Appeal No. 2020/0179-0183

IN THE SUPREME COURT OF THE UNITED KINGDOM
ON APPEAL FROM 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:

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

Appellants

-and-

THE FINANCIAL CONDUCT AUTHORITY

Respondents

-and-

HISCOX ACTION GROUP

Intervener

Appeal No. 2020/0177-0178

AND BETWEEN:

THE FINANCIAL CONDUCT AUTHORITY

Appellant

-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

Respondents

-and-

HISCOX ACTION GROUP

Appellant/Intervener

WRITTEN CASE OF THE FOURTH RESPONDENT INSURER (HISCOX)

CONTENTS

INTRODUCTION

1. Hiscox's Respondent's Case addresses the appeals by the FCA and the Hiscox Action Group ("HAG").[1]

2. Four points arise, the third of which is minor:

   2.1. The meaning of "*restrictions imposed*" in the Public Authority clause ("the PA clause"): the FCA's and HAG's Ground 2 (the FCA terms it the "*Force of Law*" point);

   2.2. The meaning of "*inability to use*": the FCA's and HAG's Ground 3 (the FCA terms it the "*Total Closure*" point);

   2.3. The Non-Damage Denial of Access clause ("the NDDA clause") in relation to the FCA's and HAG's Grounds 2 and 3; and

   2.4. The Pre-Trigger Peril/Quantum point: the FCA's and HAG's Ground 1.

PRELIMINARY MATTERS

3. First, the FCA has brought a portmanteau case against various Insurers, and groups together the different insuring clauses of different Insurers for the purposes of aggregating arguments on coverage, which it claims apply equally to each. Nonetheless, Hiscox's position is distinct and needs to be decided solely by reference to its own wordings.

4. Secondly, HAG[2] makes various assertions by way of introduction about the nature of the insureds, the policies, and their context based on §4 of the FCA's Reply {**D/18/1589**}. There was no evidence below; in particular there was and is nothing to support the allegation that Hiscox insureds were generally unsophisticated. In any event, HAG expressly acknowledges that those insureds may have been assisted by insurance brokers. The brokers' duty as insurance professionals is to advise and protect the interests of the insured, and cancels out any asserted inequality of expertise. The meaning of the policies does not change depending on whether brokers were involved.

5. Moreover, HAG's point misunderstands the exercise of construction under English law. The Court does not adopt the "*unsophisticated*" perspective of one of the parties; the basic premise is that parties mean what they say, and the Court conducts an even-handed and if necessary

---

1 The Appellants' Cases are referred to as "FCA Appellant's Case" and "HAG Appellant's Case", respectively.

2 HAG Appellant's Case §7 {**B/3/80**}.

meticulous approach to the language. In this context, HAG's suggestion[3] that a contract should be construed in accordance with the meaning it would have to the reasonable person with the knowledge available to the addressee is incorrect. The Court construes a contract from the point of view of a reasonable person with the knowledge available to both parties and what that person would have understood it to mean.[4]

6. Thirdly, HAG suggests[5] that the policies should be comprehensible, clear and readily applicable in the real world. That is not controversial. But it is a fact of life that, even if there is clarity as to what the contract means, difficult questions of application will sometimes arise. That does not mean the policy is unclear, just that there are many and varied factual situations. These situations may arise irrespective of the nature of the insured or cover limits. Furthermore, quantification under business interruption ("BI") policies is notoriously a complicated matter, and is likewise so irrespective of the nature of the insured or the amount at stake: see Hiscox's Appellant's Case at §75 {**B/6/175**} but the point is also well made by the FCA in its Appellant's Case at §6 {**B/2/29-30**}, citing Mance et al, ***Insurance Disputes*** (3rd edn, 2011) {**E/48/1375**}: "…*The business interruption extension is concerned with intangibles and hypotheticals, namely the effect of damage on trading results which might have materialised over a future period*".

7. HAG further submits that these BI policies are not "*meant to require significant time and money to be spent on unduly complex and expensive coverage and quantification investigations every time a claim is made*"[6]. This inaccurate and tendentious submission is supposedly supported by a footnote; the authorities cited in that footnote are said to show that Courts "*avoided complexity or a narrow linguistic focus in construing insurance policies*",[7] but as the excerpts in the footnote themselves suggest,[8] the Courts in those cases simply applied ordinary principles of construction.

---

3 HAG Appellant's Case §31 {**B/3/87-88**}. The authority cited, ***Dairy Containers Ltd v. Tasman Orient CV (PC)*** [2005] 1 WLR 215 at §12 {**F/21/385**}, was a case concerning a negotiable bill of lading, the holder of which had played no part in the formation of the contract.

4 J§62 {**C/3/50**}.

5 HAG Appellant's Case §§7-8 {**B/3/80**}.

6 HAG Appellant's Case §8 {**B/3/80**}. Emphasis supplied; save where stated, all emphasis in this document is supplied, and by underlining.

7 ***De Souza v Home and Overseas Insurance Co. Ltd*** [1995] L.R.L.R. 453 {**F/22**}; ***Sargent v GRE (UK) Ltd*** [1997] P.I.Q.R. Q128 {**F/42**}.

8 HAG Appellant's Case footnote 8 {**B/3/80**}.

8. Fourthly, HAG[9] submits by reference to ***Equitas Insurance Ltd v Municipal Mutual Insurance***[10] that the Court's task is to consider what reasonable parties would have intended even in novel or unanticipated circumstances. The Court of course has to ascertain the parties' objective intentions at the time of contracting and apply them to the facts as they subsequently turn out to be. However, if there are rival contentions and it is relevant to that contest that reasonable parties are unlikely to have foreseen a particular event or type of event, it is legitimate to take that fact into account. Insurance contracts concern the agreed transfer of specified risks from insured to insurer. If a particular event or type of event was not foreseen or foreseeable, that is a legitimate factor to take into account in ascertaining whether the parties' objective intention was to transfer the risk of that event or type thereof. The BI insurance in Hiscox 1-4 is an adjunct to property cover. The FCA itself emphasises that these are covers "*attaching to premises*" by way of extensions to property cover.[11] In this context it might be thought particularly unlikely that a nationwide pandemic, and the government's admittedly[12] unprecedented response to it, was within the risks which the parties contemplated and therefore objectively intended to transfer.

9. There is no principle that the Court must strain contractual language to accommodate an eventuality that reasonable parties would not have foreseen. ***Equitas*** does not establish any such principle, nor does it provide any support for the use of hindsight. On the contrary, Leggatt LJ expressly referred[13] to the speech of Lord Neuberger in ***Marks and Spencer plc v BNP Paribas*** [14] where he cited[15] a statement by Sir Thomas Bingham M.R. in ***Philips Electronique v British Sky Broadcasting*** [16] as follows:

> "*The question of whether a term should be implied, and if so what, almost inevitably arises after a crisis has been reached in the performance of a contract. So the court comes to the task of implication with the benefit of hindsight, and it is tempting for the court then to fashion a term which will reflect the merits of the situation as they then appear. Tempting, but wrong.*"

---

9 HAG Appellant's Case §9 {**B/3/80-81**}.

10 [2020] QB 418 {**E/14**}.

11 §56 of the FCA's Page 5 information {**A/1/24**}.

12 FCA trial skeleton §31 {**D/20/1598**}.

13 §159 {**E/14/266**}. Leggatt LJ in fact referred to §23 of Lord Neuberger's speech, but must have had the cited passage, which appears at §19 {**G/67/1208-1209**}, in mind.

14 [2016] AC 742 {**G/67**}.

15 §19 of the judgment {**G/67/1208-1209**}.

16 [1995] EMLR 472 at 482 {**G/77/1556**}.

10. ***Equitas*** concerned the manner in which a contractual power to cede risks under a reinsurance contract was to be exercised, and a term was implied so as to ensure that it was not abused but exercised in good faith, in circumstances where the development of the exception in ***Fairchild v Glenhaven Funeral Services***[17] meant that it was "*impossible for the applicable contracts of reinsurance to work exactly as the parties intended and reasonably expected them to work*".[18] No such impossibility arises here.

11. Fifthly, HAG asserts[19] the following principle of construction: "*Where the Policy wording is capable of a broader or narrower construction, it is wrong to construe the wording and/or to read-in words so as to narrow the ambit of the clause.*" There is no such principle of law, and the authorities cited, ***AIG Europe Limited v OC320301***[20] and ***Shell v Lostock***,[21] do not begin to suggest that there is.

12. Lastly, HAG makes an allegation that is not open to it. It is not part of any appeal (although it is raised under HAG's Ground 1) and it is not necessary for this Court to decide the point, but the correct position needs to be stated. HAG suggests that the trends clause in Hiscox 1 is optional and does not apply if the insured's schedule does not show that business trends cover applies, and that this affects many members of HAG.[22] It relies on the sentence in the Hiscox 1 trends clause that states: "*Your schedule will show if Business trends cover applies and the additional percentage amount…*"[23] and implies that it is significant that the Court did not include those words when quoting the clause at J§246 {**C/3/106-7**}.[24] However, this very point was before the Court and was decided by the Court against the FCA and HAG, as explained in the following paragraph.

