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 / Respondent

-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

Appellants / Respondents

-and-

HISCOX ACTION GROUP

Intervener / Appellant

HISCOX ACTION GROUP'S WRITTEN RESPONSIVE CASE

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1. The commercial and practical reality of Hiscox's case is as follows[1]: the owner of restaurant ABC notices rats in the kitchen on Monday morning, shuts the restaurant and calls the Council. The restaurant remains shut until the Council arrives on Wednesday, inspects the kitchen and directs that the restaurant remains shut for a week for extermination and cleaning. The restaurant then reopens, but on Hiscox's case has no claim under the Policy. The same is true of the coffee shop which closes on the Monday in preparation, having received notice from the Council that it (and other local shops) will have no running water from the Wednesday due to defects in the drains in the local area[2].

2. This case will determine not only the response (or otherwise) of the Hiscox Policies to claims arising from the COVID-19 situation, but also standard, commonplace examples such as the above. The reality is that Hiscox's approach to construction of the Public Authority Clause renders cover illusory and is contrary to the objectively correct construction[3]. No doubt this is one reason why Hiscox's Written Case is so thin on examples: because such examples would demonstrate the (un)reality and true effect of Hiscox's position.

3. Before turning to Hiscox's individual Grounds, the HAG draws attention to one general point. As was the case below, there is no real dispute between the parties as to the principles to be applied in the construction of policies such as Hiscox 1-4, as summarised by the Court at [J/62-79] {C/3/50-57}. Nonetheless, Hiscox's appeal turns those principles on their head, and – in an exercise in what might fairly be characterised as "deconstruction" rather than "construction" – adopts an approach that seeks not to construe the words of the insuring clause together, as a whole, and in their commercial context, but instead deploys an intensity of focus on individual parts of it which are treated in isolation[4]. However, whilst it may be convenient to divide arguments on construction into discrete Grounds of Appeal, the Court's task is, of course, to construe the clauses as a whole. The "iterative process"[5] requires the proposed meaning and its commercial consequences to be tested against the contract in its totality. By contrast, Hiscox's appeal seeks to reason outwards from points which, whilst they might have some intuitive plausibility if applied to individual components of a clause alone, cannot withstand the overall scrutiny that the iterative approach requires.

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[1] See, for example, [H/68] {B/6/173}. References to paragraph numbers in Hiscox's Written Case appear as [H/number].
[2] In both cases, cover should start from the Wednesday.
[3] As to which: (1) on [H/14] {B/6/160} please see the FCA's Skeleton Argument for trial at paragraphs 28 to 31 (as to the risk of epidemics) {G/5/11-13} and the HAG's Written Case at paragraph 9 and the *Equitas* case {F/28} (the touchstone of construction is not foreseeability) {B/3/80-81} ; and (2) on [H/16] {B/6/161} please see paragraphs 7 and 8 of the HAG's Written Case {B/3/80}.
[4] At first instance, Hiscox agreed that an "atomistic" approach to construction should not be taken: see, for example, paragraphs 17 and 79 of Hiscox's trial Skeleton Argument {G/8/50} and {G/8/52}.
[5] *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] A.C. 1173 at [10]-[12] per Lord Hodge JSC {G/94/1958-1959}.

4. This is most obviously demonstrated by the contradictions inherent in Hiscox's Grounds. For example, is the "core of the insured peril" the public authority restriction (see [H/32-34] {B/6/165-166}) such that that is all that matters for the purposes of causation? Or is the "stipulated peril" [H/124] {B/6/188} the "occurrence of any human…contagious disease within one mile…" such that the overall scope of cover is to be dictated by the extent to which those words support a narrow, locally focused construction? Is it the "within one mile" wording in Hiscox 4 {C/9/499} that gives that clause its allegedly local character (per Ground 5)? Or is it the meaning of the word "occurrence" itself (per Ground 6)?

5. What these tensions serve to highlight, is the need for a coherent construction of the clauses as a whole, grounded in commercial reality, not a process by which their individual parts are deconstructed and then repackaged so that the sum of the parts cannot stand together. Once that general approach is understood, the HAG submits that the answer to Hiscox's appeal is very straightforward. It requires the Court to adopt a common-sense approach to the construction of the insuring clauses of these policies as a whole, in the unusual factual circumstances presented by the COVID-19 pandemic. Although the HAG disagrees with the Judges' conclusions in some limited respects, that is the overall approach they (rightly) sought to adopt. To the extent that the resulting construction involves elements of nuance (as opposed to contradiction) that is a virtue, rather than a defect, in the unusual context in which these issues of construction arise.

GROUND 1: Nature and essence of the Insured Peril and General Principles

6. **First**, as summarised above, what Hiscox seeks to do in Ground 1 is to argue that the Public Authority Clause, a composite peril, can and should be divided up into its constituent parts, which on their own do not provide cover, and then reassembled as a whole clause which does provide cover, but only to the extent that the reassembled whole is different to the individual parts. This, of course, suits Hiscox's commercial interests because it can then leave in the counterfactual all the individual parts and assert that the cover provided by the whole is extremely narrow (indeed, in most or many cases, non-existent). This approach is, in principle, wrong, as the Court rightly found[6].

7. Going straight to a key question which follows from this, if income was reduced (to zero or otherwise) by restaurant ABC closing before the Council directed it to close due to vermin, so no customers were going to use the restaurant anyway, why is ABC covered? Precisely because, in addition to the reasons below, the Public Authority Clause is a composite peril made up of (1) the insured suffering losses (2)

[6] Hiscox's approach also rewrites the clause so that, in effect, it reads "we will indemnify you in X, Y and Z circumstances but NOT for any losses caused by X alone", whereas it would have been perfectly permissible (if unlikely) for the Policy to say that, if that is what it had meant.

resulting solely and directly from an interruption to the insured's activities (3) caused by an inability to use the insured premises (4) due to restrictions imposed by a public authority (5) following vermin at the insured premises. Once cover is "triggered", the deal struck between the insured and Hiscox is that Hiscox provides cover under the Public Authority Clause for the elements that make up the clause (in the sense set out in the FCA's and the HAG's cases).

8. **Second**, the Court was entirely correct in its analysis of the insured peril at [J/278] {C/3/114}. Hiscox wrongly seeks to argue that the Court was mistaken in its approach by finding that *"What the insured is covering itself against is … the fortuity of being in a situation in which all those elements are present"* (emphasis added), with Hiscox arguing at, for example, [H/28, 30, 31, 46] {B/6/164} and {B/6/168} that the Court mistakenly ignored the causal combination of those elements, instead finding that the elements were "*present*". This is a simple misreading of the Judgment: [J/278] {C/3/114} expressly lists the interconnected elements of the composite peril and causal connecting language of "due to" and "following". The Court rightly and obviously had in mind the causal combination.

9. **Third**, the Court was obviously right to find [J/278] {C/3/114} that the insured is covering itself against the fortuity of being in the situation where the composite peril operates. The fact that there is no cover for the individual elements of the insured peril acting alone does not mean that there is no cover for those elements operating together. Hiscox's approach works backwards from a logical premise[7], rather than reasoning forwards from the proper question: i.e. what is the objectively correct construction of this clause? That is answered clearly and correctly at [J/279] {C/3/115} by reference to how a reasonable person would understand what was agreed.

