Claim No: FL-2020-000018

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
COMMERCIAL COURT (QBD)
FINANCIAL LIST

BEFORE: Lord Justice Flaux and the Honourable Mr Justice Butcher

B E T W E E N:

THE FINANCIAL CONDUCT AUTHORITY

Claimant

- and –

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

Defendants

-and-

(1) HOSPITALITY INSURANCE GROUP ACTION
(2) HISCOX ACTION GROUP

Interveners

SKELETON ARGUMENT FOR THE HISCOX INTERVENERS
for the hearing on 2 October 2020

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1. This is the Skeleton Argument for the Hiscox Interveners (referred to below as the "**HAG**", i.e. "the Hiscox Action Group") in relation to consequential matters following the handing down of the judgment in *The Financial Conduct Authority v Arch Insurance (UK) Limited & Others* [2020] EWHC 2448 (Comm) (the "**Judgment**").

2. In respect to the HAG's position, the issues that arise for determination are:

(1) The appropriate declarations to be issued by the Court, following the Judgment;

(2) If necessary, the grounds on which the HAG seeks a "leapfrog" certificate for the purposes of an appeal to the Supreme Court and/or permission to appeal to the Court of Appeal; and

(3) If necessary, whether or not a leapfrog certificate and/or permission to appeal should be granted to the Fourth Defendants ("**Hiscox**").

3. The HAG will address each point in turn. To be clear from the outset, as explained in paragraph 7 of Leedham 2 [O/29], the HAG makes the application for a leapfrog certificate and/or permission to appeal on a protective and provisional basis, pending the Court's decision on the correct counterfactual (i.e. what has been described as "the Quantum Issue" – please see paragraphs 6, 7 and 14 below).

(1) THE DECLARATIONS

4. It is, of course, regrettable that more agreement could not be reached amongst the parties as to the terms of the proposed declarations, given the clarity and great detail with which the issues were addressed in the Judgment. For the individual policyholders making up the HAG, this is a matter of great financial and personal concern because many of them (rightly) understand the Judgment to mean that their claims should be paid by Hiscox, and the arguments now raised by Hiscox to the contrary in regard to the declarations is, in their respectful submission, incorrect and contrary to the terms of the Judgment.

5. The HAG refers to the draft declarations produced by the FCA [N/3], and respectfully makes the following submissions as to the proposed wording of the following paragraphs in that draft:

6. As to paragraph 13.4:

(1) The HAG was surprised to see this point taken by Hiscox, which point seems to arise from [351] and [389] of the Judgment, which relate to different insurers on different wordings and are not points made in the Judgment in respect to

Hiscox (indeed, the opposite). In broad terms, and subject to the further points made below, the HAG respectfully adopts what is understood to be the FCA's position on this issue – which is understood to be described as the "Quantum" point.

(2) The HAG's position is that, in the circumstance, paragraph 13.4 should read: "*Depending on the relevant policy wording, if there was a measurable downturn in the turnover of a business (not due to COVID-19 or any of the elements of the insuring clause, which must be stripped out for the purpose of the counterfactual) 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*".

(3) As explained at paragraphs 12-16 of Leedham 2 [O/29], this is the clear meaning of the Judgment, and in particular, paragraphs 278-283 and 530-533. The correct counterfactual strips out (i) the inability to use the insured premises; (ii) the restrictions imposed by a public authority; and (iii) COVID-19.

(4) If Hiscox's suggested wording were to stand,[1] this would wrongly reintroduce COVID-19 into the counterfactual, and therefore be directly contrary to the paragraphs 278-283 and 530-533 of the Judgment.

(5) Hiscox's suggested wording would also render cover under Hiscox policies illusory, contrary to paragraph 281 of the Judgment.

[1] The proposed paragraph 11.3(b) of the Insurers' Draft Declarations dated 29 September 2020: "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".