13. Whether the Hiscox 1 trends clause was optional was raised in the statements of case[25] and the FCA argued the point in its trial skeleton, where it quoted the sentence now highlighted by HAG, saying, as HAG seeks to do now, that it showed that the clause was "*optional*" and that

---

17 [2003] 1 AC 32 {**E/17**}.

18 See §158 of the judgment of Leggatt LJ at 474 {**E/14/266**}.

19 HAG Appellant's Case §10 {**B/3/81**}.

20 [2017] 1 WLR 1168 {**F/6**}.

21 [1976] 1 WLR 1187 {**F/44**}.

22 HAG Appellant's Case §16 {**B/3/83**}.

23 {**C/6/403**}. See also HAG Appellant's Case §4 {**B/3/79**} and footnotes 5 {**B/3/79**} and 16 {**B/3/83**}.

24 HAG Appellant's Case §16 {**B/3/83**} and footnotes 5 {**B/3/79**} and 16 {**B/3/83**}.

25 APOC §75.3 {**D/16/1586**} and Hiscox's Amended Defence §114.2 {**G/2/6**}.

"*if the clause is not taken up by the policyholder then no trends adjustment can take place at all.*"[26] Hiscox argued at trial that this was wrong.[27] At §J260 {**C/3/110**} the Court below recorded the FCA's argument that the trends clause was optional and dismissed that submission at J§277 {**C/3/114**}, holding that it could not "*be properly regarded as optional in any relevant sense*". The fact the Court did not quote the sentence identified by HAG is irrelevant; it had the clause firmly in mind and rejected the point HAG wrongly seeks to raise before this Court. Nothing more need be said about the point here.[28] It has been decided in favour of Hiscox[29] and there is no appeal in respect of it.

FCA and HAG Ground 2: "*restrictions imposed*"/force of law

14. So far as the PA Clause is concerned, the relevant phrase is "*restrictions imposed*". The question is simply whether "*restrictions imposed*" as a matter of language and in context refer to legally binding restrictions or something wider and, if so, what. It is particularly important that the Hiscox wordings are judged on their own merits because other wordings refer (more broadly) to authorities' "*actions or advice*".[30]

15. The typical form of the PA clause is as follows.[31]

> "***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****;*

---

26 FCA trial skeleton §§406-409 {**G/5/31-32**}, especially §408 {**G/5/32**}.

27 Hiscox trial skeleton §§408-414 {**G/8/67-68**}. §408 {**G/8/67**} sets out the sentence HAG now relies on.

28 Although HAG's conduct in relation to the consequentials hearing will also be relevant if this point is persisted in.

29 As reflected in Declaration 13, which provides "*The trends clauses contained in the business interruption sections of all the Wordings are applicable…*" (emphasis added) {**C/1/8**}.

30 E.g. The Arch GLAA extension J§308 {**C/3/121-122**}.

31 {**C/6/400-401**}.

d. defects in the drains or other sanitary arrangements;

e. vermin or pests at the ***insured premises****.*"

The decision of the Court below

16. The Court held (J§266 {**C/3/111**}) that "*restrictions imposed*" denoted legally binding restrictions:

> *"We begin with the issue of what is meant by "restrictions imposed" by a public authority. The issue has to be addressed by considering the words used and the context in which they are used. In our view, what these words mean is something which is mandatory, and they do not include something which is less than mandatory. This is the natural meaning of "imposed". Furthermore, these words are used in the context of a resulting inability on the part of the insured to use its own premises. That reinforces the conclusion that what is being referred to is something that has the force of law. Each of paragraphs (a) to (e) of the "public authorities" clause in – by way of example – Hiscox 1 is a case in which mandatory action can be taken by relevant authorities in respect of premises under identifiable legal or statutory powers, and the reference to "restrictions imposed" most naturally refers to the legally binding powers that can be exercised in relation to those situations."*

17. The consequence, the Court held (J§267 {**C/3/112**}), was that the only relevant matters as regards "*restrictions imposed*" were those promulgated by statutory instrument, in particular Regulation 2 of the 21 March Regulations and Regulations 4 and 5 of the 26 March Regulations. Guidance, exhortation, and advice given by the government and the Prime Minister, including as to social distancing, did not count as "*restrictions imposed*"; and decisions by people not to visit premises notwithstanding that they were permitted to do so would not have been caused by "*restrictions imposed*".

18. The Court's decision, which treats "*restrictions imposed*", "*mandatory*", and "*force of law*" as synonymous, and as not encompassing advice, guidance, instructions or exhortations that do not have to be complied with, was plainly correct for the reasons which it gave. It is not a difficult point.

The FCA's and HAG's cases

19. It is necessary to identify, although it is not straightforward to discern, the competing meanings contended for by the FCA and HAG.

20. First, both accept that "*restrictions imposed*" mean something "*mandatory*" and only something which is "*mandatory*" – which is what the Court held at J§266 {**C/3/111**}[32]. Thus:

> The FCA: "*The Court below erred…It should have found…that "restrictions imposed" can be satisfied by mandatory instructions or measures issued by a public authority*".[33]
>
> HAG: "*All these difficulties are avoided by taking the natural and ordinary meaning of the words as involving a mandatory instruction by a public authority…*".[34]

21. "Mandatory" is not a word much used by ordinary people to describe what they can and cannot do. They would more naturally think in terms of what is and what is not against the law. If they thought about the word "mandatory", they would understand it to mean the same as the Court did, i.e. something which has the force of law.

22. However, "mandatory" is not the word to be construed; it is a description of the effect of the words which are to be construed. The meaning of the word in any sense other than its usual meaning – having the force of law – is therefore irrelevant. Nonetheless the FCA and HAG fasten upon its use by the Court (in the ordinary sense) and seek to imbue the word with a different, and unsustainable meaning, in an attempt to get away from "*restrictions imposed*".

23. As regards the FCA, the position is this:

> "*The FCA accepts, as it did at trial, that the natural meaning of "imposed" involves something which the public authority requires or expects to be followed (i.e. something which is mandatory in character)…*".[35]

24. Thus, "*imposed*" does not mean something having the force of law but something which a public authority "*requires or expects*" to be followed, which is mandatory in character. In this way, the FCA moves from "*imposed*" to "*mandatory*".

25. How does one work out if something is "*mandatory*" in character, on the FCA's approach? It appears that it depends on how the relevant matter is expressed and specifically whether it

---

32 And at J§407 {**C/3/146-147**} in the context of the NDDA clause.

33 FCA Appellant's Case §74 {**B/2/55-56**}.

34 HAG Appellant's Case §38 {**B/3/90**}.

35 FCA Appellant's Case §65 {**B/2/53**}.

would have appeared to be "*mandatory*" to the reasonable impartial observer. So, in relation to the Prime Minister's announcements on 16, 18, 20 and 23 March it is said by the FCA:[36]

> "*As the reasonable impartial observer would have understood, and as the public understood at the time, the very purpose of those instructions, expressed in mandatory terms by the Prime Minister in solemn broadcasts…was to impose restrictions on businesses, their employees and members of the public…*".

26. Although the core test appears to be what is expressed in mandatory terms, various other features are relied on by the FCA which may or may not be part of the test, such as, in this instance, the fact that it was in a "*solemn*" broadcast; or, as another example, whether it is something that someone with an "*appropriate sense of social responsibility*" would comply with.[37]

27. As regards HAG, similarly the question of what are "*restrictions imposed*" and what is "*mandatory*" turns on the terms in which matters are expressed:

> "*A reasonable person would have understood the phrase "restrictions imposed" as encompassing situations in which instructions are given to the public by a public authority in mandatory terms*". [38]
>
> "*What matters is whether the measure is articulated in mandatory terms…*".[39]

28. If one asks, how is it to be judged whether the matters are expressed in mandatory terms, HAG gives a similar answer to that provided by the FCA:

> "*…it seems obvious that the objectively reasonable person listening to these announcements would understand the directions therein to be mandatory and an "imposition", in the sense that they were not given a choice as to whether or not to comply, thus amounting to "restrictions imposed".*"[40]

29. So, according to both the FCA and HAG, (i) whether or not something is "*mandatory*" and therefore a "*restriction imposed*" depends upon whether it is articulated in mandatory terms – meaning is it said in such a way that the relevant public authority requires or expects compliance – and (ii) whether or not it is in such mandatory terms depends on whether it would be so understood by the reasonable impartial observer or citizen.

---

36 FCA Appellant's Case §68 {**B/2/54**}.

37 FCA Appellant's Case §116 {**B/2/67**}.

38 HAG Appellant's Case §29 {**B/3/87**}.

39 HAG Appellant's Case §32 {**B/3/88**}.

40 HAG Appellant's Case §26 {**B/3/86**}, referring to the Prime Minister's announcements on 16, 20 and 23 March.

30. This meaning of "*restrictions imposed*" is, with respect, a remarkable suggestion. On the bases of (i) the natural meaning of the words and their context, (ii) certainty, (iii) a hindsight-free approach, and (iv) commercial sense, the Court's decision is clearly to be preferred. By contrast, the FCA's and HAG's cases stretch the words beyond any legitimate bounds, ignore the context, create great uncertainty, do not accord with commercial sense, and are nakedly hindsight-driven.

