IN THE SUPREME COURT OF THE UNITED KINGDOM

Claim No. FL-2020-000018

ON APPEAL FROM
IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
COMMERCIAL COURT (QBD)
FINANCIAL LIST
FINANCIAL MARKETS TEST CASE SCHEME

Neutral Citation [2020] EWHC 2448 (Comm)

BETWEEN:

THE FINANCIAL CONDUCT AUTHORITY

Claimant

-and-

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

Defendants

(1) HOSPITALITY INSURANCE GROUP ACTION

(2) HISCOX ACTION GROUP

Interveners

APPLICATION OF THE FOURTH DEFENDANT ("HISCOX")

FOR PERMISSION TO APPEAL

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INFORMATION ABOUT THE DECISION BEING APPEALED

(References to paragraph numbers in the Judgment below are in the form: (J§..)

A. INTRODUCTION

1. Hiscox refers to the "Common Sections of Appellant Insurers' Application for Permission to Appeal" for a general introduction, a narrative of the facts, the statutory framework, a chronology of proceedings and reasons for expedition.

2. There were four broad types of Hiscox policy involved in the case, known as Hiscox 1, 2, 3 and 4. Each of these types contained several individual wordings. Flaux LJ and Butcher J ("the Court") considered two types of Hiscox insuring clauses: the Non-Damage Denial of Access ("NDDA") clause and the Public Authority clause. The NDDA clause appeared in some of the Hiscox 1-2 and 4 wordings. The Public Authority clause was present in all of the Hiscox 1-4 wordings; importantly, in all the Hiscox 4 wordings the relevant sub-clause had a one mile limit, as explained below.

3. The Court held there was no coverage under the NDDA clause. Hiscox's application for permission to appeal therefore relates only to the Public Authority clause.

4. The insuring clauses in the case as a whole were divided by the Court (J§8) into three types: (i) disease clauses; (ii) "*hybrid*" clauses; and (iii) prevention of access clauses. The Public Authority clause was termed a "*hybrid*" clause (J§242), because although it expressly referred to disease there were other crucial elements of the insured peril, notably the need for (a) inability to use the premises (b) due to restrictions imposed by a public authority, following a number of matters, one of which was the occurrence of a notifiable disease. Although "*hybrid*" was recognised by the Court to be merely a term of convenience, it is important not to be swayed by the nomenclature. The structure of the Public Authority clause needs to be analysed (an analysis which the Court barely (if at all) undertook).

5. The Public Authority clause was one of a number of special covers, forming part of the business interruption cover provided by Hiscox.

6. The Hiscox Public Authority clause provides as follows:[1]

> "***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*** *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****.*"

7. The opening words "***We*** *will insure…caused by*" are referred to as the "stem". The Public Authority clause is one of a number of clauses which branch off the stem.

B. THE ISSUES THAT WERE BEFORE THE COURT BELOW

8. Broadly speaking, there were two issues before the Court relevant to Hiscox's proposed appeal:

    a. **Issue 1:** Whether and if so in what circumstances an insured was entitled to cover under the Public Authority clause for financial losses arising from public authority action taken in early 2020 in response to the COVID-19 pandemic. This entailed

[1] The only material variation to the wording quoted is in Hiscox 4, where subparagraph b. provides: "*b. an occurrence of a* ***notifiable human disease*** *within one mile of the* ***insured premises****;*", notifiable human disease being defined elsewhere in the wording in terms that mirror those set out fully in the above quoted clause (i.e. *"any human infectious or human contagious disease, an outbreak of which must be notified to the local authority*"). The **bold** is in the original and denotes a defined term.

the Court determining the meaning and effect of certain words in that clause, namely: (i) "*losses…resulting solely and directly from*" (ii) "*an interruption…caused by*" (iii) "*inability to use the insured premises due to*" (iv) "*restrictions imposed…following*" (v) "*an occurrence of…disease*" (Hiscox 1-3) or (vi) "*…an occurrence of a* ***notifiable human disease*** *within one mile of the* ***business premises***" (Hiscox 4).

b. **Issue 2:** The correct counterfactual to be applied for the purposes of assessing the loss covered by the Public Authority clause, having regard to general principles and the Hiscox policy wordings (including their trends clauses). In particular, the Court had to determine:

i. Whether (as Hiscox argued) the correct counterfactual was one that, save to the extent that COVID-19 caused loss in causal combination with other elements of the insured peril, included the impact of the COVID-19 pandemic and the UK Government's response to it, so that an insured's recoverable losses were liable to be reduced to the extent that they would have been sustained anyway as a result of COVID-19 and its other consequences not amounting to "*restrictions imposed*" etc; or

ii. Whether the FCA was right in its contention that the correct counterfactual to be applied was one in which it had to be assumed that there was simply "*no COVID-19 in the UK and no Government advice, orders, laws or other measures in relation to COVID-19*". (J§261)

9. The correct counterfactual to be applied was an issue common to all the Insurers. Specific considerations, however, arise from Hiscox's Public Authority clause which covers a very different insured peril to, in particular, the disease clauses.

