrictions imposed"

65. Starting with the ordinary and natural meaning of "*restrictions imposed*", there is nothing in the words themselves, or their surrounding context, which requires them to be interpreted so narrowly that only measures which carry the force of law will qualify. The FCA accepts, as it did at trial, that the natural meaning of "*imposed*" involves something which the public authority requires or expects to be followed (i.e. something which is mandatory in character), but to interpret "*restrictions imposed*" as necessarily limited to measures with legally binding force is to read a condition into the clause which it does not contain and which is not supported by the ordinary and natural meaning of the words.

66. Not only is the interpretation preferred by the Court below inapt as a matter of language, it is also unrealistic and uncommercial. In this regard:

67. First, where a public authority, in mandatory terms, directs businesses to close all or part of their premises, expecting compliance, and directs the businesses' employees and customers in similarly mandatory terms not to go to the premises, it is entirely unrealistic to treat the authority's directions as not being "*restrictions imposed*" solely because they did not have legally binding force: the very purpose of the directions is to 'impose restrictions' (giving those words their ordinary meaning) and obtain compliance with them.

[81] Declaration 17.4; Judgment [266-267].
[82] Declaration 17.3; Judgment [268-270].

68. That was the situation in the UK on and after 16 March 2020 as the Government reacted to the spread of COVID-19 by issuing instructions to the public, including in the Prime Minister's statements on national television on 16, 18, 20 and 23 March 2020.[83] As the reasonable impartial observer would have understood, and as the public understood at the time, the very purpose of those instructions, expressed in mandatory terms by the Prime Minister in solemn broadcasts intended as a response to a public health emergency, was to impose restrictions on businesses, their employees and members of the public generally. Thus, in his broadcast of 16 March, the Prime Minister told the public "*there is more that we need you to do now. … now is the time for everyone to stop non-essential contact with others and to stop all unnecessary travel. We need people to start working from home where they possibly can. And you should avoid pubs, clubs, theatres and other such social venues.*"[84] And in the broadcast of 20 March, he gave the following directions: "*We [that is the UK Government and the devolved administrations] are collectively telling, telling cafes, pubs, bars, restaurants to close tonight as soon as they reasonably can and not to open tomorrow. Though to be clear they can continue to provide take-out services. We're also telling nightclubs, theatres, cinemas, gyms and leisure centres to close on the same timescale.*"[85]

69. The restrictions were and would be understood by the reasonable person to have been 'imposed', because they came from outside the business (they were not the insured's own idea), from an authority (the national Government, no less), and they were unwelcome.

70. Second, the Court's construction places an unrealistic and uncommercial onus on policyholders to analyse the legal force of a public authority's instructions (and, potentially, disobey them if the conclusion is that they lack legal force). In the real world, it is to be expected that policyholders, faced with instructions issued by a public authority in mandatory terms will, on the whole, comply. They would not be expected to, and usually would not, conduct the constitutional/legal analysis which the Court's construction contemplates and in which Lord Sumption engaged in his commentaries on the actions of the Government.[86] One of the advantages of living in a free and democratic (as opposed to police or authoritarian) state is that Governments can and do attempt to rely on the social responsibility of members of the public in complying with the Government's instructions in times of emergency as an alternative or complement to resorting to coercive measures. The construction of the policies should reflect that reality. Moreover, the Court's construction places undue focus on the legally binding force

[83] Judgment [26-40].
[84] Judgment [26].
[85] Judgment [32].
[86] This point has another aspect: it is perfectly possible that a public authority may impose a restriction by law-making, and then the law be found a year later after a judicial review or similar challenge to have been *ultra vires*. It is unclear whether the insurers concede that in that case the restrictions were still imposed—because that is how they felt and were presented—or whether the insurers would say that all parties would reasonably think the policy triggered but a year later find that in fact it had not been triggered, in other words that any assessment by the insured or insurer that the policy has been triggered is only ever provisional.

of the instructions themselves. It fails to take account of the fact that, even if the instructions are not binding (an example being the 2-metre rule, which, like the closure of schools, has never been put into legislation), their indirect effect may be to create legal obligations for the policyholder as, for example, an employer and/or occupier of premises.

71. Third, a business may close its premises on the strength of a public authority's mandatory (but not legally enforceable) instructions knowing or anticipating that legally binding measures will follow shortly afterwards, or that they may follow if compliance with the instructions is not obtained. A construction of the Hiscox1-4 hybrid clause which would deprive a policyholder of cover for the period before legally binding measures are introduced (if any are) in these circumstances is, again, unrealistic and uncommercial. The unrealistic nature of that result is brought home by Hiscox's concession in this case (referred to above in the discussion of emerging perils under Ground 1) that it will treat the Prime Minister's instructions on 20 and 23 March, which were introduced into law in the 21 and 26 March Regulations respectively, as anticipatory of those Regulations and, therefore, will not treat a business closure in response to the instructions as representative of a trend. This realistic concession emphasises the artificiality of seeking to draw a bright line between a policyholder's compliance with a mandatory instruction lacking force of law on the one hand and legally binding measures on the other.

72. Fourth, the construction preferred by the Court below creates the anomalous prospect that a socially responsible policyholder which complies with the mandatory instruction of a public authority may be put in a significantly worse position than one who refuses to comply unless the instruction is given legally binding force. This point is addressed above under Ground 1 in relation to the Pre-Trigger Peril point. This outcome cannot have been intended and is a further indication that the Court below has misconstrued the meaning of "*restrictions imposed*".

73. The Court below was also wrong to consider that its construction of "*restrictions imposed*" is supported by the contextual fact that the Hiscox1-4 hybrid clause also requires an inability on the part of the insured to use its premises.[87] The Court should have recognised that this is a neutral factor, which is equally consistent with the interpretation of "*restrictions imposed*" advanced by the FCA; all the more so if it construed "inability to use" in the way that it ought to have been construed (Ground 3).

74. The Court below erred in its conclusions as to the meaning of "*restrictions imposed*". It should have found (and this Court is asked to correct the error) that "*restrictions imposed*" can be satisfied by mandatory instructions or measures issued by a public authority (and was satisfied by the

[87] Judgment [266]. (The meaning of this term is more generally considered below in relation to Ground 3.)

General Measures and the Specific Measures issued by the Government on and after 16 March 2020), and that there is no additional requirement that they should have the force of law.

Ground 3 – "inability to use"

75. It was the FCA's case at trial, as it is on this appeal, that "*your inability to use the insured premises*" refers to the insured's inability to use the premises for the purposes of its business, and that the cover is triggered by a partial inability to use, as well as complete inability.

76. On the degree of inability required, the Court below disagreed (as set out above), finding that a near complete inability to use is required. The Court's construction gives the phrase "*inability to use*" an unrealistically narrow interpretation. On its natural meaning it is a broad, flexible phrase (intentionally so since it must be capable of operating in a wide variety of circumstances). There is no basis for the Court's narrow reading in the language of the clause itself (which contains no such restriction, unlike the bomb threat clause in Hiscox1 which refers to a "*total inability*"[88]), and the construction is: (1) inconsistent with the basic commercial purpose of the cover: these are BI policies, not catastrophe policies only engaged when a business's operations are shut down and any revenue generation is precluded; and (2) inconsistent with other related clauses in the policies.

