Claim No: FL-2020-000018

IN THE SUPREME COURT
ON APPEAL FROM 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

HISCOX ACTION GROUP'S
APPLICATION FOR PERMISSION TO APPEAL:
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Information about the decision being appealed

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1. The Hiscox Action Group (the "**HAG**") respectfully seeks permission to appeal the Order of Flaux LJ and Butcher J (the "**Judges**") making various declarations, as ordered at the consequentials hearing on 2 October 2020[1], pursuant to the judgment in *The Financial Conduct Authority v Arch Insurance (UK) Limited & Others* [2020] EWHC 2448 (Comm), handed down on 15 September 2020 (the "**Judgment**")[2].

[1] The declarations made (the "**Declarations**") are currently in draft, but nearly final form. A separate Order (the "**Order**") was made dealing with *inter alia* leapfrog permission. References below to paragraphs in the Order and in the Declarations are made in the form [Order / number] and [Declarations / number], respectively.
[2] References to paragraph numbers in the Judgment are made in the form [Judgment / number].

2. The HAG has had the benefit of seeing the FCA's Application for Permission to Appeal served on 13 October 2020 (the "FCA's Application"). The HAG adopts *mutatis mutandis* the FCA's case, as far as relevant to the HAG and seeks to avoid repeating those points here. However, the HAG's case on appeal is necessarily narrower and more focused than the FCA's, given that the Claimants forming the HAG only claim against the Fourth Defendant ("**Hiscox**"), and the HAG makes various different and more specific points on appeal on the relevant Hiscox insurance policy wordings (the "**Hiscox Policies**"); further, the HAG's claims proceed only under the "Public Authority Clause" (below) in the Hiscox Policies. Nonetheless, as explained further below, the issues raised by the HAG appeal are of considerable importance to many thousands of policyholders beyond the HAG itself as a result of the representative nature of the Hiscox Policies.

I. NARRATIVE OF THE FACTS

3. The HAG adopts paragraphs 4 and 5 of the FCA's Application. The HAG is formed of 385 businesses insured by Hiscox in respect of, amongst other things, business interruption. They are businesses that have, due to the emergence of COVID-19 and restrictions imposed by government, suffered devastating losses and desperately need the financial support that an indemnity from Hiscox would provide. The HAG has sought indemnity from Hiscox in respect to their losses, but Hiscox has in all[3] cases wrongfully and in breach of contract refused to provide any indemnity. As for many thousands of other small businesses, this litigation is a matter of commercial "life or death" for the majority of the HAG claimants, all with businesses, and many with families, to support.

4. The HAG intervened in the proceedings at first instance as an intervener under paragraph 2.5(a) of Practice Direction 51M. An overview of the relevant factual background is set out at [Judgment / 9 to 60]. The relevant part of the Judgment for the HAG is mainly [Judgment / 242 to 283] which addresses the proper construction and application of the four lead Hiscox Policies (known as "Hiscox1" to "Hiscox4"), which Hiscox Policies are set out in relevant parts at [Judgment / 246 to 253].

[3] Save for one case.

5. The HAG put their claims under the business interruption insurance Public Authority Clause, which provides (with some minor variations across the Hiscox Policy wordings) as follows [Judgment / 246]:

"**What is covered**	**We** will insure **you** for **your** financial losses and other items specified in the schedule, resulting solely and directly from an interruption to **your activities**[4] caused by:
…	
Public authority	13. **your** inability to use the **insured premises** due to restrictions imposed by a public authority during the **period of insurance** following: a. a murder or suicide; b. an occurrence of any human infectious or human contagious disease, an outbreak of which must be notified to the local authority; c. injury or illness of any person traceable to food or drink consumed on the **insured premises**; d. defects in the drains or other sanitary arrangements; e. vermin or pests at the **insured premises**; …"

6. Hiscox4 [Judgment / 252] contains a differently worded Public Authority Clause with a "one-mile restriction" in the wording at sub-paragraph (b): "b. an occurrence of a notifiable human disease within one mile of the business premises".