C. TREATMENT OF THE ISSUES BY THE COURT BELOW

10. With regard to **Issue 1**, the Court held as follows:

a. The words "*…an occurrence of a disease…*" in Hiscox 1-3 were not confined to an occurrence of a notifiable disease that was small-scale, local and in some sense specific to the insured, and that the COVID-19 outbreak in the UK could qualify as *"an occurrence"* (J§271). Accordingly, the Court declared that so far as Hiscox 1-3

were concerned "*COVID-19 "occurred" on 5 March in England…*" when it became a notifiable disease (Order[2] §3) and that although "*following*" imports some sort of causal connection any relevant restrictions followed the "*occurrence*" of COVID-19 on 5 March 2020(Order §17.5)

b. The words "*following…an occurrence of a* ***notifiable human disease*** *within one mile of the* ***business premises***" (in Hiscox 4 only), (i) covered the nationwide COVID-19 outbreak, if there was an occurrence of the disease within one mile, because the local occurrence formed part of the national outbreak; (ii) did not require the national restrictions causally to follow[3] the local occurrence of disease but only to succeed them in point of time (J§273). Accordingly the Court declared that "*COVID-19…"occurred" within [one mile of the insured] premises in…Hiscox 4… wherever a person or persons…was/were within [one mile] of the premises at a time when they could still be diagnosed as having COVID-19*" (Order §5) and that "*As regards Hiscox 4 "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*" (Order §17.6).

c. To be "*restrictions imposed*" under Hiscox 1-4, the relevant public authority restrictions

   i. Had to be "*something mandatory that has the force of law*" (Order §17.4), which for the purpose of these proceedings meant in particular Regulation 2 of the 21 March Regulations and Regulations 4 and 5 of the 26 March Regulations (J§266); but

   ii. Did not "*necessarily have to be directed to the insured or the insured use of premises*", meaning that Regulation 6 of the 26 March Regulations was capable of being a "*restriction imposed*" although it would rarely cause an "*inability to use*" (J§266-7 & 270; Order §17.4).

[2] Order is a reference to the Declarations Order made on 2 October 2020.
[3] Notwithstanding that it was common ground that the word "*following*" had a causal element, albeit looser than proximate cause (J§259 and 265), and that the Court so held in relation to Hiscox 1-3 in J§272 and Order §17.5.

d. The words "*inability to use*" meant "*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*" (Order §17.3, also J§268).

e. An "*interruption"* in Hiscox 1-4 included "*interference or disruption, not just a complete cessation of the insured's "business" or "activities'*"" (Order §§17.2 & 18.3, also J§§274 & 409-418).

11. The Court's determinations at subparagraphs (c)(i) and (d) in the preceding paragraph were in accordance with Hiscox's submissions.

12. As to **Issue 2**, the Court held as follows:

a. The insured peril covered by the Public Authority clause was "*a composite one, involving three interconnected elements: (i) inability to use the insured premises (ii) due to restrictions imposed by a public authority (iii) "following" … an occurrence of an infectious or contagious disease. What the insured is covering itself against is, we consider, the fortuity of being in a situation in which all those elements are present. In answering the counterfactual question as to what would have been the position of the insured's business but for the occurrence of the insured peril, it is accordingly necessary to strip out all three interconnected elements*…" (J§278).

b. An insured's losses did not therefore fall to be reduced (either on grounds of causation or by reason of the trends clauses, which the Court held were quantification machinery and did not delineate cover (J§121)), by reason of the fact that losses would have been suffered anyway as a result of any one element of the composite peril, including COVID-19 (Order §11.1).

c. The correct counterfactual for calculating an insured's indemnity under the Public Authority clause was to assume that, once cover was triggered, there was "*no inability to use the premises, no public authority restrictions and no COVID-19 in the UK.*" (J§§278-283; Order §11.2(c)).

13. In so holding, the Court concluded that Hamblen J's decision in *Orient-Express Hotels v. Assicurazioni Generali SpA*[4] was distinguishable on the basis it was not concerned with the type of insured perils in the instant case, but that if necessary it would have reached the conclusion that it was wrongly decided and declined to follow it (J§529).

14. The Court did, however, hold that the trends clauses in all Hiscox's (and other Insurers') policy wordings[5] meant that, where there was a measurable downturn in the turnover of a business or increase in expenses due to COVID-19 before the composite insured peril was triggered, then in principle and depending on the facts it could be appropriate for the counterfactual to take into account a continuation of that measurable downturn and/or increase in expenses as a trend or circumstance in calculating the indemnity payable, albeit any such continuation could be at no more than the level at which it had previously occurred (J§§283, 349-351 & 389; Order §11.4(b) to (d)).

D. RELEVANT ORDERS MADE IN THE COURT BELOW

15. The only relevant orders for the purposes of considering this application are those declarations relevant to Hiscox's Public Authority clause that are contained in the Order.

16. Key declarations have been referred to in Section C above. For completeness, however, the declarations relevant to Hiscox's appeal are those in the following paragraphs of the Order: 3, (Hiscox 1-3) 5, (Hiscox 4 only), 11.1, 11.2(c), 11.4, and 17.

E. PROPOSED GROUNDS OF APPEAL

17. There are eight proposed grounds of appeal in relation to which permission to appeal is sought. It is convenient to append these at **Annex 1** to this document.

F. REASONS WHY PERMISSION TO APPEAL SHOULD BE GRANTED

18. Hiscox infers from the FCA's Application for Permission to Appeal that the FCA does not oppose and may indeed support Hiscox's application.[6] Nonetheless, it is necessary to explain why Hiscox submits that permission to appeal should be granted.

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[4] [2010] EWHC 1186 (Comm); [2010] Lloyd's Rep IR 531.
[5] Which, in relation to all Hiscox wordings, it held were applicable to claims under the Public Authority clause (J§§275-277 and Order §13).
[6] See §§ 2, 3, 4, 66 and 67 of the FCA's "*Information about the decision being appealed*" document.

(1) Arguable points of law are involved

19. Hiscox addresses first the arguability of the proposed grounds of appeal in turn. This takes longer than it otherwise might, as many of Hiscox's arguments below were not dealt with in the Judgment. All the points are, in Hiscox's submission, strongly arguable. The grant of a Leapfrog Certificate means that the Court considered the points arguable.

Proposed Grounds of Appeal 1 to 4.