(i) Natural meaning and context of the words

31. The PA clause states that the "*restrictions*" (i) must cause the insured's inability to use its premises ("…*your inability to use the insured premises due to restrictions imposed*"), and (ii) be "*imposed*" by a public authority. Alone, either of these requirements would be sufficient to make it clear that the PA clause requires restrictions having the force of law.

32. Dealing first with "*inability*", an inability to do something means that it is impossible to do it. In order to be capable of causing an "*inability to use the premises*", any relevant restrictions imposed must have the force of law. Advice, requests, guidance, announcements, instructions, and any other non-legal statements are insufficient to create an inability. Such things might cause some insureds to decide not to use their premises, but they cannot render them unable to use them; they create no legal obstacle to the use of the premises. They therefore cannot give rise to an inability.

33. The FCA and HAG raise on appeal the question of whether "*inability to use*" must be total or partial, contending for the latter. That issue (dealt with below) does not affect the force of the present point. The result of the restrictions must still be an inability to use, not some lesser obstacle to use.

34. Turning secondly to "*imposed*" itself, the PA clause requires the restrictions to have been "*imposed*" by a public authority. The word "*imposed*" clearly refers to something with the force of law. It is not a word that can apply to guidance, advice, instructions or requests without the backing of law. "*Impose*" in any context clearly connotes the absence of choice and an element of compulsion. Dictionary definitions support Hiscox's case in this regard.[41] Its meaning here is to denote something legally compulsory.

---

[41] ***Cambridge English Dictionary***: "*to officially force a rule, tax, punishment, etc to be obeyed or received*"; "*to force someone to accept something, especially a belief or a way of living*" {**G/123/2340**}. See also the ***Oxford Dictionary of English*** (3rd ed): "*to* ***impose*** *verb 1 – force (an unwelcome decision or ruling) on someone: "the decision was theirs and was not* ***imposed on*** *them by others." – put (a restriction) in place: sanctions imposed on South Africa.*" "***imposition*** –

35. As part of this second point, the meaning of "*restrictions imposed*" given by the Court is reinforced by the fact that the imposer is a public authority, such authorities being capable (unlike natural persons, private legal entities or indeed governments *per se*[42]) of taking action with which businesses and individuals must legally comply.

36. Thirdly, and as a closely allied point, in its reasoning as to the meaning of "*restrictions imposed*", the Court relied (J§266 {**C/3/111**})[43] on the fact that each of the matters in sub-clauses a. to e. of the PA clause is something in relation to which mandatory action – with the force of law – can be taken by reference to the premises under identifiable legal and statutory powers, and that therefore the reference to "*restrictions imposed*" is most naturally a reference to those powers.

37. Those specific legal or statutory powers were identified by Hiscox in its written submissions below and are addressed in detail in its Appellant's Case at §112 {**B/6/184**}. This is powerful context for the interpretation of the clause, and the Court was clearly right to rely on it. These are the types of powers that the contracting parties would have had in mind and were the types of powers that were in fact exercised on 21 and 26 March 2020 (but not before). The owner of any business would know that premises affected by vermin or pests, food-poisoning, occurrence of notifiable disease, or bad drains would be likely to be subject to legally compulsory measures.

38. Fourthly,[44] the third paragraph of the preamble to each of the 21 and the 26 March Regulations themselves refers expressly to the restrictions and requirements imposed by the Regulations:

> *"The Secretary of State considers that the restrictions and requirements imposed by these Regulations are proportionate to what they seek to achieve, which is a public health response to that threat."*"[45]

39. The language in the preambles itself reflected the language of the parent Act of Parliament pursuant to which the 21 and 26 March Regulations were made, the Public Health (Control

---

noun – the action or process of imposing something or of being imposed: 'the imposition of martial law.'" {**G/125/2369**}. To like effect is the French word *impôts*, which means taxes.

42 That is a government acting other than pursuant to primary or secondary legislation.

43 Also in J§407 {**C/3/146-147**} in the context of the NDDA clause.

44 A point relied on by the Court in the context of the meaning of "*imposed*" in the context of the NDDA clause (J§407 {**C/3/146-147**}).

45 The preamble to the 21 March Regulations and the 26 March Regulations are at {**E/2/12**} and {**E/3/17**} respectively.

of Diseases) Act 1984, section 45C(3)(c) of which empowered the Secretary of State to make regulations "*imposing or enabling the imposition of restrictions or requirements on or in relation to persons, things or premises in the event of, or in response to, a threat to public health*…".[46]

40. These are two examples, apposite to the present case, of "*imposed*" being used in its natural and proper sense. It is not an accident that the Hiscox wordings echo them.

41. By way of answer to these points, all of which were made by Hiscox below, the FCA and HAG say very little.

42. It is not a promising start in pursuit of an argument that the Court gave the words the wrong meaning for HAG to concede that:

> "*in normal circumstances most restrictions imposed by a public authority will be imposed pursuant to some legal power*…";[47] and that
>
> "*it is of course possible for the word "restriction" to be understood as meaning a legal restriction, just as it is possible for an "imposition" to have "the force of law"*."[48]

43. As regards the meaning of the words "*restrictions imposed*", the FCA and HAG in fact appear to make one point, namely that there is significance in the fact that the words "*the force of law*" do not appear in the PA clause.[49] That is true, but at best begs the question and does not begin to answer the points made above. It is also the type of interpretation argument by reference to what is absent from the drafting that the Court of Appeal in ***Netherlands v Deutsche Bank AG***[50] held should be treated with caution and is likely to provide little assistance.[51] The FCA asserts that to read the clause as referring to restrictions with the force of law is to read a condition into the clause which it does not contain; that is incorrect, it is simply a question of ascertaining the meaning.[52] Moreover, the criticism appears hollow given that the FCA and HAG devote so much energy to the word "mandatory", which does not appear in the clause.

---

46 {**E/7/98**}.

47 HAG Appellant's Case §27 {**B/3/86**}.

48 HAG Appellant's Case §32 {**B/3/88**}.

49 HAG Appellant's Case §34 {**B/3/88**}; FCA Appellant's Case §74{**B/2/55-56**}.

50 [2019] EWCA Civ 771 at [59] {**G/71/1312**}.

51 See J§66 {**C/3/53**}.

52 Just as the FCA argues that "*inability to use*" on its true construction means inability in part as well as complete inability: FCA Appellant's Case §75 {**B/2/56**}.

44. The suggestion[53] that the Court's meaning is constrained and uncommercial and that the FCA and HAG's is the natural and ordinary meaning is bold. To read "*restrictions imposed*" as requiring the force of law is clear, follows the well-known distinction between what the law requires and what it does not, and is one everyone can readily understand. It is entirely natural and not at all surprising for this distinction to be reflected in the PA clause.[54]

45. The FCA's assertion[55] that matters are "*restrictions imposed*" if they are from outside the business, from an authority and are unwelcome[56] states what are at most necessary conditions, but not sufficient ones.

(ii) Certainty

46. Certainty is a further powerful reason for the PA Clause to be read as requiring "*restrictions imposed*" to have the force of law.

47. It is common ground, as acknowledged in §6 above, that the policies in this case should be clear and readily applicable in the real world. The test of what is permitted by law and what is forbidden by law is not only easily comprehensible; it is, as further developed below, something by which everyone has to regulate their daily existence.

48. It is a basic principle that no government statement, guidance or instruction however couched can legally restrict the freedom of any person or be regarded as imposed on them unless it is either part of legislation or made under powers authorised by legislation. That it is precisely why the 21 March and 26 March Regulations were made, so that non-binding statements would become binding. These propositions are obvious and fundamental. Hiscox rely in this respect on §17 of the Fifth Respondent's Case.

49. By contrast, the uncertainty introduced by their test is an insuperable problem for the FCA and HAG. That test depends upon the understanding of the "*reasonable impartial observer*" or "*citizen*".[57] The test advocated assumes that everyone would have understood matters from that unitary vantage point. But differing reasonable people have differing reasonable views

---

53 HAG Appellant's Case §29 {**B/3/87**}.

54 To the extent material this distinction is also reflected in the NDDA clause.

55 FCA Appellant's Case §69 {**B/2/54**}.

56 The criterion of "unwelcomeness" is far from self-evident: local authority mandatory closure and decontamination following a disease might be regarded as welcome.

57 FCA Appellant's Case §§68{**B/2/54**} and 116{**B/2/67**}; HAG Appellant's Case §§32-33 {**B/3/88**}.

and it is very likely that there will be a spectrum of opinions as to what is regarded as "*restrictions imposed*". It is inconceivable that the parties would have objectively agreed that the insured's right to an indemnity depended upon whether or not a panel of reasonable impartial citizens would regard an announcement as "*restrictions imposed*" in the sense that compliance was required or expected by the public authority. This is an unattractively Jacobin construction.