II. STATUTORY FRAMEWORK

7. The HAG adopts paragraphs 6 to 9 of the FCA's Application. The relevant provisions of the 21 March Regulations and the 26 March Regulations appear or are summarised at [Judgment / 34 to 37] and [Judgment / 44 to 52], respectively. For ease of reference, and given its importance to this application, Regulation 6 of the 26 March Regulations provides in relevant parts as follows:

> "**6.**—(1) During the emergency period, no person may leave the place where they are living without reasonable excuse.
>
> (2) For the purposes of paragraph (1), a reasonable excuse includes the need—
>
> (a) to obtain basic necessities, including food and medical supplies for those in the same household (including any pets or animals in the household) or for vulnerable persons and supplies for the

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

essential upkeep, maintenance and functioning of the household, or the household of a vulnerable person, or to obtain money, including from any business listed in Part 3 of Schedule 2;

…

(f) to travel for the purposes of work … where it is not reasonably possible for that person to work … from the place where they are living;

…"

III. CHRONOLOGY OF PROCEEDINGS

8. The HAG adopts paragraphs 10 to 18 of the FCA's Application. It is right for the HAG to note here that the HAG Claimants' Hiscox Policies all contain arbitration clauses. However, in the circumstances of this case, and for the reasons explained in the HAG's application to intervene issued on 23 June 2020, it was felt necessary for the HAG to seek to intervene in the FCA Test Case. That application was allowed by Order made at the hearing on 26 June 2020.

9. As noted at paragraph 18 of the FCA's Application, at the consequentials hearing the HAG was granted a leapfrog certificate pursuant to s.12(1) of the Administration of Justice Act 1969 (the "**1969 Act**") [Order / 1 and 2] and also permission to appeal to the Court of Appeal [Order / 3]. In the circumstances, the HAG respectfully submits that it has standing to make this application for permission to appeal pursuant to s.13(1) of the 1969 Act. To explain, as the Court will of course be aware, ss.12 and 13 of the 1969 Act provide, in relevant parts, as follows:

"**12 Grant of certificate by trial judge.**

(1) Where on the application of any of the parties to any proceedings to which this section applies the judge is satisfied—

(a) that the relevant conditions are fulfilled in relation to his decision in those proceedings or that the conditions in subsection (3A) ("the alternative conditions") are satisfied in relation to those proceedings, and

(b) that a sufficient case for an appeal to the Supreme Court under this Part of this Act has been made out to justify an application for leave to bring such an appeal,

…

the judge, subject to the following provisions of this Part of this Act, may grant a certificate to that effect.

…

13 Leave to appeal to Supreme Court.

(1) Where in any proceedings the judge grants a certificate under section 12 of this Act, then, at any time within one month from the date on which that certificate is granted or such extended time as in any particular case the Supreme Court may allow, any of the parties to the proceedings may make an application to the Supreme Court under this section.

(2) Subject to the following provisions of this section, if on such an application it appears to the Supreme Court to be expedient to do so, the Supreme Court may grant leave for an appeal to be brought directly to the Supreme Court; and where leave is granted under this section—

(a) no appeal from the decision of the judge to which the certificate relates shall lie to the Court of Appeal, but

(b) an appeal shall lie from that decision to the Supreme Court."

10. UKSC Practice Direction 3.6.2 provides in relevant part that "An application for a certificate may be made by any of the parties …". UKSC Practice Direction 3.6.8 provides in relevant part: "At any time within one month from the date on which the judge grants the certificate, or such extended time as the Supreme Court may allow, any of the parties may apply to the Supreme Court for permission to appeal. Application is made in accordance with paragraph 3.1 of this Practice Direction. If any party to the proceedings is not a party to the application, the application must be endorsed with a certificate of service on that party."

11. The word "parties" is not defined in the 1969 Act, nor in the UKSC Practice Direction. However, the HAG respectfully submits that it was a "party" (in the relevant sense) in the proceedings at first instance because it was an intervener – i.e. an intervening party. The HAG was granted permission to intervene at first instance (as above), took part in the hearing and made written and oral submissions. The Judges then granted the HAG both the leapfrog certificate and permission to appeal to the Court of Appeal. The HAG

has at all material times been treated as, and acted as, a "party". Further and in any event, the wording of UKSC Practice Direction 3.6.8 refers to "… any party to the proceedings …" (in the second sentence quoted above). It is submitted that this indicates that what is meant by a "party" is simply a "party to the proceedings" – i.e. this would include an intervener.