7. Insofar as Hiscox continues to propose the inclusion of the declaration at paragraph 12.4 of its 27 September 2020 draft, which is in large part similar to paragraph 19 of Hiscox's / Insurers' latest draft declarations (dated 29 September 2020 [N/5]):[2]

(1) This paragraph should either be deleted in its entirety; or

(2) In the alternative, paragraph 12.4 should read: "*Subject to the relevant policy wording (including, by way of example only, definitions of Loss of income, Loss of gross profit, indemnity period etc), the correct counterfactual (which strips out COVID-19 and all elements of the insuring clause, before and after cover under the policy is triggered) can only assume that the insured peril applies from the time that the restrictions are imposed, and only for as long as they are imposed*".

(3) Hiscox's suggested wording cannot stand, for the reasons outlined at paragraph 6 above. It would (on Hiscox's case as far as it is understood) allow Hiscox to seek to argue that insured businesses that closed on 16, 20, or 23 March pursuant to government announcements would <u>not</u> be able to recover any indemnity under the policy. This would, for reasons explained above, be contrary to the clear meaning of the Judgment. Further, as to the "time period" for the operation of the counterfactual, Hiscox's approach would (it appears) seek to override the express policy wordings as to indemnity period and so on, which again cannot be correct and is not how the Judgment is understood.

8. As to paragraph 19.2:

(1) This should read: "*As regards Hiscox 1-4, "interruption" includes interference or disruption, and does not mean just a complete cessation of the insured's "business" or "activities". Whether there has been such an "interruption" is a matter of fact in each case*".

[2] The proposed paragraph 12.4 of the Insurers' Draft Declarations dated 27 September 2020: "An insured cannot claim in respect of loss sustained before or after the insured peril. Therefore, the correct counterfactual can only assume that the insured peril applies from the time that the restrictions are imposed and only for as long as they are imposed".

(2) Hiscox's suggested wording[3] is incorrectly confined to Hiscox1 and 4, and does not include Hiscox2 and 3. Paragraphs 274 and 409 of the Judgment do not (expressly or impliedly) support such a distinction being made. These paragraphs refer to "*the stem wording*" generally, which encompasses Hiscox1-4. To read the Judgment otherwise would mean that the Judgment does not determine this issue at all in respect to Hiscox2 and 3, which it is submitted cannot be correct, given that the point was argued at length and the purpose of the Judgment is obviously to determine these issues across the board.

9. As to paragraph 19.3:

(1) This should read: "*As regards Hiscox1-4, (i) there will not be an "inability to use" premises merely because the insured cannot use all of them; and (ii) equally there will not be an "inability to use" premises by reason of any and every departure from their normal use. However, (iii) partial use might be sufficiently nugatory or vestigial as to amount to an "inability to use" the premises. Whether that was so would depend on the facts of a particular case*".

(2) This reflects the wording of paragraph 268 of the Judgment with greater clarity and efficiency than Hiscox's suggested wording.[4]

10. As to paragraph 19.4(a) and (b):

(1) This should read:

(a) "The words "restrictions imposed" mean something mandatory that has the force of law, the only relevant such matters being those promulgated by statutory instrument, in particular (and subject to (b) below)

[3] The proposed paragraph 17.2 of the Insurers' Draft Declarations dated 29 September 2020 [N/5]: "As regards Hiscox 1 and 4 "interruption" includes interference or disruption, not just a complete cessation of the insured's "business" or "activities". Whether there has been such an "interruption" is a matter of fact in each case".

[4] The proposed paragraph 17.3 of the Insurers' Draft Declarations dated 29 September 2020 [N/5]: "As regards Hiscox1-4, "inability to use" means something significantly different from being hindered in using or similar. There will not be an "inability to use" the insured premises merely because an insured cannot use all of the premises and equally there will not be an ability to use the insured premises by reason of any and every departure from their normal use. Partial ability to use the premises might be sufficiently nugatory or vestigial as to amount to an "inability to use" the premises, depending on the facts".

Regulation 2 of the 21 March and Regulations 4 and 5 of 26 March Regulations. Whether such restrictions caused an inability to use is a question of fact"; and

(b) *"A "restriction imposed" does not necessarily have to be directed to the insured or to the insured's use of premises, such as Regulation 6 of the 26 March Regulations. Social Distancing and Related Action otherwise were and are not "restrictions imposed". It would be a question of fact in each case whether Regulation 6 caused an "inability to use" the insured's premises".*

(2) This accurately reflects paragraphs 267 to 270 of the Judgment, in particular the affirmation that whether Regulation 6 caused an "inability to use" is a "*question of fact*".

