APPEAL NO. UKSC 2020/0178

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
([2020] EWHC 2448 (Comm)

B E T W E E N:

THE FINANCIAL CONDUCT AUTHORITY

Appellant

-and-

(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

Respondents

-and-

HISCOX ACTION GROUP

Intervener / Appellant

HISCOX ACTION GROUP'S WRITTEN CASE

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1. This case concerns low-value business interruption insurance covers taken out by many thousands of small businesses. The fact that there are very many such policies does not change their nature: these are simple, low-value covers and the correct answers to the issues in the present case should be, and are, clear, simple and readily applicable in the real world.

2. The Hiscox Action Group (the "**HAG**") is formed of 384 businesses insured by Hiscox Insurance Company Limited ("**Hiscox**") in respect of, amongst other things, business interruption (the "**Hiscox Policies**"). They are businesses that have, due to the emergence of COVID-19 and restrictions imposed by government, suffered devastating losses and desperately need the financial support that an indemnity from Hiscox would provide. The HAG has sought indemnity from Hiscox in respect to their losses, but Hiscox has in all but one case wrongfully and in breach of contract refused to provide any indemnity. As for many thousands

of other small businesses, this litigation is a matter of commercial "life or death" for the majority of the HAG claimants, all with businesses, and many with families, to support.

3. On the three grounds addressed below, the HAG appeals against certain orders[1] made at the consequentials hearing on 2 October 2020 following the decision of Flaux LJ and Butcher J (the "**Judges**") in *The Financial Conduct Authority v Arch Insurance (UK) Limited & Others* [2020] EWHC 2448 (Comm), handed down on 15 September 2020 (the "**Judgment**") {C/3}[2].

KEY POLICY WORDING

4. The HAG put their claims under the business interruption insurance "Public Authority Clause", which provides (with some minor variations across the four groups of Hiscox Policy wordings)[3] as follows, in Hiscox1 {C/6/401-404}:

"**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**[4] 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: a. a murder or suicide; b. an occurrence of any human infectious or human contagious disease, an outbreak of which must be notified to the local authority; c. injury or illness of any person traceable to food or drink consumed on the **insured premises**; d. defects in the drains or other sanitary arrangements; e. vermin or pests at the **insured premises**;
…	
Business trends	Provided that **you** advise **us** of **your** estimated annual **income**, or estimated annual **gross profit** if applicable, at the beginning of each **period of insurance**, the **amount insured** will automatically be increased to reflect any special circumstances or business trends affecting **your activities**, either before or after the loss. The amount that **we** will pay will reflect as near as possible the result that would have been achieved if the **insured damage** had not occurred. **Your** schedule will show if Business trends cover applies and the additional percentage amount. …" (emphasis added)[5]

[1] The Judges made a Declarations Order (the "**Declarations**") {C/1} and a separate Order (the "**Order**") dealing with *inter alia* leapfrog permission {C/2}. References to these are made in the form [Declarations / number] and [Order / number].

[2] References to paragraph numbers in the Judgment are made in the form [J / number].

[3] These variations appear at [J/246 to 253] {C/3/106-109} and are not repeated here, but instead only example wordings are given.

[4] Some Policy 1 wordings use the words "**your business**" instead of "**your activities**" here.

[5] This underlined wording was omitted from the Judgment [J/246] {C/3/106}.

5. Hiscox4 {C/9/499} contains a differently worded Public Authority Clause with a "one-mile restriction" in the wording at sub-paragraph (b): "b. an occurrence of a notifiable human disease within one mile of the business premises" (emphasis added).

6. An example of a differently worded Business Trends clause appears in Hiscox4 {C/9/500}:

> "Business trends The amount **we** pay for loss of **gross profit** will be amended to reflect any special circumstances or business trends affecting **your business**, either before or after the loss, in order that the amount paid reflects as near as possible the result that would have been achieved if the **insured damage, insured failure, cyber-attack** or restriction had not occurred."

THREE INTRODUCTORY POINTS

7. **First**, context is key[6]: (1) the insureds are generally very small businesses or SMEs, many within the jurisdiction of the FOS, (2) the insureds are generally unsophisticated purchasers of insurance, (3) the Policies provide generally low, or very low, limits of indemnity (£50,000 or £100,000) for the relevant section of business interruption cover, (4) the Policies are meant to be (either because of their stated terms[7] and/or their nature) readily comprehensible to these purchasers of the insurance and (5) the Policies were generally purchased "off the shelf" in standard form written by insurers, whether through brokers or not.

8. This is all relevant to the proper approach to the construction of the Hiscox Policies, applying the well-known authorities summarised at [J/62-66] {C/3/50-53}. The Hiscox Policies in issue before the Court are, and are objectively intended to be, simple policies. It is not meant to be a difficult exercise to apply the insuring clauses or the Policies as a whole. They are meant to be readily operable in the real world and, given the nature of the insureds and the low limits of indemnity, are not meant to require significant time and money to be spent on unduly complex and expensive coverage and quantification investigations every time a claim is made[8].

9. **Second**, even when the Court is dealing with circumstances which are unanticipated and/or novel, the Court's fundamental task is "*nevertheless to consider how reasonable parties should be taken to have intended the [insurance] contract to work in the circumstances which have in fact arisen*": per Leggatt LJ

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[6] See paragraph 4 of the FCA's Reply {D/18/1589}.

[7] The "Introduction" section to many Hiscox Policies states, in relevant part: *"We hope that the language and layout of this policy wording are clear because we want you to understand the insurance we provide as well as the responsibilities we have to each other"* {C/6/374}.

[8] For examples of cases in which the Courts have avoided complexity or a narrow linguistic focus in construing insurance policies, see *De Souza v Home and Overseas Insurance Co. Ltd* [1995] L.R.L.R. 453 at 455; 463 per Mustill LJ (a personal accident policy written in "*everyday language*" to be construed in accordance with common-sense) {F/22/390} and {F/22/398}; and *Sargent v GRE (UK) Ltd* [1997] P.I.Q.R. Q128 at Q130 per Mummery LJ (narrow linguistic construction of an armed forces personal accident policy rejected in favour of a "*broader approach…embracing consideration of the policy as a whole, its context, scheme and the surrounding circumstances*") {F/42/840}.

in *Equitas Insurance Ltd v Municipal Mutual Insurance Ltd* [2019] EWCA Civ 718; [2020] QB 418, at [159] {E/14/266}, and citing Chadwick LJ in *Bromarin AB v IMD Investments Ltd* [1999] STC 301, 310 {F/10/148}. It is accepted that the circumstances of this case are indeed unusual. However, that should not affect the Court's approach to the proper objective construction of the Hiscox Policies, giving them their plain and ordinary meaning (in, admittedly, unusual circumstances).