12. The HAG is not aware of any authorities directly addressing the above issue. However, it would be consistent with the authorities that do exist and the policy underlying the leapfrog appeal procedure for the HAG properly to be considered to be a "party" for these purposes:

(1) it is established that interveners do have standing to appeal to the Court of Appeal and, indeed, even non-parties are in appropriate circumstances able to bring such appeals – see, for example, *Re W (A Child) (Care Proceedings: Non Party Appeal)* [2016] EWCA Civ 1140; [2017] 1 W.L.R. 2415, CA at [41], per McFarlane LJ:

> "41. In any event, in the light of the clear ruling by this court in the *George Wimpey UK Ltd case* [2008] 1 WLR 1649, it is, in my view, unnecessary to establish with certainty the precise procedural status of SW and PO in the lower court in order to determine whether or not they may act as "appellants" in this court. On the interpretation of CPR r 52.1(3)(d) given in the George Wimpey UK Ltd case it is clear that this court may entertain an appeal from SW and/or PO irrespective of whether they were formally made a party (or intervener) in the lower court."

(2) The Supreme Court is of course governed by its own rules, and other sets of rules are not directly relevant. However, at least by way of analogy, it is noted that s.151(1) of the Senior Courts Act 1981 defines "party" as *"'party', in relation to any proceedings, includes any person who pursuant to or by virtue of rules of court or any other statutory provision has been served with notice of, or has intervened in, those proceedings …"*. Further, s.147(1) of the County Courts Act 1984 defines "party" as *"'party' includes every person served with notice of, or attending, any proceeding, whether named as a party to that proceeding or not"*.

(3) In *Jones v Ceredigion CC* [2005] EWCA Civ 986; [2005] 1 W.L.R. 3626 at [37], Waller LJ held (in relevant part) that *"… the policy lying behind the leapfrog provisions was to cut out one layer of appeals"*. Further, in *Ceredigion CC v Jones*

[2007] UKHL 24; [2007] 1 W.LR. 1400 at [19], Lord Bingham held (in relevant part) that *"The purpose of the procedure introduced by sections 12 and 13, in cases where the judge finds the statutory conditions to be met and exercises his discretion to grant a certificate and where the House grants leave, is to save time and expense by cutting out an intermediate tier of appeal and providing that the matter in question is resolved in one forum only."* The notes in the White Book, vol.2, at CPR 4A-10.1 refer to "leapfrog" appeals as a "direct appeal" and a form of "expedited hearing".

(4) It is respectfully submitted that where the HAG does have standing to appeal to the Court of Appeal, and permission has been granted, and the purpose behind the "leapfrog" provisions is as set out above, it would be appropriate for the Court to find that the HAG does have standing to seek permission to appeal to the Supreme Court in this case.

(5) It is respectfully submitted that it appears from the above authorities that the leapfrog procedure is not intended to prevent any relevant "party" which would otherwise have standing to appeal to the Court of Appeal from appealing under the "leapfrog" provisions. To the contrary, the leapfrog procedure is a form of "shortcut", permitting (subject, of course, to permission being granted) parties to appeal directly to the Supreme Court, in the circumstances when this is appropriate. If follows that a "party" with standing to appeal to the Court of Appeal should, in appropriate circumstances, have standing to apply for permission to appeal to the Supreme Court, once a leapfrog certificate has been granted (as it has in this case), and it is submitted that it would be appropriate in the present case.

(6) Finally on this point, there was at the consequentials hearing (and to date) no objection by any party to the HAG seeking to apply for a leapfrog certificate or permission to appeal to the Supreme Court. This, of course, does not mean that the HAG does have standing so to apply, but if it were right that the HAG did not have such standing, one might expect another party to have pointed this out.

13. In the circumstances, the HAG respectfully submits that it has standing to make the present application for permission to appeal, following on from the leapfrog certificate.

For the avoidance of doubt, the HAG seeks only to continue as an intervener and does not make any separate joinder application.