(3) The HAG's proposal differs from the FCA's suggested wording of paragraph 19.4[5] and Hiscox's suggested wording of the equivalent paragraph in its draft declarations.[6] On the facts (which were, of course, not before the Court), the HAG does not agree that the cases in which Regulation 6 would have caused an "inability to use" the premises would be "*rare*". However, this is, of course, what the Judgment says (as far as it goes on this point) at the end of [270]. As explained at paragraph 19 of Leedham 2 [O/29], the "restrictions imposed" include the inability of businesses to use their premises because of employees working from home and/or customers not being able to attend the business. These cases are <u>not</u> rare, on the facts known to the HAG. In the circumstances,

[5] The proposed paragraph 19.4(a) of the FCA's Draft Declarations dated 29 September 2020: "(a) The words "restrictions imposed" mean something mandatory that has the force of law, the only relevant such matters being those promulgated by statutory instrument, including Regulation 2 of the 21 March and Regulations 4, 5 and 6 of 26 March Regulations. Whether such restrictions caused an inability to use is a question of fact. Social Distancing and Related Action otherwise were and are not "restrictions imposed". Cases in which Regulation 6 would have caused an "inability to use" the insured's premises would be rare; whether there were such cases is a question of fact".

[6] The proposed paragraph 17.4(a) of the Insurers' Draft Declarations dated 29 September 2020: "The words "restrictions imposed" mean something mandatory that has the force of law, the only relevant such matters being those promulgated by statutory instrument and in particular Regulation 2 of the 21 March and Regulations 4 and 5 of the 26 March Regulations. "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". Social Distancing and Related Action otherwise were and are not "restrictions imposed". Whether such restrictions caused an inability to use is a question of fact. Cases in which Regulation 6 would have caused an "inability to use" the insured's premises would be rare; whether there were such cases is a question of fact".

and given that the facts were not before the Court and that the learned Judges approached this point by stating that "… it seems to us that …", it is respectfully submitted that it would not be appropriate for there to be a declaration stating in terms that such cases are rare. Instead, as concluded in the last sentence of [270], it will be a question of fact in each case.

(4) Finally on this point, the HAG notes that, although this is unlikely, it is possible that some businesses may have in fact been closed earlier pursuant to the 10 February 2020 Regulations if they were, for example, a one-man band and that person contracted COVID-19. Further, some claimants are based outside of England and Wales and were not therefore impacted by the 21 and/or 26 March Regulations. Those in Ireland will have been impacted by the Irish equivalent, for example. However, these points do not appear in the Judgment and may be open to argument by Hiscox (and others). These points are, therefore, simply raised for the learned Judges' consideration, perhaps to relax the wording of the declaration above by not expressly limiting it to only the 21 and 26 March Regulations. However, for the reasons set out above, the HAG of course recognises that this may not be considered to be appropriate.

11. Whilst the relevant evidence is of course not before the Court (although it is information of which Hiscox is aware) examples of cases falling within paragraph 10(3) above include the following (and which cases are examples of insureds who have, as a result of the operation of Regulation 6, suffered material / significant losses). The HAG provides this (obviously untested) information in order to assist the Court by illustrating the real-life impact of Regulation 6 on the HAG's insured businesses, by way of some representative examples set out below. The information set out below is not complete and the HAG is doing its best in the circumstances to provide helpful information. The common thread running through each of these (non-exhaustive) examples is that they are either Category 3 or Category 5 businesses which have suffered an "inability to use" their premises due to "restrictions imposed" by Regulation 6:

(1) **Factual example 1 - Adam Anson t/a Gun Factory Studios**: The insured runs a company hiring out rooms and equipment for music rehearsals. It is a Category 5 business. The insured premises consists of five rehearsal rooms in total, which

are mainly rented out on a day-by-day basis. The impact of Regulation 6 has meant that the insured has been "*unable to operate the business at all*", as customers were not permitted to travel to the rehearsal rooms. This has caused a significant downturn in turnover.