10. **Fourth**, in order to support its approach, Hiscox relies on identifying the "core" of the insured peril. This is an incorrect approach. The correct approach is to construe the entire clause, in the normal way. Hiscox's approach, of course, sits well with their commercial purpose of seeking to argue that it is only the "restrictions imposed" which are removed from the counterfactual, leaving in the other elements and rendering cover non-existent or narrow: see the (incorrect) conclusion at [H/35] {B/6/166}[8]. But there is no legitimate basis for this approach when the Public Authority Clause is

[7] Take the well-known logic problem: on the first day of term, a teacher tells the class that they will have a surprise test one day that term. The brightest child works out this is impossible: (i) the test cannot be on the last day or it would not be a surprise, (ii) therefore the test cannot be on the penultimate day, (iii) therefore it cannot be on the ante penultimate day, and so on. Hiscox asserts that there is no cover for disease, nor is there cover for restrictions imposed and so on, working backwards to there being no, or very limited, cover.

[8] In any event, the analysis in [H/34] {B/6/165} is wrong: for example, [H/34.4] {B/6/165} refers to trends clauses referring to "restriction" (or being manipulated that way) and [J/275] {C/3/114}, but fails to refer to [J/276] {C/3/114} where the Court rightly held that the reference to "restrictions" was simply shorthand for reference to the full Public Authority clause, which plainly must be correct because otherwise there would be no cover at all and the policy does not respond to "restrictions" alone.

made up of various elements, all of which must be present in order for the cover to bite[9]. Given that, it is then necessary to "strip out" all the elements of the composite cover when considering the counterfactual, precisely as the Court correctly held. Further and in any event, why select the "restrictions imposed" and not another element of the composite peril (for example, the "inability to use" which is causally closer to the interruption)?

11. **Fifth**, Hiscox's restrictive approach ignores the full Public Authority clause: it is necessary to consider the "stem" and the rest of the wording. Contrary to [H/38] {B/6/166-167}, the cover is not "for" public authority restrictions. Instead, the clause requires that (1) the insured suffers financial losses (2) resulting solely and directly from an interruption to the insured's activities / business (3) caused by the insured's inability to use the insured premises (4) due to restrictions imposed by a public authority during the period of insurance (5) following an occurrence of any human infectious or human contagious disease. The relationship between the losses and the interruption to the insured's activities / business is key (i.e. "resulting solely and directly"). The cause of the interruption must then be one of clauses 1 to 16 (in Hiscox1) {C/6/400-402}[10]. It is therefore entirely wrong to say that the cover is "for" public authority restrictions – this is directly contrary to multiple layers of requirements in the Public Authority clause.

12. **Sixth**, as demonstrated by [H/39-42] {B/6/167}, Hiscox's construction is extremely difficult, if not impossible, to apply in the real world[11]. The idea that COVID-19 has to be removed from the counterfactual, but "*only insofar as it leads to the restrictions imposed, and only to the extent that loss flows from those restrictions imposed*" only has to be articulated to demonstrate its complexity and unworkability. How this is meant to operate in the real world, in respect to low-value, simple policies, is unexplained.

13. **Seventh**, Hiscox is wrong to assert [H/48-59] {B/6/169-171} that the FCA's construction converts the Public Authority Clause into extremely wide disease cover and makes Hiscox liable for all the consequences of COVID-19. This is clearly wrong in circumstances where there is only cover if all elements of the insured peril are made out. In fact, Hiscox's convoluted examples at [H/52-54 and 57] {B/6/169-171} help to demonstrate the unreality and complexity of Hiscox's approach. To test the example at [H/57] {B/6/170-171}, if revenue was depressed by 50% (being £1,000) because customers did not attend a shop due to fears of COVID-19 in the week before closure by the Government, the insured would not claim for that £1,000. But once the insured had been closed by

[9] Contrary to [H/36] {B/6/166}, nobody says that Hiscox *should* indemnify the insured as if disease was an independent insured peril.
[10] Hiscox's approach to "restrictions imposed" can be readily tested against all of these clauses: for example, is the cover under clause 6 Unspecified customer {C/6/400} "for" damage at the customer's premises?
[11] See, for example, [J/280-282] {C/3/115}.

the Government, the insured would claim for its losses resulting from the interruption etc under the Public Authority Clause. The issue about whether or not to count the 50% downturn as a trend under the Business Trend Clause is to be determined as Ground 1 of the FCA's / HAG's appeal. But that is a different issue as to whether or not there should be cover in the first place. Further, the example at [H/63] {B/6/172} is simply wrong on the facts: if X does not qualify as a "restriction imposed", then the Public Authority Clause is not triggered.

14. **Eighth**, the Court's analysis summarised at [H/60] {B/6/171} was entirely correct and [J/280-282] {C/3/115} are entirely correct. In brief response to Hiscox's points: (i) the issue here is the difference between realistic and wholly unrealistic and unworkable counterfactuals[12]; (ii) the Court's construction does not promote disease to the dominant element of the peril, just an element of the peril[13]; (iii) it is inherent in the Public Authority Clause that the event in sub-clause (a) to (e) will always pre-date the public authority restrictions imposed, meaning that the clause must envisage there will be an element of the clause always (at least) likely to cause (widespread) loss and the possibility of closure prior to the restrictions being imposed, but it would render cover illusory to use that loss / closure against the insured in the counterfactual; and (iv) as with [H/66] {B/6/172}, the response to [H/73] {B/6/174} is that what the Court found was obviously correct and no evidence was needed for the purpose of this analysis; Hiscox then fails to explain the (alleged) "*paradigm case*" at [H/74] {B/6/175}; and none of [H/75-76] {B/6/175-176} answers the correct analysis at [J/280-282] {C/3/115} – the fact that BI insurance might occasionally give rise to some complicated quantification questions should not be an invitation to encourage even more difficult questions; and the fact that the evidential burden "*may*" shift to the insurer [H/75.6] {B/6/175} does not make the questions caused by Hiscox's construction any less complicated and expensive to answer.

15. Ultimately, the Court correctly chose between Hiscox's "incremental difference" construction approach (which provides in many cases no cover, or almost no cover, and is difficult or impossible to apply in the real world) and the FCA's / HAG's simple and clear construction which reflects *"… how a reasonable person would understand what was agreed*" [J/279] {C/3/115}.

GROUND 2: Trends Clauses

16. **First**, Hiscox's Ground 2 is in large part parasitic on its Ground 1. For example, [H/81] {B/6/177} makes the same point about the "presence" of the composite elements of the insured peril, when the

[12] The flaw in Hiscox's approach is shown by, for example, [H/62] {B/6/171}: it is not only the consequences of the "restrictions imposed" which are covered – that is not what the Public Authority Clause provides.
[13] In any event, there is in the sense relevant here only one "occurrence of disease" and seeking to divide it up by reference to the extent that it causes the other elements of the causal chain is conceptually difficult.

Court saying that all elements of the insured peril must be present is obviously shorthand for "*present and causally operating as required by the clause*": [J/278] {C/3/114}.

17. **Second**, if the Court did at [J/348] {C/3/132} find as asserted at [H/82-83] {B/6/177}, it is in any event correct that the trends clauses in Hiscox1-4 confine their operation to extraneous factors (i.e. extraneous to the insured peril) because they provide (with some variations) that "[t]he amount that [Hiscox] will pay will reflect as near as possible the result that would have been achieved if the [insured peril] had not occurred"[14]. But this simply brings the debate back to what is the correct construction of the insured peril and takes Hiscox's Ground 2 no further.

18. **Third**, Hiscox's Ground 2 is not assisted by a number of, with respect, clearly flawed points. In particular, at [H/86] {B/6/178} it is argued that the reference to "restriction" in the "Indemnity Period" wording supports the argument that the Public Authority Clause only insures the "restrictions imposed". This is, with respect, plainly wrong because the "restriction" referred to is clearly a reference to the "restriction" as being a shorthand for the "insured peril" under the Public Authority Clause. If this were not the case then (1) the analysis at [J/276] {C/3/114} would be wrong, which is not the case; (2) the cover would be greatly expanded because the Indemnity Period would last for as long as the insured's income is affected by a "restriction", with (on Hiscox's construction) no limitation on the restriction having to follow one of sub-clauses 13(a) to (e) or cause an "inability to use"; and (3) Hiscox's construction would be inconsistent with the words "insured damage, insured failure or restriction" (emphasis added) which underlined words are the full insured peril and the "restriction" (on Hiscox's construction) is not.