77. Thus, the indemnity payable in respect of an interruption caused by the relevant "*inability to use*" the insured premises is to be calculated by reference to the insured's "*actual income*" during the period of indemnity[89] – i.e. the policies anticipate that the insured may maintain some (and not merely "*nugatory or vestigial*"[90]) income-generating operations. Likewise, the policies provide for payment in respect of increased costs of working, which again assumes that the business continues to operate (doing its best to trade out of the difficulty).[91] Similarly, the items of uninsured working expenses to be taken into account when calculating Gross Profit include rent "*for the **insured premises** that you must legally pay while the **insured premises** or any part of it is unusable as a result of **insured damage**, **insured failure** or restriction*" (underlining added).[92] If the intention had been that "*inability to use*" was not to be triggered by a partial inability to use the premises as a result of a restriction, this provision would not have been expressed as it is.

78. The Court's construction is also inconsistent with its related finding as to the meaning of "*interruption*" in the stem to the Hiscox1-4 hybrid clause. In that regard, the Court found

[88] {C/6/400}
[89] Judgment [246] (under "*How much we will pay*"), and e.g. Hiscox1 at {C/6/403}.
[90] Judgment [268].
[91] e.g. Hiscox1 at {C/6/403}.
[92] e.g. Hiscox1 at {C/6/382}

(correctly) that, on its proper construction in the context of these policies, "*interruption*" means business interruption generally, including disruption or interference, and not just complete cessation (as Hiscox had contended).[93] It appears that the Court may not have taken full account of this finding when reaching its decision on the meaning of "*inability to use*" in the hybrid clause: given that the clause is intended to respond to disruption or interference falling short of cessation, the Court ought to have concluded that it is most unlikely that a near complete inability to use the premises is required to trigger the cover.

79. Further the Court failed to take into account the fact that the "*interruption*", as construed by the Court, was applicable to "your activities", with the word "*activities*" being defined to mean: "*Your activities declared to us and accepted by us, or the business activities stated on the schedule*".[94] Two points arise from this. First, if for example the insured's declared activities were as a dine-in restaurant and takeaway and the insured is unable to use the premises for the restaurant activity, there is no obvious reason why it should have been intended that there should be no cover for the total inability to use the premises for that declared activity simply because the takeaway activity could continue. The interruption (in this case actual cessation) of the restaurant activity is "*caused by … your inability to use the insured premises*" for that insured activity. But the effect of the case advanced by Hiscox and accepted by the Court is that the ability to continue to use the premises for another insured activity (however subsidiary an activity it may be) prevents there being any "inability to use". Conversely, if the owner ran the restaurant and takeaway as two separate businesses with different limited companies and different insurance policies although sharing a lease, the dine-in restaurant business could claim. This flies in the face of reality. Second, the reference to "activities" emphasises that the focus must be on the functional impact on the insured rather than on the mere physical usability of the premises, which appears to have been the Court's focus. This is an insurance of use of premises for declared business activities.

80. In addition to not taking proper account of these other related provisions of the policies, the Court also appears to have been misled by the matters it did take into account. In Judgment [268] the Court based its interpretation of "*inability to use*" on two factors: (1) a need to recognise that "*'Unable to use' means something significantly different from 'hindered in using' or similar*"; and (2) the fact that other sub-clauses of the hybrid clause refer to matters in relation to which restrictions amounting to a complete inability to use premises "*are readily foreseeable*". As to these factors:

    80.1. The Court's search for a construction which recognises a distinction between "*inability to use*" and "*hindered in using*" was an irrelevant distraction. In the context of this clause,

[93] Declaration 17.2 {C/1/12}; Judgment [274] (Hiscox is appealing from this finding).
[94] e.g. Hiscox1 at {C/6/380}.

the hindrance is a given: there are "*restrictions imposed*". The question is whether the hindrance has caused an inability to use. That question should be answered by giving "*inability*" its natural meaning in the context – an exercise which is not helped by contrasting the word with "*hindered*" (which does not appear in the clause). Absent anything in the clause limiting "*inability*" to 'an almost total inability', the Court was wrong to construe the word so narrowly: it should have given the phrase its ordinary meaning encompassing both total and partial inability.

80.2. Whilst the matters referred to in the other sub-clauses of the hybrid clause[95] may lead to a complete inability to use premises, that is not necessarily so in each case: it depends on the premises and business. To take one example, an office building which suffers from a defect in the drains or sanitary arrangements on one floor may lead to an inability to use that floor, without affecting the entire building.[96]

81. The Court's construction also produces uncommercial results. In particular, it fails to take proper account of the fact that many businesses have more than one income-generating stream and that an inability to use premises for one business purpose may have a devastating effect on income despite the premises still being capable of use for a second business purpose (such that there is not a near total inability to use the premises for the overall purposes of the business). On any ordinary, commercially common sense use of the phrase "*inability to use*", the bookshop which is required to close to walk-in customers (representing 80% of its income) but can continue to use the premises to process telephone orders (representing 20% of its income), or the restaurant which is required to close to eat-in customers but can continue to use its kitchen for its delivery service, suffers an inability to use the premises for the ordinary purposes of its business. The indemnity would be limited because the business has not suffered a total loss of revenue, but there would reasonably be expected to be an indemnity despite the business not having suffered the catastrophe of total closure. The Court's finding that in such circumstances the cover is not triggered is unrealistic and uncommercial.

82. The Court should have concluded that the requirement for an "*inability to use*" will be satisfied where the policyholder is able to demonstrate that it has suffered an inability to use the insured premises for the ordinary purposes of its business. Most obviously, there will be an inability to use premises for the ordinary purposes of the business where part or all of the premises have had to be closed in response to restrictions imposed. But equally an inability may arise because

[95] See e.g. Judgment [246] for the sub-clauses.
[96] Note that the partial closure of premises (in that case a holiday cottage) as a consequence of defects in drains or other sanitary arrangements is expressly contemplated in RSA1: Judgment [285] (sub-clause C).

of restrictions imposed on others. The solicitors or accountants firm whose employees are told to work from home "*where they possibly can*"[97] (or required to do so by Regulation 6(1) of the 26 March Regulations[98]), and the shop selling 'non-essential' goods whose customers are instructed (or legally required by the Regulations) not to visit it, are both unable to use their premises for ordinary business purposes to a material extent. It is of course the case that a business whose employees can work from home, or which is able to sell goods in response to online or telephone orders, will continue to generate income, but that is a matter going to the calculation of loss; it is irrelevant to the question of whether there has been an inability to use the insured premises.

83. This is an important point, but one which the Court does not appear to have had clearly in mind. In Judgment [270], the Court expressed its view that whilst it had found[99] (correctly) that restrictions imposed on others are sufficient to satisfy the "*restrictions imposed*" trigger, nevertheless "*it appears to us that the cases in which Regulation 6 [of the 26 March Regulations] would have caused an 'inability to use' premises would be rare*". This view is founded on the Court's narrow finding as to the meaning of "*inability to use*" and was therefore wrong for the reasons given above. However, it is notable that, in reaching the conclusion the Court reasoned that, notwithstanding the impact of Regulation 6, businesses would be able to "*operate or come to operate by contacting customers at home*". The fact that it may be possible to mitigate an inability to use premises by working from home/contacting customers at home is not a relevant consideration when determining whether there has been an inability to use premises. The fact that the Court appears not to have appreciated that this was an irrelevant consideration suggests that it did not maintain a full grasp on the correct scope of the issue it had to decide. Also notable is the lack of any explanation as to when (in the Court's view) Regulation 6 could cause an inability to use and on what principled basis such cases are to be distinguished from those where inability to use is not caused.