(2) **Factual example 2 - Welbeck Publishing Group**: The insured is a general publisher of books, manuals and the like and supplier of publishing related products. They also cover the sale of rights to third parties - Welbeck is a globally recognised, independent publisher based in London publishing with leading authors and brands worldwide all from their London offices (their insured premises) with 64 employees. As Welbeck's employees could work from home they did not have a reasonable excuse to leave their homes pursuant to Regulation 6 and could not lawfully attend their offices. Accordingly, the company was unable to use its offices/insured premises. The business did not close but continued to operate remotely without use of insured premises, notwithstanding this resulted in interruption to the business.

(3) **Factual example 3 – Control-F Limited**: The insured provides classroom training to law enforcement and private sector customers. It is a Category 5 businesses. The insured conducts its business from a training classroom and conferencing facility. Regulation 6 has impacted the business as "*clients could not lawfully attend on-site training*" and employees had to work from home and therefore could not conduct on-site training. This caused a downturn in turnover.

(4) **Factual example 4 - Altus Partners Limited**: The insured is an executive search recruitment company. It has 13 employees and has been running for 11 years. They became unable to use their insured premises (their offices in London) from 23 March 2020. Regulation 6 meant that because their employees could work from home they did not have a reasonable excuse to leave home to attend the office. They did and could continue to work from home and did not cease trading but this does not of course mean there was no interruption to their business.

(5) **Factual Example 5 - Insanity Group Limited and certain insured subsidiaries**: Insanity Group's longest insured subsidiary has been trading since 2007. The company manages talent in the media and entertainment industries and carries on the business of a record label. The workforce is around 30 staff. Their insured premises were their offices. The insured could and did carry on working remotely and adapted their business but could not use their insured premises, which were closed on 16 March 2020. Pursuant to Regulation 6, clients could not attend the offices but neither could employees by reason that they could work from home. Notwithstanding the business continued without the use of its insured premises it still suffered interruption.

12. Furthermore, insofar as Hiscox continues to propose the inclusion of the declaration at paragraph 17.4(c) of its draft:[7]

(1) This paragraph should be deleted in its entirety.

(2) Hiscox's suggestion is contrary to the clear meaning of the Judgment, in particular paragraphs 267-270. There is no basis for inferring, either expressly or impliedly, that all insured businesses in Category 3 and Category 5 did not suffer an "inability to use" their premises due to "restrictions imposed".

(3) The terms of the Judgment make it clear that any finding as to whether an insured business suffered an "inability to use" their premises due to "restrictions imposed" is a question of fact. The Court did not have the relevant facts before it, and did not (and could not) make any determinative finding on the facts as to insured businesses in Category 3 or 5 (which is the effect of what is sought by Hiscox in this proposed declaration).

(4) Insofar as Hiscox is suggesting the inclusion of paragraph 17.4(c) on the basis that Regulation 6 is not a "restriction imposed" causing an "inability to use" the premises, this is refuted: please see paragraph 10 and 11 above.

[7] The proposed paragraph 17.4(c) of the Insurers' Draft Declarations dated 29 September 2020: "Insureds carrying on businesses in Category 3 and Category 5 did not suffer an "inability to use" their premises due to "restrictions imposed" within the meaning of Hiscox1-4".

13. As to paragraph 19.6:

(1) It is proposed that this should read "*As regards Hiscox4 "restrictions imposed" "followed" an "occurrence" of COVID-19 within one mile of the insured's premises if they were both temporally posterior to that particular local "occurrence" and were a response to the outbreak of which that local occurrence formed part. The required link is between the "restrictions imposed" and COVID-19 after COVID-19 has occurred within one mile of the insured's premises; rather than between the "restrictions imposed" and the particular occurrences of COVID-19 within one mile of the insured's premises*".

(2) This accurately reflects paragraph 273 of the Judgment, and in particular the statement that Hiscox4 "*require[es] the link to be between restrictions imposed and a disease which has "occurred" within a one mile radius, rather than between the restrictions and the specifically local instances of the disease*".