10. **Third**, the wording of the Public Authority Clause is flexible wording *capable* (in the abstract) of a broader or a narrower construction[9]. However, the way to determine the proper meaning of the Public Authority Clause is to construe the wording in context. That context includes the matters set out above as to the nature of the insureds and the insurance, and also the other wording in the relevant Business Interruption cover and the Policy as a whole[10]. Where the Policy wording is capable of a broader or a narrower construction, it is wrong to construe the wording and/or to read-in words so as to narrow the ambit of the clause. By way of analogy, the Supreme Court in *AIG Europe Limited v OC320301 LLP* [2017] 1 W.L.R. 1168[11] considered limb (iv) of the aggregation wording in the solicitors' professional indemnity Minimum Terms and Conditions: i.e. "*similar acts or omissions in a series of related matters or transactions*" {F/6/13}. Lord Toulson held at [22], in relevant part, as follows: "*Determining whether transactions are related is therefore an acutely fact sensitive exercise. To borrow the language of Rix LJ in Scott v Copenhagen Reinsurance Co (UK) Ltd [2003] 2 All ER (Comm) 190, para 81, it involves "an exercise of judgment, not a reformulation of the clause to be construed and applied"*" {F/6/19}.

GROUND (1): "THE QUANTUM POINT"

11. The Judges erred in declaring that *"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 … 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"* [Declarations/11.4(c)] {C/1/7-8}.

[9] Contrary to other clauses in the same section, the language of Public Authority Clause is by its nature flexible and not "absolutist" – see, for example, the wording "by order of the government" and "24 consecutive hours" in Non-damage denial of access ("NDDA") clause 3 and the wording "total inability" in Bomb threat clause 4 of Hiscox1 {C/6/400}.
[10] Notably, clauses 1 to 16 and the sub-clauses of clause 13 in the Business Interruption section of Hiscox1 {C/6/400-402} cover a wide range of circumstances, reflecting the very wide range of businesses and activities potentially insured and the potential fact patterns which could give rise to business interruption.
[11] For a similar point, see also *Shell UK Ltd v Lostock Garage* [1976] 1 WLR 1187 at 1204 F-H {F/44/877}.

12. The Judges' error can be illustrated by the following example: at 11am on Day 1, restaurant ABC discovers a rat infestation and closes before the lunch service. ABC calls the Council, but the Council is busy and does not attend until Day 3 evening, when it closes ABC until Day 10 so the rats can be exterminated and the premises cleaned. ABC earns nothing from Day 1 to Day 3. It is obviously wrong to include Days 1 to 3 as a trend and to argue that ABC should recover a low(er) indemnity, or nothing, because it was closed on Days 1 to 3. The reasons why this is obviously wrong, and therefore [Declarations/11.4(c)] {C/1/7-8} is also wrong, are addressed below.

13. This is a very important and high-value issue for policyholders generally, although it is right to note that the issue is of less importance for approximately 60% of the HAG[12], given its specific makeup and the following point. To explain, whilst many HAG claimants closed at the end of 20 or 23 March 2020, following the announcements made by the Prime Minister on those dates [J/26, 32 and 40] {C/3/36-37} {C/3/39} and {C/3/41-42} they did not suffer a material or any downturn before those dates and Hiscox has stated[13] that it will not treat a voluntary closure following the announcement of the 21 March and/or 26 March Regulations {E/2} {E/3} (i.e. on 20 or 23 March) and before their coming into effect as representative of a trend. However, the issue remains a matter of great importance to other policyholders, including approximately 40% of the HAG. Further, Hiscox's Grounds of Appeal (at, for example, paragraph 45) appear to raise issues of (in)direct relevance to this point {A/2/53-54}.

14. The Judges' findings at [J/278-279] {C/3/144-145} are fundamental to this Ground (as to which the HAG and the FCA take the same approach). Plainly, what was held at [J/278-279] {C/3/144-145} was correct, for all the reasons given in the Judgment. The oddity is that the Judges then went on at [J/351 and *obiter* at 389] {C/3/133} and {C/3/142} to find that it is also the correct approach to take into account pre-trigger downturns caused by COVID-19 when considering the application of Business Trends clauses. With respect, this is directly contrary[14] to the (correct) approach set out in [J/278-279] {C/3/114-115} where it is expressly held that COVID-19 should be "stripped out" from the counterfactual[15].

[12] Please see the table at the end of the HAG's trial skeleton {D/24/1630} and the more detailed explanation there.
[13] Hiscox has very fairly confirmed that this position is not dependent on the outcome of the Test Case or any appeal.
[14] The Judges clarified their position at the Consequentials Hearing by adopting [Declarations/11.4(c)] {C/1/7-8}, but did not clarify how the internal inconsistency is resolved as a matter of principle.
[15] The HAG notes here that the concept of a "counterfactual" is not a common insurance concept. As a contract of indemnity, either the insured event occurred (in which case, there is cover) or it did not (in which case, there is no cover). For example, there are no relevant references to the concept of a "counterfactual" in the leading textbooks *Colinvaux & Merkin's Insurance Contract Law* or in *MacGillivray on Insurance Law* (14th Ed.). There is not normally, therefore, any "counterfactual" of which to speak. It is only because of the operation of the Business Trends clauses in this case, and the

15. It is clear from the Hiscox Policy wordings that the correct approach when considering a claim under the Policy is to answer the following: (1) Has cover been "triggered"? This is a matter of "ticking all the boxes" in the Public Authority Clause {C/6/401}. If so, (2) how much will Hiscox pay? This is a matter of considering whether cover is provided on a "Loss of income", "Loss of gross profit" {C/6/403} or other basis. Then, (3) is any adjustment to be made under the Business Trends clause wordings {C/6/403-404}? This is a matter of considering the relevant Business Trends wordings (set out above).

16. Looking at those Business Trends wordings, the first point to make under the Hiscox1 wording is that if the insured's schedule does not show that Business Trends cover applies[16], the entire Business Trends clause does not apply[17]. In those cases where the Hiscox1 (or other) Business Trends wording does apply, the stated purpose of that clause is that "[t]he amount [Hiscox] will pay will reflect as near as possible the result that would have been achieved if the [insured event under the Public Authority Clause] had not occurred" {C/6/404}. Crucially, what this wording is obviously doing is looking at the period "post-trigger". There would, of course, be no claim under the Policy if cover had not been "triggered".

17. But once cover is triggered, it is clear from the Judgment that all elements of the insured peril must be "stripped out". The Business Trends clause can and should then apply in the normal way – i.e. to adjust[18] (upwards or downwards, as appropriate) for the normal vicissitudes of business life. The suggestion that an insurer can, through the operation of a Business Trends clause, adjust downwards for the effect of (an element of) the insured peril is wholly absent from previous case law,[19] and contrary to the accepted understanding of Business Trends clauses.[20]

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quantification exercise, that the concept of the "counterfactual" should have any place at all. But, crucially, the role of any supposed "counterfactual" is entirely dictated by the express terms of the Hiscox Policies.

