IN THE HIGH COURT OF JUSTICE **Claim No. FL-2020-000018**
BUSINESS AND PROPERTY COURTS
COMMERCIAL COURT (QBD)
FINANCIAL LIST
FINANCIAL MARKETS TEST CASE SCHEME

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

FOURTH DEFENDANT'S SKELETON ARGUMENT FOR HEARING ON 2 OCTOBER 2020

---

1. This is the Fourth Defendant's (**Hiscox's**) skeleton argument for the consequentials hearing listed to take place on 2 October 2020[1]. It addresses the following matters:

   (1) The form of the declarations to be made by the court in the light of the judgment handed down on 15 September (**Judgment**) **{N/1/1}**.

   (2) Hiscox's application of 28 September for a Leapfrog Certificate **{O/13/1}**.

   (3) Permission (on a protective basis) to appeal to the Court of Appeal and an extension of time for serving an Appellant's Notice.

[1] All references to dates are to dates in 2020 unless otherwise stated.

I. THE FORM OF THE DECLARATIONS

2. Since the FCA first provided a draft on 23 September, there have been a number of exchanges regarding the terms of the declarations to be included in the Court's final order. At the time of writing these exchanges are ongoing. The Court may well be provided with a further, more up to date draft of the order prior to the hearing. Nevertheless, the last draft provided by the FCA to insurers on 27 September[2] appears at **{N/4/1}** and Insurers latest response to that draft (sent on 29 September) appears at **{N/5/1}**. A comparison of those drafts appears at **{N/6/1}**.

Preliminary points

3. This is a consequentials hearing. As that title makes clear it is about effecting the consequences of the Court's judgment. So far as concerns the form of the declarations, the exercise is about faithfully reflecting the Judgment – i.e. either what is expressly said in the Judgment (and as close as possible to the language used in it), or what is necessarily implicit in it.

General

4. The issues in dispute may narrow further before the hearing but at the time of writing a number of issues in the draft declarations remain in dispute so far as Hiscox is concerned. **Annex A** to this skeleton lists those areas of dispute by reference to the paragraph numbers of the last version of the draft order served by the FCA on 27 September at **{N/4/1}** and sets out (a) the competing proposals of the FCA and Insurers collectively on the points of dispute; and (b) the reasons for Insurers' position. The Court is respectfully referred to Annex A.

The impact of COVID 19 before the occurrence of the insured peril

5. There is one particularly important point which the parties appear to agree that the Court did decide, but where they disagree on what the Court's decision was. This cannot be adequately dealt with in Annex A. This concerns whether in principle it is permissible to take into account the impact of a downturn in trade experienced by insureds as a result of COVID-19 **before** the occurrence of the insured peril.

[2] A further draft on one important point, the impact of COVID 19 before the occurrence of the insured peril, was sent by the FCA on 29 September and is dealt with below.

6. On this, the parties' positions are as follows:

(1) All Insurers say that the Court decided in principle that it is appropriate that such a downturn be taken into account;

(2) HAG say that the Court decided this could not be taken into account at all; and

(3) The FCA's position is equivocal, but appears to be that the Court decided it could be taken into account for Arch and Ecclesiastical but not for other Insurers. Their position is set out at Annex A point 7 where the precise wording of the FCA's proposal in this respect, sent on 29 September appears.

7. The declaration proposed by Insurers (alongside the FCA's proposal in Annex A), is:

"*11.3 As to the proper application of the trends clauses declared applicable in declaration 14 below:*

(a)What amounts to a trend or circumstance will be a question of fact and construction of the policy terms in each case, and may require an upwards or downwards adjustment;

(b)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; and

(c)Any such continuation must be at the level at which it had previously occurred."

8. The principal area of controversy relates to (b). Other points are dealt with in Annex A.

9. There are two preliminary points to be made in relation to this issue.

10. First, the Judgment must be read as a whole. There are numerous passages which cross-refer as part of the reasoning in relation to one Insurer to the reasoning in relation to the another, or to the position of Insurers generally. It is obviously wrong to treat the reasoning in relation

to each Insurer as contained in separate silos. In the context of the trends clauses, §121 of the Judgment is a good example of this.

11. Secondly, one has to keep separate two distinct questions:

    (1) Whether for the purposes of the counterfactual, i.e. for the purposes of looking at what would have happened but for the insured peril and **for the period** of the insured peril, one should remove only COVID-19 insofar as it caused the restrictions, or whether one should remove COVID-19 altogether?

    (2) For the purposes of assessing loss, what is the position as regards taking into account for the assessment of loss a downturn in income due to one element of the insured peril **before** the occurrence of the insured peril?

12. Point (1) was the major battleground at the hearing; it was not an argument about what happened **before** the insured peril operated, and indeed in principle it could not have been. The FCA submitted that once all three elements of the insured peril were present, it was necessary to strip out all three elements, including in its entirety COVID-19 in its entirety, and its consequences. Hiscox by contrast (and other Insurers *mutatis mutandis*) argued that one only stripped out the disease element insofar as it caused the public authority action and inability to use. This was Hiscox's A + B+ C + D point (see the Hiscox skeleton at §346-369 particularly **{I/13/110}**) and the pipeline metaphor as developed in oral submissions. The same point was made by reference to the trends clauses.

13. The critical point is that this was an argument about the measure of indemnity **during and as a result of** the operation of the insured peril. The whole argument concerns what would have happened had the insured peril not occurred, i.e. it looked at that period from the date of operation of the insured peril, not at what happened **before** the insured peril.