14. As to paragraph 21:

(1) It is proposed that this should read: "*Hiscox 1-4 (hybrid and NDDA), with regard to causation, subject to the relevant policy wording (including, by way of example only, definitions of Loss of income, Loss of gross profit, indemnity period etc), the correct counterfactual (which strips out COVID-19 and all elements of the insuring clause, before and after cover under the policy is triggered) can only assume that the insured peril applies from the time that the restrictions are imposed, and only for as long as they are imposed*".

(2) The reasons stated at paragraph 6 and 7 above are repeated.

(3) Hiscox's suggestion that that the paragraph also include the unqualified statement that "*An insured cannot claim in respect of loss sustained before the commencement or after the cessation of insured peril*" cannot stand, and should be deleted in its entirety, for the reasons summarised above.

(4) However, in the short time that the HAG has had to consider it, it appears from Hiscox's (i.e. Insurers') draft dated 29 September 2020 [N/5] that the Insurers have inserted the following caveat: "subject to any terms of the policy that an insured is able to demonstrate permit recovery after restrictions have ceased, e.g. as to the definition of the indemnity period". This appears to be largely consistent with the HAG's proposal, although the HAG has not yet had time to consider the point fully and therefore reserves its position on this wording.

15. In the circumstances, the HAG respectfully submits that the suggested paragraphs above be adopted, and included in the Court's declarations.

(2) LEAPFROG CERTIFICATE / PERMISSION TO APPEAL

16. As explained in Leedham 2 [O/29], in the event that the Court disagrees with the HAG's proposed declarations at paragraphs 6, 7 and 14 above (on the correct counterfactual / the Quantum point) and agrees with Hiscox's position on these issues[8], then the HAG will seek to apply for a "leapfrog" certificate, pursuant to its application filed on 28 September 2020 [O/27-30]. Should the Court refuse that application, then the HAG in the alternative seeks permission to appeal to the Court of Appeal, for the reasons and on the grounds summarised below. Further, if the leapfrog certificate is granted, there is of course the risk that the Supreme Court will reject any application for permission to appeal. In the circumstances, and on a protective basis, and to save having to return to Court on this issue, the HAG also seeks permission to appeal to the Court of Appeal now, but with an extension of time for filing the Appellant's Notice with the Court of Appeal, as the Court feels appropriate.

[8] As explained in paragraph 7(5) of Leedham 2 [O/29], if, however, the Court agrees with the HAG's understanding of the Judgment and the correct counterfactual, then the HAG currently believes that it will likely seek to withdraw this application. The HAG expresses some hesitation on this issue because Hiscox (and other insurers) have applied for "leapfrog" certificates also, meaning that the HAG must prepare for the situation where full appeals are sought by Hiscox and other insurers, which may influence how the HAG seeks to proceed.

(A) LOCUS STANDI FOR LEAPFROG APPLICATION

17. The HAG has applied for a leapfrog certificate to the Supreme Court on the understanding that it has the required *locus standi* to do so, as an intervener under paragraph 2.5(a) of Practice Direction 51M.

18. The relevant rule is set out in UKSC Practice Direction 3 [S/2], at paragraphs 3.6.2 and 3.6.8: "*an application for a certificate may be made by any of the parties… any of the parties may apply to the Supreme Court for permission to [leapfrog] appeal*". Similarly, s.12 and 13 of the Administration of Justice Act 1969 [S/1] refer to an application by "*any of the parties*" to the proceedings.

19. While this does not expressly include interveners, the HAG's view is that it is a "party" for the purposes of the rule set out above, and that it has standing to make the present application. It draws the following points to the Court's attention:

    (1) It is acknowledged that there is very limited authority or assistance on whether interveners have standing to apply for permission for a leapfrog appeal. Nonetheless, it is entirely consistent with the authorities addressing leapfrog appeals that the HAG (*qua* intervener) be deemed a "party" for these purposes.

    (2) In particular, it is clear that "*the policy lying behind the leapfrog provisions was to cut out one layer of appeals*".[9] In other words, leapfrog appeals are of course meant to provide an expedited route to the Supreme Court. This is also acknowledged at CPR 4A-10.1, which refers to leapfrog appeals as a "*direct appeal*" and form of "*expedited hearing*". There is nothing within this rationale which indicates that the parties with relevant standing should more circumscribed than if the appeal was to the Court of Appeal. It follows that a party with standing to appeal to the Court of Appeal should, *mutatis mutandis*, have standing to apply for a leapfrog certificate.