14. In the alternative, and should it be held that the HAG does not have standing to apply for permission to appeal to the Supreme Court, the HAG respectfully applies: (1) to intervene in the FCA's appeal to the Supreme Court; and/or (2) to intervene to oppose Hiscox's appeal (if any) to the Supreme Court, under rr.15 and 26 of the Supreme Court Rules 2009 (on the same grounds on which the HAG applied to intervene at first instance, and in addition that the HAG took part in the first instance hearing and made oral and written submissions which it is submitted will assist in the determination of all relevant issues in this important and urgent matter). The HAG reserves its position, if necessary, to renew this application under r.26 of the Supreme Court Rules 2009, if permission is granted to the FCA and/or Hiscox.

15. The HAG respectfully submits a request for urgent consideration of this application and/or for an expedited hearing, pursuant to r.31 of the Supreme Court Rules 2009. The HAG adopts the FCA's position in this regard.

16. Finally, under this heading, the HAG feels that it is right to inform the Court that because of (1) the make-up of the group of Claimants forming the HAG, (2) how their claims are benefited by the terms of the Judgment, and (3) Hiscox's position on "the Quantum Point" (below), if Hiscox were not to seek to appeal, the HAG has openly stated that it too would not seek to appeal. However, it is currently believed that Hiscox does intend to seek to appeal and in those circumstances, for the reasons briefly summarised below, the HAG respectfully requests permission to appeal under s.13 of the 1969 Act. For the avoidance of doubt, if it transpires that Hiscox does not seek to appeal, the HAG will withdraw this application (and, if that is the case, the HAG sincerely apologises, in advance, for imposing unnecessarily on the Court's time).

IV. ISSUES BEFORE AND RELEVANT ORDERS MADE BY THE COURT BELOW

17. The HAG adopts paragraphs 19 to 34 of the FCA's Application. The most relevant passages of the Judgment for the HAG are [Judgment / 242 to 283], in particular [Judgment / 266 to 283] and [Declarations / 5, 10, 11 and 17 to 19]. It is also right to

highlight [Judgment / 350 to 351 and 389] as being relevant, but in the HAG's respectful submission, inconsistent with the findings at [Judgment / 278 to 283 and 530 to 533].

V. PROPOSED GROUNDS OF APPEAL

18. The HAG respectfully submits that, for the reasons briefly summarised below, this application raises arguable points of law of general public importance which ought to be considered by the Supreme Court at this time, bearing in mind that the matter has already been the subject of judicial decision. The HAG makes two introductory points to its proposed Grounds of Appeal:

19. **First**, context is key in various important respects, including as to issues of construction in this case. As noted in paragraph 4 of the FCA's Reply, (1) the insureds are generally very small businesses or SMEs,[5] many within the jurisdiction of the FOS, (2) the insureds are generally unsophisticated purchasers of insurance, (3) the policies provide generally low, or very low, limits of indemnity (£50,000 or £100,000)[6] for the relevant section of business interruption cover, (4) the policies are meant to be (either because of their stated terms and/or their nature) readily comprehensible to these purchasers of the insurance and (5) the policies were generally purchased "off the shelf" in standard form written by insurers,[7] whether through brokers or not.

20. **Second**, even when the Court is dealing with circumstances which are unprecedented and unforeseen, the Court's fundamental task is "*nevertheless to consider how reasonable parties should be taken to have intended the [insurance] contract to work in the circumstances which have in fact arisen*": per Leggatt LJ in *Equitas Insurance Ltd v Municipal Mutual Insurance Ltd* [2019] EWCA Civ 718; [2020] QB 418, at [159] and citing Chadwick LJ in *Bromarin AB v IMD Investments Ltd* [1999] STC 301, 310. It is accepted that the circumstances of this case are indeed unusual. However, that should not affect the Court's approach to the proper objective construction of the Hiscox Policies, giving them their plain and ordinary meaning (in, admittedly, unusual circumstances).

[5] Hiscox acknowledges this in paragraph 32 of its Defence: "the policyholders would be either predominantly, or at least to a material extent include, small and medium enterprises".
[6] In almost all cases, the HAG's business interruption losses far exceed the limit of indemnity.
[7] Again, Hiscox acknowledges this in paragraph 32 of its Defence.