[16] As set out at paragraph 4 and fn.5 above, the relevant underlined Business Trends clause wording was omitted from the Judgment.

[17] 214 of the 384 claimants in the HAG are in this position.

[18] Which is consistent with the (correct) finding that Business Trends clauses are part of the quantification machinery for a claim, not part of the delineation of cover: see, for example, [J/121] {C/3/71}.

[19] See examples of the courts applying a business trends clauses in *Polikoff Ltd v North British and Mercantile Insurance Co Ltd* [1936] Lloyd's Rep. 279 {F/38}; and *Sugar Hut Group Ltd v AJ Insurance* [2014] EWHC 3352 (Comm) {F/46}.

[20] See, for example, *Riley on Business Interruption Insurance* (10th edn) at 3.26 and 3.28 (emphasis added): "The [business trends] clause seeks to accommodate all such influences on the business that would have occurred but for *the incident* itself… this clause can be invoked by the insurers in the calculation of a claim to reduce the amount of the standard turnover or the rate of gross profit… For example, increased competition… a general trade recession, unseasonable weather conditions, or a strike or lock-out… are typical of circumstances which may cause a reduction in turnover *concurrently with that due to the incident*." {E/50/1396-1397}.

18. What [Declaration/11.4(c)] {C/1/7-8} does is inappropriately look back in time to the pre-trigger period, and then take that COVID-19-related downturn into account when applying the Business Trends clause. Whilst the Business Trends clause wording does, of course, refer to "… any special circumstances or trends affecting **your activities**, either before or after the loss", this can only be properly referring to a special circumstance or trend that survives the proper approach "post-trigger", as set out at [J/278-279] {C/3/114-115} (i.e. a circumstance or trend which is not itself one of the interconnected elements of the composite insured peril).

19. With respect, what the Judges appear to have misunderstood is the difference between the insured seeking to recover for pre-trigger losses and, instead, seeking to recover for post-trigger losses (but to avoid having those post-trigger losses reduced to reflect a pre-trigger downturn). For example, if a business lost £1,000 in revenue pre-trigger (that being a 10% reduction in income) due to a reduction in footfall at the insured shop (because of consumers' concerns about COVID-19), the insured would not seek to recover that £1,000 from Hiscox. Instead, the insured would (post-trigger) seek to recover losses of income from the date of the insured peril, but not to have the sums claimed reduced by 10%.

20. That the Judges, with respect, misunderstood this distinction is clear from [J/351] {C/3/133}: *"… once an insured peril occurred … the policyholder would in fact recover for its losses both before and after the occurrence of that insured peril …"*; and [J/389] {C/3/142}, where there is an obvious logical error in the reasoning – going from *"… that loss of income before the insured peril was triggered is not recoverable under the Parish Plus policy"* (i.e. pre-trigger recovery) to then applying that reduced percentage to post-trigger losses.

21. It is common ground that pre-trigger losses are not recoverable. Perhaps influenced by the misunderstanding that the insureds seek to recover pre-trigger losses, the Judges have wrongly concluded (as above) that post-trigger losses should be discounted to reflect COVID-19-related pre-trigger downturn, which is contrary to [J/278-279] {C/3/114-115} and a large number of other passages in the Judgment[21] to the same effect: i.e. all elements of the insured peril must be stripped out once the insured peril has been triggered.

22. It may also be that the Judges were influenced by what is, with respect, their misunderstanding of *New World Harbourview Hotel v Ace Insurance* [2012] HKCFA 21; [2012] Lloyd's Rep IR 537 {E/30}: see [J/349] {C/3/132}. The issue in *New World Harbourview* was not about quantum of

[21] See, for example, [J/121] {C/3/71}, [J/148] {C/3/81}, [J/278-283] {C/3/114-116}, [J/298] {C/3/119}, [J/305] {C/3/121}, [J/348] {C/3/132}, [J/388] {C/3/142}, [J/476] {C/3/164}, [J/530-532] {C/3/178-179}.

loss, but was simply one of timing (i.e. the date upon which cover commenced), and gave effect to the uncontroversial principle that the indemnity period can only start once the insured peril has been triggered. That was of no relevance to the construction of the Business Trends clause, which concerned the separate question of the continuation, post-trigger, of pre-trigger elements of the insured peril. Adopting the Judges' own language at [J/531] {C/3/178-179}, *New World Harbourview* did not concern the relevance of interconnected aspects of a "composite peril" to the counterfactual analysis when addressing quantum of loss.

23. Had the Judges not fallen into the above errors, they would have followed the approach that they correctly adopted at [J/278-283 and 530-533] {C/3/114-116} and {C/3/178-179}, in which they (rightly) held that the correct counterfactual when calculating the indemnity is one which excludes "*any part of the insured peril*", i.e. strips out all elements of the same. The Judges' (correct) approach to *Orient-Express* [J/503-535] {C/3/170-179} is also inconsistent with the approach taken in [Declaration/11.4(c)] {C/1/7-8}.

24. The competing constructions can be tested by their commercial and practical effects. The HAG's approach above is simple, easy to apply and entirely consistent with the principled approach taken in [J/278-279] {C/3/114-115}. Contrary to this, however, the error in [Declaration/11.4(c)] {C/1/7-8} is highlighted by its commercial unreality and its potentially extreme and unintended effects. It would reward the reckless insured who remains open after discovering an infestation of vermin, but punish the reasonable insured who closes. Further, it will in many cases be impossibly difficult to apply the second part of [Declarations/11.4(c)] {C/1/7-8}: *"… 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"*. Further, how to calculate and prove how pre-trigger losses should impact post-trigger losses will in many case be extremely complicated and time-consuming, contrary to how simple, low-value covers of this kind should operate in the real world. Further still, the Court's approach would be contrary to the express policy wordings which provide how the indemnity is to be calculated.

GROUND (2): "RESTRICTIONS IMPOSED"

25. The Judges erred in holding that "restrictions imposed" within Hiscox 1-4 meant only something "*mandatory that has the force of law"*, and that the only relevant such matters were those promulgated by statutory instrument, and in particular, Regulation 2[22] of the 21 March Regulations {E/2/13}, and Regulations 4, 5 and 6 of the 26 March Regulations {E/3/18-21}

[22] See [J/35] {C/3/39-41} and [Declaration/17.4] {C/1/13}.

(but in this latter case, would only result in an inability to use in what the Judges described as "*rare*" circumstances)[23].