84. For the above reasons, the Court below should have found (and this Court is asked to correct the Court below's errors) that (i) a partial inability to use the premises for the ordinary purposes of the business (rather than a total inability to use the premises subject only to "*nugatory or vestigial*" use) would satisfy the requirement of "inability to use"; and (ii) such an inability to use can arise because of restrictions imposed on others (including employees and/or customers) and there is no basis for a conclusion that an inability to use by virtue of such restrictions would be rare.

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[97] As per the Prime Minister's statement of 16 March 2020 (Judgment [26]).
[98] Because they had no "*reasonable excuse*" to leave their home.
[99] Judgment [269].

RSA1 (hybrid): Ground 2

85. RSA1 is directed at holiday cottage owners (that is, Category 6 businesses). It includes an Extension 2 ('Disease, Murder, Suicide, Vermin and Pests') which provides cover for:[100]

> "Loss as a result of
>
> A) closure or restrictions placed on the **Premises** as a result of a notifiable human disease manifesting itself at the **Premises** or within a radius of 25 miles of the **Premises**."

86. There is no separate requirement in the policy for interruption or interference – provided the "*closure or restrictions placed on the Premises*" result in loss, the claim is within the scope of the cover. It was common ground at the trial that this requirement was satisfied on 26 March 2020, when Category 6 businesses were required to close by the 26 March Regulations.

87. The question for the Court below which gives rise to the FCA's appeal on Ground 2 in relation to RSA1 was whether the requirement was satisfied before 26 March 2020. That required considering whether "*closure or restrictions placed on the premises*" had to be mandatory and have the force of law, or whether the pervasive measures and the express instruction of 24 March 2020 were sufficient. The Court decided that the closure or restrictions did need to have the force of law and accordingly declared that closure or restrictions were placed on Category 6 businesses from 26 March 2020 as a result of Regulation 5(3) of the 26 March Regulations, but not before.[101]

88. The Court's reasoning is given briefly in Judgment [294]:

> "While it is not specified who may 'close or place restrictions' on the premises, it is in our view clear that this must be by an authority having power to do so. We consider that this clause requires that the closure or restrictions should be mandatory: it is only such mandatory restrictions which would ordinarily be described as 'closing' or being restrictions 'placed on' the premises."

89. As will be apparent, the issue in relation to RSA1 as to the meaning of "*closure or restrictions placed on the premises*" has much in common with the issues relating to "*restrictions imposed*" in the Hiscox1-4 (hybrid) clause. For all the reasons given on Ground 2 above in relation to the Hiscox1-4 (hybrid) clause, which are relied on here, the Court was wrong to conclude that "*closure or restrictions placed*" requires the force of law. In addition, the FCA makes the following points.

90. First, although (as recorded in Judgment [288]) the FCA made the same submission in relation to RSA1 which the Court accepted in relation to Hiscox1-4 (Judgment [269]) to the effect that the relevant restrictions on premises need not be directed to the insured or to the premises (that is, that the 'placing' of restrictions may be indirect as well as direct), the Court made no finding on this point in relation to RSA1. It should have found that the FCA was right about this.

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[100] Judgment [285].
[101] Declaration [27.2], {C/1/21-22}.

91. Second, accordingly, the Court should have found that the General Measures, in particular the stay at home instruction but also the prohibition against gatherings, restricted the public from travelling freely and therefore amounted to closure or restrictions placed on holiday cottages insured under RSA1. The effect of those instructions was that the customers of any cottage rental business could not travel on holiday (either alone or to meet with other households) without contravening the Government's mandatory instructions. The Court should also have found that this was satisfied by the instruction to Category 6 businesses on 24 March 2020 that they should now take steps to close for commercial use:[102] this was self-evidently a closure or restriction placed on those businesses.

92. Third, RSA1 contained General Condition 10, which provided that "*You must at your own expense take all reasonable steps to prevent or minimise any Damage or Injury to Employees or the public*". In light of the emphasis in the Government's instructions on remaining at home unless absolutely necessary,[103] policyholders could not ignore government advice (for example, by requiring employees to undertake the cleaning and servicing of properties) without risking breach of this term.

93. For these reasons, the Court below should have found (and this Court is asked to correct the error) that the General Measures and the Specific Measures introduced by the Government on and after 16 March 2020 amounted for all businesses to "*closure or restrictions placed on the premises*" for the purposes of RSA1.

RSA4 (enforced closure): Ground 2

94. A description of RSA4 generally is given at Judgment [123-127]. The RSA4 'enforced closure' is addressed at Judgment [299-305]. The clause provides cover in respect of interruption or interference to the Insured's business as a result of "*defective sanitation or any other enforced closure of an Insured Location by any governmental authority or agency or a competent local authority for health reasons or concerns*". RSA4 policyholders are in all Categories from 1-6.

95. The FCA's appeal in respect of RSA4 arises under Ground 2 only. The issue is whether the Court was right to decide that there will only be an "*enforced closure*" of premises if all or part of the premises were closed under legal compulsion.[104] The Court considered that this would extend to closure which either is or is legally capable of being enforced. That includes a case where a relevant authority directs that particular premises should be closed, and states that if they are not closed then a compulsory order for their closure will be obtained – but only where

[102] Judgment [42].
[103] For example, in the Prime Minister's statements of 16 and 23 March: Judgment [26, 40].
[104] Declaration [31.1], {C/1/24}.

the authority gives a direction to close and has the power to enforce it by obtaining a compulsory order. The Court considered that the only enforced closures in the present case were those resulting from the 21 and 26 March Regulations.

96. The FCA submits that this decision was wrong and that the Court should have found (contrary to Judgment [303]) that the Government's instructions from 16 March 2020 constituted enforced closure where their effect was that policyholders, employees and/or customers were unable to access insured premises. The Court's construction of "*enforced closure*" is overly-narrow and formalistic. There will be a 'closure' where access to all or part of insured premises is prevented. There will be an 'enforced closure' where that prevention of access is of a compulsory nature. Where the Government instructs the public to do something in mandatory (albeit not legally binding) terms, a closure of premises which results from the instruction is 'enforced'. In any practical sense, the instructions are compulsory, compliance is expected and the Government may back its instructions with legislation if compliance is not forthcoming.

97. To test the point, one need only imagine an advertising agency or animation studio or one of a thousand other modern businesses whose essential work can be conducted from home. The Government's instruction on 16 March 2020 to (among other things) avoid any non-essential contact with others, and to stop all unnecessary travel,[105] and the instructions on 23 March 2020 that they "*must stay at home*" and that they would only be allowed to leave their home for very limited purposes including "*shopping for basic necessities, as infrequently as possible*",[106] meant that no customers or employees could visit the insured premises. None at all. The premises were therefore closed. This closure was forced by the Government's instruction. Furthermore, the mandatory prevention of access to premises and the consequential closure of physical business premises was a core part of the purpose of the instructions given by the Government on and after 16 March 2020 in relation to social distancing, self-isolation, lockdown, restricted travel and activities, staying at home and home working. Where insured premises were closed by a policyholder in compliance with those instructions, there was an enforced closure. Equally, there was also an enforced closure where the effect of the instructions was to prevent owners, employees and/or customers from accessing the insured premises.