GROUND (1): THE QUANTUM POINT

21. This Ground is expressly conditional on the matters set out at paragraph 29 below. Subject to that introduction and the specific and different points made below, the HAG adopts *mutatis mutandis* paragraphs 36 to 47 of the FCA's Application, insofar as relevant to the HAG. The Judges erred in declaring that *"if there was a measurable downturn in the turnover of a business due to COVID-19 before the insured peril was triggered, then it is in principle appropriate … for the counterfactual to take into account the continuation of that measurable downturn and/or increase in expenses as a trend or circumstance (under a trends clause or similar) in calculating the indemnity payable in respect of the period during which the insured peril was triggered and remained operative"* [Declarations / 11(c)].

22. With respect, this declaration is derived from parts of the Judgment which are internally inconsistent with other findings. The Judges erred by reason of the internal inconsistency between, *inter alia*, [Judgment / 278-283 and 530-533] and [Judgment / 350-351 and 389]. The Judges clarified their position at the Consequentials Hearing by adopting [Declarations / 11(c)], but did not clarify how the internal inconsistency is resolved as a matter of principle.

23. The Judges should have held 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 <u>not</u> appropriate for the counterfactual to take into account the continuation of a measurable downturn and/or increase in expenses in calculating the indemnity payable. In other words, when calculating the indemnity, the correct counterfactual strips out any part of the insured peril, namely: (i) the inability to use the insured premises; (ii) the restrictions imposed by a public authority; and (iii) COVID-19.

24. However, the Judges' finding at [Judgment / 351] was, in relevant part, that "*any downturn in turnover before the date(s) when businesses closed pursuant to … the Regulations was a trend or circumstance which affected the business before the Damage*". Further, at the consequentials hearing, the Judges indicated that "*there is no*

recovery in respect of the diminution before the occurrence of all the elements of the composite peril".[8]

25. At [Judgment / 349], the Judges relied on *New World Harbourview Hotel v Ace Insurance* [2012] HKCFA 21; [2012] Lloyd's Rep IR 537. The Judges erred by misapplying the Hong Kong Court of Final Appeal's decision in *New World Harbourview*:

    (1) The relevant insured peril in *New World Harbourview* was closure by a competent authority due to a notifiable disease occurring within 25 miles of the premises. The Court determined that cover only commenced from the date on which SARS became a notifiable disease, which was 27 March 2003.

    (2) This is an issue of timing: an indemnity period can only start once the insured peril has been triggered. The Court in *New World Harbourview* gave effect to the uncontroversial principle that there will be no cover for something which is <u>not</u> an ingredient of the insured peril (i.e. something which is <u>not</u> yet a notifiable disease).

    (3) The Judges erred in not recognising that the FCA/HAG's arguments are distinct from those in *New World Harbourview*. The argument raised by the FCA/HAG, briefly put, is that where loss is caused by an ingredient of the insured peril, prior to there being a 'full house' of ingredients triggering cover, that loss should be excluded from the counterfactual in calculating indemnity.

    (4) The Judges therefore appear to have misunderstood and misapplied *New World Harbourview*. It is inapplicable as: (a) the issue in *New World Harbouview* was timing, and not quantum; and (b) *New World Harbourview* decided (and it is accepted) that there is no cover for something which is not an element of the insured peril (when, conversely, the FCA/HAG's argument concerned the continuation, post-trigger, of pre-trigger elements of the insured peril). Adopting the Judges' own language at [Judgment / 531], *New World Harbourview* did not concern the relevance of interconnected aspects of a "composite peril" to the counterfactual analysis when addressing quantum of loss.

[8] See page 62, lines 22ff of the Draft Transcript of the Consequentials Hearing: *"What your Lordship is saying is if [the hurricane] does strike New Orleans then there is no recovery in respect of the diminution before the occurrence of all the elements of the composite peril"* (Counsel for Hiscox); *"Precisely"* (Flaux LJ).

26. The Judges were therefore wrong to elide submissions by the FCA/HAG on this issue with the decision in *New World Harbourview*. Had the Judges not fallen into this error, they would have followed the approach that they correctly adopted at [Judgment / 278-283 and 530-533], in which they (rightly) held that the correct counterfactual when calculating the indemnity is one which excludes "*any part of the insured peril*", i.e. strips out all elements of the same. Failure to follow this approach amounts to an irreconcilable logical inconsistency (and error) within the Judgment.