19. The point at [H/87-89] {B/6/178} is, with respect, equally flawed: the reason why there is no cover for the period prior to the occurrence of the insured peril is precisely because the insured peril has not occurred. It is, therefore, wrong to say that "*[t]he same logic applies afterwards*". It is common ground that losses suffered before the insured peril has occurred are not recoverable under the Policy because cover has not been "triggered". However, for all the reasons addressed under Ground 1, that does not mean that (contrary to [H/91] {B/6/179}) it is correct to leave in the counterfactual all the elements of the insured peril which, on their own, would not trigger cover. If this were correct, then all (or almost all) composite perils would be extremely narrow and/or provide essentially illusory cover because each element of the insured peril would, in effect, count against the insured whole (by remaining in the counterfactual).

[14] See also fn.20 of Hiscox's Written Case {B/3/83} and *Riley on Business Interruption Insurance* (10th edn) at 3.26 and 3.28 {E/50/1396-1397}.

GROUND 3: *Orient-Express*

20. The HAG respectfully adopts the FCA's case and the analysis of the Court at first instance in response to Ground 3 and, for the reasons given there, Ground 3 should be dismissed.

GROUND 4: *"Solely and directly"*

21. Given how briefly Ground 4 is developed by Hiscox, it is unclear how firmly the point is pressed. In any event, the correct approach to the "solely and directly" wording is as follows: the Public Authority Clause has two causal requirements which must be held separate: (1) first, the losses must result from an interruption to the business (the "First Requirement"); and (2) second, that interruption of business must itself have been "*caused by*" the inability to use the Insured Premises due to restrictions imposed by a public authority following (under sub-clause 13(b)) an occurrence of disease (the "Second Requirement").

22. The words "*solely and directly*" only qualify the First Requirement. They require, therefore, that the interruption to the activities of the business must be the sole and direct cause of the relevant losses, in the sense explained at first instance[15]. This would rule out other perils which proximately caused loss but did not involve an interruption to the business itself.

23. The Second Requirement is not so qualified. It requires simply that the inability to use the premises etc must "*cause*" the interruption to the business. This difference in the drafting is striking and significant. Something does not cease to be a "*cause*" simply because there are other causative elements which, of themselves, would be capable of producing the relevant result.[16] If that were so then, in the event of two sufficient causes, neither would be acknowledged as causative, since each would exclude the other. On this reading, there would be no legally recognised cause at all. That is absurd. The correct analysis must, therefore, be that an event which was operative at the relevant time and which was sufficient to produce the relevant result, is a cause, even if there were other concurrent and equally sufficient causes. The existence of those concurrent causes does not rob that event of its causative potency.

24. It follows that losses are recoverable if: (1) they were "solely and directly" caused by the interruption of the insured business; and (2) a cause of that interruption was the "inability to use" the insured's premises due to public authority restrictions etc. The above is accurately summarised at [J/262] {C/3/110}. For the above reasons, the last sentence of [H/98] {B/6/181} is incorrect – the words

[15] See the HAG's trial Skeleton Argument at paragraphs 64 to 118 {G/9/73-90}.
[16] See e.g. *JJ Lloyd Instruments Ltd v Northern Star Insurance Co Ltd (The "Miss Jay Jay")* [1987] 1 Lloyd's Rep 32 (CA) at 40, col 1 {E/23/588}; *Ene Kos I Ltd v Petroleo Brasiliero SA ("The Kos")* [2012] 2 AC 164 at [70]-[74] per Lord Clarke {E/15/297-298}.

"solely and directly" apply to the interruption, and the words "caused by" apply to the composite peril.

GROUND 5: Hiscox 4 – the effect of the one mile limit

25. Ground 5 concerns wording that only appears in Hiscox 4 (see [J/252] {C/3/108}), namely the requirement for an "occurrence of a notifiable human disease within one mile of the business premises…". The Judges gave effect to those words at [Declaration 17.6] {C/1/13}, read together with [Declaration 5] {C/1/2}. The issue on this ground is (in essence) whether the Judges should have held that the effect of that wording is to exclude cover where (i) the disease was not only present[17] within the one mile radius but also present elsewhere (in the Judges' words at [J/109] {C/3/68}, if it makes a "*local appearance*"), and (ii) the public authority restrictions were imposed as a response to the national pandemic, of which the local case formed part, rather than as a response to the local case alone. The HAG's position is that neither the wording nor context dictate such a result, which would be contrary to commercial common sense. The Court's construction gave effect to those words in a nuanced way, consistent with their place in the clause and the overall context and purpose, in light of the unusual factual circumstances in which they were asked to construe them.

26. Whilst it is right that Hiscox 1-3 and Hiscox 4 fall to be construed separately, nonetheless there is a notable tension between Hiscox's Ground 5 and Ground 6. On Hiscox's case, they do not need Ground 5 because the meaning of "occurrence" itself in this context is narrow, and dictates a strongly local form of cover (although to what extent remains unclear). For that reason, some of the points made below in relation to Ground 5 are also relevant, *mutatis mutandis*, to Ground 6, although it is right to note that, insofar as the HAG is concerned, the resolution of Ground 5 is unlikely to matter much given the HAG's composition (although the resolution of Ground 5 will, of course, affect numerous policyholders who are not within the HAG).

27. The first and overarching point is that Hiscox's general approach to the construction of this clause (and also in relation to Ground 6) is dictated by an assumption, necessary for its case but entirely at odds with common sense, that it is possible to disentangle the local impact and public authority response to a notifiable disease from the national. That therefore leads Hiscox to dispute the common-sense proposition, articulated by the Judges at [J/273] {C/3/113}, that in the context of a notifiable contagious disease, the official response is likely to follow not merely from an individual local case but from the national outbreak of which the local case forms part, and that the correct construction should

[17] Adopting a neutral term at this stage.

be consistent with that basic proposition. The Judges' reliance on that proposition cannot be faulted, yet once that is accepted, Hiscox's construction runs into numerous difficulties:

28. **First**, the "one mile" wording only applies to a discrete aspect of the composite insured peril, namely the occurrence of the notifiable human disease. There is no basis in the text for assuming, as Ground 5 does, that one should reason outwards from those words such that they dictate the nature and quality of the insured peril as a whole (see e.g. at [H/106] {B/6/183} ("*the local nature of the cover*"), [H/116] {B/6/186} ("*the purpose of the express one mile limit…is to ensure that only local events are covered*") and [H/124] {B/6/188} ("*[t]he stipulated peril is an occurrence within one mile*"[18])). The relationship between the one-mile wording and the public authority restriction is not (as Hiscox wrongly contends) that the former defines the scope of the latter; it is rather a (weak) causal one, connoted by the word "following".

29. **Second**, the Judges' construction did not fail to give effect to that weak causal connection. It is common ground that "public authority" in this context includes national government, but once that is accepted it is absurd to suggest that the weak causal relationship can only be satisfied if it is only the occurrence of the disease within one mile of the premises that drives the national public policy response, rather than the disease in general (but with cover only triggered insofar as it is within one mile of the premises). Hiscox's construction errs in (i) requiring the causal link connoted by the word "following" to apply only to the "one mile" aspect of sub-clause (e), rather than the sub-clause in its entirety and, moreover, (ii) elevating it from a weak causal connection to something more akin to a requirement of proximate causation such that it is only satisfied if the local case within one mile is the effective cause of the public authority restriction. However, the restrictions imposed by the national policy response did follow the local occurrence, in that the "national pandemic" was a mosaic of local occurrences that became sufficiently widespread to necessitate national measures. The Judges' reasoning was based on the (correct) observation [J/112] {C/3/69} that it would be odd if the clause required there only to be cover if the national measures were caused by a specific local occurrence, but not the accumulation of them.