20. Grounds (1)–(4) raise closely interconnected questions of law. Expressed broadly, they are: what is the nature and essence of the insured peril, and what is the extent of the indemnity provided under the Public Authority clause? In particular, is the indemnity only against loss caused by COVID-19 insofar as it was acting in causal combination with the other elements of the clause or, once an insured peril has occurred is the indemnity against all the consequences of COVID-19? The key passages in the Court's judgment are at J§§278-283, particularly J§278.

Ground of Appeal 1 – Essence and nature of insured peril and general principle

Essence and nature of the insured peril

21. Hiscox submitted that the core of the insured peril under the Public Authority clause was the restrictions imposed by the Public Authority. This starting point is important because identifying the core of the insured peril yields the answer to the scope of the indemnity and the appropriate counterfactual.

22. That "*restrictions imposed*" are the core of the insured peril (as opposed to murder or suicide, faulty drains, disease, vermin etc.) under the Public Authority clause is plain from (i) the title of the clause; (ii) the language of the clause; (iii) the substance of the clause and (iv) other provisions of the business interruption sections of Hiscox 1-4:

    a. The title of the clause is "*Public Authority*". That is clearly shorthand for Public Authority restrictions as the only public authority actions referred to are restrictions imposed.
    b. Linguistically, the words from "*interruption*" to "*restrictions imposed*" all look forwards to "*restrictions imposed*". The words after "*restrictions imposed*" all look back to them.
    c. As a matter of substance, the words from "*interruption*" to "*restrictions imposed*" describe the effect which the relevant restrictions must have, namely that the

insured is unable to use the insured premises causing an interruption to the insured's activities. The words after "*restrictions imposed*" describe the reasons for the restrictions imposed which fall within the cover.

d. As an example of the fourth point, the trends clauses referred to "*restrictions*" to denote the essence of the insured peril. (J§276).

23. These points clearly demonstrate that the core of the insured peril was "*restrictions imposed*". The Court, however, failed to address the question of the essence of the insured peril and similarly failed to deal with these submissions in any part of its Judgment. It should have accepted them.

General principle

24. As a matter of general principle, the question to be asked in order to arrive at the correct counterfactual is what would the position have been if the insured peril had not occurred or, to put it another way, what would the position have been "but for" the insured peril. In J§278 the Court rightly held that the "but for" approach was the correct approach in relation to the counterfactual.

25. The key question is how one applies the "but for" approach where one has a composite peril, which not merely requires several elements to be present, but also to be in a given causal combination and only covers loss solely caused by that combination.

26. As to this, the Court also held in J§278 that:

"*The insured peril is a composite one, involving three interconnected elements: (i) inability to use the insured premises (ii) due to restrictions imposed by a public authority (iii) "following" one of (a) to (e), relevantly (b) an occurrence of an infectious or contagious disease. What the insured is covering itself against is, we consider, the fortuity of being in a situation in which all those elements are present.*" (Emphasis added)

27. The first sentence of this passage[7] recognises that the insured has protected itself against those elements acting in causal combination, and that that is the insured peril.[8] However,

[7] Similarly J§531.

[8] In fact, as is clear from §6 above, interruption is also part of the causal combination which makes up the composite insured peril and it is only loss resulting solely and directly from interruption caused by the elements mentioned in J§278 which is covered.

in the second sentence, the Court did not follow through the need for the elements to be acting in causal combination ("*all those elements are present*") and that led it into error. As a result, in the last sentence of J§278, the Court departed, without justification from the correct course of stripping out simply the insured peril, and moved instead to removing the national outbreak of COVID-19 and all its consequences:

> "*In answering the counterfactual question as to what would have been the position of the insured's business but for the occurrence of the insured peril, it is accordingly necessary to strip out all three interconnected elements, including in this instance the national outbreak of COVID-19.*"

28. Putting the elements of the Public Authority clause in their correct causal sequence, they are (A) an occurrence of a notifiable disease followed by[9] (B) restrictions imposed causing (C) an inability to use causing (D) an interruption.

29. The insured peril is manifestly not any of individual elements, nor a combination of them shorn of their causal nexus to the other elements. The insured is only entitled to be indemnified for the consequences of A→B→C→D in causal combination, not for the consequences of A alone, albeit that A did in fact cause B, which caused C which caused D. A alone is not an insured peril. This was cover against the consequences of public authority restrictions taken for various stated reasons, not pandemic cover.

30. It follows that what is removed in order to arrive at the appropriate counterfactual is not COVID-19 as a whole with all its consequences, but only the consequences of COVID-19 insofar as it caused the other elements of the clause. These points were made in written and oral submissions by Hiscox, but were not addressed by the Court.

31. The Court's conclusion effectively re-writes, through the back door of causation, the insured peril. Once the insured peril is triggered, it becomes an insurance against all the consequences of COVID-19, not just the consequences which are comprised within the stated peril. Again, this point was not recognised or addressed by the Court.

32. It is a striking feature, and a sign that something has gone wrong in the Court's approach that, notwithstanding the narrowness of A→B→C→D, once they are all present, cover is

[9] See footnote 3 above.

effectively available for all consequences of A. Logically, the more elements of the insured peril required to be present and causally connected, the narrower the cover and the wider the counterfactual. The Court's conclusion means that however long or intricate the causal combination in a composite cover, once triggered the cover will always insure all the consequences of the first element in the causal chain.

33. The Court did give some justification for its conclusion in J§278 in J§§279-283, but the justification given does not withstand examination. There are three strands to its reasoning: (i) the artificiality of the counterfactual proposed by Hiscox and its failure to recognise the disease as an essential element of the insured peril (J§279); (ii) the fact that cover would be rendered "*illusory*" if Insurers were right (J§§280-281); and (iii) difficulties of proof if Insurers were right (J§§280-282). There are answers to each of these points, which formed part of Hiscox's submissions at trial, and which again were not addressed in the Judgment.