27. The error in the Judges' [Declaration / 11(c)] is highlighted by its potentially extreme and unintended effects. The Judges accepted the FCA's example of the closure of a restaurant following the discovery of vermin dislodged from a nearby building site: [Judgment / 281]. On that example, it is likely that reduction to zero income would be suffered prior to restrictions being imposed as, while it will take a few days for the authority to impose restrictions, the restaurant owner would be likely to close the restaurant on discovery of the vermin. That "loss" (of reduction to zero income) is therefore incurred pre-trigger. If the Judges' declaration were correct, this would mean that the restaurant would arguably recover nothing or a minimal amount during the indemnity period, having had its income reduced to zero. This would render cover illusory, contrary to the last sentence of [Judgment / 281][9].

28. The HAG's major concern is that very many of its claimant group (understandably) closed at the end of 16, 20 or 23 March 2020, following the announcements made by the Prime Minister [Judgment / 26, 32 and 40]. The income of those businesses then in many cases reduced to zero. If it were right that the "zero income" should be carried into the indemnity period, that could be argued to mean that those claimants should make no or a minimal recovery.

29. However, and very importantly as far as the HAG is concerned, at paragraph 35(2) of Hiscox's Skeleton Argument for the consequentials hearing, Hiscox stated: *"Hiscox has not treated and will not treat a voluntary closure following the announcement of the 21*

[9] The same point can be made by reference to the example of a café flooded with sewage as a result of a defect in its drains. There would be a few days between the flooding and the local authority ordering the café to shut. However, the loss would have been suffered prior to those restrictions, as the owner would have closed the café and no one is likely to want to eat at a café filled with sewage. If the Judges' declaration were correct, this would mean that the café would, again, arguably recover nothing or a minimal amount.

March and/or 26 March Regulations (as applicable) and before their coming into effect as representative of a trend." It was clarified during the consequentials hearing that what Hiscox meant by "the announcement of the 21 March and/or 26 March Regulations" was the announcements made by the Prime Minister on 20 and 23 March 2020. As the HAG understands the position, this would allay their concerns summarised at paragraph 28 above. If Hiscox can confirm that this position is not and will not be withdrawn (whatever the outcome of any appeal), the HAG will discuss with Hiscox whether or not it would be appropriate to withdraw the HAG's appeal on Ground 1 entirely (which it is currently believed should be the case).

30. In the alternative, if it is found to be appropriate to take into account "pre-trigger" downturns / losses, it is submitted that this must in principle be subject to the express policy wording, which cannot be overridden. In the Hiscox Policies, various wording (including but not limited to "indemnity period", "Loss of income" and "Loss of gross profit") properly construed, together with the proper application of the Judges' approach to "stripping out" the elements of the insured peril, means that even those "pre-trigger" downturns / losses would not affect the indemnity payable.

GROUND (2): "RESTRICTIONS IMPOSED"

31. Subject to the specific and different points made below, the HAG adopts *mutatis mutandis* paragraphs 48 to 52 of the FCA's Application, insofar as relevant to the HAG. The Judges erred in holding that "restrictions imposed" meant only something mandatory that has the force of law, the only relevant such matters being those promulgated by statutory instrument, and that the guidance, exhortation, and advice of the Government do not suffice: [Declaration 17.4] and [Judgment / 266 to 267].

32. The short point is that the Judges misconstrued the meaning of "restrictions imposed", failing to give those words their ordinary and natural meaning, and instead giving them an uncommercial and unrealistic meaning, inconsistent with the proper, objectively ascertained intentions of the parties. In stark terms, the effect of the Judges' construction is that the mandatory directions given by the Prime Minister to the British public on national television on 16, 20 and 23 March were not "restrictions imposed". In any

normal use of those words, and properly construed in the context of the Hiscox Policies, those announcements by the Prime Minister were "restrictions imposed".

33. The correct construction of "restrictions imposed", as used in Hiscox 1 to 4, includes directions given by the Government that are given in mandatory and imperative terms, and does not require that such directions are promulgated by statutory instruments.