50. Further, on the tests proposed by the FCA and HAG, whether or not something is mandatory, and therefore whether or not it falls within "*restriction imposed*" turns on the <u>way</u> in which it is expressed, rather than the <u>nature</u> of the restriction. This means that if a particular word is used, it may fall one side of the line, whereas if it is not, it may fall the other. This is not a sensible basis for a distinction. Rights cannot depend upon the parsing of public utterances by ministers and an analysis of the particular modal verbs used. Take the word "must". That is often used in a hortatory way ("you must lose weight", "you must take care"). Deciding whether in any particular context it is imperative rather than hortatory would be impossible.

51. Both the FCA[58] and HAG[59] attempt to turn the certainty point on its head by arguing that to read "*restrictions imposed*" as referring to matters which are mandatory in the sense of having the force of law places an unrealistic and uncommercial onus on the policyholder to analyse the legal force of a public authority's instructions; and the policyholder would not in the real world conduct a constitutional/legal analysis. Thus, HAG submits,[60] one should just read the words as meaning "*mandatory instructions*", without the need to import "*additional and complex concepts*" about whether such instructions had the force of law.

52. This is a most surprising submission. The distinction between what is permitted and what is legally prohibited has to be made every day by people in all sorts of circumstances and in every walk of life, insured or uninsured. It is a fundamental and immanent feature of life in our democracy. If someone seeks to close a premises down, an insured is entitled to ask by what legal authority the person acts: *quo warranto*. Many people know and all are taken to know that statements by ministers do not have the force of law. The distinction sought to be blurred by the FCA and HAG is a basic principle, not an arcane point. There is, unsurprisingly,

---

58 FCA Appellant's Case §70{**B/2/54-55**}.

59 HAG Appellant's Case §39 {**B/3/90-91**}.

60 HAG Appellant's Case §38 {**B/3/90**}.

authority that people are expected to know the basic principles of law.[61] Indeed, the curiosity of the FCA's and HAG's construction is that it presupposes a misunderstanding of the true legal position.

53. The FCA submits[62] in this context that one of the advantages of living in a democracy is that governments rely on people's sense of social responsibility to comply with instructions in time of emergency. On the contrary, in a democracy governments legislate on matters they consider important and practicable, as they have done in the current emergency. Until they do so, people can do what they like. Not only is it tendentious to stigmatise as lacking in social responsibility the owner of a struggling café who maximises his income by staying open until forced to close, but the whole concept of social responsibility is unacceptably subjective.

54. As an important part of the uncertainty point, the width of the FCA' s case must be noted: the test is that which the public authority "*requires or expects*"[63] to be followed. Given the inclusion in particular of "*expects*", the FCA's case would potentially embrace all sorts of advice, guidance and requests. The FCA's pleaded case is that everything the government announced by way of guidance, exhortation, urging and instruction was mandatory.[64] The FCA below described the government's "*say-so*"[65] as sufficient (which included advice, what the government was "*asking*" people to do, what they "*should do*" and what it would "*no longer be supporting*") a case which in substance is unaltered here. In an echo of Orwell, one of the reasons given below for treating matters such as guidance as mandatory was that the appeal by the government to act voluntarily carried the threat that, if people did not, it would be forced to invoke the law.[66] The FCA also suggests, as noted above, that its case extends to embrace instructions which those with an "*appropriate sense of social responsibility*" would comply

---

61 "*The preponderance of authority is to the effect that the parties must be taken to know established principles of English law*": Lewison, ***The Interpretation of Contracts*** (6th ed), para 4.06 {**F/62/1327**}. See also ***Spencer v Secretary of State for Defence*** [2012] EWHC 120 (Ch); [2012] 2 All ER (Comm) 480, per Vos J at [73]: "*A reasonable person cannot be assumed to be in ignorance of clear and well known legal principles*", {**G/80/1633**} approved by Gloster LJ in ***First Abu Dhabi Bank PJSC v BP Oil International Limited*** [2018] EWCA Civ 14 at [37(iii)] {**G/54/584-585**}.

62 FCA Appellant's Case §70 {**B/2/54-55**}.

63 FCA Appellant's Case §65 {**B/2/53**}.

64 Reply §13.1 {**G/3/8-9**}.

65 FCA trial skeleton §§375-376 {**G/5/29-30**}.

66 Day 1, page 63. ll. 9-12 {**G/22/172**}.

with.[67] It also extends to a situation where an insured can anticipate that legislation may follow.[68]

55. One can demonstrate both the difficulty of the parsing exercise that is necessary on the FCA's and HAG's cases and the width of what is contended for by looking at one of the announcements relied on, that of the Prime Minister on 16 March. HAG[69] cites two phrases "*[now is the time for everyone to] stop non-essential contact with others and to stop all unnecessary travel*" (the square brackets add in words not cited) and should "*avoid pubs, clubs, theatres and other such social venues*". Those are presumably cited by HAG as high points for its case, but are far from obviously mandatory even at face value, and in the same paragraph the supposedly mandatory avoidance of social contact is referred to explicitly as "*advice*": "*Now, this advice about avoiding all unnecessary social contact is particularly important for people over 70*…".[70] Also, when dealing with the position of London, the need to stay at home and avoiding pubs and restaurant is explicitly referred to only as "*advice*": "*...it's important that Londoners pay special attention to what we are saying about avoiding non-essential contact, and to take particularly seriously the advice about working from home, and avoiding confined spaces such as pubs and restaurants.*"[71]

(iii) Hindsight

56. The clear meaning of the words cannot be manipulated just because, in unprecedented circumstances, the government may now be said to have influenced behaviour by making statements using language (sometimes) in imperative terms. The notion of a government ordering people what to do in a non-legal way is wholly unfamiliar and the concept of restrictions other than those backed by law is not one that would have been in contemplation at the time the contracts were entered into. To read the words so as to include them would be to re-write the parties' clear bargain on the basis of hindsight. This is not a permissible exercise.

---

67 FCA Appellant's Case §116 {**B/2/67**}.

68 FCA Appellant's Case §71 {**B/2/55**}.

69 HAG Appellant's Case §44 {**B/3/92**}.

70 Statement of Facts and Issues §24, page 5 {**B/1/5**}.

71 Statement of Facts and Issues §24, page 6 {**B/1/6**}.

(iv) Commercial sense

57. Under the guise of commercial reality, the FCA and HAG introduce various further arguments[72] to support their attempt to obscure the clear dividing line between that which is legally binding and that which is not.

58. The FCA submits that it is not realistic or commercial to treat statements by the Prime Minister instructing premises to close as other than "*restrictions imposed*".[73] This is mere assertion. The FCA is in substance complaining about a few days – that the policyholder is not covered from 16 March (but only from 21 or 26 March).[74] But there is nothing unrealistic or uncommercial about that.

59. Secondly, in this context the FCA[75] and HAG[76] fasten on the examples of a law which seems valid at the time but later proves to be *ultra vires*, or of a policeman acting apparently lawfully but in fact not. These anomalous cases cannot be taken to represent, or to have been present in their minds so as to have influenced, the reasonable parties' objective intentions at the time of contracting.

60. There are other telling anomalies in the FCA's and HAG's position. What of businesses not mentioned in the Prime Minister's 16 or 23 March announcements but subsequently subject of the 26 March Regulations? In his announcements on 16 and 23 March, the Prime Minister did not list every business that would be required to close and would be listed in what ultimately became Part 2 of Schedule 2; he just listed some in a non-exhaustive way, saying that "*we will immediately close…other premises including libraries, playgrounds, and outdoor gyms, and places of worship.*"[77] This omitted, for example nail, beauty, hair salons and barbers, car show rooms and auction houses which were included in Part 2 of Schedule 2 of the 26 March Regulations[78] and therefore required to close under Regulation 4. On the FCA's case it appears they would not be subject to a "*restriction imposed*" on 23 March. The question of insurance cover thus depends on which types of business the Prime Minister happened to mention.

---

72 FCA Appellant's Case §§66-72{**B/2/53-55**} and HAG Appellant's Case §§39-41 {**B/3/90-91**}.

73 FCA Appellant's Case §§66-68{**B/2/53-54**}.

74 FCA Appellant's Case §§67-68{**B/2/53-54**}.

75 FCA Appellant's Case §70 {**B/2/54-55**} and footnote 69{**B/2/51**}.

76 HAG Appellant's Case §§32-33 {**B/3/88**} and 40 {**B/3/91**}.

77 {**C/37/1842**}.

78 {**E/3/26-27**}.

61. Thirdly, a bad point is taken by both the FCA[79] and HAG[80] that guidance like the 2 metre "*rule*" has the "*indirect effect*" of creating legal obligations for an employer. At most, such advice and guidance would be relevant to consideration of whether other anterior legal obligations, whose creation and existence was not associated with or a response to COVID-19, had been discharged. Those other obligations are clearly not "*restrictions imposed*". The fact that such advice or guidance might be relevant does not alter the status of the advice or guidance; it does not thereby become "*restrictions imposed*".