98. The distinction which the Court sought to draw in Judgment [303] between the present case and a case involving closure under explicit threat of compulsion backed by an existing power is not, with respect, a sound one. Firstly, it fails to give due weight to the fact that on the rare occasions when a UK Government speaks directly to the public to issue mandatory instructions, those

[105] Judgment [26].
[106] Judgment [40].

instructions are intended to be and, generally speaking, are understood to be compulsory. Secondly, it fails to take account of the fact that the public would, rightly, anticipate that if compliance was not forthcoming (and, as it happened, even if it was forthcoming) the Government may (and in fact did) introduce legislation to back its instructions and make them compulsory in the formal, legally binding sense. In other words, when the Government instructs in a time of emergency, the threat of a compulsory order for closure is implicit.

99. For these reasons, the Court below should have found (and this Court is asked to correct the error) that the General Measures and the Specific Measures by the Government on and after 16 March 2020 amounted for all businesses to "*enforced closure*" of the premises for the purposes of RSA4.

Arch1 (Prevention of Access): Ground 3

100. The (optional) BI section in Arch1 provides an extension in the following terms:[107]

> "We will also indemnify you in respect of reduction in Turnover and increase in cost of working … resulting from …
>
> **Government or local authority action**
>
> Prevention of access to The Premises due to the actions or advice of a government or local authority due to an emergency which is likely to endanger life or property."

101. The FCA's appeal in relation to this provision arises under Ground 3 only. The Court below erred in holding that the requirement for "*prevention of access*" would only be satisfied where there is "*closure of the premises for the purposes of carrying on the Business as defined in the policy schedule*" (Judgment [326]), and that "*[a]nything short of complete closure will not constitute prevention of access*" (Judgment [330]).

102. The Court should have held that a partial prevention of access to the premises for the purposes of carrying on the business will suffice.

103. The starting point is that "*prevention of access*" is deployed in a provision the purpose of which is to provide cover for reduction in turnover and increased cost of working arising from a prevention of access to the insured premises for the purposes of the business (not only to a complete closure). There is no limitation on how, or to what extent, the prevention may affect access to the premises, no limitation on whose access is relevant and no requirement for a cessation of the business. The cover reflects the fact that businesses depend on the ability of their owners, employees, customers and suppliers to access business premises in order for the business to be carried on. This is the commercial context in which the clause is to be construed.

[107] Judgment [308], {C/4/226-227}.

104. As a matter of ordinary language, 'prevention' may be complete or partial, and a policy which responds to 'reduction in Turnover' and 'increase in cost of working' resulting from 'prevention of access', ought (absent some express provision or determinative contextual factor to the contrary – and there is none here) to respond to a partial prevention of access as well as total prevention. The mere fact that the action or advice of a relevant public authority is aimed at prevention to a defined and limited extent, rather than total prevention, does not mean that there was not a prevention to that extent. A road closed save for access by residents still amounts to a prevention of access for non-residents, even though the road is not completely closed.

105. The point that a partial prevention in access is a prevention all the same (and is conceptually distinct from a hindrance in access or hindrance in use) is an important one in this appeal because the Court below lost sight of it in reaching its decision on this issue (and on the identical issues which arise in respect of the MS Amlin 1(AOCA) and Zurich1-2 prevention of access clauses – as addressed below). This is apparent from Judgment [324] where the Court sets up the opposition between prevention and hindrance ("*'Prevention' is to be contrasted with and is not synonymous with 'hindrance'*") which then runs through its analysis of the construction (see, for example Judgment [327, 329, 333, 335]). The correctness of the Court's statement as a matter of definitions is not disputed, but it mischaracterises the issue the Court had to address, which was whether the clause responds to partial prevention (as the FCA contended), not whether it responds to hindrance (i.e. an obstacle making access more difficult[108]), which is no part of the FCA's case on the clause.

106. To the extent that the sale of goods/force majeure authorities referred to in Judgment [324-325] were relied on by the Court for what they say about the distinction between prevention and hindrance they are, therefore, irrelevant. Perhaps more significantly the Court's reliance on those authorities pushed it to the extreme position that "*impossibility*" is the "*touchstone of prevention*" and, therefore, that in the context of this clause only complete closure of the insured premises can amount to prevention of access (Judgment [325-326], [330]). In the commercial context with which those authorities were concerned, it is entirely understandable that the respective courts gave 'prevention' the narrowest possible meaning: the clauses in issue operated to suspend or terminate a party's obligations in contracts for the supply or shipment of goods in the event performance was "prevented" or "hindered". It was necessary to give those words a very narrow interpretation in order not to enable parties to escape their contractual obligations merely because of difficulties brought about by ordinary economic vicissitudes. But the context for the

[108] For example, the situation where the front entrance to an apartment store is blocked due to an incident in the street so that customers have to be directed to enter via another, more remote, entrance causing a material drop off in custom: access to the insured premises continues to be entirely possible, but more difficult.

decisions in those cases is a world away from the present case. They provide no justification for not giving the word "prevention" its ordinary and natural meaning in the present context.

107. As with its construction of "*inability to use*" in the context of the Hiscox1-4 hybrid clause, the Court's construction of "*prevention of access*" produces uncommercial and unrealistic results. Taking the example in Judgment [327]: where a restaurant is forced to close to customers so far as consumption of food and drink on the premises is concerned, but is able to continue a pre-existing takeaway service, on the ordinary and natural meaning of the phrase there has been a prevention of access for the business's customers so far as eat-in dining is concerned (i.e. a prevention to that extent). That is a prevention of access to the premises for the purposes of the business, and to the extent the prevention results in reduction in turnover, the cover should respond. The result accepted by the Court – that there is no cover because the restaurant is able to continue operating a different (and perhaps much smaller part) of its business – is entirely uncommercial. Contrary to the Court's view (at the end of Judgment [327]), this does not conflate 'prevention' with 'hindrance': the effect of the partial closure of the business is to prevent eat-in diners from accessing the restaurant, not merely to put an obstacle in their way. The error, with respect, is not in the FCA's case that "*prevention of access*" contemplates partial prevention, it is in the Court's failure to appreciate the distinction between partial prevention and hindrance.

108. The Court was also wrong (Judgment [328-329]) in its conclusion that there was no prevention of access in the relevant sense as result of the 16 March 2020 instructions of the Prime Minister, or Regulation 6 of the 26 March Regulations. The very point of those measures, requiring the public to "stay at home", socially distance, restrict travel and activities, and work from home, was to prevent people from accessing businesses – either entirely or to a defined extent. Thus, for example: (1) a visit to a shop for basic necessities became the only form of shopping trip permitted: the purpose of the measures was to prevent access to shops for any other reason; and (2) working at the office was only permitted where working from home was not reasonably possible: the measures prevented access to offices save to that extent.

109. For the above reasons, the Court below should have found (and this Court is asked to correct the Court below's errors) that a partial prevention of access to premises for the purposes of the business will satisfy the requirement of "*prevention of access*", and that a complete closure of the insured premises is not required.

<u>MS Amlin 1 (AOCA) and Zurich1-2 (AOCA): Grounds 2 and 3</u>

110. The MS Amlin 1 (AOCA) and Zurich1-2 (AOCA) wordings are very similar, and the issues they give rise to on this appeal are the same. They are therefore considered together.