34. It is with respect wrong to say that directions given by the Government do not amount to "restrictions imposed", solely because they are not promulgated by statutory instrument. By way of example, the Government announcements on 23 March 2020 [Judgment / 40] gave the public a set of "*instructions*" and "*rules*", which were backed by sanctions (*"the police will have the powers to enforce them, including through fines and dispersing gatherings"*). The Government was clear in its intention to "*ensure compliance with the Government's instruction*". The objectively reasonable person listening to these announcements would understand the directions therein to be mandatory and an "imposition", in the sense that they were not given a choice as to whether or not to comply.

35. The point can be tested by reference to two (illustrative and non-exhaustive) scenarios showing that the Judges' construction, taken to its logical conclusion, leads to anomalous and unintended results:

    (1) The Judges' construction would: (i) deny cover to the careful insured who shuts his business in response to directions given by the Government; yet (ii) provide cover for a reckless insured who decides to keep the business open despite those directions, only closing once the relevant Regulations come into force. With respect, this cannot be right, especially when the (largely unsophisticated) insureds should not be expected to work out the legal basis for the Government's announcements.

    (2) Additionally, if an insured closed pursuant to a Regulation which was subsequently quashed on judicial review, the Judges' construction would allow Hiscox to deny cover on the grounds that there was no restriction validly promulgated by statutory instrument. Again, this cannot be correct. The insured would have been complying

with what was, to its knowledge at the time, a mandatory direction given by the Government.

36. Furthermore, the wording of Hiscox 1 to 4 makes it clear that it was not the objectively ascertained intention of the parties that "restrictions imposed" must have the force of law. This is not stated in Hiscox 1 to 4. Conversely, where it was objectively intended to require that an imposition have the force of law, the Hiscox Policy wording has expressly spelt it out: see, in particular, the Hiscox NDDA clause which refers to a "*denial of access … imposed by any civil or statutory authority* <u>*or by order of the government or any public authority*</u>" (emphasis added) [Judgment / 391].

37. Finally, as set above, it is relevant context for the construction of the Hiscox Polices that these are simple policies[10], with low limits of indemnity and provided (on standard terms) to unsophisticated, small businesses. Seen in that context, it is clear that the proper construction of "restrictions imposed" would include the mandatory announcements made by the Prime Minister that shops must close, given the nature and content of the announcements (which were, of course, followed by the 21 and 26 March Regulations, understandably a short time later).

<u>GROUND (3): "INABILITY TO USE"</u>

38. Subject to the specific and different points made below, the HAG adopts *mutatis mutandis* paragraphs 53 to 58 of the FCA's Application, insofar as relevant to the HAG. The Judges erred in finding that *"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 inability 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."* [Declaration /17.3] and see [Judgment / 268 and 270].

[10] The "Introduction" in many of the Hiscox Policies provides, in relevant part, "We hope that the language and layout of this policy wording is clear because we want you to understand the insurance we provide …".

39. The Judges' construction is incorrect, having wrongly adopted an uncommercially narrow construction of the wording "inability to use", when this is not borne out of the wording of Hiscox 1 to 4. The correct construction is that "inability to use" refers to the inability to utilise or employ the premises for its intended aim or purpose. This encompasses the inability to use the premises as they are normally used, i.e. for the insured's business activities. This is how the objectively reasonable impartial observer would understand the words "inability to use", read in context, and giving the language of the clause its natural and ordinary meaning. The Judges did not fully engage with the fact that Hiscox 1 to 4 provided business interruption cover, and if the insured cannot use the premises for its business (as it is normally conducted), then it is unable to use the premises (depending on the facts of the case).

40. By way of example only, and illustrating the unreality of the Judges' interpretation:

    (1) A retail business which normally relies on being able to invite customers onto the premises to browse and purchase goods is now unable to do so, as a result of "restrictions imposed". It is now only able to run a small (but not vestigial or nugatory) delivery service. This must, giving the wording its ordinary and natural meaning, amount to an "inability to use" the premises, as the business cannot use its premises for its business activities.

    (2) A restaurant whose business is normally comprised of an eat-in service is now only able to make partial use of its insured premises to provide a reduced (but not vestigial or nugatory) takeaway service, following "restrictions imposed". Again, properly construed, this amounts to an "inability to use" the premise, as the business cannot use its premises for its business activities. The fact that the insured makes great efforts to mitigate its losses (by, for example, inventively using part of its premises) should not count against the insured and prevent them from recovering under the policy.

