

Insurance - business interruption insurance - contracts

**Financial Conduct Authority (Appellant) v
Arch Insurance (UK) Ltd and others (Respondents) – UKSC 2020/0177**

**Hiscox Interveners (Hiscox Action Group) (Appellant) v
Arch Insurance (UK) Ltd and others (Respondents) – UKSC 2020/0178**

**Argenta Syndicate Management Ltd (Appellant) v
Arch Insurance (UK) Ltd and others (Respondents) – UKSC 2020/0179**

**Royal & Sun Alliance Insurance Plc (Appellant) v
Arch Insurance (UK) Ltd and others (Respondents) – UKSC 2020/0180**

**MS Amlin Underwriting Ltd (Appellant) v
Arch Insurance (UK) Ltd and others (Respondents) – UKSC 2020/0181**

**Hiscox Insurance Company Ltd (Appellant) v
Arch Insurance (UK) Ltd and others (Respondents) – UKSC 2020/0182**

**QBE UK Ltd (Appellant) v
Arch Insurance (UK) Ltd and others (Respondents) – UKSC 2020/0183**

**Arch Insurance (UK) Ltd (Appellant) v
Financial Conduct Authority and others (Respondents) – UKSC 2020/0184**

Parties	<p>Financial Conduct Authority (the “FCA”)</p> <p>(1) Arch Insurance (UK) Ltd (“Arch”)</p> <p>(2) Argenta Syndicate Management Ltd (“Argenta”)</p> <p>(3) Hiscox Insurance Company Ltd (“Hiscox”)</p> <p>(4) MS Amlin Underwriting Ltd (“MS Amlin”)</p> <p>(5) QBE UK Ltd (“QBE”)</p> <p>(6) Royal & Sun Alliance Insurance plc (“RSA”, together with Arch, Argenta, Hiscox, MS Amlin and QBE, the “Appellant Insurers”)</p> <p>(7) Hiscox Action Group (“Hiscox Interveners”)</p> <p>(8) Zurich Insurance Plc (“Zurich”)</p>
Issues	<p>These appeals against the orders of the Butcher J and Flaux LJ concern the construction of certain provisions in insurance policies written by the Appellant Insurers, and obtained by a range of businesses and organisations, which purport to provide coverage in the event of business interruption. The Divisional Court considered the construction of each policy wording and the FCA, the Appellant Insurers and the Hiscox Interveners appeal on a number of points. However, broadly speaking, the Supreme Court is asked to determine:</p>

1. certain matters of construction relating to:
 - a. “**Disease Clauses**” (*i.e.* those which can be triggered by the occurrence of severe acute respiratory syndrome coronavirus 2 (“**COVID-19**”), typically within a specified distance of the insured’s premises);
 - b. “**Prevention of Access Clauses**” (*i.e.* those triggered by public authority intervention preventing access to, or use of, premises as a result of COVID-19); and
 - c. “**Hybrid Clauses**” (*i.e.* those clauses which contain wording from both Disease and Prevention of Access Clauses), and
2. whether the Divisional Court was correct:
 - a. to apply certain counterfactual scenarios in relation to the operation of the clauses in relevant policies which provided for loss adjustments (the “**Trends Clauses**”); and
 - b. in its analysis of *Orient-Express Hotels Ltd v Assicurazioni Generali S.p.A.*

Facts

In March 2020, the UK Government began to take a series of measures to combat the transmission of COVID-19. These included informal announcements and instructions from the Prime Minister as well as the passage of primary and secondary legislation through the UK Parliament and devolved administrations. The present appeals considered the impact of these actions and measures on 28 clauses in the 21 lead policies written by the Appellant Insurers. The FCA and the Appellant Insurers agreed to submit those policy wordings for consideration with the aim of addressing issues arising from similar policies prevalent in the insurance industry.

The case was heard in July 2020 by the Divisional Court under the Financial Markets Test Case Scheme. Judgment was given on 15 September 2020 and final orders were sealed on 18 October 2020.

Chronology of proceedings

Date of hearing	Date of judgment	Court	Judge	Neutral citation	Order
20 – 23 and 27 – 30 Jul. 2020	15 Sep. 2020 but orders made on 18 Oct. 2020	High Court (QBD.) (Financial List)	Butcher J. and Flaux LJ.	[2020] EWHC 2448.	See appendix to this memorandum for a summary of the Divisional Court’s sealed order.
	2 November 2020	Supreme Court	Lord Reed Lord Hamblen Lord Leggatt		Permission to appeal granted.

HEARING VIA VIDEO CONFERENCE

Hearing Date: 16-19 November 2020

Lord Reed, Lord Hodge, Lord Briggs, Lord Hamblen, Lord Leggatt

Counsel

Financial Conduct Authority (“FCA”)

Colin Edelman QC
Peter Ratcliffe
Adam Kramer
Max Evans

Arch Insurance (UK) Ltd (“Arch”)

John Lockey QC
Jeremy Brier

Argenta Syndicate Management Ltd (“Argenta”)

Simon Salzedo QC
Michael Bolding

Hiscox Insurance Company Ltd (“Hiscox”)

Jonathan Gaisman QC
Adam Fenton QC
Miles Harris
Douglas Grant

MS Amlin Underwriting Ltd (“MS Amlin”)

Gavin Kealey QC
Andrew Wales QC
Sushma Ananda
Henry Moore

QBE UK Ltd (“QBE”)

Michael Crane QC
Rachell Ansell QC
Martyn Naylor
Sarah Bousfield

Royal & Sun Alliance Insurance plc (“RSA”)

David Turner QC
Clare Dixon
Shail Patel
Anthony Jones

Hiscox Action Group (“Hiscox Interveners”)

Ben Lynch QC
Simon Paul
Nathalie Koh

Zurich Insurance Plc (“Zurich”)

Andrew Rigney QC
Craig Orr QC
Caroline McColgan
Michelle Menashy

You can watch video of today’s hearing at www.supremecourt.uk, from tomorrow.
Look for the relevant case profile in our ‘Current Cases’ section: scroll to the bottom to see the available