111. MS Amlin 1 (AOCA) provides as follows:[109]

> "**We** will pay **you** for:
>
> **1. Action of competent authorities**
>
> loss resulting from interruption or interference with the **business** following action by the police or other competent local, civil or military authority following a danger or disturbance in the vicinity of the **premises** where access will be prevented provided always that there will not liability under this additional cover for loss resulting from interruption of the business during the first 24 hours of the **indemnity period**."

112. The equivalent Zurich AOCA clause[110] provides business cover for interruption of or interference with the business in consequence of:

> "**Action of competent authorities**
>
> Action by police or other competent local, civil or military authority following a danger or disturbance in the vicinity of the **premises** whereby access thereto will be prevented provided that there will be no liability under this section of this extension for loss resulting from interruption of the **business** during the first 3 hours of the **indemnity period**.

113. In relation to the 'prevention of access' requirements in these clauses, the Court below reached the same conclusion as to their meaning as it had in relation to "*prevention of access*" in Arch1, relying in both cases on the same reasoning.[111] For all the reasons given above in relation to Arch1, the Court below erred in its findings as to these prevention of access requirements, and (under Ground 3) this Court is asked to correct those errors in the same manner.

114. The issue under Ground 2 in respect of these clauses arises from the Court below's conclusions as to the meaning of "*action*". The Court held in both cases that 'action' in the relevant sense "*connotes steps taken by the relevant authority which have the force of law, since it is only something which has the force of law which will prevent access*".[112] Accordingly it found that only the 21 March and 26 March Regulations amounted to "*action*" within the meaning of the clauses.[113]

115. The Court's construction places an unduly restrictive interpretation on the clauses. The only relevant question they pose is whether there has been a prevention of access following action by a competent authority in response to a danger or disturbance. 'Action' naturally has a broad meaning: it is simply an act or thing done. Likewise, the breadth of authorities referred to ("*local, civil or military*") and of the underlying event contemplated ("*danger or disturbance*") indicate that the purpose of the clauses is to capture all intervention by a public authority that gives rise to prevention of access.

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[109] Judgment [419]; {C/10/566}.
[110] Judgment [479]; {C/18/1405}, {C/19/1448}.
[111] Judgment [431-433] in respect of MS Amlin1 (AOCA); Judgment [494-496] in respect of Zurich1-2 (AOCA).
[112] Judgment [434, 497].
[113] Judgment [435, 497].

116. There is no basis in the clause for reading into it a requirement that, in order to qualify, the relevant action must *necessarily* have the force of law. A number of the points made above in this regard in relation to the Hiscox1-4 hybrid clause apply here. In particular: (1) it is to be expected that, in a healthy democracy characterised by an appropriate sense of social responsibility among its citizens, businesses will comply with the instructions of a competent public authority expressed in mandatory terms, and it is wholly unrealistic to treat such instructions as not amounting to "*action*" unless given formal legal force; (2) a business may close its premises in response to a public authority's instructions notwithstanding that they are not legally enforceable, knowing or anticipating that legally binding measures will or may follow – and, again, there is no good reason for those instructions not to be regarded as "*action*".

117. The Court below erred in reading into these clauses a requirement that "action" connotes only steps taken by a public authority which have force of law. It should have held, (and this Court is asked to correct the error) that "*action*" of a public authority encompasses mandatory instructions or measures issued in response to a danger or disturbance (and that the General Measures and Specific Measures introduced by the Government on and after 16 March 2020 constituted "*action*" in this sense), and that there is no additional requirement that such action should have the force of law.

Hiscox 1,2,4 NDDA and MS Amlin 2 (AOCA): Grounds 2 and 3

118. Again, these clauses are in very similar terms and there are common issues arising from them on this appeal under Grounds 2 and 3. There is also a further issue under Ground 3 in relation the MS Amlin 2 (AOCA) clause (as to the interpretation of 'interruption').

119. In its most common form, the Hiscox 'NDDA' clause provides as follows:[114]

"What is covered	**We** will insure **you** for **your** financial losses and other items specified in the schedule, resulting solely and directly from an interruption to **your activities** caused by:…
Non-damage denial of access	3. an incident occurring during the **period of insurance** within a one mile radius of the **insured premises** which results in a denial of access or hindrance in access to the **insured premises**, imposed by any civil or statutory authority or by order of the government or any public authority, for more than 24 consecutive hours"

120. MS Amlin 2 (AOCA) is in these terms:[115]

> "**8. Prevention of access – non damage**
>
> **Your** financial losses and other items specified in the schedule, resulting solely and directly from an interruption to **your business** caused by an incident within a one mile radius of **your premises** which results in a denial of access or hindrance in access to **your premises** during the **period of**

[114] Judgment [391]; see e.g. Hiscox1 at {C/6/400}.
[115] Judgment [420]; {C/11/646}.

insurance, imposed by any civil or statutory authority or by order of the government or any public authority, for more than 24 hours."

121. The Court below's principal finding on these clauses was that they respond only to losses caused by measures imposed in response to a local incident, rather than something like the government's national response to the broad outbreak of COVID-19, and that there is therefore no cover under them in respect of BI losses caused by the restrictions imposed by the government in response to the national pandemic.[116] The FCA does not challenge that conclusion (although it should be noted that the Court was not asked to, and did not, consider whether there may be cover under these clauses for businesses interruption caused by local lockdown measures).

122. However, in its discussion of the Hiscox clause the Court went on to give some brief consideration to the construction of "*imposed by any civil or statutory authority or by order of the government or any public authority*", concluding that "*imposed*" and "*by order*" require any restriction on access to have the force of law.[117] In relation to MS Amlin 2 (AOCA), the Court stated that the wording is "*materially identical*" and that its conclusions in relation to the corresponding phrase in that clause were the same.[118]

123. On the meaning of "*imposed*", the Court relied on its reasoning in relation to the Hiscox1-4 hybrid clause for the conclusion that the word refers only to measures having the force of law. For all the reasons given above (under Ground 2) in relation to the hybrid clause, the Court was wrong to conclude that force of law is required. Moreover, its conclusion ignored the fact that the Hiscox NDDA and MS Amlin 2 AOCA clauses refer to a denial or hindrance in access to premises "*imposed by any civil or statutory authority or by order of the government or any public authority*". In addition to the "*by order"* gateway (which more naturally conveys the sense of a measure with legal force), the parties have included a broader additional gateway of "*imposed*" (the gateway the FCA relies on here for the non-Regulation Government actions) to make clear that actions without strict legal force satisfy. The Court's construction fails to reflect this distinction in the wording. The Court should have found (and this Court is asked to correct the error) that the requirement for "*a denial of access or hindrance in access … imposed*" in the Hiscox 1,2,4 NDDA and MS Amlin 2 (AOCA) wordings can be satisfied by mandatory instructions or measures issued by a competent authority (and was satisfied by the General Measures and Specific Measures introduced by the Government on and after 16 March 2020), and that there is no additional requirement that the instructions or measures should have the force of law.

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[116] Declarations [18.1, 18.2], {C/1/13-14}.
[117] "*…it is not strictly necessary to consider the other aspects of the clause but we do so briefly in case this matter goes further*": Judgment [407].
[118] Judgment [439].