26. Plainly, the "restrictions imposed" (and the entirety of the Public Authority Clause wording) must be read in the context of the relevant Hiscox Policy as a whole and not compartmentalised. The real question here is whether, properly construed, the Public Authority Clause is capable of encompassing the mandatory directions given by the Prime Minister to the British public on national television on 16, 20 and 23 March 2020 {C/29}, {C/33} and {C/37}. The Government announcements on 23 March 2020 [J/40] {C/3/41-42} gave the public a set of "*instructions*" and "*rules*", which were backed by sanctions (*"the police will have the powers to enforce them, including through fines and dispersing gatherings"*). The Government was clear in its intention to "*ensure compliance with the Government's instruction*" {C/37/1842}. Put this way, it seems obvious that the objectively reasonable person listening to these announcements would understand the directions therein to be mandatory and an "imposition", in the sense that they were not given a choice as to whether or not to comply, thus amounting to "restrictions imposed". The question, therefore, is whether the proper construction of these words should be contrary to this apparently obvious, objective understanding.

27. It is accepted, of course, that in normal circumstances most restrictions imposed by a public authority will be imposed pursuant to some legal power. However, these are unusual circumstances and the Court's fundamental task is "*nevertheless to consider how reasonable parties should be taken to have intended the [insurance] contract to work in the circumstances which have in fact arisen*": per Leggatt LJ in *Equitas* (above) {E/14/266}.

28. The Court's reasoning in support of [Declaration/17.4] {C/1/13} is contained in only two paragraphs of the Judgment: [J/266-267] {C/3/111-112}, and has three elements: (1) that the natural meaning of the word "*imposed"* is something "mandatory", (2) that the words are used in the context of a resulting inability to use[24] the premises, which reinforces the conclusion that the restrictions being imposed must have the "force of law", and (3) each of the contexts at (a)-(e) of the public authorities clause are contexts in which mandatory action can be taken by public authorities under identifiable legal or statutory powers.

[23] See [J/47-49] {C/3/43-46} and [Declaration/17.4] {C/1/13}.

[24] The Court's analysis of "inability to use" is challenged below, and as explained below the Court's decision on both "restrictions imposed" and "inability to use" is inconsistent with the correct finding that "interruption" means "*disruption or interference, not just complete cessation*" [J/274] {C/3/113-114}.

29. The HAG respectfully submits that the Court erred in this analysis. The Court's construction fails to give the words their natural and ordinary meaning, and instead gives them a constrained and uncommercial meaning that leads to inconsistent and anomalous results. A reasonable person[25] would have understood the phrase "restrictions imposed" as encompassing situations in which instructions are given to the public by a public authority in mandatory terms. Insureds who acted faithfully on public authority instructions with that character should not be deprived of recovery under their policies because of the result of a legal analysis that could not possibly have been within their reasonable contemplation at the time of contracting, and which is unlikely to be straightforward in the contexts in which the policy operates, even for specialists.[26]

30. Consistently with the above analysis, there is no definition of "public authority", nor any definition of "restrictions". The only threshold "test" for "restrictions imposed by a public authority" to meet is that they result in an "inability to use the insured premises". This is not a test based on the legal underpinning of the restrictions imposed, but rather on their practical effect, in any given circumstances. Were it considered that this approach to the clause would otherwise be too broad, there need be no such concern because the ambit of the clause is limited by the "inability to use" requirement, meaning that the restrictions imposed by the public authority must be of a sufficient quality and seriousness to have such a result – and it is not necessary to read-in "having the force of law" wording to put a sufficient constraint on the ambit of the clause.

(1) Natural and ordinary meaning of "restrictions imposed"

31. As set out above, the starting point is that each of the Hiscox Policies are simple policies, with low limits of indemnity and which are provided (on standard terms) to unsophisticated, small businesses. That is relevant to their construction not only because of the pointers in the policy wording itself[27], but also because the contract should be given the meaning it would convey to

[25] That is, a person with all the background knowledge reasonably available to the parties at the time of entering into the contract: *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900 at [14] {E/34/962-963}, as cited at [J/62] {C/3/50}.

[26] The Court, in giving its judgment, was addressing the specific "restrictions" pleaded by the FCA at para 18 of its APOC {D/16/1573-1574}. Whilst not the subject of these proceedings, there are other relevant contexts in which insureds will have acted on the instructions of a variety of entities properly described as "public authorities", such as regulators, local authorities, and police officers. It is understood that the approach taken in the Judgment and, as determined, the Supreme Court's decision should be applied *mutatis mutandis* to such contexts. Of course, if the Supreme Court felt that clarification were appropriate in this regard, such clarification would be welcomed, albeit of course only within the ambit of the issues properly before the Court.

[27] See for example the "Introduction" wording in many of the Hiscox Policies, at fn.7 above.

a reasonable person "*having all the background knowledge which is reasonably available to the person or class of persons to whom the document is addressed*" (emphasis added).[28]

32. It is of course possible for the word "restriction" to be understood as meaning a legal restriction, just as it is possible for an "imposition" to have "the force of law". Yet these are neither natural nor necessary components of the concept in the context of the clause. There is no necessary connection between the concepts of a "restriction" and an "imposition" and their legal status. What matters is whether the measure is articulated in mandatory terms. If a police officer, acting unlawfully, places a citizen under house arrest without any reasonable suspicion of crime, the police officer is imposing a restriction on that person. It is a restriction because it inhibits their freedom of action, and it is an imposition because it is put forward without regard to the consent of the person affected. It is the mandatory quality that makes it such, not its legal status, and that is so even if it later turns out that the police officer had no legal authority to give such an instruction.

33. In that context, the police officer is likely to be obeyed not because the citizen conducts an analysis of the legal foundation for the instruction he or she is given. A reasonable person would not consider that every exercise of public power by a public authority must be traceable to a specific and identifiable legal source before modifying their behaviour in accordance with those instructions. Public authorities are clothed in a status that non-constitutional lawyers would reasonably understand as giving them a general power to impose restrictions on the public within their sphere of activity – when they tell citizens to act in a certain way they do so with the "authority" that is conferred by that status.

34. The Court's reasoning at [J/266] {C/3/111} does not give the words their natural and ordinary meaning, but instead reads into the clause words which are not there[29], and in so doing elides the distinct concepts of the imposition of a restriction (rightly recognised by the Court as involving something articulated in mandatory terms) and the imposition of a restriction with the "*force of law*". However, neither the language of the clause nor its context require that further step; it is both necessary and sufficient for a public authority to give an instruction in mandatory terms for it to impose a restriction.

[28] *Dairy Containers Ltd v Tasman Orient CV (PC)* [2005] 1 WLR 215 at [12] per Lord Bingham {F/21/385}.