14. It is clear from the leapfrog application, in particular §§11-17 of Leedham 2 **{O/29/5}** and draft Ground of Appeal 1 **{O/30/2}** that HAG are suggesting that the Court has found that the counterfactual and assessment of loss should proceed on the basis that COVID-19 and its consequences did not occur at all, **including for the period before the commencement**

of the insured peril, and that any downturn due to COVID-19 before the inception of the insured peril should not be taken into account for the purposes of the trends clauses.

15. The paragraphs of the Judgment which HAG rely on (Leedham 2 §15 **{O/29/6}** in support of their argument, §§278-283 and 530-533 of the Judgment, do not support it.

16. Those paragraphs are explicitly dealing with point (1) in §11 above, subject to one sentence in §283 where point (2) is dealt with explicitly (and in a way consistent with Hiscox's position not HAG's). Thus, in §278 the Court held:

> "*278. As to how the counterfactual is to be applied, whether it is being considered for the purposes of considering the losses which the insured can claim, either as a matter of application of the insuring clause, or pursuant to the "trends clause", we consider that the exercise must give effect to the insurance effected. This means assuming that the insured peril did not occur. 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.*** *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.*" (Emphasis added)

17. The Court held that what had to be stripped out for the counterfactual, whether one was looking at the insured peril or the trends clauses, was the insured peril, and that the insured peril comprised three interconnected elements ((i) inability to use, (ii) due to restrictions imposed by a public authority (iii) following an occurrence of disease. These had to be stripped out for the period during which they were acting in combination – i.e. during which the insured was "*in a situation in which all those elements are present*". This is in itself quite contrary to the suggestion that any individual elements are stripped out for **longer** than when acting in combination, because that would be a contradiction of the Court's approach that (whether for the purposes of the insured peril **or** the trends clause) what is removed is the **composite** insured peril.

18. That the Court was concerned in §§278-283 only with the period of the insured peril is also emphasized by §283 and in particular the last sentence:

"*…For these reasons, we considered that the FCA's case in this regard was to be accepted, and that the correct application of the counterfactual in the current case is to compare the actual performance of the business with that which the business would have achieved in the absence of the COVID-19 outbreak which led to restrictions (as understood in the sense we have given above) and the inability to use the premises.* ***As we explain elsewhere, however, the counterfactual can only assume that the insured peril applies from the time that the restrictions are imposed, and only for as long as they are imposed***."

19. That last sentence makes it explicitly clear that as regards the counterfactual, COVID-19 is only removed for the period of the insured peril. That conclusion flows inexorably from the analysis of the Court previously in §§278-283, namely that what is insured against is a composite peril, with elements acting in combination. As will be seen, it is also what the Court said in relation to other Insurers.

20. Similarly, in §531 of the Judgment, which deals with the hybrid clauses, the Court refers to the same interconnected elements as in §278 and holds that:

"*The composite peril involves (i) inability to use the insured premises (ii) due to restrictions imposed by a public authority (iii) following, here, the occurrence of a human infectious or contagious disease. To the extent that any insured can show that there was a relevant restriction and an inability to use the premises, in assessing what loss the insured can recover, each of these interconnected elements should be removed from the counterfactual.*"

21. That again makes clear that what is removed is COVID-19 for the period it was acting in combination with the other elements; that is the period of the insured peril and therefore it is the period of the "*counterfactual*". §530 makes clear that what is stripped out is the composite insured peril, which is the various elements acting in combination. §§532-533 do not in any way affect these points and do not advance HAG's argument.

22. All this should be clear as a matter of principle. However, the Court in fact specifically considered the issue of a prior downturn in the context of both Arch (§§337-351 of the Judgment) and Ecclesiastical (§§385-389 of the Judgment).

23. As a preliminary, it should be noted that the Hiscox trends clauses (§246, 249, 251 and 253 of the Judgment) are materially the same as the Arch (§346) and Ecclesiastical clauses (§379). That is to say, they refer to circumstances or trends before or after the loss and to the aim being that the amount paid should reflect as near as possible the results which would have been achieved if the insured peril had not occurred. The Ecclesiastical Parish Plus wording (§378 of the Judgment) though expressed differently achieves the same effect of what income would have been received had the insured peril not occurred.

24. It is quite clear from the consideration of Arch at §§349-351 that the Declaration sought by Insurers accurately reflects the Judgment. For convenience those passages are set out:

"*349.That leaves the issue raised by Mr Lockey QC's first practical point,* ***the fact that many businesses had suffered a reduction in turnover as a consequence of the pandemic and its social and economic effects before the insured peril operated****, here before the actions or advice of the government due to the emergency that businesses should close, thus preventing access. This was an issue raised* ***generally*** *by Mr Edelman QC in submissions on behalf of the FCA. In the Hong Kong Court of Final Appeal in New World Harbourview Hotel v Ace Insurance [2012] HKCFA 21; [2012] Lloyd's Rep IR 537, a case concerned with a business interruption claim arising out of the 2003 SARS outbreak, Sir Anthony Mason NPJ (in a judgment with which the other members of the Court agreed) concluded that coverage was not available in respect of the period before the date when the disease became notifiable, because the cause of the loss under the policy wording had to be a notifiable disease and a disease did not become notifiable until it was required to be notified, which was on 27 March 2003. Before that date, any loss caused by SARS was caused by a loss which was not notifiable and hence not covered by the insurance.*

350.Mr Edelman QC contended that even if that case was correct, it could be distinguished ***in relation to the trends clauses which we are considering because the whole emergency i.e. the coronavirus pandemic had to be taken out of the equation*** *for the purposes of the counterfactual assessment,* ***not just that part of the emergency which occurred after the date when the disease became notifiable.*** *He argued that this was not to compensate the policyholder for loss prior to the disease becoming notifiable which was not permissible, but in relation to loss after notifiability, the effect of*

the pandemic on the policyholder's turnover before it became notifiable should also be extracted. He submitted that if an insuring clause was contemplating insurance against a notifiable disease, ***it must encompass the emergence of a disease which, once the authorities get round to it, will be made notifiable****.*