34. As to artificiality, the content of the counterfactual is dictated by the nature of the insured peril, not the other way around. Counterfactuals in any context (e.g. a professional negligence claim) are always artificial; they require one to imagine something which never happened, and which never could have happened, given what has actually occurred.[10] Further, the counterfactual branded as artificial by the Court (the presence of the disease, but no mandatory restrictions) is no more artificial or unrealistic than a UK wholly without COVID-19; indeed, were it relevant, it is more realistic, as the example of Sweden and the disparate responses of governments around the world show.

35. Nor did Hiscox fail to recognise that the occurrence of disease was an element of the insured peril; Hiscox's submission was that in the counterfactual COVID-19 is reversed out, but only insofar as it causes the imposition of public authority restrictions causing inability to use and interruption.

36. As regards "*illusory*" cover, the Court relied (J§281) on an example involving vermin in a restaurant. However, in the majority of cases, there will be no difficulty in triggering cover. In the ordinary case of legionnaire's disease in the building or a suicide in an adjacent flat, the natural conclusion will be that customers would have continued to come to the restaurant anyway but for the restrictions, i.e. absent the insured peril. They would typically

[10] This submission is supported by §§46-47 of the *Orient-Express* judgment.

only have known about the event as a result of the closure. The fact that in some extreme circumstances – a restaurant with sewage on the floor or which is visibly overrun with rats before closure – there would be no recovery is not because cover is "*illusory*". It is because of the specific nature of the insurance. It is not against vermin, it is only against vermin causing restrictions which cause an inability to use, where the public authority restrictions is the core of the insured peril. The restrictions are not a merely a necessary pre-condition, which once it occurs, converts the cover into insurance against vermin.

37. The Court also relied on the insured's difficulties in demonstrating why customers had not come to the restaurant, saying that Insurers had suggested cross-examination of customers but held that was this impractical, particularly if large numbers were involved (J§282). However, as regards the difficulties of proof, there are several answers:

    a. Difficulties of proof do not justify re-writing the contract or ignoring legal principle.
    b. Business interruption insurance notoriously gives rise to difficult, hypothesis-dependent, questions of quantification, recognised in the text books.[11]
    c. Trends clauses similarly give rise to difficult hypothetical questions.
    d. Clauses such as the Public Authority clause have existed for a long time and there is no evidence of any difficulty arising from Insurers' interpretation. Claims under these clauses are typically dealt with by loss adjusters as a matter of course.
    e. Hiscox never suggested cross-examining people who did not come to a restaurant or other premises. Except in extreme cases, such as those identified in paragraph 36 above, where it is obvious that the public authority restrictions will have made no difference, the insured will be able to say that it was the very fact of the public authority closure which brought the underlying problem to customers' notice. One can also look at other matters such as the income before the imposition and after the lifting of restrictions.
    f. In any given case, once the elements of the clause have been satisfied, and loss has *prima facie* been shown to be due to their combined effect, the evidential burden may shift to the insurer.

[11] See e.g. Chapter 14 of Riley on Business Interruption Insurance, 10th Edition. See also §20 of the award in *Orient-Express*, cited in *Orient-Express* judgment §17.

Ground 2 - Trends Clauses

38. The trends clauses in Hiscox 1-4 are in differing forms. The trends clauses in the Hiscox 1-4 lead policies are set out or described in J§§246, 249, 251 & 253. All Hiscox trends clauses, however, have words the same or materially similar to the Hiscox 1 lead policy trends clause: "*the amount we will pay will reflect as near as possible the result that would have been achieved if the [restriction] had not occurred*" (J§246).

39. The trends clauses thus indicate that the purpose of the assessment of loss is to achieve the result that would have obtained had the insured peril not occurred. That, as other parts of the clauses make clear, necessarily involves considering trends and circumstances which would have affected the business had the insured peril not occurred.

40. The Court referred to the trends clauses (J§121) as part of the quantification machinery and not part of the delineation of cover. In one sense that is correct, but the trends clauses clearly indicate, as the Court in fact held in that paragraph, the basis upon which the assessment of loss must be approached, and that affects the extent of the indemnity provided. The *Orient-Express* decision supports this.[12]

41. In J§121 the Court also held that:

> "*Where the policyholder has therefore prima facie established a loss caused by an insured peril, it would seem contrary to principle, unless the policy wording so requires, for that loss to be limited by the inclusion of any part of the insured peril in the assessment of what the position would have been if the insured peril had not occurred.*" (Emphasis added)

42. As regards a composite peril consisting of the elements acting in causal combination, the underlined passage is wrong or at least too widely expressed. Where the insured peril consists of A→B→C→D acting in causal combination, it is not contrary to principle to include in the counterfactual the effects of A acting other than in that causal combination; indeed principle dictates that such effects should be taken into account. The reason is because those effects are not part of the insured peril and the exercise being undertaken is to restore the insured to its position, had the insured peril not occurred. The *Orient-Express*

[12] See paragraph 46 below.

decision again supports this. There the causal chain was simple: physical damage to the hotel (A) causing an interruption (B). The insured however sought to recover loss arising not from A→B, but Z→B, where Z was physical damage to the city of New Orleans. Hamblen J held that was not recoverable, because Z was not the insured peril.[13]

43. The point may be illustrated further by the example of social distancing guidance (X). Such guidance is not in the A→B→C→D chain because it does not qualify as a "*restriction imposed*"; only restrictions with the force of law qualify. It was, however, undoubtedly caused by A (the disease). On the Court's approach, however,[14] once the A→B→C→D chain is established, then all consequences of A, including A→X→C→D, are recoverable.