30. **Third**, the Judges' construction gives meaningful effect to the "one mile" wording which is consistent with, rather than repugnant to, the nature of the cover. The key difference is that Hiscox 4 requires there to have been a case of Covid-19 within one mile of the insured premises[19], whereas Hiscox 1-3 do not. In circumstances where Covid-19 is extremely widespread that may not make much of a difference on these facts, but that is no reason to doubt it as a construction of the clause. On the

[18] This latter point, as noted above, is inconsistent with the weight Hiscox attaches to the public authority restriction under Grounds 1-4 as being the alleged "core" of the insured peril.
[19] See [Declaration 5] {C/1/2}.

Judges' construction, there would be cover in circumstances where public authority restrictions were imposed following a national pandemic insofar as the disease comprising that national pandemic had a case within a one-mile radius of the insured premises. Whilst that may seem harsh to businesses who are affected by national measures that bite on them notwithstanding that there is no occurrence within one-mile of their premises, that is a sensible way of giving effect to the "local" characteristic of the wording, given its place in the clause. By contrast, Hiscox's construction would deprive businesses of cover even if the first occurrence of the disease was within the one-mile radius of the insured premises, but by the time public authority measures had been taken, it had expanded outwards, such that it had become a national pandemic, and the public authority measures were in response to that national pandemic not merely the local occurrence. Like many aspects of Hiscox's case, the end result is (conveniently for Hiscox) a position whereby the more severe and widespread the peril the less likely there is to be cover.

31. **Fourth**, whilst it is correct that the matters identified in sub-clauses (a) to (e) are ones in respect of which local action *can* be taken (see [H/112] {B/6/184-185}), that is not necessarily the case. Those are also contexts in which measures with wider applicability are equally likely[20]. For example (and non-exhaustively)[21]:

    31.1 As to sub-clause (a) (murder and suicide), the common law police power to cordon off a crime scene extends to preventing access to public rights of way.[22] Whether those are characterised as "local" or not is likely to be a matter of degree.

    31.2 As to sub-clause (b) (notifiable human disease), the Public Health (Control of Disease) Act 1984 at s.13(1)(a) {G/36/245} gives the Secretary of State power to make regulations "*as respects* ***the whole or any part of England****…with a view to the treatment of persons affected with any epidemic, endemic or infectious disease and for preventing the spread of such diseases.*". Regulations affecting the whole of England are not "local" (at least in the sense in which Hiscox uses the word).

    31.3 As to sub-clause (c) (injury/illness traceable to food and drink), the Food Safety Act 1990, at s.11(3) {G/35/234} empowers the Court to impose prohibitions on "*any other food business of the same class or description"* or even on *"any food business"*. If the Court prohibits the sale of a food item that is sold at the insured premises, on Hiscox's case, there would be no cover if a complaint about that food at an insured restaurant had revealed a dangerous problem in a foodstuff that

[20] See *Letang v Cooper* [1965] 1 QB 232, 247 {G/65/1163}: *"The maxim noscitur a sociis is always a treacherous one unless you know the societas to which the socii belong."* There is no "societas" here and there is no "common characteristic" [H/111] {B/6/183} for the principle to apply to.
[21] For example, defects in the drains (sub-clause (d)) could be caused remotely and give rise to wide-scale and local responses.
[22] See *Director of Public Prosecutions v Morrison* [2003] EWHC 683 (Admin) {F/25}.

was sold in a class of similar restaurants throughout the country, and the prohibition was made in response to that general problem of which the particular restaurant was part. It is not easy to see why there should be no cover in those cases; the "local" element is satisfied by the presence of the problematic food at the restaurant, in the same way that the presence of a COVID-19 case within one mile of the insured premises does in the case of notifiable diseases.

32. Indeed, somewhat strikingly the definition of "*notifiable human disease*" within Hiscox 4 does not feature much in Hiscox's submissions, but is in fact a strong pointer towards the clause not applying only to events which are only local: "*Any human **infectious** or human **contagious** disease, **an outbreak of which** must be notified to the local authority."* {C/9/498} (emphasis added). The words "infectious", "contagious" and "outbreak" indicate that the clause envisages cover for disease which is present beyond the locality of the insured premises[23]. The list of notifiable diseases contains a mixture of those which are likely to be more local, and those which are not.[24] There is no reason to construe the clause as though it were only focused on the local, rather than a flexible interpretation that encompasses both.

33. It is thus a significant overstatement to suggest that each of the sub-clauses "*insures what can only be local events"* [H/110] {B/6/183}. Hiscox needs to make that extreme case, but the reality is more nuanced: whilst some of the sub-clauses contain pointers to events that are more local in character[25], not all of them do – and even in the case of those that do, there is no pointer in the clause that leads to the conclusion that the public authority restriction must also be of a local kind or only caused by that local event.

GROUND 6: Hiscox 1-3, meaning of *"occurrence"*

34. The issue on Ground 6 is whether the presence of the word "occurrence" in Hiscox 1-3, in the absence of any express geographical limit such as "one mile" or "vicinity" wording, nonetheless means that the notifiable human disease must be "*something limited, small-scale, local and specific to the insured, its premises or business"* [H/131] {B/6/189-190}. The HAG submits, straightforwardly, that the answer is "no": there is no reason to construe the clause as though it contains words of limitation when it does not.

35. At the outset, one point should be dismissed. This is the attempt (at [H/133] {B/6/190}) to suggest that the approach to construction should be governed by what Hiscox contends (without any

[23] Indeed, as explained more fully by the FCA, notifiable contagious diseases are inherently likely to spread and to do so widely. Again, this strongly indicates that the ambit of the clause is not "localised", as Hiscox contends.
[24] See the Health Protection (Notification) Regulations 2010, Schedule 1 {E/5/88} E.g. SARS and Plague are more likely to be geographically dispersed.
[25] E.g. sub-clause (e): "*vermin or pests **at the insured premises**"* {C/9/499}.

reference to authority) is the "nature" of property cover. Such an approach to construction is misconceived, both generally, and in this context:

35.1 Insuring clauses do not fall to be construed by reference to the genus of the policies of which they form part, save insofar as it is relevant to the overall commercial purpose, or where particular words have come to have a settled meaning. The start and end point should be the words of the policy itself, not one party's characterisation of the "Platonic form" of the type of cover of which it is said to be a part.

35.2 That is particularly so in this context. Whilst it may be convenient and/or traditional for business interruption cover to be sold together with property cover, it is not a useful exercise to construe the business interruption policy as though it should be assumed it shares a common purpose or features with a standard property policy. There is nothing in the wording of Hiscox 1-4 which suggests that the business interruption cover falls to be construed by the other types of cover with which it is packaged.[26] It is not very meaningful to construe a policy that does not require physical damage to property (i.e. Hiscox 1-4) by reference to a category of policy that typically does (i.e. standard property cover).

