

BI INSURANCE TEST CASE

TABLE OF HIGH COURT AND SUPREME COURT OUTCOMES ARRANGED BY POLICY TYPE – 22 JANUARY 2021

The table below is intended to help policyholders navigate the High Court and Supreme Court judgments in the BI insurance test case. It is intended to provide a starting point to highlight the overall conclusions on coverage and certain key paragraphs of the judgments by policy type. It is not definitive or legally binding.

The judgments (and associated declarations – including those awaited from the Supreme Court) declare how and to what extent the policies in the [representative sample](#) may respond to business interruption losses arising from UK Government action taken primarily in March 2020 in response to the Covid-19 pandemic. Given the timing of the first instance trial, the judgments do not specifically deal with subsequent UK Government action particularly from July 2020 onwards, such as ‘local’ or ‘tiered’ lockdowns or further national lockdowns, but may provide relevant guidance.

The judgments also provide authoritative guidance for the interpretation of similar policy wordings.

The application of the judgments and associated declarations to any particular policy will depend on the wording of the policy. Policyholders are encouraged to speak to their insurance broker, legal advisers or insurer for questions arising.

Policy type ¹	Did the High Court find that the policy would potentially provide cover? ²	Was the cover appealed such that the overall outcome could change? ³	Final judgment on whether the policy would potentially provide cover? ⁴	Type of clause ⁵	Key paragraphs on cover in High Court judgment ⁶	Key paragraphs for the policy in Supreme Court judgment ^{6 7}
Arch 1	Yes, for certain types of business	Yes – by Arch and FCA	Yes, for certain types of business, including partial closure	POA	306-351	PARTS VI – IX and XI
Argenta 1	Yes	Yes – by Argenta	Yes	Disease	80-81, 149-174	82, PARTS VII – IX and XI
Ecclesiastical 1.1 and 1.2	No – see especially declaration 16.1	No	No (only High Court judgment on certain aspects of coverage, but parts of Supreme Court judgment may be relevant)	POA	306, 352-389	Aspects of PARTS VI – IX and XI may be relevant

¹ To view the names of the policies and full names of the insurer under each policy type, click on the policy type to be taken to the relevant part of the [Representative Sample of Policy Wordings document](#).

² In relation to the UK Government action taken primarily in March 2020 in response to the national COVID-19 pandemic. See the [relevant declarations of the High Court](#) to understand the extent of the potential cover or reason for there generally being no cover (in particular, the “Specific policy type declaration”). Where the High Court found there to be potential cover, this was subject to the facts in each case, including issues of prevalence (declaration 8) and the application of trends clauses (declarations 11-13). Each policy needs to be reviewed in light of the judgment and declarations applicable, and the particular facts.

³ The written cases and applications for permission to appeal to the Supreme Court covered many issues. Where the FCA was appealing a policy where the High Court found that there would generally potentially be cover, that was because the FCA is seeking to expand the circumstances in which there would be cover. The same was true for Hiscox Action Group’s appeal. Apart from coverage, the FCA, certain Defendants and Hiscox Action Group appealed various matters (e.g. causation, trends clauses) relevant across many policy types. The FCA’s appeals on Hiscox 1, 2 and 4 (NDDA), MSAmIn 1-2 (AOCA), and Zurich 1-2 could not overturn the High Court’s findings as to the overall outcome on those policies, hence the “no” entries for these policies. See the written cases and applications to appeal to the Supreme Court on the [FCA’s webpage](#), which contain each appellant’s grounds of appeal.

⁴ For those policies that potentially provide cover, the Supreme Court ruled on the FCA’s appeals that cover may be available for partial closure of premises (either closure of a discrete part of the premises or closure of a discrete part of the policyholder’s business activities) as well as full closure (see paras 129-156) and for mandatory closure orders that were not legally binding (see paras 106-124); and that valid claims should not be reduced because the loss would have resulted in any event from the pandemic (Parts VIII and IX). These rulings are particularly important for hybrid and POA clauses and will mean that more policyholders will have valid claims and some pay-outs will be higher. Some aspects of these rulings are relevant for policy types for which cover was not appealed (and for which there is only a High Court judgment on coverage), i.e. if the wording not appealed contains a term/phrase which was the subject of appeal under another wording, then the Supreme Court’s decision on how that term/phrase should be construed will apply. See also the relevant text in Note 2 above.