351 ***Ingenious though this argument is, we consider that it is fallacious****. Upon analysis, if it were correct, once an insured peril occurred, here the prevention of access due to government actions or advice due to the pandemic, the policyholder would in fact recover for its losses both before and after the occurrence of that insured peril, despite Mr Edelman QC's attempts to contend that this was not the effect of his argument.* ***In any event****, in the case of the Arch policy wording, whatever the merits of the argument it is precluded by the express words of the trends provision. Any downturn in turnover before the date(s) when businesses closed pursuant to government advice or the Regulations was a trend or circumstance which affected the business before the Damage i.e. as manipulated before "the Prevention of access to The Premises due to the actions or advice of government due to an emergency which is likely to endanger life" within the meaning of (i) of the trends provision.*" (Emphasis added)

25. Of particular note in relation to those passages are the following:

(1) The Court recorded (in §349 of the judgment) that the fact that many businesses had suffered a reduction in turnover as a consequence of the pandemic and its social and economic effects before the insured peril operated was an issue raised "*generally*" – i.e. in relation to all Insurers - by Mr. Edelman QC.

(2) The Court recorded that the argument of Mr. Edelman QC at §350 on this issue was in relation to "*the trends clauses we are considering*", meaning **all** of them, not just Arch's.

(3) Most importantly, the argument recorded at §350 was precisely the argument that HAG is now making; Mr. Edelman QC argued that the whole of the COVID-19 emergency, not just the part that occurred after the disease became notifiable, had to be taken out of the counterfactual assessment. In other words, COVID-19 and its consequences **before** the triggering of the insured peril had to be removed from the counterfactual.

(4) That argument was squarely rejected by the Court. The Court rejected that argument first on the basis of principle (the first sentence of §351). This basis is clearly generally applicable to all Insurers.

(5) The Court then rejected the argument as regards Arch in any event because of the wording in the Arch trends provision and specifically because any downturn was a trend or circumstance which affected the business before the insured peril. This specific point clearly applies to Hiscox as well as its trends clauses are materially indistinguishable from those of Arch.

26. The Court also dealt with the question of downturn prior to the inception of the insured peril in the context of Ecclesiastical (§§385-389 of the Judgment). The position is here made, if anything, even clearer.

27. It is notable again that in §385 the Court discusses the nature of the peril and states that "***as with others the Court has been considering*** *it is a composite one with three elements*". This shows the reasoning which follows is generally applicable. The last sentence of §386 which refers to it being contrary to principle for loss to be limited by one or more elements of the insured peril still being included in the counterfactual assessment relates to the period of the insured peril; as does the first sentence of §388. This is in accordance with the principle that the counterfactual relates to the period of operation of the insured peril. If it were otherwise, these paragraphs would be flatly contradictory of the example given in §389, which is now discussed.

28. §389 illustrates the position on the basis that Insurers' main argument (point (1) in §11 above) is wrong; Insurers' argument is discussed and (again) dismissed in the prior §§385-388. In §389, in the context of the Parish Plus wording, the Court gives a worked example involving collections falling to 80% before the triggering of the insured peril and then falling a further 70% during the period of the insured peril to 10%. The Court holds the insured would recover on the basis of the 70% fall – significantly for present purposes not on the basis of a 90% fall. The Court holds in terms that "*the loss of income before the insured peril is triggered is not recoverable for the same reasons as we gave in relation to the Arch wording*". This is clearly a reference back to §§ 349-351 of the Judgment. The example and that sentence are quite unequivocal that a downturn caused by COVID-19 before the inception of the insured peril can be taken into

account. The reason for that is that what the insured has protected himself against, as the Court holds in §278, is the "*fortuity of being in a situation in which all those elements are present*".

29. Those passages in relation to Arch and Ecclesiastical are clearly applicable to Hiscox and other insurers.

30. The result is that the Insurers' position on this issue is correct and HAG's and the FCA's is wrong.

31. In Leedham 2 **{O/29/1}**, the witness statement in support of HAG's leapfrog application, points are made about HAG's understanding of Hiscox's position on the proper application of its trends clauses and how this would work in practice. Not only is this irrelevant to the present exercise of establishing the correct declarations, but it very much looks as if HAG are really trying to persuade the Court that its decision on this issue is wrong.

32. In §13, Mr Leedham states that Hiscox "*believes*" the Judgment means that if there was a measurable downturn in the turnover of a business 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 in calculating the indemnity payable in respect of the insured period.

33. That is indeed what the Judgment says. Hiscox has added the clarification, which is set out in sub-paragraph (c) of the Declaration sought by Insurers (see point 7 of Annex A), that the continuation of the trend can only be at the level at which it had previously occurred. In other words, Insurers cannot rely on any further projected deterioration.

34. In §14, Leedham 2 deals with what Mr Leedham says is Hiscox's "*understanding*" of the effect of this in practice, namely that an insured that closed voluntarily before restrictions being imposed (e.g. on 16, 20 or 23 March when various Government announcements were made) would not be able to make any recovery under its policy because its period of voluntary closure would be treated as establishing a trend of zero income to be continued into and throughout the indemnity period.

35. The basis of Mr Leedham's understanding, if it is more than what he considers the consequence of what is set out in §13 of Leedham 2, is not made clear. Hiscox's position is that:

(1) If an insured has chosen to close voluntarily prior to being required to do so by reason of the 21 March and/or 26 March Regulations, it will not be entitled to any indemnity in respect of any financial loss suffered during the period prior to the relevant Regulations coming into force. This should be uncontroversial. Prior to then, the insured peril has not arisen.