[9] *Jones v Ceredigion CC* [2005] EWCA Civ 286 [37].

(3) The HAG (as intervener) has standing to appeal to the Court of Appeal[10].

(4) Lastly, while the Supreme Court is governed by its own set of rules, the HAG notes the definition of "party" in the surrounding legislation: see, for example, the Senior Courts Act 1981 s.151(1) ("*party, in relation to any proceedings, includes any person who… has intervened in those proceedings*") and the County Courts Act 1984 s.147(1) *("…"party" includes every person served with notice of, or attending, any proceeding …*").

20. In the alternative, and should it be held that the HAG does not at present have standing to apply for a leapfrog certificate, then the HAG respectfully applies[11] to be joined as a party to the proceedings for the purposes of making that same application. To that end: (1) the Court has already decided, at the second CMC, that the HAG is a "*third party affected by the determination of the issues*", as required under paragraph 2.5(a); and (2) those findings apply with equal force to the HAG's (alternative) application to be joined as a party to the present proceedings for the purposes of leapfrog appeal.

(B) LEAPFROG CERTIFICATE / PERMISSION TO APPEAL

21. As set out at paragraph 9 of Leedham 2 [O/29], the HAG applies for a leapfrog certificate (and, below, permission to appeal) on the following grounds: (1) under s.12(1) of the Administration of Justice Act 1969 (the "**Act**"), there is a sufficient case for an appeal to the Supreme Court to justify an application for leave to bring such an appeal; and (2) the proceedings satisfy the statutory conditions set out in s.12(3A) of the Act.

22. Further, it is respectfully submitted that the grounds on which this application are based have real prospects of success, applying the test under CPR 52.6(1)(a), and that it would be appropriate to grant permission to appeal to the Court of Appeal (were no leapfrog certificate granted).

[10] *Re W (A child)* [2016] EWCA Civ 1140 at [41]: "… *it is clear that this court may entertain an appeal from [the parties] irrespective of whether they were formally made a party (or intervenor) in the lower court*". It follows, *a fortiori*, that the HAG (as a formal intervenor) is able to appeal to the Court of Appeal.

[11] Under paragraph 2.5(a) of Practice Direction 51M and on same grounds and the same evidence as set out in Leedham 1 when the HAG applied to intervene in the first place.

23. The HAG will first identify the grounds on which it considers that there is a sufficient case for appeal to the Supreme Court (and permission to appeal to the Court of Appeal):

i. *Ground 1: the correct counterfactual*

24. If the Court disagrees with its understanding of the correct counterfactual, then (subject to the more detailed position as set out in Leedham 2) the HAG will seek to appeal the finding (if it is so) 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 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:

(1) This is inconsistent with paragraphs 278-283 and 530-533 of the Judgment and the correct approach to the counterfactual as identified there, meaning that the Judgment is internally inconsistent.

(2) Furthermore, this finding renders cover under the Hiscox policies illusory, when this was clearly not intended (see paragraph 281 of the Judgment).

(3) The reasons why paragraphs 278-283 and 530-533 of the Judgment are *correct* as to the counterfactual mean that [if Hiscox's approach to the Judgment on this issue is correct] the Judgment is *incorrect* in the respects above.

(4) Lastly, this finding is contrary to the HAG's and the FCA's written and oral submissions at the hearing on the counterfactual issue, which were correct.

ii. *Ground 2: Regulation 6 of the 26 March Regulations*

25. If an appeal is pursued, the HAG will seek to appeal the finding that "*[they] did not consider that it could be said that Regulation 6 of the 26 March Regulations amounted to a "restriction imposed" which could have led to an "inability to use" the premises of all insureds where that insured's business had relied on the physical presence of customers*" (Judgment, paragraph 270). It is respectfully submitted that (to the extent

that this has not already been held in the Judgment) the learned Judges should have gone further and found that:

(1) Regulation 6 is in all cases (albeit subject to the facts) a "restriction imposed" as the relevant "restrictions" include both direct requirements to close specific businesses and also other restrictions which on the facts result in the inability to use the Insured Premises normally, because the business owners, employees, workers, customers and other users could not use the Insured Premises normally.