44. The Court rightly held, in relation to trends clauses and generally, that in the context of composite perils it is permitted in principle, when assessing loss, to take into account as a trend or circumstance a downturn in income due to the effects of COVID-19, which occurs before the composite insured peril begins. The relevant passages in the Court's Judgment are J§§345-351 and J§§385-389. Although these passages are in the context of other Insurers' wordings, they are of general application: see J§283. The Court so confirmed at the consequentials hearing on 2 October, and Order §11 reflects that.

45. This conclusion is correct as far as it goes. However, if before the operation of the insured peril it is in principle permissible to take into account as a trend the uninsured effects of COVID-19, it should also be allowable to take into account those uninsured effects when considering the counterfactual for the period of operation of the insured peril.

Ground 3 - *Orient-Express*

46. Hiscox and other Insurers relied on the decision in the *Orient-Express* case as support for many of the points made above including that:

    a. The correct approach is to apply "but for" causation in the assessment of loss.[15]
    b. Loss that does not result from the causal chain contemplated by the insuring clause remains in the counterfactual and is not recoverable.[16]

[13] See paragraph 46 below.
[14] And assuming, contrary to the fact, that social distancing will have caused inability to use.
[15] §§20-38 *Orient-Express* judgment.
[16] §38 *Orient-Express* judgment.

c. The same approach is mandated by the trends clauses, of which a materially similar clause to those in Hiscox 1-4 was contained in the *Orient-Express* policy; one simply asks what the position would have been but for the damage (in that case),[17] or the restrictions (in the present case).
d. The trends clauses are not confined, contrary to the FCA's argument, to extraneous circumstances;[18]
e. Artificiality is irrelevant as regards the counterfactual.[19]
f. It is nothing to the point to say that, on Insurers' argument, the greater the impact of the hurricane, the less the indemnity.[20]

47. The Court's treatment of the *Orient-Express* case is, with respect, wrong.

48. The Court held that Hamblen J had mischaracterised the insured peril (J§§523-525). The judge, it is said, erred in holding that it was the damage, rather than the damage including the cause of the damage; so, rather than regarding it as "*Damage in the abstract*" the judge should have recognised that it was "*Damage caused by hurricanes*" (J§525). The reason for this error was, the Court considered, that the judge had "*surprisingly*" not asked himself what was the proximate cause of the loss, but wrongly focussed on the "but for" question (J§523). Had the mistake not been made, Hamblen J would have realised that not only the damage to the hotel but also "*the hurricanes and their effect generally*" were to be stripped out for the counterfactual: J§527. The surprising suggestion is actually that Hamblen J and inferentially the arbitrators overlooked the question of what was the proximate cause of the loss and mischaracterised the true nature of the insured peril. But even if they had, this would not have begun to justify stripping out the general effect of the hurricane, given that all that was insured was interruption caused by damage to the hotel; Hamblen J was clear about this, both as matter of the main insuring clause and in the light of the trends clause.[21] There could have been many causes of damage to the hotel giving rise to interruption which did not entail city-wide devastation.

[17] §§46-48, 59 *Orient-Express* judgment.
[18] §57 *Orient-Express* judgment.
[19] §§46-48, 51-53 *Orient-Express* judgment.
[20] §51 *Orient-Express* judgment.
[21] §38; 46-47 *Orient-Express* judgment.

49. The Court also held (J§526) that Hamblen J should have realised that the cover provided was "*illusory*" on his construction of the insured peril, and that the perverse result was achieved that if the hurricane had only caused damage to the hotel, there would have been a full recovery, but the more serious the fortuity, the less the recovery. The Court did not regard the judge's answer that that was what was dictated by the terms of the policy as convincing. But the Court's criticism is misplaced: cover is only "*illusory*" if one makes the (unwarranted) assumption that the policy was intended to provide cover against the consequences of the hotel being involved in wide area damage. In fact, coverage against the impact of wider area events was provided by the Loss of Attraction and Prevention of Access clauses.

50. These supposed errors would have led the Court to say *Orient-Express* was wrongly decided (J§529). However, the Court also wrongly held (J§529) that *Orient-Express* was distinguishable on the grounds that the composite perils involved in the instant case were different to the insured peril under consideration in *Orient-Express*. Of course they were, but Hamblen J's approach and reasoning were clearly relevant, in particular in the respects identified in §46 above.

Ground 4 – "*solely and directly*"

51. The Court did not reach any conclusion on the effect of the words in the stem "*solely and directly*". The significance of "*solely and directly*" is that those words make clear, if it were not already so because of the "but for" principle, that it is only loss caused by A→B→C→D in causal combination, i.e. the insured peril, which is covered, and not loss caused by other elements, even if those other elements were caused by A.

Ground 5 – Effect of the one mile limit in Hiscox 4

52. Ground 5 is a point which arises only in relation to Hiscox 4, where the relevant sub-clause of the Public Authority clause is in the following terms and unlike those in Hiscox 1-3 has an express local limit:

> "*b. an occurrence of a* ***notifiable human disease*** *within one mile of the* ***business premises****;*" (Emphasis added)

53. The Court held (J§272) that in relation to Hiscox 1-3, the necessary causal requirement (between the "*occurrence of disease*" and the "*restrictions imposed*") which is comprised within the

word "*following*" was satisfied upon the occurrence of a notifiable disease in the UK, there being no geographical restriction on "*occurrence*" in Hiscox 1-3. The Court here expressly approved Hiscox's submission (which was in any event common ground)[22] that "*some sort of causal connection*" was required.