(2) Where cover exists, Hiscox is committed to adjusting policyholders' claims in accordance with normal loss adjusting principles, where appropriate having regard to business trends affecting businesses before the insured peril, as permitted by the Judgment. Hiscox has not treated and will not treat a voluntary closure following the announcement of the 21 March and/or 26 March Regulations (as applicable) and before their coming into effect as representative of a trend.

II. HISCOX'S APPLICATION FOR A LEAPFROG CERTIFICATE

36. Hiscox's application for a leapfrog certificate (**Leapfrog Certificate**) pursuant to s.12 of the Administration of Justice Act 1969 (**the Act**) appears at **{O/13/1}**. The application is supported by a witness statement from Mr Lawson Caisley **{O/15/1}** which exhibits Hiscox's draft Grounds of Appeal (at page 3 of LMC2 **{O/16/3}**).

37. Applications under s.12 of the Act are also made by the FCA, HAG and all the Insurers apart from Zurich. Hiscox does not oppose any of those applications.

38. As Mr Caisley explains, Hiscox has not yet decided whether to pursue an appeal and that remains its position. However, the Act requires any application to be made within 14 days of judgment being handed down, i.e. by 28 September. Accordingly, the various Leapfrog Certificate applications were necessary (in the interests of all concerned with these proceedings, not just Hiscox) to preserve the possibility of a leapfrog appeal, which, if permitted, would be the quickest route to final determination of these proceedings.

39. The basis on which Hiscox submits a Leapfrog Certificate should be granted are fully set out in the statement of Mr Caisley to which the Court is respectfully referred to avoid repetition. In short, Hiscox maintains (and it appears all parties agree) that:

(1) The Court's decision involves a point of law of general public importance (s.12(1) and s.12(3A). Even if the Court were to take the view that not every point taken in one or other party's draft Grounds of Appeal is one of general public importance, that is not an obstacle to the granting of a Leapfrog Certificate: provided it is satisfied its decision *"involves"* such a point, the first essential requirement of s.12(3A) of the Act is satisfied. Hiscox says that this is the case here.

(2) In this context "*decision*" is the whole order made by the Court. This accords with the relevant words of S.12(3A) "*in relation to a decision of the judge in any proceedings … that a point of law of general public importance is involved in that decision*". The filter as to what grounds of appeal to allow is exercised by the Supreme Court when it considers whether and in relation to what points to grant permission to appeal. It is important to interpret S. 12(3A) in such a way to minimise the risk of the case splitting between the Court of Appeal and the Supreme Court at this stage, bearing in mind that (i) one cannot have appeals in relation to one decision in both the Court of Appeal and the Supreme Court at the same time; and (ii) the object of a leapfrog is to cut out a tier of appeal.

(3) Further, there can be no real doubt (and the parties all agree) that at least one if not all of the following criteria (only one of which must also be satisfied if a Leapfrog Certificate is to be granted) are also met:

a. The subject matter of these proceedings is of national importance (s.12(3A)(a) of the Act);

b. The result of the proceedings, as embodied in the Judgment and the declarations ultimately made in the light of it, is so significant as to justify a hearing by the Supreme Court (s.12(3A)(b) of the Act);

c. Particularly because of the pressing urgency of these proceedings, the benefits of earlier consideration by the Supreme Court outweigh the benefits of consideration by the Court of Appeal (s.12(3A)(c) of the Act).

40. Finally, the Grounds of Appeal Hiscox wishes to pursue **{O/16/3}** clearly:

(1) Set out a sufficient case to justify an application to the Supreme Court for leave to bring a leapfrog appeal (s.12(1)(b)) of the Act); and

(2) Are such that, were no certificate granted, it would be proper to grant permission to appeal to the Court of Appeal (see s.15(3) of the Act and *Abd Ali Hameed Al-Waheed v Ministry of Defence* [2014] EWHC 2714 (QB) *per* Leggatt J at [18]).

41. As to these last two points, all the points are points of law and Hiscox relies on the arguments it advanced at trial to show the merit of the arguments raised by its Grounds of Appeal. The Court is very familiar with these arguments, so they are not repeated here. While the Court may have rejected these arguments in respect of the points under appeal, the arguments plainly have sufficient merit – i.e. real prospects of success - to justify an application to the Supreme Court and the granting of permission to appeal to the Court of Appeal, especially given the unprecedented factual background against which the various points were decided.

III. EXTENSION OF TIME FOR APPELLANT'S NOTICE

42. Hiscox also seeks, on a protective basis, in case it does not succeed in its leapfrog application, permission to appeal to the Court of Appeal (pursuant to PD52, para 4.1(a)) and a further extension of time to file an Appellant's Notice beyond the 7 days granted by this Court's order of 15 September 2020. The basis on which Hiscox would seek permission to appeal is addressed above in relation to the Leapfrog Certificate. Hiscox reiterates that it has not made a decision to appeal.

43. As to the proposed extension of time, Hiscox asks that the deadline for filing its Appellant's Notice be extended by 14 days to 23 October.

44. This short additional extension is sought because the time is reasonably required by Hiscox:

(1) To give it further time to reflect on the Judgment and the final form of the declarations in order to decide whether to pursue an appeal;

(2) To ensure Hiscox has a fair opportunity to prepare cogent submissions in what remains a large and complex case, given that the rules require the skeleton argument to be filed along with the Notice of Appeal: Practice Direction 52C paragraph 3(g). Allowing Hiscox a short extra time will allow it both do justice to its case and to ensure that the skeleton is of maximum assistance to the Court of Appeal.