124. Turning to Ground 3 there is, firstly, a short point arising from Judgment [414] from which it is clear that the Court construed the phrase "*denial of access*" in the Hiscox NDDA clause (and the same interpretation must apply to the identical phrase in MS Amlin 2 AOCA clause) as requiring a complete closure of the insured premises. For the reasons set out above in relation to the Arch1 prevention of access wording (there being no material difference between "*denial of access*" and "*prevention of access*" for these purposes), the Court was wrong to reach this conclusion.

125. Finally, in relation to the MS Amlin 2 AOCA clause the Court was wrong to hold that the word "*interruption*" in the clause requires a complete cessation of the business.[119] On its correct construction, what is required is an element of cessation to the business's normal operations. Thus, a clothes shop which is unable to continue to sell clothes in-store, but is able to continue (or introduce) an online strand to its business, suffers an interruption to its business. Likewise, if a manufacturing operation is ordered to shut down one of two manufacturing lines, it would obviously be wrong to say that the business has not suffered an interruption. In the present case, this point is reinforced by the fact that the clause envisages an interruption resulting from a "*hindrance in access*" to the premises. It is most unlikely that a cover for interruption resulting from a hindrance is contemplating a complete cessation of the business. This Court is asked to correct the error of the Court below and to find that "interruption" does not require a complete cessation of the business.

D. GROUND 4: QBE2-3

126. The Court below correctly found in relation to the disease clauses in Argenta1, MSAmlin1-2 (disease), QBE1, RSA3 and RSA4 (disease), and the hybrid clauses in Hiscox4 (hybrid) and RSA1, that the requirement that COVID-19 occur or manifest within a radius of the premises meant that there was cover for losses to the business resulting from COVID-19 as a whole, providing it came within the radius and thus (relatively) near the premises, and not just cover for losses due to the particular occurrences of COVID-19 that were within the radius.[120]

127. The Court rightly said that the opposite conclusion would have been "*highly anomalous*": Judgment [105]. However, contrary to its findings on all other disease clauses, it reached that opposite conclusion in relation to clause 3.2.4 in QBE2[121] and clause 3.4.8 in QBE3[122], deciding that these were "*significantly different*" from the other disease clauses (Judgment [230]), and

[119] Judgment [421].
[120] Judgment [99]-[113] (RSA3 - {C/16/1237}), [147] (RSA4 - {C/17/1299}), [161]-[165] (Argenta1 - {C/5/317}), [191] and [196] (MSAmlin1-2 (disease) - {C/11/645}), [225]-[228] (QBE1 – {C/12/745}), [273] (Hiscox4 (hybrid) – {C/9/498}), [296] (RSA1 – {C/15/1129}).
[121] {C/13/852}.
[122] {C/14/955}.

uniquely provided cover only for interruption or interference caused by COVID-19 to the extent that it was within the radius. The Court relied on Lord Mustill's *dictum* in *Axa Reinsurance v Field* [1996] 1 WLR 1026 at 1035[123] to conclude that what was being insured was matters occurring at a particular time, in a particular place and in a particular way: Judgment [231].

128. Clause 3.2.4 in QBE2 states:

> "Loss resulting from interruption of or interference with the business in consequence of any of the following events:
>
> […] c) any occurrence of a notifiable disease within a radius of 25 miles of the premises"

129. Clause 3.4.8 in QBE3 provides:

> "Loss resulting from interruption of or interference with the business as covered by this section in consequence of any of the following events:
>
> […] c) an occurrence of a notifiable disease within a radius of one (1) mile of the premises"

130. It is significant that the Court's approach of singling QBE2 and QBE3 out and differentiating them from QBE1 was not one for which any of the parties advocated. QBE itself described QBE1 and QBE2 as being "*in very similar form*" in its trial skeleton at [44]. The FCA will defend the Court's conclusion in relation to all the other disease clauses in its Respondent's case, but in this Appellant's written case attacks the Court's unsolicited conclusion that QBE2-3 were special.

<u>The underlying rationale and purpose are the same as for the other disease clauses</u>

131. The matters which convinced the Court of the broader view of the insured peril on all the other disease clauses apply with equal force to QBE2-3. These matters will be developed further in the FCA's Respondent's case, but in summary, they are as follows.

132. The cover is for notifiable diseases. These are diseases designated under the Health Protection (Notification) Regulations 2010, which were enacted to control "*epidemic, endemic or infectious disease*".[124] Those diseases include SARS, a viral respiratory illness for which there is no vaccine, and which can spread across the policy radius. And the list of notifiable diseases insured by the policies was not closed (unlike many other policies which itemise the diseases covered in an apparently exhaustive list), meaning insurers were providing cover for diseases which did not yet exist or which had not yet manifested themselves. Cover was therefore being provided for, amongst other diseases, new notifiable diseases, which might spread like SARS, or like other listed diseases, or in a way which none of them had done before.

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[123] {E/8/120}.
[124] Agreed Facts 5, {D/9/1530}.

133. Thus the cover contemplated by QBE2 and QBE3 would obviously encompass a disease which exists both inside and outside the radius. QBE itself fairly concedes that its cover is contemplated to apply and applies to diseases that exist both inside and outside the relevant policy area (although its case is that there is only cover to the extent that a policyholder can prove it was the disease inside the policy area which caused the Government action which interrupted the business).[125]

134. Yet QBE argues that there is no cover "*if it is the fact of the disease being elsewhere, rather than in the relevant policy area, that is the cause of the BI loss*".[126] But giving cover for the 'local-only' part of a wider disease is in reality giving illusory cover for notifiable diseases because the nature of diseases falling within the ambit of notifiable diseases and public authority responses to them is likely to make it very difficult to show that the authority acted because – and only because – of disease within the radius. The Court below recognised this, saying that authorities "*would be most unlikely to take action which had any regard to whether cases fell within or outside a line 25 miles away from any particular insured premises*"[127] and "*it might well be impossible to distinguish whether that reaction was to the disease within or outside the relevant policy area*".[128]

135. In other words, on QBE's approach, the insured will in reality almost never be able to recover in the case of diseases that are both outside and inside the policy area.[129] This would be the case even if the outbreak was a localised one if the locality in which the outbreak occurred straddled the boundary of the policy area rather than being entirely within the policy area.

136. Thus the practical effect of QBE's argument, accepted by the Court, is that QBE2-3 applies only to local-only diseases, i.e. occurring exclusively within the policy area, despite contemplating wider disease and not specifying expressly that it covers such local-only diseases (a textual point that was central to the Court's conclusion in relation to the other disease clauses: Judgment [102, 142, 160, 226]).