62. Fourthly, the FCA[81] relies on the fact that, if its construction is not adopted, a socially responsible policyholder who closes in reliance on guidance will not be covered. This is said to demonstrate that the Court's construction is unrealistic and uncommercial and,[82] a point which HAG[83] makes too, will "*penalis[e]*" the prudent insured.

63. A policyholder who closes in reliance on advice, guidance or instructions is not being penalised. It is simply that the PA clause does not insure against voluntary closure. The submission relies on an unknown principle of construction and is replete with hindsight. Further, there is sound commercial reason why the parties decided that indemnity should depend upon whether or not restrictions were legally binding; it is because at that point the insured has no choice but to comply. The FCA inadvertently expresses the point well, albeit in its pre-trigger peril point: "*a customer may have had the choice to attend or stay away prior to the restriction being imposed, and may even have probably stayed away, but the restriction removes that choice and makes the staying away definite, which is why it was imposed. Insofar as the restriction requires closure, it similarly removes from the business owner the choice as to whether to close or remain open.*"[84]

64. It follows that the effects of people voluntarily staying away from businesses cannot be covered. As regards Regulation 6, on Hiscox's Appeal (Ground 8) it argues that the Regulation is not engaged at all. But even if Hiscox is wrong about that, Category 3 businesses[85] were expressly permitted to stay open, and importantly, Regulation 6(2)(a)[86] expressly permitted

---

79 FCA Appellant's Case §70 {**B/2/54-55**}.

80 HAG Appellant's Case §41 {**B/3/91**} footnote 35 {**B/3/91**}.

81 FCA Appellant's Case §§71 and 72 {**B/2/55**}.

82 FCA Appellant's Case §§71 and 72 {**B/2/55**}.

83 HAG Appellant's Case §41 {**B/3/91**}.

84 FCA Appellant's Case §30 {**B/2/39**}.

85 Those identified in Part 3 of Schedule 2 to the 26 March Regulations {**E/3/27-28**}.

86 {**E/3/20**}.

people to visit them. There is a symmetry between that exception and those businesses in Category 3. If people chose not to visit them, that cannot have been a result of restrictions imposed. Even so, many Category 3 businesses have brought claims.

Other HAG points

65. HAG seeks to make further points by reference to other provisions of the Hiscox policies.

66. The first point[87] is that, as "*following*" imports a looser causal connection between the occurrence of disease and the restrictions than proximate cause, this impacts the meaning of "*restrictions imposed*". It is said to weaken in an unspecified way the Court's reliance on sub-clauses a. to e. of the PA clause as matters in relation to which public authorities can exercise mandatory powers. This is not understood: a. to e. are the only matters which can give rise to the relevant restrictions; furthermore, the effect of the restrictions must be to cause an inability to use. In the NDDA clause the denial is itself imposed by or by order of the public authority; in the PA clause restrictions are imposed which result in inability to use; but this is a distinction without a difference.

67. The second point is that the NDDA clause refers to a denial of or hindrance in access to the premises being imposed "*by any civil or statutory authority or by order of the government or any public authority*."[88] The use of "*by order of*", it is claimed, more naturally refers to a mechanism with the force of law. It cannot seriously be suggested that the meaning of "*imposed*" is different in the NDDA clause depending on whether one is looking at "*by any civil or statutory authority*" or "*by order of the government or any public authority*". There is an overlap between "*any civil or statutory authority*" and "*any public authority*", and a "*civil or statutory authority*" plainly has power to impose restrictions by law. It also is highly implausible that "*imposed*" is used in a different sense in the NDDA clause to the PA clause. Moreover, the presumption against surplusage is not strong in insurance contracts.[89]

---

87 HAG Appellant's Case §36 {**B/3/89**}.

88 HAG Appellant's Case §37.1 {**B/3/90**}. This point is also made by the FCA in the context of the NDDA clause: FCA Appellant's Case §123 {**B/2/68**}.

89 ***Flying Colours Film Company v Assicurazioni Generali*** [1993] 2 Lloyd's Rep 184, per Staughton LJ at 192 rhc {**G/89/1828**}.

68. Lastly, HAG makes reference to the bomb threat[90] clause dealing with "*restrictions imposed*" by the armed forces or police[91] for which it is conceded that a statutory or other legal basis may be found, but it is said that the exercise of looking for such basis is unreal, when the PA clause simply refers naturally (according to HAG) to "*mandatory instructions*". In the context of a clause which concerns explosive devices, there is nothing unreal about a clause allowing for the possibility of a lawful denial of access by the armed forces, nor is it difficult or unreal to identify a statutory basis for such action.[92] If anything, the bomb threat clause supports Hiscox's position that the words "*restrictions imposed*" refer to restrictions with the force of law.

Ground 3: The meaning of "*inability to use*"

69. This Ground of Appeal concerns the correct interpretation of the words "*inability to use*" in the PA clause in Hiscox 1-4.

The decision of the Court below

> "*We turn then to the phrase "inability to use". In our view this plainly does not embrace any and every impairment of normal use. "Unable to use" means something significantly different from "hindered in using" or similar. Furthermore, the phrase is used in a context which includes the various sub-clauses (a) to (e) (in Hiscox 1), in each of which situations restrictions amounting to a complete inability to use the premises for the purposes of the business (albeit typically for a limited time) are readily foreseeable. We agree with Hiscox that there will not be an "inability to use" premises merely because the insured cannot use all of them; and equally there will not be an "inability to use" premises by reason of any and every departure from their normal use. Hiscox accepted, however, in our view correctly, that partial use might be sufficiently nugatory or vestigial as to amount to an "inability to use" the premises. Whether that was so would depend on the facts of a particular case.*"[93]

---

90 HAG Appellant's Case §37.2 {**B/3/90**}.

91 Which is in any event in only 18 of the 41 Hiscox wordings considered at trial.

92 Pursuant to s.20 {**G/33/227-228**} and s.22(3) {**G/33/229-230**} of the Civil Contingencies Act 2004 emergency regulations can be made by a senior Minister of the Crown when an emergency has occurred or is about to occur to (among other things) "*…(e) require, or enable the requirement of, movement to or from a specified place…(l) enable the Defence Council to authorise the deployment of Her Majesty's armed forces; (m) make provision (which may include conferring powers in relation to property) for facilitating any deployment of Her Majesty's armed forces.*" Further, s.22(3)(i) {**G/33/229**} provides that emergency regulations may "*create an offence of-- … (ii) failing to comply with a direction or order given or made under the regulations; (iii) obstructing a person in the performance of a function under or by virtue of the regulations*". Emergency is defined so as to include "*an event or situation which threatens serious damage to human welfare*" (Section 19(1)(a) {**G/33/226**}) and "*terrorism which threatens serious damage to the security of the United Kingdom*" (Section 19(1)(c) {**G/33/226**}). The Hiscox policies expressly state that the terrorism exclusion does not apply to the bomb threat clause {**C/6/403**}.

93 J§268 {**C/3/112**}.

70. The FCA attempts to criticise this passage as less than clear.[94] There is nothing in that criticism. Since the question is in each case one of fact, it was not realistically possible for the Court to express itself in more precise terms. The Court later summarised its decision thus:

> "*As we have said, "inability to use" premises means what it says and is not to be equated with hindrance or disruption to normal use.*"[95]

71. The Court's adoption of Hiscox's case that, while partial inability to use was not covered, partial use might in a given case be so vestigial or nugatory as to amount to no use, means that in a particular case ability to use may be so minimal that, practically speaking, there is inability to use. Hiscox does not contend and did not contend that every last square inch of a premises must be unusable, in order for the criterion to be satisfied.

<u>The case advanced by the FCA and HAG</u>

72. The FCA asserts that the Court's interpretation was "*unrealistically narrow*"[96] and "*uncommercial*".[97] HAG essentially makes the same point.[98] Between them, the FCA and HAG say that the simple words "*inability to use the* ***insured premises***" in the PA clause in Hiscox 1-4 in fact mean (variously) "…*inability to use the premises for the purposes of its business*…";[99] "…*an inability to use the insured premises for the ordinary purposes of its business*…";[100] "*unable to use [the] premises for ordinary business purposes to a material extent*";[101] "*inability to utilise or employ the premises for its intended aim or purpose. This encompasses the inability to use the premises as they are normally used, i.e. for the insured's normal business activities*";[102] "*material inability to use the premises for the insured's*

---

94 FCA Appellant's Case §64.2 {**B/2/53**}.

95 J§270 {**C/3/112**}.

96 FCA Appellant's Case §76 {**B/2/56**}.

97 FCA Appellant's Case §81 {**B/2/58**}.

98 HAG refers to "*the Court's overly restrictive understanding*" (HAG Appellant's Case §50.3 {**B/3/95**}) and to any construction other than its own as being "*at odds with…business common sense*" (HAG Appellant's Case §49 {**B/3/94**}).