41. Further, it is to be noted that the Judges themselves considered that a "restriction imposed" does not need to be directed towards the insured or the insured's use of the premises [Judgment / 269]. The "restriction imposed" could therefore be of a wide variety, including restrictions preventing customers from attending the premises, as in

the examples above, or employees from attending the premises (as was generally the case under Regulation 6, set out above). The Judges did not appreciate how this finding on "restrictions imposed" strongly indicates that the proper construction of "inability to use" the premises must be an inability to use the premises normally.

42. Further, the impact of the Judges' finding in this regard (especially [Judgment / 270]) on Category 3 and Category 5 businesses is potentially huge, when as a matter of practical reality very many such business plainly could not operate normally (or, reasonably, at all) because customers and/or employees could not attend the Business Premises, pursuant to Regulation 6 of the 26 March Regulations – i.e. there was an "inability to use", giving those words their natural and ordinary meaning. To the extent that the Judges' construction of the Public Authority Clause was to contrary effect, it was wrong, uncommercial and unrealistic.

43. For these reasons, and because when "inability to use" and "restrictions imposed" are properly construed Regulation 6 in very many cases caused an "inability to use", and also because it is an inherently factual issue[11], the Judges were wrong to hold that *"... the cases in which Regulation 6 would have caused an 'inability to use' premises would be rare"* [Declaration / 17.4] and [Judgment / 270].

44. Further, the Judges rightly held [Judgment / 274] that "interruption" in the Hiscox Policy wordings means "interference", rather than a cessation or stop (and nothing less). In those circumstances, if the Hiscox Policies do respond to "interference" (in this sense), it would be highly surprising if there had to be an almost complete inability to use the Premises before cover for "interference" is triggered. Further still, a comparison between the Hiscox NDDA wording [Judgment / 391] and the Public Authority Clause wording supports the above construction of "inability to use".

REASONS WHY PERMISSION TO APPEAL SHOULD BE GRANTED

45. This application raises arguable points of law of general public importance which ought to be considered by the Supreme Court at that time, bearing in mind that the matter will

[11] As held at [Declarations / 17.4] and the last sentence of [Judgment / 270].

have already been the subject of judicial decision and may have already been reviewed on appeal.

46. The application raises arguable points of law:

(1) In the case of Ground 1 (if pursued): this is a general issue relevant to many policyholders outside the HAG and is a general point of law of public importance.

(2) In the case of Grounds 2 and 3: the construction and application of commonly used terms in public authority clauses in response to the COVID-19 pandemic.

47. These points have all been hotly contested in the course of the proceedings and are, with respect, clearly arguable (for the reasons summarised above). These points of law are of general public importance. Paragraphs 63 to 68 of the FCA's Application are adopted. Furthermore, the points of law (as stated above) are of wider application, despite being addressed in a way which is specific to Hiscox 1-4.

48. Hiscox 1-4 were chosen as sample policies as they reflect wording commonly used by insurers: see the Witness Statement of Matthew Brewis dated 9 June 2020, [51] ("*the FCA … has identified sample wordings which … will enable the court to grant declarations that will provide clarity in relation to the majority of contentious issues between insurers and policyholders*"). The points of law relating to Hiscox 1-4 will therefore be common or similar to those raised in many other widely used policy wordings. They will therefore be relevant to issues arising from an extremely large number of insureds and insurers (with particular reference to the FCA's estimate that 700 types of policies across more than 60 insurers and 370,000 policyholders could be potentially affected by the Court's decision). The Hiscox figures alone [Judgment / 244] are that a total of 31,171 Hiscox policyholders had live policies in one of the four groups into which the FCA split the wordings. At roughly £50,000 to £100,000 per claim (as per the limits of indemnity), this matter is obviously of significant value.

49. In the circumstances, the HAG respectfully invites the Supreme Court to grant it permission to appeal on the above Grounds.

BEN LYNCH Q.C.

SIMON PAUL

NATHALIE KOH

FOUNTAIN COURT CHAMBERS

16 October 2020