⁵ For the meaning of “disease clause”, “hybrid clause”, and “prevention of access (POA) clause” see para 4 of the Supreme Court’s [judgment](#). The different types of clause are discussed in Part V (paragraphs 48-95) for “disease clauses” and Part VI (paragraphs 96-159) for “hybrid clauses” and “POA clauses”.

⁶ The two judgments are complex and run to over 100 pages each. The paragraphs referred to in these columns offer a starting point only and (in respect of the High Court judgment) relate to policy coverage as opposed to wider issues such as causation and prevalence of Covid-19. It is not suggested that only these paragraphs are relevant for a particular policy type. See also the [summary of the two judgments](#) provided by Herbert Smith Freehills on their [website](#).

⁷ For policy types that were not appealed, we have noted key paragraphs of the Supreme Court’s judgment that may be relevant.

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Hiscox 1	<p>Yes for hybrid clause, for certain types of business</p> <p>No for NDDA clause</p>	<p>Yes for hybrid clause – by Hiscox, FCA and HAG</p> <p>No for NDDA clause</p>	<p>Yes for hybrid clause, for certain types of business, including partial closure</p> <p>No for NDDA clause (only High Court judgment on certain aspects of coverage but parts of Supreme Court judgment may be relevant)</p>	<p>Hybrid and</p> <p>POA (labelled ‘non-damage denial of access’ or NDDA)</p>	<p>Hybrid: 242-283</p> <p>NDDA: 306, 390-418</p>	<p>Hybrid: 96-146, 157-159, PARTS VII – IX and XI</p> <p>NDDA: Aspects of PARTS VI – IX and XI may be relevant</p>
Hiscox 2	<p>Yes for hybrid clause, for certain types of business</p> <p>No for NDDA clause</p>	<p>Yes for hybrid clause – by Hiscox, FCA and HAG</p> <p>No for NDDA clause</p>	<p>Yes for hybrid clause, for certain types of business, including partial closure</p> <p>No for NDDA clause (only High Court judgment on certain aspects of coverage but parts of Supreme Court judgment may be relevant)</p>	<p>Hybrid and</p> <p>POA (labelled ‘non-damage denial of access’ or NDDA)</p>	<p>Hybrid: 242-283</p> <p>NDDA: 306, 390-418</p>	<p>Hybrid: 96-146, 157-159, PARTS VII – IX and XI</p> <p>NDDA: Aspects of PARTS VII – IX and XI may be relevant</p>
Hiscox 3	<p>Yes, for certain types of business</p>	<p>Yes for hybrid clause – by Hiscox, FCA and HAG</p>	<p>Yes for hybrid clause, for certain types of business, including partial closure</p>	<p>Hybrid</p>	<p>Hybrid: 242-283</p>	<p>Hybrid: 96-146, 157-159, PARTS VII – IX and XI</p>
Hiscox 4	<p>Yes for hybrid clauses, for certain types of business</p> <p>No for NDDA clauses</p>	<p>Yes for hybrid clause – by Hiscox, FCA and HAG</p> <p>No for NDDA clause</p>	<p>Yes for hybrid clause, for certain types of business, including partial closure</p> <p>No for NDDA clause (only High Court judgment on certain aspects of coverage but parts of Supreme Court judgment may be relevant)</p>	<p>Hybrid and</p> <p>POA (labelled ‘non-damage denial of access’ or NDDA)</p>	<p>Hybrid: 242-283</p> <p>NDDA: 306, 390-418</p>	<p>Hybrid: 96-146, 157-159, PARTS VII – IX and XI</p> <p>NDDA: Aspects of PARTS VI – IX and XI may be relevant</p>