45. While Hiscox has had time to consider the Judgment and the possibility of an appeal since the Judgment was handed down, a great deal of time has been spent by Hiscox and its legal team in discussions concerning the form the declarations and working to preserve the possibility of a leapfrog. Further, the precise form of the Court's declarations will not be known until after the hearing on 2 October, only 7 days before any Appellant's Notice currently has to be filed.

46. An extension of 14 days will cause no prejudice to any party or prevent the expeditious disposal of an appeal, in the event that Hiscox decides to pursue an appeal.

JONATHAN GAISMAN QC
ADAM FENTON QC
MILES HARRIS*

30 September 2020

7 KING'S BENCH WALK
* 4 NEW SQUARE

HISCOX'S SKELETON FOR CONSEQUENTIALS HEARING ON 2 OCTOBER 2020

ANNEX A- POINTS OF DISPUTE

1. Paragraphs 5 and 6 of the FCA's draft of 27 September 2020[1]

FCA's draft text	Insurers' draft text[2]
5. There was COVID-19, and COVID-19 was "sustained" or "occurred" within Argenta1, Hiscox4 (hybrid), QBE2-3 and RSA3, wherever a person or persons had contracted COVID-19, whether or not it was verified by medical testing or a medical professional and/or formally confirmed or reported to the PHE and whether or not it was symptomatic. 6. There was COVID-19, and COVID-19 was "sustained" or "occurred" within a given radius of the premises in Argenta1, Hiscox4 (hybrid), QBE2-3 and RSA3, wherever a person or persons had contracted COVID-19, whether or not it was verified by medical testing or a medical professional and/or formally confirmed or reported to the PHE and whether or not it was symptomatic, and was/were within that radius of the premises.	5. There was COVID-19, and COVID-19 was "sustained" or "occurred" within a given radius of the premises in Argenta1, Hiscox4 (hybrid), QBE2-3 and RSA3, wherever a person or persons contracted COVID-19 so that it could be diagnosed, whether or not it was verified by medical testing or a medical professional and/or formally confirmed or reported to the PHE and whether or not it was symptomatic, and was/were within that radius of the premises at a time when they could still be diagnosed as having COVID-19.

1. Insurers' amendments (i) condense paragraphs 5 and 6 of the FCA's draft into one paragraph avoiding repetition, (ii) make it clear that it is necessary for COVID-19 to be diagnosable, as per §93 of the Judgment and the FCA's case for an "occurrence" and (iii) make clear that there is not an "occurrence" when someone who no longer has COVID-19 comes within the radius of the premises.

[1] All the headings in this Annex refer to paragraph numbers of the FCA's draft sent to Insurers on 27 September 2020 **{N/4/1}**, although the FCA's draft text in respect of paragraph 13.4 was set out in an email of 29 September 2020.

[2] As set out in the draft sent by Allen & Overy on behalf of insurers to HSF on 29 September 2020 **{N/5/1}**

2. Paragraph 12.2(e) and (f)

FCA's draft text	Insurers' draft text
(e) a distribution-based analysis – where absolute precision is not required to discharge the burden of proof – to demonstrate the geographical distribution of COVID-19 cases (where the policyholder relies on ONS Death Data or Reported Cases in an LTLA or another reporting area, and the relevant policy area is entirely within, or intersects, the LTLA or another reporting area);	(e) a reliable distribution-based analysis – ~~where~~ albeit absolute precision is not required to discharge the burden of proof – to demonstrate the geographical distribution of COVID-19 cases (where the policyholder relies on ONS Death Data or Reported Cases in an LTLA or another reporting area, and the relevant policy area is entirely within, or intersects, the LTLA or another reporting area);
(f) given the likely true number of cases of COVID-19 in the UK in March 2020 was much higher than that shown in the Reported Cases, an undercounting analysis – where absolute precision is not required to discharge the burden of proof – to demonstrate the likely number of actual cases of COVID-19 in the relevant policy area; in this context, insureds can seek to rely, for example, on reports produced by Imperial College London and Cambridge University.	(f) given the likely true number of cases of COVID-19 in the UK in March 2020 was much higher than that shown in the Reported Cases, ~~an~~ reliable undercounting analysis – where absolute precision is not required to discharge the burden of proof – to demonstrate the likely number of actual cases of COVID-19 in the relevant policy area~~; in this context, insureds can seek to rely, for example, on reports produced by Imperial College London and Cambridge University~~. Insureds can seek both (i) to demonstrate that the reports produced by Imperial College London and Cambridge University are such reliable analyses and (ii) to rely upon them to discharge the burden of proof.

2. Insurers' amendments are necessary to reflect the true nature of Insurers' concessions in relation to the use of distribution-based and undercounting methodologies. Insurers did not concede that any such methodologies could be used by policyholders. As the Court recorded at §556[3] and §560[4] of the Judgment, Insurers' only accepted that policyholders could seek to prove an occurrence by using "*reliable*" analyses.

[3] "*…insurers accepted that in principle 'some reliable method of calculating the distribution of cases across an area could be used…*" (emphasis added).
[4] "*…insurers did not dispute that, in principle, an undercounting ratio could be used…if it could be shown to provide a reliable (not merely reasonable) estimate…*" (emphasis added)

3. In exchanges the FCA has sought to justify its proposed text (and in particular the omission of the need for any methodology to be reliable) by referring to the third sentence of §579[5] of the Judgment, but this sentence refers back to the concessions more fully recorded at §556 and §560. Further, in §579 the Court recorded that "*The real issues between the parties were as to the reliability of the of the particular methodologies introduced by the FCA…*", so recognising both (i) that Insurers only accepted that policyholders could seek to rely on reliable methodologies, and (ii) that Insurers did not concede that the Imperial College and Cambridge analyses were reliable, but policyholders could seek to rely on them as the Court also recorded in §579.