[29] For example, if Hiscox had wanted to include "by order" or "with force of law" wording, it could have done so.

(2) Other provisions of the Hiscox Policies

35. The Court's construction is inconsistent with other aspects of the Hiscox Policies (and the Court's own interpretation of those aspects of the Policies), whereas the HAG's construction gives rise to no such difficulty.

36. First, in each of the Public Authority Clauses the restrictions that are imposed must be imposed "following" the events listed in (a)-(e). The Court rightly held (at [Declaration/17.5] {C/1/13}) that the word "following" imports a causal connection such that the restrictions must follow the "occurrence" of the notifiable disease. However, that causal connection is a weak one when compared with "resulting solely and directly from", "caused by" and "due to", used elsewhere in the same cover. The restrictions imposed must be "following" the relevant matter in (a)-(e) in the sense that there is a chronological and causative connection. But the weakness of this causal link indicates that the "restrictions imposed" can be of a wide variety and not necessarily directly causatively determined by the relevant matter in (a)-(e). This causatively distances the "restrictions imposed" from the matters in (a)-(e) and weakens the Court's reliance on the point that paragraphs (a)-(e) are contexts in which mandatory action can be taken by public authorities under identifiable legal or statutory powers. Further, this is to be contrasted with the NDDA clause {C/6/400} (see [J/391; 415] {C/3/143} and {C/3/149}), where the wording envisages that it is the denial of access that is itself imposed by the public authority; by contrast, the hybrid clauses in Hiscox1-4 simply require a causative link between the restriction and the inability to use.

37. Second, in cases where the "restrictions imposed" are pursuant to powers involving an element of discretion[30], such as a power of arrest, that imposes a very difficult burden on insureds to identify whether a particular measure, which is likely to be implemented on an emergency basis, is derived from some sound legal underpinning or not. This difficulty is highlighted by two further aspects of the Hiscox Policies:

[30] There is a tension in the Court's analysis between two different ways in which it might be said that a restriction has "*the force of law*": first, where the restriction itself takes the form of a law, and second, where the restriction is given pursuant to some pre-existing legal power. Although [Declarations/17.4] {C/1/13} is expressed in terms of the former case ("*promulgated by statutory instrument*"), the reference to "*identifiable legal or statutory powers*" at [J/266] {C/3/111}, suggests the Court's reasoning was intended to encompass both concepts. In the latter case, it is the exercise of power not the pre-existing source of that power that must be the restriction, as otherwise it would not "follow" the occurrence of the notifiable disease. Yet if that is so, the practical difficulties in assessing whether there is cover in any particular instance are immense, and may even result in contradiction (for example, where a public authority orders closure pursuant to a pre-existing power for failure to comply with guidance that does not itself have the force of law). The Court's brief analysis at [J/266-267] {C/3/111-112} does not engage with these difficulties presented by its construction.

37.1 The NDDA clause, unlike the Public Authority Clause, expressly refers to the imposition of a restriction on access "*by any civil or statutory authority or by order of the government or any public authority*" (emphasis added) {C/6/400}. That wording draws a distinction between restrictions which are simply imposed, and those which are imposed by government/public authority "orders" (i.e. more naturally referring to a mechanism with the force of law). Yet rather than give effect to that distinction, the Court did the opposite, and treated it as amounting to precisely the same as the different wording in the Public Authority Clause: see [J/407] {C/3/146-147}.

37.2 Hiscox1 contains a Bomb threat clause which has the same "restrictions imposed" language as in the Public Authority Clause {C/6/401}. The clause envisages restrictions being imposed by the police or Armed Forces in response to a bomb threat for as short term a duration as four hours. Whilst it might be possible to find a statutory or other legal basis for citizens to obey emergency instructions given to them by the Armed Forces, on the other hand such an exercise seems somewhat unreal when the natural and ordinary meaning of the words simply refers to a situation in which mandatory instructions are given by the police or Armed Forces in response to a bomb threat[31].

38. All these difficulties are avoided by taking the natural and ordinary meaning of the words as involving a mandatory instruction by a public authority, and stopping the analysis there, without the need to import additional and complex concepts about whether those instructions had the force of law, and if so, what that means.

(3) Commercial common sense

39. The consequences of the Court's construction, which the Court did not assess at [J/266-267] {C/3/111-112}, render it unduly difficult for insureds to identify whether the Policy is likely to respond in a particular instance. By construing the clause as requiring not merely a restriction to be imposed by a public authority but rather a restriction lawfully imposed, the Court's construction requires insureds to engage in a legal analysis that is not straightforward even for specialists. Although there is a principle of construction whereby the factual matrix is taken to include the "relevant legal background"[32], the scope of that principle cannot sensibly encompass the attribution to insureds of sufficient knowledge to know whether a direction in mandatory

[31] It would be odd, for example, if the policy did not respond because such emergency instructions turned out to be given in a manner inconsistent with their legal basis, yet that is the effect of the Court's construction.
[32] See e.g. *Lewison on the Interpretation of Contracts* (6th edn) §4.06 {F/62}.

terms issued by a public authority has a proper legal foundation.[33] By contrast, the HAG's construction simply requires insureds and insurers to deploy concepts readily intelligible to all (i.e. whether an instruction is given by a public authority in mandatory terms or not).

40. Further, the Court's construction renders the presence or absence of the insured peril contingent on events which may occur substantially later. A public authority instruction can have, or at least appear to have, the force of law when it is pronounced, yet if it is challenged by way of judicial review on the grounds that it was *ultra vires*, it would not have done so[34]. At the time the instruction was given, however, it would have had the *appearance* of legality.

41. The Court's construction also has the perverse effect of penalising the prudent insured who faithfully followed Government instructions understood to be mandatory and in the public interest, and benefiting those who did not follow such instructions. The correct construction of the Policy should not be one which encourages insureds to be sceptical towards mandatory instructions given by public authorities in emergency situations, and only comply if certain as to the legal basis for those instructions[35].

(4) Fact-sensitive nature of enquiry

42. The Court's construction also imposes an unwarranted restriction on the words that leads to great unpredictability as to how the clause will be applied in other contexts occurring in response to the COVID-19 pandemic and generally. In many normal circumstances, restrictions imposed by a public authority will have the force of law. However, it is simply a matter of a novel fact-pattern arising (as in the present case) to test whether or not that is an actual *requirement* of the meaning of the clause, properly construed, or whether it is simply something that is normally the case on the facts, but not mandated by the terms of the Policy.