35.3 In any event, Hiscox's characterisation of the essential nature of property cover [H/133] {B/6/190} involves the same confusion deployed in Grounds 5 and Grounds 6 generally, namely an inability to accept that events can at the same time be local and specific whilst also having a widespread and national effect. There is no contradiction between cover that insures against events that happen to the insured's business or its premises, but which at the same time are so widespread that they affect others as well. An obvious example might be a widespread and devastating earthquake: there is no difficulty in seeing how the damage caused by such an event to an insured property can give cover under a property damage policy, notwithstanding it caused damage to property throughout the nation.[27] An example closer to home is Hiscox 1-2 and 4: as the FCA rightly pointed out below, these policies provide cover for damage "*arising from…riot or civil commotion"*.[28] In both the case of damage cover and non-damage cover, it is of course necessary for something to have happened to the insured, its business or premises. But what needs to happen to them is a loss, which can take the form of damage or business

[26] For an illustration of this, see *Outokumpu Stainless Ltd v Axa Global Risks (UK) Ltd & Ors* [2008] Lloyd's Rep. I.R. 147 at [26] {G/72/1323} in which Tomlinson J (as he then was) held that the words "*the insurance by this section is extended"* were a pointer towards the general insuring clause determining the type of loss recoverable under an extension in a property policy; this was in contrast to the business interruption cover, which was provided under a separate section.

[27] The large number of cases in New Zealand concerning cover under property policies arising from earthquake damage is supportive of this: see e.g. the authorities cited at *Colinvaux & Merkin* C-0039/2, fn1 {G/105/2150}.

[28] FCA trial Skeleton Argument, paragraph 355 {G/5/28}.

interruption caused by an insured peril. Whilst the insured must suffer a loss caused by an insured peril, there is no reason why the insured peril must be one that only impacts on the insured.

36. The HAG makes the following points, in addition to the matters relied on in respect of Ground 5, insofar as they are relevant to Ground 6.

37. **First**, if the objective meaning of the word "occurrence" were that it only meant "local occurrence" and anything wider is excluded, then the policy could have been drafted so as to make this clear. As noted in a different context by Schroder JA, sitting in the Ontario Court of Appeal in *Shea v Halifax Insurance Co Ltd* [1958] OR 458-474 {G/102/1982}: "…*if the defendant insurer had desired to create an exemption from liability for damage resulting from an explosion, however caused, it should have had the commercial courage to spell out the exemption in clear and unambiguous language* …*"* (emphasis added).

38. **Second**, that point is reinforced by the fact that, where the policies are intended to exclude cover because of events that are widespread, this *is* made clear. There is no exclusion for pandemics or epidemics in the Public Authority clauses (and, as noted each of the clauses, whether in the insuring word or the definition, refers expressly to an "*outbreak"* of *"human contagious disease"* as part of the insured peril), however there is such an exclusion in the "Cancellation and abandonment" wording[29], which states in clear terms "*we will not make any payment for loss of gross profit [etc.]…directly or indirectly due to….any action taken by any national or international body or agency directly or indirectly to control, prevent or suppress any infectious disease."*

39. **Third**, it is wrong to suggest [H/113] {B/6/185} that the word "occurrence" has a settled meaning in insurance generally, that refers to something specific "*on a small scale*". The contexts in which that word has previously been construed are very different, but in any event do not support the gloss that Hiscox places on it:

    39.1 Aggregation.[30] the word "occurrence" has been construed in the context of aggregation clauses as synonymous with an event, which denotes "*something which happens at a particular time, in a particular place, in a particular way"*.[31] However, that definition tells one nothing about the scale of the event; all it requires is that it has a singular character, and it is typically contrasted in that context with a "*general state of affairs*" [32]. Although "occurrences", applying this definition, might

[29] E.g. of Hiscox 1 {C/6/402}.
[30] See also RSA's Written Case at §42 {B/9/305-306}.
[31] *Axa Re v Field* [1996] 1 WLR 1026 at 1035G {E/8/120}.
[32] In the words of the authors of *Colinvaux & Merkin* at C-0163 {G/105/2152}, commenting on *Axa v Field*: "*something specific must have happened."* The authors go on to state "*An alternative way of framing [the definition] is that an event or occurrence is something that has*

be small scale, that is not necessarily the case. An occurrence can be something large scale that embraces a number of individual losses; indeed, that is precisely why the meaning of the word has been litigated so heavily in the aggregation context.[33]

39.2 Personal accident. The House of Lords has considered the relationship between the meaning of the words "accident" and "occurrence" in two cases concerning accidental personal injury. In *Fenton (Pauper) v J. Thorley & Co Ltd.* [1903] A.C. 443, a case about the Workmen's Compensation Act 1897, Lord Lindley held (at 453) {G/53/563}, "*Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss."* In *In Re Deep Vein Thrombosis and Air Travel Group Litigation* [2006] 1 AC 495, Lord Scott considered the meaning of the words "accident" and "occurrence" in Articles 17 and 18 of the Warsaw Convention 1929, and held at [7] {G/61/1050-1051}: "…*Both terms impart the idea that something or other has happened. But "occurrence" is entirely general in its natural meaning. It permits no distinction to be drawn between different types of happening. "Accident" on the other hand must have been intended to denote an occurrence of a particular quality, an occurrence having particular characteristics …".*

40. Whilst the search for the meaning of the word "occurrence" in Hiscox 1-4 in these different contexts is likely to be of limited value, it is notable that there is nothing in these definitions that requires an occurrence to be something "*small scale"*. On the contrary, the gist, in both contexts, accords with the natural meaning, namely something that has happened. This is flexible enough to encompass events of all scales.

41. **Fourth**, and perhaps most obviously, there is no express "vicinity" requirement in the wording of sub-clause (b), whereas there is such express wording in sub-clauses (c) and (e), strongly indicating that there was no objective intention for sub-clause (b) to be subject to such restriction[34]. Were there a concern that this lack of restriction might render the clause unduly wide, such concern would be misplaced because of the (sufficient) limitation on the clause imposed by the requirements of the insured's "inability to use the insured premises due to restrictions imposed by [the] public authority".

42. **Fifth**, whilst of course bearing in mind any concerns about reading across from one policy wording to another, a striking oddity arises on Hiscox's construction, which is that if Hiscox is correct that the

happened which has given rise to one or more losses. A state of affairs – whether it be a general propensity for a person to drive or to give advice negligently, or a state of war – does not of itself give rise to losses. Something must take place that causes the state of affairs to trigger losses, and that happening is the relevant event or occurrence."

[33] See, for example, *Kuwait Airways Corporation v Kuwait Insurance Co SAK (No. 1)* [1996] 1 Lloyd's Rep. 664, quoting at 685 from an arbitral award of Mr Kerr QC (as he then was) {E/26/861}.

[34] Contrary to [H/140-143] {B/6/191-192}, also see the numerous other "non-local" covers in Hiscox1: for example, clauses 6 to 12 {C/6/400-401}.

true meaning of sub-clause 13(b) in Hiscox1 {C/6/401} is that the *"occurrence"* following which the restriction had been imposed must be one that is local and specific to the insured or the Insured Premises, then this would (apparently) be narrower than the Hiscox4 wording that expressly includes the 1-mile restriction {C/9/499}. Applying Hiscox's construction, what is obviously a restriction on the clause (i.e. the wording "within one mile") in fact "buys" the insured a 1-mile radius, which is a large area: see the FCA's trial Skeleton Argument at {G/5/19}. Thus, the insured with the restriction on their wording gets an expansion of cover, whereas the insured with no restriction on their wording only has cover localised to their Insured Premises. That simply cannot be right and vividly demonstrates how unrealistic and unworkable is Hiscox's construction.

GROUND 8: was Regulation 6 capable of being a *"restriction imposed"*?

43. Ground 8 applies to each of Hiscox 1-4 and concerns the sentence in [Declaration/17.4] {C/1/13}: "*Restrictions imposed" do not necessarily have to be directed to the insured or the insured use of premises and Regulation 6 is capable of being a "restriction imposed"*. The issue is whether "restrictions imposed" must be directed to the insured and its use of the insured premises, as Hiscox contends at [H/149] {B/6/194}, or whether that is not a necessary component of the insured peril.