137. Further, the fact that the cover in QBE2 is for a 25-mile radius – 2,000 sq miles, the size of Oxfordshire, Berkshire and Buckinghamshire combined – shows that the parties must have contemplated cover in the case of public authority action affecting a wide area (i.e. disease outbreaks up to 25 miles away that could lead to public authority action affecting the insured's

[125] QBE trial skeleton [62], {D/22/1620}.
[126] QBE trial skeleton [62].
[127] Judgment [104].
[128] Judgment [160]. See, similarly, Judgment [143] "*It is also of the nature of such diseases that they may well produce a response from the authorities or the public which is to the outbreak as a whole, not to those parts of it which fall within [the policy area]*".
[129] QBE itself makes this point, in relation to COVID-19, at its trial skeleton [76] ({D/22/1621}): "*The (assumed) occurrence / manifestation of COVID-19 in the relevant policy area of any particular insured will not, in the overwhelming majority of cases, have had any causative effect*".

business), and thus relating to disease inside and outside the radius. The Court below rightly noted that this meant what was being insured was interruption deriving from diseases "*some of which might spread over a wide and unpredictable area, and which might have an effect at a considerable distance from a particular case*".[130]

138. Accordingly, the Court's general conclusion that cover in these disease clauses is for the effects of a notifiable disease if it has been manifested within the policy radius should apply to QBE2-3 just as with the other disease clauses. The policy radius therefore acts as an adjectival qualification, limiting the class of notifiable diseases which, if they interfere with the business, will lead to coverage, the significance being that the disease had been (relatively) near the business, not that those local cases were the specific cause of the interruption.[131]

The points of distinction for QBE2 do not justify the different approach

139. The matters in QBE2 which the Court described as being "*significantly different*" from the other disease clauses were not significantly different at all, nor were they such as to outweigh the indicators set out above. The Court relied on: (i) the words "*event*" and "*incident*" appearing in the stem and sub-clauses (h) and (i) of the key coverage clause 3.2.4; (ii) the same words appearing elsewhere, in clauses 3.2.5(b), 18.2 and 18.47.2; and (iii) the nature of the matters insured by clause 3.2.4(a), (b) and (d)-(f): Judgment [231]-[233].

(i) 'Events' and 'incident' in clause 3.2.4

140. The term "*event*" does not appear in the particular disease sub-clause but rather in the stem that introduces all the non-damage coverage sub-clauses, describing each as "*the following events*". This is merely a catch-all to refer to the various insured perils, which consist of a number of different things. The syntax of the stem suggests that the draftsperson is merely describing the succeeding insured perils as events, not restricting their natural meaning in any way. It is simply being used to refer to what has happened: this is the natural meaning of the word "*event*", which the Shorter Oxford Dictionary of English defines as meaning "*something that happens*".

141. Thus, in the disease clauses, the "*event*" is the disease outbreak. The Court seemed to accept this, because it concluded that multiple occurrences of the disease *within* the radius do constitute an "*event*": Judgment [231]. There are no reasons (nor did the Court give any) why, if the disease goes just beyond the radius, that should stop being an "*event*". The Court below took the correct approach when considering a similar argument in the context of the RSA4 disease clause (which RSA is not appealing), in which each of the insured perils, including the occurrence of a disease

[130] Judgment [160]. See, similarly, Judgment [104], [143], [228].
[131] See *e.g.* Judgment [226]-[227].

within the vicinity of the premises, was described in the policy as an "*event*" and a "*Covered Event*" in the quantum machinery.[132] The Court correctly rejected RSA's argument that the word "*event*" should be construed in line with Lord Mustill's dictum in *Axa Reinsurance*,[133] finding that the word "*event*" appeared "*simply as a shorthand for what is in the various insuring clauses*", and did not import an "*additional requirement or re-definition of what constitutes an insured peril*".[134] This is the proper construction of the use of the word "*event*" in the stem wording in QBE2 also, for exactly the same reason.

142. The words "*event*" and "*incident*" must also take their meaning from their contractual context. While Lord Mustill's dictum in *Axa Reinsurance* is well-recognised and apt for application to aggregation clauses in the reinsurance market (for example, when considering the question of what amounts to "*one*" event under the JELC clauses[135]), it is inapposite to apply it to this policy because the context is different: notifiable diseases do not occur at a particular time, in a particular place and in a particular way.

143. Clause 3.2.4(c) provides cover for an open-ended list of diseases which may spread in unpredictable ways, within and across a policy radius, and in ways that would make it almost impossible for an insured to prove which cases drove public authority action. It was common ground below that cover in QBE2/3 was not for a single case of COVID-19, but for the disease outbreak: *i.e.* for the occurrence of COVID-19, rather than for individual cases of COVID-19.[136] In relation to Hiscox1, the Court was similarly prepared to treat the outbreak of COVID-19 in the UK as an "occurrence", because that word was "*plainly*" not intended to mean a single case and was satisfied "*if there is an outbreak of such a disease*": Judgment [271]. Where the policies wanted to delineate cover in a narrow and limited way, they did so expressly: see, *e.g.*, the definition of "*Accident*" in QBE2 (irrelevant to the non-damage cover here) as "*a single, sudden and unexpected event, which occurs at an identifiable time and place*" in clause 18.1.

144. Similarly, the word "*incident*" in sub-clauses 3.2.4(h)-(i) should not be interpreted as redefining the scope of the insured peril. These clauses provide that QBE "*shall only be liable for loss arising at those premises which are directly subject to the incident*" and its maximum liability is capped "*in respect of any one incident*". These are merely common provisos serving particular purposes which have to employ some form of words to refer to the various insured perils in clause 3.2.4 without any

[132] The Indemnity Period was defined as starting on the occurrence of a Covered Event, which was defined as "*the events as described in*" various insuring clauses including 2.3 the non-damage cover clause. See Definitions 17, 42 and 120, cited at Judgment [127].
[133] See RSA's trial skeleton Appendix 4 [26] ({D/23/1624}), and recorded in Judgment [131].
[134] Judgment [145].
[135] Joint Excess Loss Committee Excess Loss Clauses for reinsurance contracts, {F/61/1303}.
[136] QBE trial skeleton [26], [170], [240] ({D/22/1619, 1622-1623}).

indication of an intention to alter the scope of those perils. Sub-clause (h) is a standard proviso which limits cover to premises "*directly subject to*" the insured peril; the Court ruled elsewhere that the purpose of clauses such as this is to ensure that "*there is no cover for the effects on the business which do not arise from those premises which are impacted by the contingency insured*".[137] Sub-clause (i) is an aggregation provision limiting the insurer's liability "*in respect of any one incident*". These clauses need to employ a word to refer back to the various insured perils in clause 3.2.4; other policies use the words "*occurrence, discovery or accident*"[138] or "*loss, discovery or accident*".[139] The use of the word "*incident*" is just a shorthand employed instead of using similar words. QBE1 also repeatedly uses the word "*incident*" when referring to matters which may lead to a claim on the policy,[140] but this was rightly was not considered as changing what would otherwise be the nature of the insured peril. Likewise, the Court also did not consider that the word "*incident*" in the prevention of access cover clause itself in Arch1[141] restricted the triggering emergency to having to be local in any way.

(ii) 'Event' and 'incident' in clauses 3.2.5, 18.2 and 18.47.2

145. Clause 3.2.5(b) extends the cover in clause 3.2.4 to clean up costs, including the costs of removing and disposing contaminated stock in trade at or from the premises if the use of the premises has been restricted on the order or advice of the competent local authority "*in consequence of an incident as defined above*", *i.e.* as defined in clause 3.2.4. Again the word "*incident*" is being used as a shorthand to refer back to the various perils in clause 3.2.4 and not to limit the scope of those perils.