54. In relation to Hiscox 4, however, the Court (J§273) "*with more hesitation*" reached what it called a "*similar*" conclusion on this basis: "*For reasons which we have canvassed in relation to the "disease clauses" above, when one is considering notifiable diseases, it is not difficult to envisage that official responses will be to the full extent of an outbreak, and not necessarily specific to those in a given geographical area. In the circumstances, and unless the language otherwise dictates, it is appropriate to regard a response as having "followed" the local occurrence of the disease, provided that the response was temporally posterior , if it was a response to the outbreak of which the local occurrence formed a part.*"(Emphasis added)

55. The Court erred in making this finding. The following points are significant:

    a. The hesitancy was, with respect, a recognition that the Court was not satisfied with the reasons given
    b. In saying that "*official responses*" would likely be "*to the full extent of an outbreak*", the Court was begging the question whether a clause in the terms of Hiscox 4 was objectively intended to respond to a non-local outbreak. Whatever the true construction of other clauses in other Insurers' policies, they provided no justification for construing (in J§273) the word "*following*" in Hiscox 4, as regards the stipulated occurrence within one mile, to mean something different from the same word in the same place in Hiscox 1-3.
    c. Here the language does clearly "*otherwise dictate*". The clause stipulates that the trigger must be local; the insured peril only covers a local occurrence, not a wider outbreak. That is the whole purpose of the (notably small) one mile radius. This is exactly what the Court decided in concluding (in relation to QBE3) that a one mile radius "*reinforces the view that what is being contemplated is specific and localised events*." J§237.
    d. In several Hiscox wordings, including one Hiscox 4 wording, there is also a one mile radius in the NDDA clause ("*an incident…occurring within a one mile radius*"). The Court had no difficulty in accepting Hiscox's submission that this was "*narrow, localised cover intended to insure events or incidents which occur within a one mile radius*." (J§406).

[22] See footnote 3 above.

There was no sufficient reason for construing the same radius in the Public Authority clause as covering national pandemics, so long as they happened (adventitiously, but on the Court's reasoning decisively) to encroach within a one mile radius.

e. When considering causation in relation to the NDDA clauses, the Court held (J§418): "*Even if the presence of a person with COVID-19 within the radius or in the vicinity could be said to be "an incident" which it cannot, for the reasons we have given, it simply cannot be said that any such localised incident of the disease caused the imposition by the government of the restrictions.*" The Court had no basis for approaching the question of causation in the Hiscox 4 Public Authority clause in any different way. The result is to give the causal component of "*following*" no meaning at all in relation to the required "*occurrence…within one mile*".

Ground 6: the meaning of "*occurrence*" in Hiscox 1-3

56. The Court's conclusion on the meaning of "*an occurrence*" in Hiscox 1-3 – namely that an "occurrence" covered an occurrence anywhere in the UK (J§271) - failed to give proper weight to (i) the nature of the cover provided by Hiscox, (ii) the context in which the word "*occurrence*" appears in the Public Authority clause, and (iii) the context given by the other covers in the Hiscox 1-3 wordings. These factors should have led the Court to accept that "*an occurrence"* means something limited, small-scale, local and specific to the insured, its premises or business.

57. The Hiscox business interruption cover is an adjunct to property cover rather than freestanding cover against widespread events that may adversely affect an insured.

58. Moreover, the Public Authority clause, within which the word "*occurrence*" appears, clearly envisages restrictions following small-scale events that relate to the premises or at least are local or specific to the insured or its premises. Subclauses (c) and (e) expressly refer to the insured premises: "*(c) injury or illness of any person traceable to food or drink consumed on the* ***insured premises****…*(e) *vermin or pests at the* ***insured premises"*** (emphasis in the original). Sub-clauses (a) and (d) ("*murder or suicide*" and *"defects in the drains or other sanitary arrangements*") make no express reference to the insured premises, but clearly concern scenarios with a specific, local and direct nexus between the reason for the restriction imposed and the premises. The surprising effect of the meaning the Court gave to "*occurrence*" is that an

occurrence of a disease in Alnwick is sufficient for the purposes of an insurance policy protecting a small office in Ilfracombe.

59. Further, as Hiscox submitted at the trial and the Court should have accepted, the nature and effect of the other clauses contained in the business interruption section of Hiscox 1-4 support the meaning of "*occurrence*" contended for by Hiscox and make clear that Hiscox was not willing to accept the consequences of pervasive events which may affect millions of others along with the insured. A particularly clear example of this is the (computer) virus exclusion in Hiscox 1, which provides: "*We will not make any payment … for any interruption to your activities directly or indirectly caused by, resulting from or in connection with any* ***virus*** *which indiscriminately replicates itself and is automatically disseminated on a global or national scale ...*".

60. Given that, in the context of Hiscox 1-3, the Court held that the word "*following*" required "*some sort of causal connection*" between the "*occurrence of disease*" and the "*restrictions imposed*", had the Court accepted Hiscox's submissions on the small-scale, local and specific nature of "*occurrence*", it would, alternatively should also have held that no relevant restrictions followed an occurrence for the purposes of Hiscox 1-3.

Ground 7: the meaning of "*interruption*" in Hiscox 1-4

61. The stem of the Hiscox wordings states that an insured's losses must result solely and directly from "*an interruption*". This contrasts starkly with typical business interruption wordings that refer to loss caused by 'interruption or interference'.

62. Despite accepting that there was *"much force in"* Hiscox's submission that "*interruption*" did not encompass mere interference, but required a cessation in an insured's activities (J§274), the Court concluded that the word was to be interpreted so widely as to extend to "*disruption or interference*". This is a major departure from the natural meaning of "*interruption*" and an unwarranted expansion of the cover that Hiscox agreed to provide.