44. There is, in relation to this Ground as in relation to the others, a straightforward answer. The clause does not contain any language that limits the nature of the public authority restriction, nor is there any reason to read such a limitation into it. The alarmist concerns expressed by Hiscox (e.g. at [H/161, 163] {B/6/196-197}) bear all the hallmarks of a party seeking to escape a bargain which it regrets striking. Whilst the extent to which a construction gives rise to widespread cover in these unusual circumstances is itself of limited relevance to the exercise of interpretation, Hiscox's concerns are in fact misplaced, as a result of other features of the Public Authority Clause which limit its ambit:

    44.1 Cover is only triggered insofar as the restriction that is imposed causes an inability to use the premises. The causal requirement is contained in the words "due to", and thus it is not the case that any insured will be able to point to Regulation 6 and contend that they should be indemnified. They are still required to satisfy all the other elements for cover, including that Regulation 6 caused their inability to use.

    44.2 That conclusion is also not altered if Hiscox and the FCA succeed in establishing by their appeals that the inability to use need only be a "material inability" for cover to be triggered. The argument that "all policyholders everywhere" would suddenly be able to recover misses the

point: coverage might well be triggered more widely, but those policyholders would only be able to recover to the extent of the business interruption resulting "solely and directly" from an interruption to their activities "caused by" their inability to use, together with the other elements of the insured peril. There is no reason to assume that the level of indemnity in each case would be substantial, although again, that itself would not be a reason to prefer Hiscox's construction.

45. There is one basic error that colours Hiscox's approach to this issue, but which flows from an overall approach to construction that is technical, narrow and not grounded in commercial reality. This is the submission at [H/155-156] {B/6/195} that a meaningful distinction can be drawn between the insured's use of the premises, and the use of the premises by third parties such as customers and employees, by reference to the wording "***your*** *inability to use…"*. However, the insureds who subscribe to Hiscox 1-4 make us of their premises by their employees serving their customers or clients: that is simply what it means by "*your…use"*, in this context. It is only through customers being able to use their premises, and their employees being able to be present at them, that the cafes, restaurants, beauty parlours, recruitment agencies etc. that comprise the insureds are themselves able to use them. They did not rent or purchase their business premises so they could enjoy them without the practical ability for customers or their employees to be present at them, and the risk that they would be unable to do so is a risk that, objectively construed, one would expect the policy to cover. Once that basic point – which is a necessary consequence of the nature of the insurance – is taken into account, then there is no difficulty in construing the policy such that public authority restrictions which are not directed towards the insured or the insured premises *per se* can nonetheless be sufficient to trigger cover, once all the other elements are in place. As to the other matters relied on by Hiscox:

46. Adjunct to property cover [H/154] {B/6/195}: the limited value of construing the Public Authority Clause by reference to some general notion of what property cover involves, has been addressed above. The problems in "reading across" such preconceptions are particularly evident here, in circumstances where the insured's "use" of the premises does not mean its use *qua* property in a general sense, but must mean its use for the purpose of the insured's business. In that context, there is no obvious inconsistency between cover extending to a general "lockdown" Regulation insofar as it leads to an inability to use the premises in that way.

47. The sub-clause (a)-(e) matters [H/157-158] {B/6/195}: the flaw in Hiscox's reasoning here is, as noted above in relation to Ground 5, to seek to construe "restrictions imposed" as though its meaning is exclusively dictated by the matters in sub-clauses (a)-(e). However, the only relationship the clause requires is a causal one, in that the restrictions must "follow" those matters. There are no words of limitation on the restrictions themselves (and even Hiscox does not go so far as to suggest that

restrictions following the matters at (a)-(e) can only be directed at the insured premises). Further, there is nothing objectionable about the police cordon example [J/269] {C/3/112}, and indeed, Hiscox's complaint is merely that "*an important part"* of the imposition of a police cordon might be to prevent the use by the insured of its premises inside the cordon [H/158] {B/6/195}. However, with respect, that mischaracterises the Judges' use of this example. The point was that a police cordon can be put in place on a public right of way that might have the effect of restricting access to a shop. That is not because the "crime scene" need be in the shop; it might be on the street. What matters is whether it caused the insured to be unable to use its premises for the purposes of its business, not whether it was directed at the insured's premises.

48. Nature of Regulation 6 [H/159-160] {B/6/196}: Hiscox's criticisms of Regulation 6 are in reality driven by a misreading of the Public Authority Clause, that rewrites it as though what was required was not a restriction that causes an inability to use, but rather a restriction that takes the form of an inability to use (i.e. an order for closure). However, if that were the intention, different wording would have been adopted[35]. Indeed, there is, on analysis, very little difference between what Hiscox says is required for cover under the Public Authority Clause, and what is required under the NDDA clause,[36] in which it is the denial of access that is itself imposed by the public authority, rather than a restriction leading to denial of access. In the different context of the Public Authority Clause, the causal relationship between the public authority restriction and the inability to use is both necessary and sufficient, without the restriction needing to be of a particular type. The clauses envisage public authority restrictions with certain consequences, not of a certain type.

49. Alleged unforeseeability [H/161] {B/6/196}: Whether or not the parties ever "*dreamed of*" the insured business being reduced to the state of an inability to use its premises by reason of the entire public being mandatorily subjected to a modified form of house arrest, and whether such events are or would have seemed "*far-fetched*", is beside the point[37]. The Court's task is to construe the words in the contract objectively in light of those events which have now occurred, as stated by Chadwick LJ in *Bromarin AB & ANR v IMD Investments Ltd* [1999] S.T.C. 301, 310 at E to J {F/10/148}.

50. Alleged surprising results [H/162] {B/6/197}: caution must always be exercised before construing a policy by reference to extreme hypothetical examples. However, whether or not those results are surprising may well depend upon from whose perspective the question is asked. A sole trader is unlikely to be surprised if the business interruption cover responds, in circumstances where he suffers

[35] See other wordings available in the market: "enforced closure", "closure", and "prevention of access".
[36] The text of the NDDA clause is quoted at [J/391-392] {C/3/143}.
[37] Although, again, please see the FCA's trial Skeleton Argument at paragraphs 28 to 31 (as to the risk of epidemics) {G/5/11-13}.

losses because he was unable to use his premises as a result of restrictions imposed on him personally (but not his premises). On the contrary, a sole trader might be surprised if he was told by Hiscox that his policy did not respond because, although a murder had occurred at his premises, and although the premises remained open, that was of no practical value because he was unable to use the premises due to being detained for investigation. Why should it make a difference that the reason for the loss was not a police cordon around his premises for the purposes of investigating a murder, but his detention for that same purpose? There is no obvious reason why those two situations should be treated differently, either as a matter of logic or under the wording of the policy. But these are extreme examples, and taking, perhaps, a more realistic example from sub-clause (e) (vermin or pests at the insured premises) {C/6/401}: the restrictions that may be imposed under the Prevention of Damage by Pests Act 1949 include the power under s.4 {F/79/1497} to require the owner/occupier of private property to take action in response to the pests. That is not a restriction that is necessarily directed at the insured premises (for example, the required action could relate to an uninsured or adjacent part of the land), and if so, on Hiscox's construction, any business interruption losses caused by the insured taking such action would not be covered.[38] It is not easy to see why.

GROUND 7: the meaning of *"interruption"*

51. Hiscox's primary case is that the term "interruption" necessarily, and on the natural meaning of the word, refers to a "*cessation or stop or break*" in the insured's business [H/164] {B/6/198}. Hiscox argues that multiple clauses in the Hiscox Policies (which are, in fact, irreconcilable with its construction) are "*out of place*", "*misplaced*", and "*provide no guide*" to construction [H/173] {B/6/200}. Hiscox's alternative approach is that, even if "interruption" does not require complete cessation, it must be "*akin to cessation… where the activities which could be continued were nugatory*" [H/179] {B/6/201}.