99 FCA Appellant's Case §75 {**B/2/56**}.

100 FCA Appellant's Case §82, l. 2 {**B/2/58-59**}.

101 FCA Appellant's Case §82, l. 9 {**B/2/58-59**}.

102 HAG Appellant's Case §46, l. 1 {**B/3/92-93**}.

normal business activities, which could be partial or total…";[103] or that "*inability to use*" is satisfied by "*any and every departure from their normal use*".[104]

73. Underlying all of these different formulations, the very number of which tends to undermine the suggestion that any one of them is correct, is the argument that partial inability to use is *ipso facto* covered.[105]

74. The FCA and HAG argue that the Court erred because it:

    74.1. Departed from the natural meaning of the words "*inability to use*";[106]

    74.2. Failed to take into account what are said to be inconsistencies between the Court's interpretation of "*inability to use*" and (i) the purpose of the cover; and (ii) other provisions in the Hiscox wordings;

    74.3. Wrongly took into account matters that were not supportive of its interpretation;[107] and

    74.4. Failed to have regard for the fact that its interpretation would produce "*uncommercial results*"[108] and "*render cover illusory*".[109]

75. In addition, both the FCA and HAG say that the Court was wrong to conclude (as it did at J§270 {**C/3/112**}) that it would be a "*rare*" case where there would be an inability to use premises by reason of Regulation 6.[110]

76. The criticisms of the Judgment are unjustified. The Court's interpretation of the words "*inability to use*" was in keeping with their natural meaning and the context. In this respect, the Court was quite correct to rely on the point that it was readily foreseeable that each of the

---

103 HAG Appellant's Case §48, l. 1 {**B/3/93-94**}.

104 HAG Appellant's Case §45 {**B/3/92**}, where it is said that the Court below was wrong to conclude that there would not be "*an "inability to use" premises…by reason of "any and every departure from their normal use".*"

105 FCA Appellant's Case §75{**B/2/56**}; HAG Appellant's Case §§47-48 {**B/3/93**}.

106 FCA Appellant's Case §76 {**B/2/56**}: "*On its natural meaning it is a broad, flexible phrase…There is no basis for the Court's narrow reading in the language of the clause itself…*". See also HAG Appellant's Case §50 {**B/3/95**}.

107 FCA Appellant's Case §80 {**B/2/57-58**}; HAG Appellant's Case §50.3 {**B/3/95**}.

108 FCA Appellant's Case §81 {**B/2/58**}; HAG Appellant's Case §51.2 {**B/3/96**}.

109 HAG Appellant's Case §51 {**B/3/95-96**}.

110 FCA Appellant's Case §§83-84 {**B/2/59**}; HAG Appellant's Case §§54-55 {**B/3/97**}.

situations in sub-clauses a. to e. of the PA clause could result in a complete inability to use the premises, albeit typically for a limited time.[111]

77. Here too one must beware hindsight. The FCA and HAG are driven to over-elaborate arguments in order to attempt to fit into the clause situations which the parties would not have contemplated when agreeing this clause: the notion of premises being closed indefinitely, and in fact for months, sufficient for insureds to consider turning to an adapted use, would simply not have been within the contracting parties' consideration.

78. None of the three other reasons set out in §74.2-74.4 above, support a departure from that meaning in favour of the interpretations advocated by the FCA and HAG.

Natural meaning of the words and the context of the clause

79. As the assortment of attempted definitions cited in §72 above illustrates, the arguments supporting the appeals in respect of these words both complicate and distort the clear and simple requirement of "*inability to use the insured premises*".

80. The PA clause does not refer to "increased difficulty in use" nor to inability in "whole or part"[112] or "material" inability, let alone to "any use that is not normal". In the absence of these qualifications, the words "*inability to use*" are clear and are not ambiguous. They pose a simple, binary question: can the insured use its premises for its business activities or not? Further, the words "*inability to use*" do not require emphatic but tautologous adjectives such as "*total*" or "*complete*", and accordingly the presence or absence of such an adjective in the PA clause cannot sensibly be said to alter the words' meaning.

81. Inability connotes the opposite of "able to use". It is therefore an inherently absolute term: "I am unable to use my premises…" does not mean or embrace an ability to use half; or to use them on some days but not others. It is unqualified. Inability is not a "*flexible*"[113] term and it does not denote any "*extent*" to which someone is unable to do something:[114] it means one cannot do it at all.

---

111 J§268 {**C/3/112**}.

112 See by way of contrast, the RSA1 'hybrid' clause quoted at J§285 {**C/3/116**}, which expressly provides cover in respect of loss as a result of "*C) closing of the whole or part of the* ***Premises*** *by order of the Public Authority for the area in which the* ***Premises*** *are situate as a result of defects in the drains…*" {**C/15/1129**}.

113 HAG Appellant's Case §47 {**B/3/93**}.

114 HAG Appellant's Case §50.2 {**B/3/95**}.

82. The FCA's contention that words "*inability to use the* ***insured premises***" mean "*an inability to use the insured premises for the ordinary purposes of its business…to a material extent"* and cover "*partial inability to use the premises*",[115] is thus wrong. There are in Hiscox's submission three main flaws with that position, each fatal.

82.1. First, inserting words such as *"material extent*" and "*partial"* introduces a qualification or gloss that mixes intermediate terms ("*material*" or "*partial*") with an absolute ("*inability*"). The effect is that the words used are not given their natural meaning.

82.2. Secondly, inserting the above or similar words extends the width of the clause unacceptably. On the FCA's and HAG's approach, the loss of use of a small part of the premises would satisfy the test. "*Material*" in particular, which on at least one formulation both the FCA and HAG adopt, is very wide. As a demonstration of this width, the FCA's case[116] is that unless a business was wholly takeaway, online, or mail order before a business was ordered to close, there was an inability to use within the meaning of the PA clause.

82.3. Allied to the problem of width is a serious issue of uncertainty. As opposed to a simple test of inability to use, what is proffered are vague and uncertain criteria: "*material*", "*normal*" or "*ordinary*". These would be very difficult to apply in practice.

83. There is a further point, already touched on in §76 above and relied upon by the Court. The situations covered in sub-clauses a. to e are ones in which it is likely that there will be a complete inability to use the premises, although probably not for long. One simply has to consider their nature – murder or suicide, an occurrence of a notifiable disease, food-poisoning, defects in drains, and vermin or pests, and to consider the points made in Hiscox's Appellant's Case at §112 {**B/6/184-185**} about the mandatory powers which are enforceable in consequence of such matters. These contemplate a closure by an environmental health officer or by magistrates, or a cordoning off by police. They are situations in which there will be a total inability to use the premises. These obvious paradigms reinforce the meaning which the words "*inability to use*" would have on their own.

115 FCA Appellant's Case §§82 {**B/2/58-59**} and 84 {**B/2/59**}.

116 APOC §47.2 **{G/1/3}**.

84. The FCA[117] accepts that such matters may lead to a complete inability to use the premises, and HAG impliedly does so[118], but suggests on the basis of no evidence and no reasoning that inability to use in the other sub-clauses will "*often*" fall short of making the entire premises unusable. The improbable example is given of the main dining room of a restaurant but not the small bar annexed to it being affected by a leaking drain. It may be that in some cases there would not be a total inability to use the premises as a result of one of the matters in a. to e. The point is that the paradigm case, and the one the parties would have in mind, is one where the inability would affect the whole of the premises.

85. Indeed, as Butcher J observed at trial in the course of Hiscox's submissions, one can readily see why insurers would only offer a policy that provided cover in the event of an inability to use premises.[119] Unless such a clear requirement was imposed, the ambit of cover being granted by an insurer would be uncertain and potentially very broad indeed.

Supposed inconsistencies with the purpose of the cover and other aspects of the Hiscox wordings

86. The FCA and HAG suggest that the Court's and Hiscox's construction of the PA clause is inconsistent with various other clauses in the Hiscox wordings.

87. The FCA also argues that there is an inconsistency between the Court's decision and the commercial purpose of the cover which, it says, is not 'catastrophe' cover requiring complete closure of the premises and preclusion of any revenue generation.[120] This point is in reality based upon the supposed effect of certain other clauses and is a bad one; those clauses on analysis (conducted in §§89-96 below) clearly do not militate against the Court's construction of "*inability to use*".[121] But in any event, the Court's construction does not mischaracterise the policy as 'catastrophe' cover. Complete "*inability to use*" premises would, following the events encompassed within sub-clauses a. to e., ordinarily (and without hindsight knowledge of the pandemic) be measured in days.

---

117 FCA Appellant's Case §80.2 {**B/2/58**}: "…*the matters referred to in the other sub-clauses of the hybrid clause may lead to complete inability to use premises, that is not necessarily so*".

118 HAG Appellant's Case §50.3 {**B/3/95**}, where the point is impliedly conceded.

119 Hiscox's oral submissions, Day 5, page 128, l. 18 to page 129, l. 2 {**G/26/198-199**}.

120 FCA Appellant's Case §76 {**B/2/56**}.

121 FCA Appellant's Case §§76 and 77 {**B/2/56**}.

88. Moreover, the PA clause is one of a number of distinct special covers branching off the stem, that cover a wide range of circumstances. Some covers, e.g. financial losses due to insured damage,[122] respond in the event of matters of varying degrees of seriousness. But there is nothing surprising about a special cover containing its own particular requirements that will in practice lead to a cessation if and when it is triggered, even if that is not the case for other special covers; a good example of this is the bomb threat clause,[123] which requires a total inability to access the premises.