43. The Court's construction is also, with respect, unduly narrow on the facts of this case: of course the Prime Minister's announcements of the various extreme restrictions imposed were *going to*

[33] For an example of the limitations of this principle, see *Zoan v Rouamba* [2000] 2 All E.R. 620 at [36]-[38], in which the Court of Appeal declined to hold that the reasonable background for the purposes of construing a hire purchase agreement included detailed knowledge of consumer credit legislation {F/53/1127-1128}.
[34] See, for example, *Dolan & Ors v Secretary of State for Health and Social Care & Anor* [2020] EWHC 1786 (Admin) {F/24}.
[35] It is also not difficult to conceive of circumstances in which the insured's failure to follow the instructions could have an indirect effect on the insured's legal liability, and in that sense might be said to have had the "force of law". For example, it is possible that on certain facts, a failure to follow mandatory Government public health instructions (even if not legally binding) could be relied upon as evidence of a failure to take reasonable precautions to comply with duties under the Health and Safety at Work Act 1974 {F/3}, which breaches sound in civil and criminal liability. It would be a strange result if an insured found itself criminally liable as a result of disobeying government instructions, yet at the same time could not recover under its business interruption policy because those instructions did not have binding legal force.

have a legal basis[36]. But, of course, there would be a time-lag between the (extremely urgent) announcements and the passing of the Regulations putting those announcements into effect. This obviously should not convert the announcements into something that is not "restrictions imposed" when they would have been so if they had been made pursuant to pre-existing legal powers[37].

44. On the facts[38], the 16, 20 and 23 March 2020 announcements were "restrictions imposed". It is necessary to read those announcements in full detail, but by way of example: (1) the 16 March 2020 statement told citizens to "*stop non-essential contact with others and to stop all unnecessary travel*" and to "*avoid pubs, clubs, theatres and other such social venues"* {C/29/1783}; (2) on 20 March 2020, the Prime Minister stated[39] that "*after schools shut their gates on Friday afternoon [*20th March*] they will remain closed for most pupils – for the vast majority of peoples – until further notice."* {C/32/1807}; (3) on 20 March 2020, the Prime Minister stated that he was "*telling"* cafes, pubs and restaurants "*to close tonight as soon as they reasonably can, and not to open tomorrow"* {C/33/1815}; and (4) in addition to paragraph 26 above, the 23 March 2020 statement referred to social distancing (which never had "the force of law" in England and Wales) as part of the "*measures"* the Government was taking {C/37/1842}.

GROUND (3): "INABILITY TO USE"

45. The Court erred in finding that the requirement of "inability to use" was only satisfied if use was "*sufficiently nugatory or vestigial*", and that (in the sense explained below) it was not satisfied if the insured was "*being hindered in using*", and/or not able to "*use all of the premises*", and/or by reason of "*any and every departure from their [i.e. the insured premise's] normal use*": [Declarations/17.3] {C/1/12}.

46. The correct construction is that "inability to use" refers to the inability to utilise or employ the premises for its intended aim or purpose. This encompasses the inability to use the premises as they are normally used, i.e. for the insured's normal business activities. Importantly, this is consistent with the essence of the cover provided – i.e. the cover is for "interruption to **your activities** [or **business**]". Further, the insured is not required to prove an almost total inability

[36] Although surely the announcements would still amount to "restrictions imposed" if, for some reason, it was not possible for the Regulations to be passed (perhaps because the emergency was so serious).
[37] No reasonable insurer or insured would deliberately want to insure for legally mandatory restrictions but not an order by the government. No insured would understand why one should be covered and not another, nor would any insurer.
[38] Please see Annexe 1 for some Worked Examples.
[39] This was obeyed, even though the school closures did not have "force of law": FCA's Reply, §15 {D/18/1590}; the High Court has held that there was no legal measure imposing a requirement on schools in England to close: see *Dolan, Monks v Secretary of State for Health and Social Care & Anor* [2020] EWHC 1786 (Admin) at [110] {F/24/459}.

to use, which would be completely inconsistent with other express Policy wording such as the provisions for payment of "*increased costs of working*" (which, the HAG highlights, assumes that work continues) {C/6/403}.[40] Instead, it is sufficient to prove that there is a material inability to use the premises for the insured's normal business activities[41].

(1) Inability to use the premises for the insured's normal business activities

47. The Court has correctly held at [J/274] {C/3/113-114} and [Declarations/17.2] {C/1/12} that "interruption" includes interference or disruption, not just a complete cessation of the insured's "business" or "activities" and that whether there has been such an "interruption" is a matter of fact in each case. In those circumstances, it would be strange if "inability to use" meant only complete inability to use the insured premises because that would indicate that "interruption" meant only a complete cessation. Instead, read consistently with the rest of the business interruption cover wordings, "inability to use" is a flexible term and does not mean complete inability to use.

48. Properly understood, the term "inability to use" must be read as referring to the material inability to use the premises for the insured's normal business activities, which could be partial or total. This is, most obviously, borne out of the word "use", which denotes utilising or employing (the premises) with some aim or purpose.[42] The purposes for which the premises are employed cannot be abstract or theoretical, and necessarily relates back to the insured's purposes, and the use of the premises for the insured's business activities. This was rightly agreed by Hiscox.[43] In the circumstances, the real question is whether the insured can use the premises for the purpose of its business activities, or whether there is a material inability to do so. This depends, in turn,

[40] Defined as "the costs and expenses necessarily and reasonably incurred by you for the sole purpose of minimising the reduction in income from your activities during the indemnity period, but not exceeding the reduction in income saved" {C/6/399}.
[41] For example, (1) a café which normally provides an eat-in service, now only operating a takeaway facility (that is not nugatory or vestigial); (2) a dance studio which normally provides in-person lessons, now only providing online/remote lessons filmed from the studio (that are not nugatory or vestigial); and (3) a retail store which normally only sells goods from its premises, now only providing a delivery service (which is not nugatory or vestigial).
[42] See, for example, *Black's Law Dictionary* (11th edn) 1855 ("To employ for the accomplishment of a purpose") {F/56}, and *Hay's Words and Phrases Legally Defined* (5th edn) ("The first meaning assigned to the word "use" in the Johnson's Dictionary is "to employ to any purpose"", citing *British Motor Syndicate Ltd v Taylor & Son* [1900] 1 Ch 577 at 583) {F/59}.
[43] Hiscox Defence at paragraph 14.1 ("The question is simply: can the insured use the premises for its business activities or not") {D/19/1596} and Hiscox Skeleton Argument for Trial at paragraph 156 ("the "use" in question is use for the purpose of the insured's business activities") {D/21/1614}.

on the insured's normal business activities, i.e. the way in which the insured would ordinarily run its business[44].

49. Any other construction of "inability to use" would be at odds with the wording of the Hiscox Policies and/or business common sense:

49.1 It would be plainly wrong to argue that an insured is able to use the premises (and therefore has no cover), so long as it is carrying on operations in some loose shape or form, no matter how far a departure that is from its normal business activities.