52. **First**, as to Hiscox's primary case, Hiscox's argument is premised on a rigid and strained definition of "interruption" as necessarily referring to a complete stop or break. Properly construed and seen in context, however, this is not what the word denotes. Rather, the concept of "interruption" is malleable and capable of bearing a wide range of meanings[39]. While it *could* potentially be read in the highly restrictive sense adopted by Hiscox, it is also perfectly natural to refer to "interruption" as "*disruption or interference*" [J/274] {C/3/113-114} and/or being unable to "*operate normally and properly*".[40] To take everyday examples: a speech can be "interrupted" by noisy audience members, such that the speaker

[38] Notwithstanding that this is one of the statutory regimes relied on by Hiscox as an aid to construction: see [H/112.5, fn69] {B/6/185}.
[39] Indeed, the kind of insurance before the Court is always referred to as "business interruption insurance".
[40] Please see the HAG's trial Skeleton Argument at paragraph 120 {G/9/90} and the corresponding definition in the FCA's trial Skeleton Argument at paragraph 159 {G/5/17} ("some operational impact").

(while continuing his speech) is distracted and, whilst able to continue, gives a less good presentation; and a video call can be "interrupted" by bad Wi-Fi signal, while still continuing with poor quality.

53. **Second**, the range of meanings borne by the word "interruption" is clear from the diverse authorities produced by the parties. Hiscox, the FCA and the HAG have all relied on case law[41] and extracts from dictionaries demonstrating, concurrently, that "interruption" can mean both: (i) a "*stop… [or] break*";[42] or (ii) being "*prevented from operating normally*".[43] Both definitions of "interruption" are valid. The HAG does not contest this.[44] Instead, its case is that definition (i) is inappropriate and wrong in context, and in light of the wording of the Hiscox Policies. Hiscox's case, however, is that "interruption" can only ever mean definition (i). This is, with respect, a linguistically extreme and incorrect approach to "interruption", which renders the Hiscox Policies incoherent and contrary to business common sense.

54. **Third**, Hiscox's (above) argument that multiple clauses in the Hiscox Policies offer "*no guide to construing the meaning of "interruption" in the stem*" [H/173] {B/6/200} is, with respect, wrong for the reasons set out in the Judgment and following. There are multiple clauses in the Hiscox Policies which are irreconcilable with Hiscox's construction of "interruption". For the avoidance of doubt, this is not a matter of picking between two equally plausible constructions which will, in either case, leave the Hiscox Policies intact as a coherent whole. Instead, Hiscox's construction renders many clauses in the Hiscox Policies incoherent and/or inexplicable, and the Policies unable to operate as a coherent whole. Looking at examples[45] of the other Business Interruption covers:

    54.1 **Clause 5 "Loss of Attraction":**[46] addresses **insured damage** in the vicinity of the **insured premises** etc resulting in "a shortfall in [the insured's] expected **income** or **gross profit**". The Judgment rightly held that "*since [the clause] contemplates a shortfall in expected income, it is clearly encompassing not just the case where the insured damage… leads to the insured premises closing… but the case*

[41] See, for example, the FCA's reliance on *The Silver Cloud* [2004] Lloyd's Rep 696 {E/19} (FCA's trial Skeleton Argument at paragraphs 159-160 {G/5/17}); *Archer Daniels Midland v Aon Risk Services* 356 F.3d 850 {G/95} (in oral submissions on Day 8, page 137ff of the transcript {G/29/215}); and *Le Treport Wedding & Convention Centre Ltd v Co-operators General Insurance Company* [2020] ONCA 487 {G/98} (in oral submissions on Day 8, page 139ff of the transcript {G/29/215}); and Hiscox's reliance on various Commonwealth authorities at paragraph 287 of its trial Skeleton Argument {G/8/63}.
[42] Oxford Dictionary of English (3rd edn, 2010), as relied on in Hiscox's trial Skeleton Argument at paragraph 277 {G/8/62} and Hiscox's Written Case at paragraph 167, fn 105 {B/6/198}.
[43] Cambridge English Dictionary, as relied on in the HAG's trial Skeleton Argument at paragraph 121 {G/9/91}.
[44] See the HAG's trial Skeleton Argument at paragraph 120 ("it is accepted that in the abstract the word "interruption" is capable of an extremely narrow and restrictive meaning, but that is not realistic in context") {G/9/90}.
[45] The same or similar points can be made in respect to others in the list of clauses 1 to 16 in Hiscox1 {C/6/400-402}. Hiscox argues that other clauses such as the insured damage, denial of access, NDDA, bomb threat etc clauses "clearly could stop business activities continuing" [H/171] {B/6/199}. That is correct, but those same clauses can (and should) also properly be read to accommodate disruption/interference/being unable to operate normally and properly.
[46] In Hiscox 1, clause 5 {C/6/400} and Hiscox 4, clause 8 {C/9/499}.

where the premises remain open but… there are fewer customers" [J/410] {C/3/147}. Hiscox's response to this point is addressed at paragraphs 57-59 below.

54.2 **Clauses 6 and 7 "Unspecified customers" / "Specified customers":**[47] address **insured damage** arising at the premises of, respectively, "any of **your** direct customers operating and based in the European Union … other than any **specified customer**[48]" and "any **specified customer**". Again, the Judgment correctly highlights the flaw in Hiscox's argument as "*[t]he only way in which [these] provisions could be applicable if "interruption" meant total cessation would be if the customer or supplier were, in effect, the sole supplier or customer upon whom the business was totally dependent for supply or custom*". Whilst such an "*extreme*" case would be covered, it is "*inherently unlikely*" that the intention was to limit the cover to one single specified supplier or customer [J/412] {C/3/148}.

54.3 Hiscox's riposte is that some SMEs in particular will be reliant on a major customer and/or supplier. Hiscox correctly concedes that these might not be frequent situations, but nonetheless argues that these (isolated) cases show that the clauses "*make sense*" on Hiscox's interpretation [H/175] {B/6/201}. This argument is wrong. The clauses themselves refer to "customers", and "any … customer" (emphasis added). This wording clearly contemplates a plurality of customers. Furthermore, Hiscox accepts that this situation is "*not frequent*" (in fact, "*extreme*" [J/412] {C/3/148}), which makes its suggested construction less likely.

54.4 **Clauses 8 and 9 "Unspecified suppliers" / "specified suppliers":**[49] these clauses address **insured damage** arising at the premises of, respectively, "any of **your** suppliers operating and based in the European Union … other than any **specified supplier**[50]" and "any **specified supplier**". The arguments above are repeated here, *mutatis mutandis*.

54.5 **Clause 12 "Online market places":**[51] addresses "failure of any online market place, used by [the insured] …". Again, Hiscox's construction of "interruption" would only apply to businesses operated on one sole online marketplace. This is similarly "*extreme*" and "*inherently unlikely*" [J/412] {C/3/148}.

55. Looking at other clauses in the Business Interruption section and the Policies generally:

[47] In Hiscox 1, clauses 6 and 7 {C/6/400}.
[48] Defined as "Any direct customer of **yours** operating and based at the address individually stated in the Business interruption section of the schedule" {C/6/400}.
[49] In Hiscox 1, clauses 8 and 9 {C/6/400}, and equivalent provision in Hiscox 2, clause 3 {C/7/431}; Hiscox 3, clause b {C/8/461}; and Hiscox 4, clause 3 {C/9/498}.
[50] Defined as "Any supplier of **yours** operating and based at the address individually stated in the Business interruption section of the schedule" {C/6/400}.
[51] In Hiscox 1, clause 12 {C/6/401} and Hiscox 4, clause 5(b) {C/9/498}.