89. Turning to supposed inconsistencies based on other clauses, first it is argued that the Court's construction of the requirement for an "*inability to use*" in the PA clause was inconsistent with its own conclusion that the word "*interruption*" in the stem extended to "*interference and disruption, not just complete cessation*".[124] Hiscox's primary position is that "*interruption*" in the stem does require a cessation or alternatively something which has the effect that any continuing activities are nugatory (that is Ground 7 of its appeal).[125] If either of its arguments in that regard are accepted, this point is no longer available to the FCA and HAG in any event.

90. Even if, however, a wide construction of "*interruption*" is upheld, that would not assist the FCA and HAG in their attempt to expand the natural meaning of "*inability to use*". The Court has held (J§274 {**C/3/113-114**}) that "*interruption*" includes interference and disruption, not that it excludes a situation in which there has been cessation.

91. Secondly, it is suggested that various clauses in the Hiscox policies relating to the basis and calculation of the indemnity payable and the insured's obligation to take reasonable steps to minimise loss are only consistent with a business continuing at least in part, and therefore inconsistent with the Court's construction of "*inability to use*". Reliance is placed on:

    91.1. The definition of "*Loss of income*";[126]

    91.2. The availability of increased cost of working cover;[127]

---

122 Clause 1 on {**C/6/400**}.

123 Clause 4 on {**C/6/400**}.

124 J§274 {**C/3/113-114**}.

125 §§164-184 of Hiscox's Appellant's Case {**B/6/198-203**}.

126 FCA Appellant's Case §77 {**B/2/56**}. An example of this provision is the definition of "*Loss of income*" in Hiscox 1 at {**C/6/403**}.

127 FCA Appellant's Case §77 {**B/2/56**}; HAG Appellant's Case §§46 {**B/3/92**} and 49.3-49.4 {**B/3/94**}.

91.3. The existence of claims conditions requiring an insured to take steps to minimise loss;[128]

91.4. The fact that[129] an element of the rate of gross profit calculation used where an insured has loss of gross profit cover includes "*rent*" as an uninsured working expense, which is defined as the "*[r]ent: 1. for the insured **premises** that you mut legally pay while the **insured premises** or any part of it is unusable as a result of **insured damage, insured failure**, or restriction…*".[130]

92. Nothing in these provisions undermines the Court's interpretation of "*inability to use*". They are entirely neutral. Before dealing with these clauses individually, it is to be noted that the general point made in §88 above is applicable to the first three: namely that they are general provisions which apply to all covers under the stem, and that those covers respond to perils with varying degrees of impact.

93. The "*Loss of income*" definition is as follows: "*The difference between **your** actual income during the **indemnity period** and the **income** it is estimated you would have earned during that period.*" First, the clause does not assume that any level of "*actual income*" above zero will be earned during the "***indemnity period***" and so is not inconsistent with a total inability to use the premises. Secondly, the FCA's suggestion overlooks the term "***indemnity period***" which is defined as the "*period in months beginning at…the date the restriction is imposed, and lasting for the period during which **your income** is affected as a result of such…restriction…*".[131] Thus, there can in principle be a shortfall of income during the indemnity period, even if there is no income during the closure, and there is no inconsistency with Hiscox's case.

94. As to the increased cost of working cover, this is defined as: "*the costs and expenses necessarily and reasonably incurred by you for the sole purpose of minimising the reduction in **income** from your activities during the **indemnity period**, but not exceeding the reduction in income saved.*"[132] Both the FCA[133]

---

128 These are relied on in HAG Appellant's Case at §§49.2 and 49.3 {**B/3/94**}. Examples of the conditions are: clause 2, one of the claims conditions {**C/6/378**}; similarly, the "*Reasonable Precautions*" clause which applies before the insured peril arises; clause 5 {**C/6/377**}.

129 FCA Appellant's Case §77 {**B/2/56**}.

130 {**C/6/382**}.

131 Special definitions in the business interruption section of Hiscox 1 at {**C/6/399**}.

132 {**C/6/399**}.

133 FCA Appellant's Case §77 {**B/2/56**}.

and HAG[134] contend that this cover presupposes continuation of trading. That is plainly wrong. It provides cover in respect of costs and expenses incurred to minimise the reduction in income during the indemnity period; the second point made in §93 above is repeated. So there is no such presupposition and the cover is not inconsistent with Hiscox's case. Further, it is not difficult to envisage circumstances where an insured would be able to recover increased cost of working even while being unable to use its premises. If, for example, an insured was unable to use its restaurant premises to host a dinner because of restrictions imposed following a murder close to the premises, it would be able to recover the costs of hiring temporary premises or providing catering at the customer's home.

95. Similarly, the obligation, as part of the claims conditions, to take steps to minimise loss[135] might oblige an insured to take reasonable steps to ensure a business re-opened as soon as reasonable, but has no bearing on the meaning of "*inability to use*". Again, there is no inconsistency.

96. The attempt to rely upon the reference to *"or any part of"* the insured premises being unusable in the definition of "***rent***" as being inconsistent with near complete "*inability to use*" is obviously an incorrect point. The clause includes reference to "*insured damage*" and "*insured failure*",[136] both of which refer to other perils that could result in partial inability to use. The draftsman obviously included the reference to "*any part…*" because of the inclusion of those perils, rather than have more cumbersome drafting dealing with each of the three matters (insured damage, insured failure and restriction) separately. This detailed quantification provision, lying buried in a definition, could in any event hardly be a useful guide to the meaning of "*inability to use*".

---

134 HAG Appellant's Case §49.3 {**B/3/94**}.

135 Clause 2, one of the claims conditions {**C/6/378**}; similarly the "*Reasonable Precautions*" clause which applies before the insured peril arises; Clause 5 {**C/6/377**}.

136 Both "*insured damage*" and "*insured failure*" are the triggers for special covers other than the PA clause: e.g. as regards "*insured damage*", financial losses from insured damage cover, clause 1 on {**C/6/400**}, and as regards "*insured failure*", equipment breakdown cover clause 15 on {**C/6/401**}.

97. Thirdly, both the FCA[137] and HAG[138] have fastened onto the phrase "*your <u>total</u> inability to access*"[139] in the bomb threat clause,[140] even though the clause is absent from 23 of the 41 Hiscox wordings that were before the Court.[141] The points made in this regard go nowhere. As set out above, in the absence of any adjective such as "partial", the natural meaning of inability is "total" inability. Further, pointing to small differences between clauses in a wording which may well have had different clauses added to it at different times is unlikely to be a fruitful exercise. Nonetheless, if necessary, the use of "*total*" in this clause is readily explicable. Another clause in the same wordings refers to "*denial of or <u>hindrance in</u> access*".[142] The emphatic addition of the word "*total*" therefore, while strictly unnecessary, objectively reflects the parties' desire to make clear that only if there was no access at all would the clause bite in the case of a bomb threat. This is emphasised by the use of "*total access*" in the last line of the clause.

98. Fourthly, the FCA says[143] that the Court failed to attach appropriate significance to the reference in the stem to "***your activities***".[144] It suggests that the word "*activities*", defined as "*Your activities declared to us and accepted by us, or the business activities stated on the schedule*",[145] indicates an intention that "*inability to use*" ought to be considered by reference to the different activities conducted at the insured premises separately (it gives as an example dine-in and takeaway activities), and emphasises that the focus is on the "*functional impact on the insured rather than on the mere physical usability of the premises*".

99. However, the stem in the majority of the Hiscox wordings[146] does not refer to "***your activities***", but rather to "***your business***", which is defined as "*Your business or profession as*

---

137 FCA Appellant's Case §76 {**B/2/56**}.

138 HAG Appellant's Case §50.1 {**B/3/95**}, footnote 49 {**B/3/95**}.

139 Only the words "*total inability*" are quoted in FCA Appellant's Case §76 {**B/2/56**}.

140 Clause 4 on {**C/6/400**}. It appears in all the Hiscox 1 wordings and some Hiscox 2, Hiscox 3 and Hiscox 4 wordings.

141 The clause is in the all nine of the Hiscox 1 wordings, but only in six (out of 23) Hiscox 2 wordings, one (out of five) Hiscox 3 wordings and two (out of four) Hiscox 4 wordings.