49.2 More significantly, there are inherent practical difficulties with the Court's construction. It would result in an insured that (i) complies with his contractual obligation to take "*every reasonable effort to minimise any loss*";[45] and (ii) resourcefully adapts his business (by, for example, adapting his food for takeaway or conducting operations remotely), having no cover, as compared to the insured who simply ceased operations altogether.

49.3 Further, an insured's efforts to minimise / mitigate loss by adapting its business in light of an insured peril properly goes to quantification of the business interruption loss, and not to delineation of cover. The fact that an insured seeks to adapt its business by shifting to conducting lessons online, for example, is specifically catered for in the quantification clauses of Hiscox 1-4: see the provisions for payment of "*increased costs of working*" {C/6/403} (which must mean that work continues).[46]

49.4 Hiscox argued below that if a restaurant adapted so as to operate a takeaway service[47] "*if the restaurant in this case successfully adapted, it would be able to claim the costs of doing so from Hiscox*". This misses the point entirely. The insured would not be able to claim the costs of doing so, as (on the Court / Hiscox's understanding) it would still be able to use the premises and therefore have no cover.

[44] For example, prior to the COVID-19 pandemic, a Michelin-starred restaurant would only provide an eat-in service, and a dance studio would only conduct lessons in person. What the insured purchased was business interruption cover, and the nature of the business must colour the proper meaning and application of "inability to use".
[45] General claims conditions clause 2(a) in Hiscox1 {C/6/378}.
[46] Defined as "the costs and expenses necessarily and reasonably incurred by you for the sole purpose of minimising the reduction in income from your activities during the indemnity period, but not exceeding the reduction in income saved" {C/6/399}.
[47] See the FCA's Skeleton Argument for Trial at para.370 {D/20/1608-1609} and Hiscox's Skeleton Argument for Trial at para.174 {D/21/1616}.

(2) The insured does not need to prove an almost total inability to use

50. The Court's construction is a marked departure from the natural meaning of the words "inability to use". This is evident from the wording of the Hiscox 1-4 policies themselves[48]:

    50.1 The Policy simply requires an "inability to use". If the parties had intended to specify a particular degree of "inability" required and/or required the term to be read restrictively, then the Policy would have said so. See, for example, the specification of a "*total inability to access the insured premises*" (Bomb threat clause)[49] and, by contrast, "*hindrance in access*" (NDDA clause) {C/6/400}.

    50.2 The word "inability", on its own terms, does not denote the specific extent to which the insured lacks the ability to use. It does not suggest that the insured must be completely unable to use the premises, *in toto*. To the contrary, it is a perfectly acceptable and correct use of the term to state that an insured is unable to do something, to the extent of that inability.

    50.3 Crucially, the Court's overly restrictive understanding of "inability to use" is incompatible with the other sub-clauses, which indicate that "inability to use" will often fall short of an almost total inability to use. For example, there is cover for "*inability to use… following defects in the drains or other sanitary arrangements*" (sub-clause (e)) {C/6/401}. It is common, and entirely foreseeable, that a drain leakage is confined to a particular part of the premises. By way of example, a leak could affect the main dining room of a restaurant but leave unscathed a small bar annexed to it. This should be sufficient to trigger indemnity.

51. In the circumstances, there is no textual basis for the Court's requirement that the insured prove an almost total inability to use. Further, the proper construction of "inability to use" must also be substantially shaped by the Policies' purpose and context. The Court's construction is at odds with this and would (contrary to well-documented principles of construction[50] and [J/281] {C/3/115}) in many cases render cover illusory:

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[48] For context, see also the other wordings available in the market: "enforced closure", "closure" and "prevention of access" and "enforced closure".

[49] Hiscox argued below that the use of the word "total" in the Bomb threat clause "*reflects the parties' desire to make clear that only if there was no access at all would the clause bite*" (as compared to the terms "hindrance in access" in the NDDA clause of the Policy) {D/21/1615}. However, if, as Hiscox argues, the word "inability" denotes "total inability", then there would be no need to include the word "total" in order to differentiate it from the 'weaker' requirement of "hindrance", as this would be (on Hiscox's case) self-evident.

[50] See paras 56-57 of the HAG's Skeleton Argument for Trial {D/24/1627-1628}.

51.1 The practical reality is that a substantial number of businesses did not simply shut down. Facing a commercial life-or-death situation, insured businesses adapted so as to continue (part of) their operations or new operations: see Annexe 1.

51.2 It is prudent and reasonable that those insureds did so. The Court's construction would mean that many businesses, which were able to make partial use of their premises which was not nugatory or vestigial, would not have cover. This is a manifestly uncommercial and unrealistic result.

52. Furthermore, these Hiscox Policies are sold to a wide range of businesses[51] (including but not limited to: cafes and restaurants; salons, spas, and beauty parlours; retail stores; equipment/event hire businesses; estate agents; legal consultancies; recruitment agencies; photographers/videographers; theatres; gyms and sports clubs; and accountants). Each type of business will seek to adapt to the same "restrictions imposed" in different ways; for example, a café will be able to (and often will) adapt by providing a small takeaway service, while a beauty parlour generally has to close completely. The Court's construction would produce anomalous distinctions between different types of business, with no obvious principled basis: cover will turn on the type of business being insured, which is arbitrary in circumstances where the insured peril is the same. The distinction should sound in quantum, but not in principle as to whether there is cover or not (depending on the facts).

53. Lastly, on this issue, the Court's construction of "inability to use" is at odds with other key aspects of the Judgment:

(1) The Court held that "interruption" means "*disruption or interference, not just complete cessation*" [J/274] {C/3/114}. It is difficult to see why the Court would require the insured to establish, as a minimum, an almost total "inability to use" before finding that cover is triggered for causing a "*disruption or interference*". Conversely, if the insured does not need to prove a "*cessation*", then it should not need to prove an almost total "*inability to use*".

(2) The Court held that a "restriction imposed" does not have to be directed to the insured, or to insured's use of the premises [J/269] {C/3/112}. This means that a "restriction imposed" can, for example, be directed to customers and/or employees, preventing them from attending the premises. This encompasses a variety of restrictions, which will have

[51] The Public Authority Clause by its terms addresses a wide range of different factual circumstances, and the Hiscox Policies cover a wide range of different kinds of businesses. What amounts to an "inability to use" in any case will be an acutely fact-sensitive issue.

widely differing effects on an insured's ability to use the premises. Given that these two elements of the insured peril are directly linked, the term "inability to use" must be capable of accommodating these diverse effects, and should not be confined to the Court's restrictive interpretation.