63. The Court based its decision on what it described as the *"context of the insuring clauses which follow…"* the stem. It considered that the loss of attraction, specified customers/suppliers, and unspecified customers/suppliers clauses all contemplated circumstances where there would not be or would rarely be a cessation (J§274 and §§408-414). However, this was an

inadequate justification for departing from the unequivocal meaning of the word "*interruption*":

a. Requiring cessation is not an unduly onerous requirement. On the contrary, the FCA's submission below, that any form of departure from normal operations (such as entailed by social distancing) amounted to an "*interruption*", is simply not an available use of the word.
b. Hiscox's construction of "*interruption*" is clear and straightforward to apply. The FCA's case that any departure from normal operations suffices for there to be an interruption was obviously far too wide. However, the Court's intermediate holding (J§274) that "*interruption*" extends to disruption or interference, without stating what degree of disruption or interference is sufficient to constitute an "*interruption*", is not clear and will make it difficult to know whether in many situations there has been an "*interruption*" or not.
c. With the exception of the loss of attraction cover, all the clauses that influenced the Court concerned circumstances that could cause a cessation. Interruptions to supply from an important supplier are plainly capable of causing a business to come to a stop, even if that is not an inevitable or even common consequence; similarly if a major customer fails to take delivery of some large piece of equipment.
d. The loss of attraction clause, which in any event does not appear in many Hiscox wordings,[23] was obviously inserted out of place under the stem. It expressly provided that an insured need only suffer "*a shortfall in your expected income*" as a result of damage in the vicinity of the premises and so (by obvious implication) did not require an insured to show any other impact on its business (whether interruption, disruption or otherwise). The Court should therefore have accepted that the loss of attraction clause ought to have appeared in the Hiscox wordings as an 'additional cover' rather than under the stem and, accordingly, should be ignored when construing the meaning of "*interruption*" in the stem.
e. In any event the clauses on which the Court relied in interpreting "*interruption*" were an insufficient basis for departing from the clear meaning of the word.

[23] The loss of attraction clause appears in 4 (of 8) Hiscox 1 wordings, 5 (of 23) of Hiscox 2 wordings and 3 (of 4) Hiscox 4 wordings. It does not appear in any Hiscox 3 wordings.

64. Finally, even if the Court was correct to conclude that "*interruption*" did not require a cessation of the insured's activities and should be given some wider meaning, it should have made clear that the term could not possibly extend to any kind of disruption, however slight. The word "*interruption*" must at least require a very significant interference with the effectiveness of an insured's business activities, beyond for example the requirements of social distancing in shops, and would not be satisfied by mere disruption of or alteration in an insured's normal activities. Otherwise, for example, numerous professional businesses that have been able very effectively to carry on their activities remotely could say they had sustained an "*interruption*".

65. By way of illustration, from March 2020 and in relation to the present proceedings, the parties' lawyers have had to adapt their ordinary working methods, often substantially, but it would be absurd to say that their activities were 'interrupted' or in any sufficient sense interfered with or disrupted: on the contrary, their activities have continued, in the present case with great intensity. While restaurants (without a takeaway service) that were required to close could say that their activities were interrupted, a lawyer or accountant working from home could not; likewise, a shop where customers were forced to wait to enter the store because of social distancing.

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

66. The Public Authority clause makes clear that it concerns restrictions that cause "*your*" (i.e. the insured's) "*inability to use*" its premises for the insured purpose. Thus, a "*restriction imposed*" must create (i) an inability (ii) on the part of the insured (iii) to use the premises. The clause, therefore, does not concern mandatory restrictions in general, but only restrictions that are directed at the insured and/or its premises and/or their use. This reflects the fact that the Hiscox business interruption wordings are all an adjunct to property cover. There is a clear nexus between the imposition of the restriction and the inability to use, such that the natural meaning of the word "*restrictions*" is that it is directed to the insured's use of the premises.

67. Although the Court accepted that "*restrictions imposed*" would often be directed to the insured or its use of the premises, it held that Regulation 6 (the lock-down regulation) could be a "*restriction*", for the single reason that it considered that a police cordon erected after a murder or suicide (e.g. to preserve a crime scene) would amount to a restriction imposed, then apparently reasoning by analogy that this meant Regulation 6 could also be a restriction

imposed (J§269). However, an important part of the purpose of a cordon erected in such circumstances is precisely to prevent the use by the insured of its premises inside the cordon so as to preserve the forensic scene. Thus, a cordon is paradigmatically directed at the insured, its premises and/or the use of thereof.

68. By contrast, Regulation 6 was an altogether different type of public authority action. It concerned confining individuals to their homes, subject to exceptions. It had nothing to say about the use of business premises. It was not directed at any particular insured or any particular premises and said nothing about how premises might be used. This is true generally, but it is especially true of Category 3 businesses (expressly permitted to remain open) and Category 5 businesses (not mentioned in the Regulations at all).[24]

69. There is a very good reason why Regulation 6 should not be held to be a "*restriction imposed*" causing an "*inability to use*". In the pre-pandemic era, when the Hiscox wordings were agreed, the parties would never have dreamed that an insured business in the UK could potentially be reduced to the state of an inability to use its premises by the entire public being ordered to stay at home. Such a thing - entirely unprecedented - would have appeared utterly far-fetched. The argument that Regulation 6 is capable of being a "*restriction imposed*" within the meaning of the Public Authority clause is a hindsight-driven argument.

(2) Points of law of general public importance

70. All the proposed grounds of appeal raise points of general public importance.[25] The points arise in a market Test Case where the Insurers, and the issues raised by them, were chosen by the FCA as representing the position between a wider body of insurers and policyholders.

71. Grounds 1-4, the causation issue, are similar to issues raised by other Insurers and raise points which affect all policies containing composite insured perils, not just those under consideration. The FCA's proposed Ground 1 also concerns the causation issue. The points are of very wide application. Ground 5, the Hiscox 4 radius point, raises a point similar to

[24] The Categories are explained in J§53.