3. Paragraph 12.3

FCA's draft text	Insurers' draft text
12.3 The particular types of underlying data pleaded by the FCA (specific evidence, NHS Death Data, ONS Death Data and Reported Cases) will discharge the burden of proof if they are the best available evidence in a particular case.	N/A- Insurers all propose deletion of this paragraph

4. The text proposed by the FCA, based on §574 of the Judgment, is potentially misleading. It could be understood to suggest that the underlying data will necessarily discharge the burden of proof if it is the best evidence. Hiscox does not understand the Court to have said this because that would contradict the statement, also in §574 of the Judgment, that *"as the parties acknowledged, even the best evidence available may not discharge the burden of proof."*

5 "*The insurers have conceded that a distribution-based analysis, or an undercounting analysis, could in principle be used to discharge the burden of proof on an insured.*"

4. Paragraph 12.4

FCA's draft text	Insurers' draft text
12.4 The true number of individuals infected with COVID-19 on relevant dates in March 2020 in a regional, UTLA or LTLA zone is at least as great as the number of Reported Cases for those dates for that zone	8.3 The true number of individuals infected with COVID-19 on relevant dates in March 2020 in a regional, UTLA or LTLA Zone is at least as great as the number of Reported Cases for those dates for that Zone, where "Reported Cases" here is referring only to the daily (and not the cumulative) totals contained in the data referred to in paragraph 8.2 (d) above.

5. In exchanges, the FCA has said that the additional text in the Hiscox draft is otiose. However, the declaration proposed by the FCA relies not on a determination made by the Court, but only what Insurers accepted at trial. Therefore, the declaration must accurately reflect the terms of Insurers' concession, which was as set out in Insurers' draft text. This text mirrors the terms of the concession made in §39.1 of Appendix 3 to MS Amlin's written opening **{I/12/212}**, which concession was adopted by Hiscox in its skeleton at §321 **{I/13/103}**.

5. Paragraph 14.1

FCA's draft text	Insurers' draft text
14.1 COVID-19 and the governmental and public reaction thereto were one indivisible cause.	In Argenta1, MSAmlin1-2, RSA3-4, QBE1(disease clauses), and RSA1 (hybrid clause); the occurrence of a case of COVID-19 within a Relevant Policy Area is to be treated as part of one indivisible cause,

	namely the national COVID-19 outbreak and the governmental and public reaction, of any business interruption. Alternatively, each such occurrence of a case is to be treated as a separate, but effective cause of national action and any consequential business interruption.

6. The paragraphs of the Judgment on which the FCA's draft text appears to be based (§147 and §110-112) do not concern Hiscox 1-4 but rather disease clauses. Other insurers who have disease clauses (Argenta, MSA, RSA and QBE) have proposed some alternative text in response to the FCA's draft, set out above, but even that alternative text should omit reference to Hiscox.

6. Paragraph 14.3(c)

FCA's draft text	Hiscox draft text
14.3 The correct counterfactual when calculating an indemnity is to assume that once cover under the policy is triggered none of the elements of the insured peril were present, which:…	11.2 The correct counterfactual when calculating an indemnity is to assume that once cover under the policy is triggered none of the elements of the insured peril were present, which:…
...(c) for hybrid clauses means (for example) no inability to use the premises, no public authority restrictions and no COVID-19.	...(c) for hybrid clauses means (for example) no inability to use the premises, no public authority restrictions and no national COVID-19 outbreak.

7. Hiscox's proposed text accurately reflects the parts of the Judgment that addressed what needs to be stripped out on a proper application of the counterfactual, which so far as COVID-19 was concerned was: "*the national outbreak of COVID-19*" (§278) and "*national outbreak of the disease*" (§279) (emphasis added).

7. Potential paragraph 14.4- FCA's proposed trends wording provided by email on 29 September 2020

FCA draft text- provided by email on 29 September 2020	Insurers' draft text
As to the proper application of the trends clauses declared applicable in declaration [15] below: a) The object of the quantification machinery (including any trends clause or provision) in the policy wording is to put the insured in the same position as it would have been in if the insured peril had not occurred. b) What amounts to a trend or circumstance will be a question of fact and construction of the policy terms in each case, and may (in general terms, and subject to sub-paragraph (e) below) require an upwards or downwards adjustment; c) Unless the policy wording so requires, loss is not 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. d) If there was a measurable downturn in the turnover of a business due to any component of the insured peril before the full insured peril was triggered, then *[it is not 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]* **OR** ***[for Arch and Ecclesiastical]*** *[it is in principle appropriate, but only if the*	11.3 As to the proper application of the trends clauses declared applicable in declaration 14 below: (a) What amounts to a trend or circumstance will be a question of fact and construction of the policy terms in each case, and may require an upwards or downwards adjustment; (b) 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; and (c) Any such continuation must be at the level at which it had previously occurred.

particular effect amounts to a trend or circumstance (as required under the particular clause) and is sufficiently distinct from the insured peril. The court did not address when that would or would not be the case. For example, the FCA would say that where a business closed in the days immediately before legislation qualifying as a trigger, the brief closure is unlikely to amount to a trend or circumstance, and would not be distinct from the insured peril. That will, however, be a question of fact and construction in each individual case. Further, the downturn will only apply to the extent that as a matter of fact the downturn would have continued during the indemnity period absent the insured peril]; e) Any such continuation must be at no more than the level at which it had previously occurred.	

8. Hiscox's (and all Insurers') proposed text is intended to reflect the Court's reasoning in the Judgment. The main controversy arises between Insurers' proposal at (b) and the FCA's proposal at (d). This issue is dealt with fully in the Skeleton.