(3) Regulation 6 of the 26 March Regulations

54. In light of the proper construction of "inability to use" as set out above, the Court was wrong to hold that "*the cases in which Regulation 6 would have caused an 'inability to use' premises would be rare*" [Declarations/17.4] {C/1/13}. Whether or not Regulation 6 causes an "inability to use" is, as the Court correctly notes, to be determined as a matter of fact [J/270] {C/3/112}. As the examples in Annexe 1 demonstrate, the correct finding is that the cases in which Regulation 6 would have caused an "inability to use" premises would <u>not</u> be rare.

55. The general effect of Regulation 6 is that customers and/or employees and/or workers of and/or other stakeholders and/or normal participants in the business would not be able to leave home to attend the insured premises, unless they have one of the very narrow "reasonable excuses" as stipulated in Regulation 6(2). The correct construction of "inability to use" readily accommodates this. Conversely, any argument that businesses affected by Regulation 6 are still able to "use" the premises as they are able to conduct operations remotely is inconsistent with the plain meaning of "inability to use" the premises (as identified above), and erroneously elides the "use" of the premises with the different concept of generating profit and/or conducting business operations.

DISPOSITION

56. The HAG respectfully invites the Supreme Court to allow this appeal for the following reasons:

    56.1 Ground 1: the Court erred in declaring at [Declarations/11.4(c)] {C/1/7-6} that if there was a measurable downturn in turnover due to COVID-19 before the insured peril was triggered, it is in principle appropriate for the continuation of that measurable downturn to be taken into account for the purposes of quantifying the level of indemnity under the Business Trends clause; the correct approach is for all elements of the composite insured peril, including COVID-19, to be stripped out of the counterfactual when assessing the level of indemnity under the Business Trends clause.

    56.2 Ground 2: the Court erred in declaring at [Declarations/17.4] {C/1/13} that the words "restrictions imposed" in Hiscox 1-4 (hybrid) mean something mandatory that has the

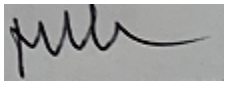
force of law, and that the only relevant such matters were those promulgated by statutory instrument. The Court should have held that, in the sense set out above, mandatory instructions from a public authority are "restrictions imposed".

56.3 Ground 3: the Court erred in declaring at [Declarations/17.3] {C/1/12} that "inability to use" was only satisfied if use was "*sufficiently nugatory or vestigial*", that it was <u>not</u> satisfied if the insured was "*being hindered in using*", and/or not able to "*use all of the premises*", and/or by reason of "*any and every departure from their [i.e. the insured premise's] normal use*", and that cases where Regulation 6 caused an "inability to use" would be rare. The Court should have held that "inability to use" is satisfied where the insured is materially unable to use the premises for its normal business purposes.

57. In the circumstances, the HAG respectfully seeks the following Orders:

57.1 that the appeal be allowed; and

57.2 that the Declarations be revised in accordance with the above Grounds.



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BEN LYNCH QC, SIMON PAUL, NATHALIE KOH

30 October 2020

ANNEXE 1: WORKED EXAMPLES

The following hypothetical examples[52] are provided by the HAG to illustrate how the Court's unduly narrow construction of "inability to use" and "restrictions imposed" is uncommercial and would render cover illusory for a potentially large number of businesses:

1. **Example 1:** The insured runs a restaurant whose business normally comprised of an eat-in service. Following the imposition of Regulation 2(1) of the 21 March Regulations and/or Regulation 4(1) of the 26 March Regulations, it is only able to offer a takeaway service, which is small but not nugatory or vestigial.

2. **Example 2:** The insured runs a Pilates and Yoga studio, which provided both mat and equipment-based fitness lessons. The equipment-based lessons made up the bulk of its income. Following the imposition of Regulation 2(4) of the 21 March Regulations and/or Regulation 4(4) of the 26 March Regulations, it was unable to conduct in-person lessons, but was able to continue some of its operations by providing online mat lessons live-streamed from the studio.

3. **Example 3:** The insured is an optician. Its business consists of providing routine eye examinations, selling spectacles and contact lenses, and providing eye health services. Regulation 6 of the 26 March Regulations meant that customers could only attend the business to seek medical assistance. This meant that, while the insured was able to remain open as a business listed under Part 3, Schedule 2 of the 26 March Regulations, it was not able to conduct routine eye examinations and/or sell spectacles and contact lenses on the premises. The business was also instructed by its statutory regulator that it could only open to provide urgent medical assistance, and should otherwise remain shut.

4. **Example 4:** The insured runs a marketing agency. Its business consists of providing in-person consultations to clients, and producing marketing material (including the use of a specialised print room on the premises). Following the imposition of Regulation 6(1) of the 26 March Regulations: (i) employees were still able to use the print room to produce marketing material (but could not use the premises for other purposes), however, (ii) customers could not attend the premises for consultations.

[52] The HAG refers to the correspondence with Allen & Overy (acting for Hiscox) dated 21 October 2020 and 22 October 2020 {D/35} and {D/36}, which records the agreement between those parties that "*any examples of potential factual scenarios used to illustrate submissions will be treated as hypothetical and shall be anonymised*" {D/35/1661}. To that end, the HAG confirms that these examples do not correspond to any specific insured within the HAG, but are based on realistic and commonplace scenarios of which the HAG is aware.

5. **Example 5**: The insured runs a retail business, which normally relies on being able to invite customers onto the premises to browse and purchase goods. The business was specifically instructed to shut by its local authorities and the police. Following the imposition of Regulation 5(1) of the 26 March Regulations, it is only able to run a delivery service, which is small but not nugatory or vestigial.

6. **Example 6:** The insured is a golf club which consists of a golf course and a clubhouse which served food and drink (alongside hosting events and conferences). The entirety of the business was shut following the imposition of Regulation 4(4) of the 26 March Regulations, although the business was permitted to have groundskeepers on the premises for the maintenance of the golf course. Following Government announcements and guidance given on 13 May 2020, the business was permitted to reopen its golf course, but the clubhouse had to remain shut. This resulted in a severe dip in the number of customers.

7. **Example 7:** The insured runs a recruitment agency which provides services to employers and candidates. Following the imposition of Regulation 6 of the 26 March Regulations: (i) most employees were unable to attend the premises to work, as it was reasonably possible for them to work from home (and therefore there was no reasonable excuse for them to leave their homes to attend work under Regulation 6(2)); and (ii) clients were unable to attend the premises for in-person meetings, as this was not a reasonable excuse for them to leave their homes under Regulation 6(2). However, security/maintenance staff were permitted to attend the premises, as it was not possible for them to work from home. There was therefore an "inability to use" the premises due to "restrictions imposed". This is, contrary to [J/270] not a "*rare*" scenario, but will likely be the case for a substantial number of businesses (including Category 5 businesses specifically).