55.1 **Cover for "additional increased costs of working" and "alternative hire costs":**[52] these are defined as "additional costs and expenses … in order [for the insured] to continue **your activities**" and "additional costs and expenses … for the necessary hire of a substitute item", respectively.[53] These key provisions are irreconcilable with Hiscox's construction of "interruption", as they clearly contemplate the continuation of the insured's business activities, rather than its complete cessation.

55.2 **The insured's BI notification obligation, i.e. "[Hiscox] will not make any payment under [this BI section] unless [the insured] notify [Hiscox] promptly of any damage or event which might prevent or hinder [the insured] from carrying on [its business / activities]":**[54] this key provision appears in all the Hiscox Policies. The obvious point is that if "interruption" only meant complete cessation, the clause would not use the word "hinder".[55]

56. As to the "Loss of attraction" cover, in light of its prominence at [J/410] {C/3/147} and in oral submissions,[56] Hiscox argues that this cover does not affect the construction of "interruption" as it has been (allegedly) wrongly inserted under the stem, and should instead be re-inserted into the "Additional cover" provisions. Hiscox relies on *Tektrol Limited v International Insurance Company of Hanover Limited* [2005] EWCA Civ 845 {F/47} and *Limit (No 3) Ltd and others v PDV Insurance Company Ltd* [2003] EWHC 2632 (Comm) {F/34} as suggesting that insurance contracts are, in Hiscox's own words, not "*necessarily consistent*", and that "*internal inconsistencies may arise"* [H/173 and fn.116] {B/6/200}. However, this is not what those cases say. In *Tektrol*, Buxton LJ was addressing "*redundancies or potential redundancies in the clause*" which result from the draftsman's use of language. In particular, the draftsman had resorted to "*linguistic overkill … by using a number of phrases expressing more or less the same idea*" (emphasis added).[57] This is the opposite of inconsistency. Similarly, in *Limit (No 3)*, Moore-Bick LJ was concerned with "*linguistic anomalies*" which arise when clauses are lifted from other contracts. He considered that the contract was nonetheless "*understandable*".[58] Again, this is distinct from Court saying that internal inconsistencies are to be accepted.

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[52] In Hiscox 1 {C/6/403}; Hiscox 2 {C/7/431}; and Hiscox 4 {C/9/500}.
[53] In Hiscox 1 {C/6/399}; Hiscox 2 {C/7/430}; and Hiscox 4 {C/9/497}.
[54] In Hiscox 1 {C/6/404}; Hiscox 2 {C/7/432}; Hiscox 3 {C/8/463} and Hiscox 4 {C/9/501}.
[55] This is a typical "notification of claims" clause, as considered in *Colinvaux's Law of Insurance* (12th edn) at 10-001 {G/104/2148}.
[56] See, for example, Butcher J on Day 2 (transcript/p.159/lines 8-14) {G/23/179}: "Hiscox cover has a loss of attraction… where that envisages that a shortfall in your expected income for more than two consecutive days will be covered… well, that does amount to an interruption"; and Flaux LJ on Day 2 (transcript/p.160/lines 11-14) {G/23/179}: "it can't be right that what is required is a complete cessation of the business, because otherwise, as my Lord says, it wouldn't be a shortfall, it would be a cessation of all your income".
[57] [2005] EWCA Civ 845 [15] and [16] (citing Lord Hoffmann in *Tea Trade Properties Ltd v CIN Properties Ltd* [1990] 1 EGLR 155) {F/47/979}.
[58] [2003] EWHC 2632 (Comm) [12] {F/34/754}.

57. Crucially, there is no basis for Hiscox ignoring the fundamental principle of construction that Courts will seek to avoid (rather than give effect to) inconsistency between parts of a contract, and will adopt a reasonable construction in favour of coherency.[59] This is especially so when the contested term is capable of two plausible meanings[60] (as is the term "interruption"). Hiscox's argument, which results in inconsistency, also contradicts its own position on construction.[61]

58. Furthermore, the Judgment correctly rejects this exact argument at [J/410] {C/3/147} on the grounds that it amounted to "rewriting the wording" of the Hiscox Policies. This is self-evident. Hiscox tendentiously rearranges, without basis, the location of this clause in the Policies. If parties had intended for "Loss of attraction" cover to be part of the "Additional cover" instead of a cover under the stem, then the Policies would have said that.

59. As to Hiscox's alternative case, there is in reality no meaningful distinction between Hiscox's primary case and its alternative case. In particular, Hiscox's 'alternative' definition of "interruption" is "*interference… akin to cessation… where the activities which could be continued were nugatory*" (emphasis added) [H/179] {B/6/201-202}. With respect, this is splitting hairs, and the arguments made against Hiscox's primary case apply with equal force to its alternative case.

60. Additionally, Hiscox's explanation for its proposed test is difficult to discern. The criticism underlying Hiscox's alternative case appears to be that the Judgment should have clarified that a "*mere disruption to or alteration in normal activities would not be sufficient*" to amount to "interruption". This misunderstands the Judgment. As with other provisions in the Policy, whether there is an "interruption" (defined as "*disruption or interference*" [J/274] {C/3/113-114}) is to be determined on the facts of each case. The Judgment does not state that "*mere*" disruption amounts to "interruption"; it simply requires a sufficient "*disruption or interference*" on the facts. This could include, by way of example: closure of premises in whole or in part; a loss or reduction of customers; or a restriction on the modes of businesses that can be carried on. It is also difficult to see how the above (alleged) lack of clarity justifies Hiscox's suggested interpretation, which is a complete departure from the Judgment.

61. Lastly, Hiscox contends that the FCA's construction of "interruption" meaning *"some operational impact*" is "*far too broad a test of interruption*" as: (i) people could still travel to Category 3 businesses; (ii)

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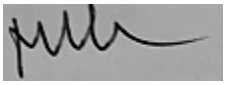
[59] *Lewison on The Interpretation of Contracts* (6th edn) at 9.13 {G/108/2193} ("The court is reluctant to hold that parts of a contract are inconsistent with each other, and will give effect to any reasonable construction which harmonises such clauses").
[60] *Chitty on Contracts* (33rd edn) at 13-078 {G/103/2143} ("If the words used in an agreement are susceptible of two meanings, one of which would validate the instrument or the particular clause in the instrument, and the other render it void, ineffective or meaningless, the former sense is to be adopted. This principle is often expressed in the phrase ut res magis valeat cum pereat").
[61] See, for example, Hiscox's trial Skeleton Argument at paragraphs 17 and 32 {G/8/50-51}; and the Insurers' Submissions on Principles of Construction of Contracts at paragraph 30 {G/12/123-124}.

people could still travel to some Category 5 businesses (where it was not reasonably possible to work from home); and (iii) some Category 5 businesses could operate remotely, through "*the power of technology*". On Hiscox's case [H/183-4] {B/6/203-204}, "*it is not a proper or common-sense use of the language to say that [these businesses] sustained "an interruption"*". However, whether the specific Category 3 or 5 business has suffered an "interruption" is to be determined on the facts of each case, and in particular whether it suffered a "*disruption or interference*". It is plainly not the case that the true construction of "interruption" will encompass, across the board, all Category 3 and 5 businesses. Hiscox's criticism of the FCA's construction is therefore unfounded.

62. For the reasons summarised above, the HAG respectfully invites the Court to dismiss Hiscox's appeal.



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BEN LYNCH QC, SIMON PAUL, NATHALIE KOH

9 November 2020