[25] Ground 8 above was not included in Hiscox's draft grounds of appeal before the Court but the Leapfrog Certificate to the Supreme Court is not directed to grounds of appeal or points of law (§1 of the order granting the Certificates) and the Certificate was granted to all parties across the board. Moreover, both the FCA (Ground 2) and the Hiscox Action Group (Ground 2) have been granted Leapfrog Certificates and are themselves seeking to appeal in relation to other aspects of the phrase "*restrictions imposed*".

the "disease" clauses and again is of wide general application. Ground 7, "*interruption*", concerns a word which appears in all business interruption policies; what is required for something to amount to an "*interruption*" has been left unclear by the Court and certainty is needed. As to Grounds 6 and 8, the meaning of "*occurrence*" in Hiscox 1-3 and the extent of "*restrictions imposed*" affects many Hiscox policyholders (over 30,000 are affected by the Test Case) and the latter is also the subject of appeal by the FCA.[26]

72. Hiscox also relies *mutatis mutandis* on the points made by the FCA in §§2 and 63-67 and on the points made by the Fifth Defendant in §19 of their "*Information about the decision being appealed*" documents, submitted as part of their Applications for Permission to Appeal.

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[26] See footnote 25 above.

ANNEX 1

HISCOX'S PROPOSED GROUNDS OF APPEAL

1. The Court erred in failing to hold that the essence of the composite insured peril under the Public Authority clause in Hiscox 1-4 was restrictions imposed by a public authority, and in failing to hold that the indemnity provided by the Public Authority clause was only in respect of loss caused in a causal combination by each of (i) an interruption (ii) caused by an inability to use the premises (iii) due to restrictions imposed by a public authority (iv) following an occurrence of a relevant disease, here COVID-19, and that there was no indemnity in respect of any other cause or combination of causes of loss. The Court should have held that the clause only provided an indemnity against loss caused by each of the above four elements in causal combination, and that, save to the extent that COVID-19 caused loss as part of and in causal combination with the other elements of the insured peril, COVID-19 and its other consequences were to be included in the counterfactual and were not to be stripped out for the purposes of assessing loss. Instead, the Court held that, once an insured peril had occurred, Hiscox was liable for all the consequences of COVID-19.

2. The Court erred in holding that the trends clauses in Hiscox 1-4 were (merely) part of the quantification machinery of the claim and that it would be contrary to principle if (subject to wording to the contrary) any part of the insured peril was included in the assessment of loss. It should have held that the trends clauses made it clear that, save to the extent that it caused loss as part of and in causal combination with the other elements of the insured peril under the Public Authority clause, COVID-19 and its consequences were to be taken into account for the purposes of the counterfactual and not to be stripped out for the purposes of the assessment of loss.

3. The Court erred in holding that there were problems with the reasoning in *Orient-Express Hotels Limited v Assicurazioni Generali SpA* [2010] EWHC 1186 (Comm); [2010] Lloyd's Rep IR 531 and that if necessary to do so it would have concluded the decision was wrongly decided and declined to follow it. It also erred in holding that the decision was distinguishable. The Court should have held that decision was correctly decided and not distinguishable, and that it supported the argument that COVID-19 and its consequences, save to the extent that COVID-19 caused loss as part of and in causal combination with

other elements of the insured peril under the Public Authority clause, were to be included in the counterfactual and not to be stripped out for the purposes of the assessment of loss.

4. The Court erred in failing to hold that the words "*solely and directly*" in the stem had the effect that the indemnity provided by the Public Authority clause in Hiscox 1-4 was only in respect of loss solely and directly caused by the four elements of the insured peril in causal combination and no other loss and/or that COVID-19 and its consequences were otherwise to be included in the counterfactual and not to be stripped out for the purposes of the assessment of loss.

5. The Court erred in holding, in relation to Hiscox 4, that it was appropriate to regard a public authority response as having followed a local occurrence of COVID-19, provided the response was temporally posterior to the local occurrence, if it was a response to the outbreak of which the local occurrence formed a part. The Court ought to have held that the insured peril under the Public Authority clause in Hiscox 4 was, as regards the occurrence of disease element, in respect of a local occurrence only (i.e. within one mile of the premises), not a wider outbreak, and ought to have held that a public authority response followed an occurrence of COVID-19 within the meaning of Hiscox 4 only if it causally and not merely temporally followed an outbreak within a one mile radius of the relevant premises.

6. The Court erred in holding in relation to Hiscox 1-3 that there was an "*occurrence*" for the purposes of Hiscox 1-3 on 5 March 2020 upon COVID-19 becoming a notifiable disease. The Court ought to have held that "*occurrence*" meant something limited, local, small scale and specific to the insured and that the insured peril under the Public Authority clause in Hiscox 1-3 was, as regards the occurrence of disease element, in respect of such an occurrence only, not a wider outbreak. Further, having rightly held that "*following*" required a causal connection, the Court accordingly should have held that any relevant restrictions imposed did not follow "*an occurrence*" of notifiable disease within the meaning of Hiscox 1-3.

7. The Court erred in holding that "*interruption*" in the stem meant "*business interruption*" generally, including disruption or interference, not just complete cessation. The Court should have held that "*interruption*" meant complete cessation, alternatively that it did not extend to any and all disruption and interference.

8. The Court erred in holding that Regulation 6 was capable of being a "*restriction imposed*" within the meaning of the Hiscox 1-4 Hybrid clause. It should have held that "*restrictions imposed*" necessarily had to be directed to the insured or to the insured's use of the premises and that only Regulation 2 of the 21 March Regulations and Regulations 4 and 5 of the 26 March Regulations were capable of being such "*restrictions*".