9. The FCA's proposed subparagraphs (a) and (b) are unobjectionable to Hiscox, (b) reflecting Insurers' proposal at (a) with a slight qualification. Subparagraph (c) is not clear; if all that it is saying that the insured peril is the effect of all the elements acting in combination and that loss has to be assessed on the basis of the combined elements being removed for the period of the operation of the insured peril, then it is not controversial. The FCA's (e) is not believed to be substantively different from Insurers' proposal at (c). (c) refers to the continuation of the particular trend, i.e. downturn due to COVID 19,again outside of the period when the insured peril is triggered. It is not ruling out an offsetting upturn for other reasons which may occur.

10. The FCA's proposed subparagraph (e) is also acceptable to Hiscox. Hiscox does not seek to suggest that it can use a trends clause to reduce the amount payable to an insured on the basis that a prior downturn due to COVID-19 would have worsened after the insured peril commenced upon the imposition of restrictions due to which the insured was unable to use its premises.

8. Paragraph 14.5(a)

FCA draft text	Hiscox draft text
14.5 In relation to the following policy wordings, in order to prove causation, a policyholder would have to demonstrate that: (a) In respect of the Hiscox 1-2 and 4 NDDA clauses and MSA2, a localised "incident" of disease caused the imposition by the government of the restrictions…	N/A- Hiscox proposes deletion of paragraph or at least deletion of the reference to Hiscox 1-2 and 4 (NDDA)

11. In exchanges, the FCA has sought to rely on §418 of the Judgment to support its draft text, but in fact §418 contradicts its draft. The FCA's proposed text wrongly suggests that the Court endorsed a concept of a 'localised incident' of disease. It is clear from the Judgment that it did not. Rather, the Court stated at §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…"* (emphasis added).

12. What follows in §418 of the Judgment is simply to the effect that any such localised incident of disease (which the court had already held would not amount to *"an incident"* under Hiscox1, 2 and 4) would in any event not have caused the government's restrictions. The relevant passage (paragraph 418) of the Judgment on causation with regard to the Hiscox 1-2 and 4 (NDDA) is accurately dealt with in the draft text Hiscox at paragraph 18.6 of the Insurers' draft text. This also makes the FCA's suggestion superfluous in any event.

9. Paragraph 20.2 and 21.3

FCA draft text	Hiscox draft text
20.2 As regards Hiscox 1-4 "interruption" includes interference or disruption, not just a complete cessation of the insured's "business" or "activities". Whether there has been such an "interruption" is a matter of fact in each case.	17.2 As regards Hiscox 1 and 4 "interruption" includes interference or disruption, not just a complete cessation of the insured's "business" or "activities". Whether there has been such an "interruption" is a matter of fact in each case.
21.3 As regards Hiscox 1-4 "interruption" includes interference or disruption, not just a complete cessation of the insured's "business" or "activities". Whether there has been such an "interruption" is a matter of fact in each case.	18.3 As regards Hiscox 1 and 4 "interruption" includes interference or disruption, not just a complete cessation of the insured's "business" or "activities". Whether there has been such an "interruption" is a matter of fact in each case.

13. The Hiscox amendments record that the Court's conclusion as to the meaning of "interruption" only related to Hiscox 1 and 4 and not to Hiscox 2 and 3.

14. The Judgment says at §414 "…*in our judgment 'interruption' in the stem wording in Hiscox 1 and Hiscox 4 is to be interpreted as not being limited to complete cessation*…." There is no reference to Hiscox 2 and 3 (which had materially different wordings). Further, §274 of the Judgment says in the last sentence *"at least in the Hiscox 1 lead wording"*, does not refer to Hiscox 2 and 3, and incorporates the reasoning at §414. There is no reference in the Judgment to the Hiscox 2 or 3 in this context and the Court did not make any finding.

10. Paragraph 20.3

FCA draft text	Hiscox draft text
20.3 As regards Hiscox1-4, there will not be an "inability to use" the insured premises merely (i) because an insured cannot use all of the premises, and/or (ii) 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.	17.3 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 ~~(i)~~ because an insured cannot use all of the premises, ~~and/or~~ and equally there will not be an inability to use the insured premises ~~(ii)~~ 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.

15. Hiscox's proposed amendments ensure that the text more closely tracks the language of the Judgment at §268.

11. Paragraph 20.4(a)

FCA draft text	Hiscox draft text
20.4 As regards Hiscox 1-4 (hybrid): (a) The words "restrictions imposed" mean something mandatory that has the force of law, the only relevant such matters being those promulgated by statutory instrument, including Regulation 2 of the 21 March and Regulations 4, 5 and 6 of 26 March Regulations. Whether such restrictions caused an inability to use is a question of fact. Social Distancing and Related Action otherwise were and are not "restrictions imposed". Cases in which Regulation 6 would have caused an "inability to use" the	17.4 As regards Hiscox 1-4 (hybrid): (a) The words "restrictions imposed" mean something mandatory that has the force of law, the only relevant such matters being those promulgated by statutory instrument, ~~including~~ and in particular Regulation 2 of the 21 March and Regulations ~~4, 5 and 6~~ 4 and 5 of the 26 March Regulations. "Restrictions imposed" do not necessarily have to be directed to the insured or the insured's use of the premises and Regulation 6 is capable of being a "restriction imposed". ~~Whether such~~

insured's premises would be rare; whether there were such cases is a question of fact. (b) There is no requirement for a "restriction imposed" to be directed specifically at the insured or the insured's use of premises.	~~restrictions caused an inability to use is a question of fact.~~ Social Distancing and Related Action otherwise were and are not "restrictions imposed". Whether such restrictions caused an inability to use is a question of fact. Cases in which Regulation 6 would have caused an "inability to use" the insured's premises would be rare; whether there were such cases is a question of fact. ~~(b) There is no requirement for a "restriction imposed" to be directed specifically at the insured or the insured's use of premises.~~

16. Hiscox's proposed text runs together 19.4(a) and (b) of the FCA's draft. Hiscox considers that its proposed draft more closely tracks the language, logic and order of the Judgment, which first refers to refer Regulation 2 of the 21 March and Regulations and 4 and 5 of the 26 March Regulations (at §267 of the Judgment), and then addresses whether Regulation 6 can be a "restriction imposed" separately at §269 of the Judgment, where it is stated that the restrictions do not necessarily have to be directed at the insured or its premises.