(2) Contrary to paragraph 270 of the Judgment, the cases in which Regulation 6 would have caused an "inability to use" premises would not be rare.

iii. *Ground 3: "Restrictions imposed"*

26. If an appeal is pursued, the HAG will seek to appeal the finding that "restrictions imposed" refer only to "*legally binding powers… promulgated by statutory instrument*", and that "*guidance, exhortation and advice given by the Government, including by the Prime Minister… do not count as "restrictions imposed" by a public authority*" (Judgment, paragraphs 266-267):

(1) The HAG considers it to be clear that if the Government tells its citizens to do something then that is mandatory, and it is an "imposition". The important thing is whether the core sense is that what the citizen is being told/asked to do is not understood to be optional giving the citizen a genuine choice but rather to be compulsory. This is the case whether or not the instruction is backed by legislation or not. As such, a "restriction imposed" does not require force of law.

(2) Properly construed, all of the restrictions pleaded by the FCA at paragraph 18 of the Particulars of Claim amount to restrictions imposed by a public authority.

(3) In particular, the government announcements made on 16, 20 and 23 March 2020 amount to "restrictions imposed" – the public were "ordered" by the Prime Minister to comply with a set of extreme measures, under threat of Police action

and also the background of serious threat to their personal health: these announcements were, in any ordinary use of the words, "restrictions imposed".

iv. *Ground 4: "Inability to use"*

27. If an appeal is pursued, to the extent that the grounds below go beyond the terms of the Judgment, the HAG will seek to appeal the finding that "*[inability to use] means something significantly different from "hindered in using" or similar… there will not be an "inability to use" premises merely because the insured cannot use all of them; and equally there will not be an "inability to use" premises by reason of any and every departure from their normal use*" (Judgment, paragraph 268). Again, to the extent that this goes beyond the terms of the Judgment, the learned Judges should have found that:

(1) The meaning of "your inability to use" is the inability to utilise or employ the premises for or with its intended aim or purpose, i.e. the insured's business activities. That inability may be partial or total.

(2) An example of this is if the business (or part of the business) relies on it being able to invite customers into the premises and it is unable to do so without acting in contravention of Government advice – it is unable to use the premises for the purposes of the clause.

28. The HAG submits that the above grounds also have a real prospect of success, and therefore satisfy the test in CPR 52.6(1)(a), such that it would be appropriate to grant permission to appeal to the Court of Appeal if a leapfrog certificate is not granted. The HAG is aware of the rule in *Ceredigion CC v Jones*,[12] and emphasizes that this is an alternative that will only be pursued if the Court rejects the HAG's application for a leapfrog certificate.

29. Further, it is respectfully submitted that the HAG has satisfied the statutory conditions set out in s.12(3A) of the Act, namely that: (1) the decision involves a point of law of general public importance; (2) the proceedings entail a decision relating to a matter of

[12] [2007] UKHL 24 (a claimant is not permitted to seek both permission to appeal to the Court of Appeal and leapfrog appeal to the Supreme Court at the same time, in parallel in different courts).

national importance or consideration of such a matter; (3) the result of the proceedings is so significant that a hearing by the Supreme Court is justified; and (4) the benefits of earlier consideration by the Supreme Court outweigh the benefits of consideration by the Court of Appeal.

30. Taking each of the s.12(3A) requirements in turn, and as addressed in Leedham 2 [O/29]:

(1) **Point of law of general public importance**: the various points of law raised above concern key questions for any Hiscox policyholder and for Hiscox itself, as well as relevant insureds and insurers more generally. These issues will feature (either directly or indirectly) in many claims under policies covering business interruption losses. These points of law are clearly of general public importance, as they go to the heart of whether insured businesses can claim under their policies. Most of the insureds are SMEs (or smaller) and recovery under their insurance is a matter of commercial "life or death".