Policy type ¹	Did the High Court find that the policy would potentially provide cover? ²	Was the cover appealed such that the overall outcome could change? ³	Final judgment on whether the policy would potentially provide cover? ⁴	Type of clause ⁵	Key paragraphs on cover in High Court judgment ⁶	Key paragraphs for the policy in Supreme Court judgment ^{6 7}
MS Amlin 1	Yes for disease clauses No for AOCA clauses	Yes for disease clause – by MS Amlin No for AOCA clause	Yes for disease clause No for AOCA clauses (only High Court judgment on certain aspects of coverage but parts of Supreme Court judgment may be relevant)	Disease and POA (labelled ‘action of competent authorities’ or AOCA)	Disease: 80-81, 175-199 AOCA: 306, 419-437	Disease: 82, PARTS VII – IX and XI AOCA: Aspects of PARTS VI – IX and XI may be relevant
MS Amlin 2	Yes for disease clauses No for AOCA clauses	Yes for disease clause – by MS Amlin No for AOCA clause	Yes for disease clauses No for AOCA clauses (only High Court judgment on certain aspects of coverage but parts of Supreme Court judgment may be relevant)	Disease and POA (labelled ‘action of competent authorities’ or AOCA)	Disease: 80-81, 175-199 AOCA: 306, 419-421, 438-439	Disease: 82, PARTS VII – IX and XI AOCA: Aspects of PARTS VI – IX and XI may be relevant
MS Amlin 3	No	No	No (only High Court judgment on certain aspects of coverage but parts of Supreme Court judgment may be relevant)	POA (labelled ‘action of competent authorities’ or AOCA)	306, 419-421, 440-444	Aspects of PARTS VI – IX and XI may be relevant
QBE 1	Yes	Yes – by QBE	Yes	Disease	80-81, 200-229, 239-241	83-86, PARTS VII – IX and XI
QBE 2	No	Yes – by FCA	Yes	Disease	80-81, 200-223, 230-235, 239-241	87-95, PARTS VII – IX and XI
QBE 3	No	Yes – by FCA	Yes	Disease	80-81, 200-223, 236-241	87-95, PARTS VII – IX and XI

Policy type ¹	Did the High Court find that the policy would potentially provide cover? ²	Was the cover appealed such that the overall outcome could change? ³	Final judgment on whether the policy would potentially provide cover? ⁴	Type of clause ⁵	Key paragraphs on cover in High Court judgment ⁶	Key paragraphs for the policy in Supreme Court judgment ^{6 7}
RSA 1	Yes, for certain types of business	Yes – by RSA and FCA	Yes, for certain types of business, inc. partial closure	Hybrid	242, 284-298	PARTS VI – IX and XI
RSA 2.1 and 2.2	No	No	No (only High Court judgment on certain aspects of coverage but parts of Supreme Court judgment may be relevant)	POA	306, 445-467	Aspects of PARTS VI – IX and XI may be relevant
RSA 3	Yes	Yes – by RSA	Yes	Disease	80-122	49-80, PARTS VII – IX and XI
RSA 4	<p>Yes for disease clause</p> <p>Yes for ‘Enforced closure’ / ‘First denial of access’ clause, for certain types of business</p> <p>Yes for ‘POA Non-Damage’ / ‘Second denial of access’ clause</p>	<p>No for disease clause</p> <p>Yes for ‘Enforced closure’ / ‘First denial of access’ clause – by FCA</p> <p>No for ‘POA Non-Damage’ / ‘Second denial of access’ clause</p>	<p>Yes for disease clause (only High Court judgment on coverage as there was no appeal but parts of Supreme Court judgment are relevant)</p> <p>Yes for ‘Enforced closure’ / ‘First denial of access’ clause, for certain types of business including partial closure (only High Court judgment on certain aspects of coverage, but parts of Supreme Court judgment are relevant)</p> <p>No for ‘POA Non-Damage’ / ‘Second denial of access’ clause (only High Court judgment on certain aspects of coverage but parts of Supreme Court judgment may be relevant)</p>	<p>Disease</p> <p>and</p> <p>Hybrid (labelled as ‘enforced closure’ or ‘First denial of access’ clause)</p> <p>and</p> <p>POA (labelled as ‘POA Non-Damage’ or ‘Second denial of access’ clause)</p>	<p>Disease: 80-81, 123-148</p> <p>‘Enforced closure’ / ‘First denial of access’ clause: 242, 299-305</p> <p>For ‘POA Non-Damage’ / ‘Second denial of access’ clause: 306, 451-455, 468-476</p>	<p>Disease: PARTS VIII – IX and XI</p> <p>‘Enforced closure’ / ‘First denial of access’ clause: PARTS VI – IX and XI</p> <p>For ‘POA Non-Damage’ / ‘Second denial of access’ clause: aspects of PARTS VI – IX and XI may be relevant</p>

Policy type ¹	Did the High Court find that the policy would potentially provide cover? ²	Was the cover appealed such that the overall outcome could change? ³	Final judgment on whether the policy would potentially provide cover? ⁴	Type of clause ⁵	Key paragraphs on cover in High Court judgment ⁶	Key paragraphs for the policy in Supreme Court judgment ^{6 7}
Zurich 1 and 2	No	No	No (only High Court judgment on certain aspects of coverage but parts of Supreme Court judgment may be relevant)	POA	306, 477-502	Aspects of PARTS VI – IX and XI may be relevant