146. Clauses 18.2 and 18.47.2 do not assist either. Clause 18.2 provides the definition of the phrase "Accumulation limit", that phrase appearing only in the personal accident section of the policy and capping the insured amount where more than one insured person is killed or injured by the same event or series of events (see clause 6.4.2). The Court said that this clause "*indicates that the draftsman, and the parties in agreeing the wording, distinguished between an event, a series of events, and a cause*" (Judgment [233]). That may be so for the purposes of the personal accident section; but quite why this should change the nature of an entirely unrelated insured peril in another section of the policy is not addressed in the Judgment and is not readily comprehensible, particularly in circumstances where an outbreak of a disease is far more naturally an "*event*" rather than a "*series*

[137] Judgment [97] for RSA3, similarly Judgment [166] for Argenta1.
[138] RSA3 and Argenta1, quoted at Judgment [85] and [150].
[139] MSAmlin1-2 (disease), quoted at Judgment [178] and [183].
[140] Clause 1.5 "Claims procedure": "*In the event of an incident resulting in a claim or one that may result in a claim, please read the 'Duties in the event of a claim or potential claim' section to this policy*". See, further, clause 1.4, and also clause 20.9.1 providing an exclusion for "*Any claim reported to us more than one hundred and eighty (180) days after the date the person insured should have known about the incident insured*".
[141] "*We will not indemnify You in respect of (1) any incident lasting less than 12 hours…",* quoted at Judgment [308].

of events" or a "*cause*". This is not so much using the back door to cut down non-damage cover, but breaking in through the letter box to do so.

147. Clause 18.47.2 provides that the indemnity period for the coverage clause 3.4.2 starts on the date of the occurrence of the notifiable disease. The fact that the indemnity period is 12 months actually supports the FCA's case: it contemplates that the covered disease might lead to interruption or interference of a whole year, which points to cover being for severe and widespread outbreaks. Other than that, it is a garbled clause: it refers to "*the an event* [sic]"; it incorrectly states that sub-clauses (b) and (c) in clause 3.2.4 require "*restrictions*", which they do not; it inaptly refers to the "*discovery of the incident*", which is not what clause 3.2.4 provides; and it omits any reference to sub-clauses (e) or (f) in clause 3.2.4. It would be wrong to read clause 18.47.2 as circumscribing the cover within clause 3.2.4(c).

(iii) The nature of the matters insured

148. The Court below also relied on the nature of what falls within clauses 3.2.4(a), (b) and (d)-(f) as fortifying its conclusion that what was covered was a single, one-off event: see Judgment [231]. But the Court did not explain *why* these perils made any difference, and there is no such reason because the quintet of perils in QBE2 (disease, organism, vermin, sanitation and murder/suicide) is entirely standard and indeed appears in all the other disease clauses which the Court ruled on (save for QBE1 which, for some reason, omits reference to 'organism').[142] This explains why QBE itself conceded that QBE1 and QBE2 are "*in very similar form*".[143] There is no logic in using those perils to support a different interpretation to QBE2 than was reached in all the other disease clauses.

<u>The points of distinction for QBE3 do not justify the different approach</u>

149. For QBE3 and clause 3.4.8, the Court relied on even fewer contra-indicators to distinguish QBE3 from QBE1 and all the other disease clauses (other than QBE2): the word "*events*" in the stem; the word "*incident*" in sub-clause 3.4.8(i); the phrasing of sub-clause 3.4.8(c) as "*an occurrence*"; and the policy radius of 1 mile: Judgment [237].

150. The use of the words "*event*" and "*incident*" are again (see above re: QBE2) merely shorthand for referring to the various insured perils in clause 3.4.8 – if a word had to be employed, these were as good as any others and not unusual or particular so as to suggest that any limit on cover under the insured perils is intended. The reference in sub-clause 3.4.8(c) to "*an occurrence*" is again not unique to QBE3: RSA3 and Argenta1 similarly refer to "*any occurrence*", but that rightly did not

[142] In RSA4 the vermin cover and murder/suicide cover are found in clauses 2.3(iv) and 2.3(vi) respectively.
[143] QBE trial skeleton [44] ({D/22/1618}).

change the nature of their cover. It was common ground below that this refers to the outbreak of the disease (and not merely a single case of COVID-19), so it is not clear why the Court was of the view that this supports the conclusion that cover here was only for a local outbreak and not the outbreak more widely. While it is true that the 1-mile policy radius in QBE3 is the smallest radius in the policies before the Court, this does not affect things because the cover encompasses diseases which could spread (rapidly) beyond that radius. For an infectious disease at the Barbican to interrupt a business near the Royal Courts of Justice (a mile away) clearly encompasses a situation in which there is a significant spreading of the disease, or a fear of the same. Thus the central case of an outbreak occurring 1-mile away is one that is spreading or liable to spread. To put it another way, the Court's explanation of what a relevant policy area does (Judgment [108-109, 144, 226-227]) applies equally to a 1 mile limit as a 25 mile limit, it is merely that with the 1 mile limit the parties have decided to require that the outbreak makes a more local appearance than in policies with a 25 mile limit. It does not alter the purpose and nature of that 1 mile limit.

151. Moreover, if cover was intended to be lost where the disease within and without the radius were both causes of interruption or interference, then both QBE2 and QBE3 would have been expected to say so in clear terms. It would not have been hard expressly to exclude loss caused by disease outside the radius. Elsewhere in QBE2 and QBE3, the policies exclude loss if an excluded peril is present even if an insured peril "*contribut[es] concurrently or in any sequence*"[144] or "*regardless of any other cause or event contributing concurrently or in any other sequence*"[145]. No such wording is used in the disease clauses.

Conclusion

152. Thus, contrary to the Court's conclusion that these policies are uniquely not intended to respond to diseases both within and outside the radius, the policy terms and common sense show that in fact that they contemplate and cover just such a peril. They are no different to any other of the disease clauses before the Court and therefore should provide cover for COVID-19 (and its effects) once it has occurred within the relevant policy radius in both cases.

E. DISPOSITION

153. *As to Ground 1 (the Pre-Trigger Peril Point)*: the Court was wrong to make Declaration 11.4(c) to (d) as a result of its incorrect conclusion as to the Pre-Trigger Peril Point, and Declaration 11.2

[144] Electronic risks in QBE2 p. 40 cl 4.12 ({C/13/863}), and the Micro-organism exclusion at QBE3 p. 54 cl 12.11 ({C/14/987}).
[145] War and terrorism in QBE2 p. 42 cl 4.22 ({C/13/865}), QBE3 p. 132 cl 22.7.1 ({C/14/1065}).

giving effect to its correct conclusion as to the Counterfactual Point should have been left unqualified.

154. *As to Ground 2 (the Force of Law point)*: the Court was wrong to declare, at Declarations 17.4, 18.4, 21.2-21.4, 22.4-22.5, 27.2, 31.1 and 33.2-33.5, that only the imposition of legally binding measures will satisfy the triggers in issue under Ground 2 and should have found that they can be satisfied by mandatory instructions from a competent authority without force of law.

155. *As to Ground 3 (the Total Closure point)*: the Court was wrong to declare, at Declarations 14.4-14.5, 17.3, 18.5, 21.1-21.4, 22.3-22.5, 27.2 and 33.1-33.5, that only a near total inability to use premises (hybrid clauses) and only total closure (prevention of access clauses) will satisfy the triggers in issue under Ground 3 and should have found that partial inability/closure will suffice (which may arise through indirect restrictions placed on others).

156. *As to Ground 4 (QBE2-3)*: the Court was wrong to make Declaration 12, and the treatment of QBE2-3 should have been the same as the other disease clauses in Declaration 11.

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30 October 2020