(2) **National importance**: the Judgment (and therefore the potential appeal) is a matter of national importance. The COVID-19 pandemic has of course had a profound and severe impact on the national economy, stemming largely from the distress under which businesses have been placed. Whether or not insured businesses are able to claim under their policies (therefore potentially allowing them to stay afloat, hire/re-hire employees, and so on), and on what grounds, will have significant economic repercussions, and therefore relates to a matter of national importance.

(3) **So significant that a hearing by the Supreme Court is justified**: for the same reasons, the decision is so significant that a hearing by the Supreme Court is justified. The Grounds outlined above are also purely points of law, and therefore respectfully submitted to be suitable for an appeal.

(4) **Benefits of earlier consideration by the Supreme Court outweigh the benefits of consideration by the Court of Appeal:**

(a) Clarity and certainty are urgently required by both the HAG and Hiscox. For the HAG policyholders, a protracted wait for a final judgment from the Supreme Court (following a hearing before the Court of Appeal first) would result in further losses from, for example, being unable to take any steps to relieve the pressure placed on their businesses in the absence of any insurance pay out. Policyholders have also been placed under immense personal hardship, as the Court is aware.

(b) It is also likely that a determination by the Court of Appeal would be appealed to the Supreme Court, given the importance of the decision for the stakeholders. This would result in further delay for all concerned.

(c) In the circumstances, an earlier consideration by the Supreme Court would be a beneficial and proportionate way to determine the disputed issues between the parties.

(d) This does not, in any way, detract from the expeditious and efficient manner with which the Judges determined the matter in the High Court. The HAG remains extremely grateful to the Judges (and to the Court staff) for all their time and effort in considering the matter on such an expedited basis.

31. For the above reasons, the HAG respectfully invites the Court to grant a leapfrog certificate pursuant to s.12 of the Act, in the terms of the HAG's Draft Certificate [O/28]. In the alternative, it respectfully invites the Court to grant permission to appeal to the Court of Appeal on the same points identified above, on the grounds that the HAG has a real prospect of success.

(3) HISCOX'S DRAFT GROUNDS ON APPEAL

32. Lastly, the HAG addresses the Draft Grounds of Appeal submitted by Hiscox [O/16]. It remains to be seen whether Hiscox pursues any application for a leapfrog certificate and/or permission to appeal. If such applications are made, the basis on which they will be put also remains to be seen. The HAG reserves its position in this regard to argue,

as appropriate that: (1) none of Hiscox's grounds constitutes a sufficient case for an appeal to the Supreme Court, as required under s.12(1) of the Act; and (2) none of these grounds has a real prospect of success, as required by CPR 52.6(1)(a).

33. As to the second ground of appeal:

(1) Hiscox's point has been roundly rejected in the Judgment, for the reasons set out therein. The fundamental unworkability of Hiscox's proposed counterfactual is revealed when it is applied to the example of an insured restaurant being unable to use its premises due to restrictions imposed by a local authority following the discovery of vermin.

(2) At paragraph 281 of the Judgment, the Court reasoned that: "*on insurers' case the insured could not recover in respect of the period after the imposition of the restrictions, unless it could show that customers not coming to the restaurant was due to the restriction imposed rather than due to the vermin, and that if the insured could not demonstrate that customers would have come despite the presence of vermin, it could not recover*".

(3) The absurdity of this conclusion "*effectively illustrate[s] the fallacy and unreality*" of Hiscox's ground of appeal. The wording of Hiscox's ground of appeal does not adequately circumvent this difficulty.

(4) The above is set out by way of example response to Hiscox's application (which may or may not be made). The HAG will not take up the Court's time by responding in any detail to an application that might not be pursued.

CONCLUSION

34. For briefly summarised above, the HAG respectfully requests that:

(1) The Court adopt its suggested declarations at paragraphs 6-14 above;

(2) Should the Court disagree with the HAG's position on the correct counterfactual, and in the circumstances set out more fully in Leedham 2, that the Court grant the HAG a certificate under s.12 of the Act;

(3) Should the Court decline to grant the HAG a certificate under s.12 of the Act, that the Court grant the HAG permission to appeal to the Court of Appeal.

BEN LYNCH Q.C.

NATHALIE KOH

FOUNTAIN COURT CHAMBERS

30 September 2020