12. Paragraph 20.4(b)

FCA draft text	Hiscox draft text
N/A- The FCA objects to the inclusion of this declaration altogether and so omits it	17.4 As regards Hiscox 1-4 (hybrid):… …(b) Insureds carrying on businesses in Category 3 and Category 5 did not suffer an "inability to use" their premises due to "restrictions imposed" within the meaning of Hiscox1-4.

17. The Court rejected the FCA's primary case that there was cover for all categories of business (i.e. 1 to 7) under the Hiscox1-4 hybrid clause from 16 March; this was because it concluded that "*restrictions imposed*" required something mandatory with the force of law (§266-7). The FCA's alternative case was that the requirements of the Hiscox 1-4 hybrid clause were only satisfied by businesses in Categories 1, 2, 4, 6 and 7 (see §254), not Categories 3 and 5.

18. Further, when considering various insurers' prevention of access clauses, the Court determined that Category 3 and Category 5 businesses (which were not subject to compulsory closure) were not unable to use (as opposed to being hindered in the use of) their premises due to restrictions imposed on them. In this respect see in particular see §333 and §335 (in relation to Arch), where in relation to both Category 3 and 5 businesses it was held that they were not required to close and that at most there was an impediment or hindrance of use (not an inability to use). In relation to Category 5 businesses, Regulation 6 was considered explicitly in §335, where it was held it and amounted at most to an impediment or hindrance of use; Regulation 6 was considered implicitly in §333 with the same result. In §433 (in relation to MS Amlin Prevention of Access), the Court reiterated that for Category 3 and 5 businesses Regulation 6 was no more than a hindrance in use. Further, it appears to Hiscox that the Court's reasons for concluding, in relation to Arch, that Category 5 businesses at most suffered an impediment or hindrance on the use of their premises necessarily entails accepting the submissions in Hiscox's skeleton in relation to its Hybrid clause to the effect that Category 5 businesses, such as accountants, were not unable to use their premises because of Regulation 6 and that *"no government measure prevented such businesses being carried on, if necessary from the insured premises*" (see §180 to 184 of the Hiscox skeleton **{I/13/58}**).

19. Yet further, in §415 in particular, the Court stated with regard to Hiscox's NDDA clause that *"So far as businesses were allowed to remain open (essential shops and businesses in Category 3) or about which the Regulations were silent (professional service businesses and manufacturing in Category 5), we agree with Mr Gaisman that there cannot be said that there was any denial or hindrance in access…At most there was a restriction on use of the offices because they could work from home, but since the Regulations were silent about businesses in Category 5, it cannot be said that any such restriction on use was imposed by or by order of the government."*

20. The Court's conclusions in these paragraphs therefore entail and justify the proposed declarations.

13. Paragraph 20.6

FCA draft text	Hiscox draft text
As regards Hiscox4 "restrictions imposed" "followed" an "occurrence" of COVID-19 within one mile of the insured's premises if they were both temporally posterior to that particular local "occurrence" and were a response to the outbreak of which that local occurrence formed part. The required link is between the "restrictions imposed" and COVID-19 after COVID-19 has occurred within one mile of the insured's premises; rather than between the "restrictions imposed" and the particular occurrences of COVID-19 within one mile of the insured's premises.	As regards Hiscox4 "restrictions imposed" "followed" an "occurrence" of COVID-19 within one mile of the insured's premises if they were both temporally posterior to that particular local "occurrence" and were a response to the outbreak of which that local occurrence formed part. ~~The required link is between the "restrictions imposed" and COVID-19 after COVID-19 has occurred within one mile of the insured's premises; rather than between the "restrictions imposed" and the particular occurrences of COVID-19 within one mile of the insured's premises.~~

21. Hiscox does not understand the intended meaning of sentence it proposes be struck through, nor can it identify the part of the Judgment on which it is based.

14. Paragraph 22

FCA draft text	Hiscox draft text
As regards Hiscox 1-4 (hybrid), subject to the terms of the policy, e.g. as to the definition of the indemnity period, an insured cannot claim in respect of loss sustained before the commencement or after the cessation of insured peril, and therefore the correct counterfactual can only assume that the insured peril applies from the time that the restrictions are imposed and only for as long as they are imposed	19. As regards Hiscox 1-4 (hybrid), subject to ~~the~~ any terms of the policy that an insured is able to demonstrate permit recovery after restrictions have ceased, e.g. as to the definition of the indemnity period, an insured cannot claim in respect of loss sustained before the commencement or after the cessation of insured peril, and ~~therefore~~ the correct counterfactual can only assume that the insured peril applies from the time that the restrictions are imposed and only for as long as they are imposed.

22. Hiscox's proposed amendments to the FCA's draft are intended to reflect the fact that:

a. The meaning and effect of any relevant terms that may affect the recoverable losses have not been determined (hence *"any terms…that an insured is able to demonstrate permit…"*); and

b. The indemnity period in the Hiscox policies very clearly commences upon the imposition of the relevant restrictions and so cannot on any view assist an insured in claiming any loss prior to then (See for example the Hiscox 1 Lead: "….*The period, in months, beginning at the date…when the restriction is imposed…"* **{B/6/40}**.