142 The NDDA Clause.

143 FCA Appellant's Case §79 {**B/2/57**}.

144 For example, Hiscox 1: "…*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*…" {**C/6/400**}.

145 For example at {**C/6/380**}.

146 In 20 of the 23 Hiscox 2 policies, four of the five Hiscox 3 policies and all the four Hiscox 4 policies, the defined term "***your business***" is used in place of the defined term "***your activities***". Thus, "*activities*" appears in fewer than half of the 41 Hiscox wordings.

shown in the schedule".[147] It is, therefore, unsafe to seek to draw some general conclusion about the meaning of "*inability to use*" which appears beneath both terms. Further, again, assuming that Hiscox's appeal on the meaning of "*interruption*" is not upheld, the fact that the stem and other special covers may envisage an event causing a disruption of some activities but not all of an insured's activities does not mean that it is inconsistent for the PA clause, which is focused on the premises, to require inability to use those premises for any business purposes, as opposed to an inability to use them for normal business purposes. The fact that this means there is no cover where, say, takeaway can continue but dine-in cannot does not "*fl[y] in the face of reality*" as the FCA suggests. It is simply a reflection of the requirement of an inability to use the premises.[148]

100. As to the suggestion that the word "*activities*" emphasises the functional impact, the FCA is wrong to suggest that the Court focused on the "*mere physical usability of the premises*". It was Hiscox's submission at trial, correctly accepted by the Court, that there had to be "*some (most likely) legal obstacle which makes it impossible for the insured to use the premises for its business activities…The factual question which arises is simply: can the insured use its premises for its business activities or not?*"[149]

Supposedly irrelevant or unsupportive matters

101. The FCA also suggests that the Court was "*misled by the matters it did take into account*".[150] It is said that it was wrong for the Court to contrast "*inability to use*" with mere "*hindrance in using*", the FCA criticising the drawing of such a contrast as an "*irrelevant distraction*"[151]. This is with respect bizarre. It is entirely orthodox for judges to contrast the meaning of contractual words with other expressions. It is not as if the word "*hindrance*" is recondite or unfamiliar: it is to be found in the Hiscox NDDA clause. What the Court was doing here was to provide the

147 Hiscox 2 Lead wording property definitions at {**C/7/415**}.

148 As to the FCA's attempt to make good its criticism of the Court's decision as unreal by reference to the hypothetical case of two insureds using the same premises (see FCA Appellant's Case §79 {**B/2/57**}), this does not help it either. On its example, one insured would not be able to use its premises (the restaurant) but the other would (the takeaway). That is, again, a reflection of the cover and the particular restrictions that have been imposed.

149 Hiscox trial skeleton at §158 {**D/21/1614**} and also §178 {**G/8/56-57**}: "*The relevant inability to use must be of the insured and prevent the fulfilment of the insured's business purposes. Thus, a restaurateur living above his restaurant who cooks himself an omelette is obviously not using the insured premises in that sense, and no Insurer contends that he was, or that the omelette prevents him showing "inability to use".*"

150 FCA Appellant's Case §80 {**B/2/57**}.

151 FCA Appellant's Case §80.1 {**B/2/57-58**}.

very guidance that both the parties and those interested in the test case desired.[152] Moreover, making clear that the words did not equate to "*hindrance or disruption to normal use*" was essential because of HAG's submission (still pursued before this Court) that inability to use meant "*the inability to use the insured premises normally*"[153] and the FCA's similar contention that there was "*an inability to use [the insured premises] if it cannot be used in the manner in which it would normally be used for the business' intended aim or purpose*."[154] The Court needed to make clear that these submissions were rejected.

Supposedly "*uncommercial*" results

102. The FCA and HAG assert that the Court's straightforward construction of the words "*inability to use*" would produce "*uncommercial results*"[155] or a "*manifestly uncommercial and unrealistic result*"[156] and "*render cover illusory*".[157] There is nothing in these mere assertions.

103. In support of this argument, the FCA and HAG raise various examples of businesses that may have a number of different activities and revenue streams: a bookshop that can maintain part of its business by receiving telephone orders,[158] a restaurant that can continue to use its kitchen for delivery services,[159] a shop that normally sells goods from its premises but now provides a delivery service.[160] It is said that the Court's construction would lead to such insureds not being covered; this, it is said, undermines the commercial purpose of the Hiscox policies.[161]

104. This line of argument, however, assumes what it seeks to prove, namely that circumstances where an insured is able to use its premises in a way that is not vestigial or nugatory ought to be covered.

---

152 Framework Agreement, Recital I {**D/15/1552**} and Clause 1.4 {**D/15/1553-1554**}.

153 HAG trial skeleton §§31(2) {**G/9/72**}, 125, {**G/9/91-92**} 126 {**G/9/92**} and 131 {**G/9/93**}.

154 Leading Counsel for the FCA, Day 8, page 146 ll. 13-16 {**G/29/217**}.

155 FCA Appellant's Case §81 {**B/2/58**}; see also the introductory text to Annex 1 of HAG Appellant's Case {**B/3/99**}.

156 HAG Appellant's Case §51.2 {**B/3/96**}.

157 HAG Appellant's Case §51 {**B/3/95-96**} and the introductory text in Annex 1 {**B/3/99**}.

158 FCA Appellant's Case §81 {**B/2/58**}.

159 FCA Appellant's Case §81 {**B/2/58**}. Takeaway, too, presumably though this is not mentioned.

160 HAG Appellant's Case footnote 41 {**B/3/93**}.

161 FCA Appellant's Case §76 {**B/2/56**}.

105. Identifying limitations in the cover provided by the PA clause in the particular circumstances of the 21 March and the 26 March Regulations does not help to show that the Court's construction was uncommercial. It merely illustrates the extent to which insurer and insured agreed to transfer risk. Especially when viewed without hindsight, there is nothing inherently uncommercial or unrealistic about a clause dealing with circumstances where complete inability to use by reason of the imposition of public authority restrictions is readily foreseeable requiring such an inability (including sufficiently vestigial or nugatory use) as a condition of cover.

106. HAG argues that the Court's construction would produce "*anomalous distinctions between different types of business, with no obvious principled basis: cover will turn on the type of business being insured, which is arbitrary in circumstances where the insured peril is the same.*"[162] But it is self-evident that the same peril may affect different types of insured differently because of the variety of businesses and the different ways in which businesses may be conducted. The "*obvious principled basis*" for distinguishing between those who are covered and those who are not remains the same: "*inability to use*".

107. As to the suggestion that the outcome is hard on insureds who adapt their businesses, this does not advance the FCA and HAG's arguments. It is important to keep in mind, as the Court clearly did, that the paradigm situation covered by the PA clause will be an impact on the business where it is unable to use its premises, typically for a limited time (a few days whilst the evidence is gathered by the police or the premises decontaminated or the drains repaired). The unprecedented events of 2020, in which businesses are closed for months, should not influence the construction of the clause or the meaning of "*inability to use*". The possibility of businesses adapting themselves after weeks of closure simply would not have been in contemplation. In any event, adapting to unforeseen events with or without insurance cover is a fact of business life, and many businesses have done so very successfully. Moreover, if an insured adapts after a period of being unable to use its premises, it will be able to claim for both the period of inability to use and the increased cost of working within the indemnity period.[163] As to §49.4 {**B/3/94**} of its Appellant's Case, it is HAG, not Hiscox which has missed the point: it assumes that any adaptation will always be seamless and not follow a period of inability to use premises.

---

162 HAG Appellant's Case §52 {**B/3/96**}.

163 I.e. their "*income is [still] affected as a result of*" the relevant public authority restriction {**C/6/399**}.

108. The interpretations advocated by the FCA and HAG mean there would be an "*inability to use*" in the most unlikely of circumstances. This can be demonstrated by the example of Category 3 businesses in Wales (and the example would apply in England if the FCA succeeded on its appeal as to the meaning of "*restrictions imposed*"). The 2 metre distance guidance became the subject of an obligation as regards businesses in Wales permitted to stay open (food retailers, pharmacies etc.), with those businesses obliged to take reasonable measures to maintain a distance of 2 metres between persons on the premises and persons waiting to enter them.[164] On the FCA's and HAG's case, such businesses would be unable to use their premises, because they could not use those premises "*normally*" or carry on a "*material*" part of their activities. However, to say that these businesses suffered from an "*inability to use*" their premises would be a clear misuse of language. A shop that has customers queuing both before and during opening hours, often spending large amounts so as to stock up with essentials, is clearly able to use its premises.

Regulation 6[165]

109. In addition to criticising the Court's interpretation of "inability to use", both the FCA and HAG object to the Court stating that:

> "…*Given the exceptions to Regulation 6, which include the general exception of "reasonable excuse" and the specifically enumerated exceptions including travel for the purposes of work where it was not reasonably possible for the person to work from home, and given the possibility (and reality) that businesses could operate or come to operate by contacting customers at home, it appears to us that the cases in which Regulation 6 would have caused an "inability to use" premises would be rare.*"[166]

110. The FCA says that this passage shows the Court wrongly took into account the possibility of insureds mitigating loss by "*working from home/contacting customers at home*" which, the FCA says, was irrelevant to whether there was an inability to use premises.[167] HAG similarly says that

---

164 Regulation 6 (1) and (2) and Schedule 1 Part 4 of the Health Protection (Coronavirus Restrictions) Wales Regulations 2020 {**G/40/308**} and {**G/40/310**}.

165 It should be noted that it is not the effect of the Court's finding that a business subject to Regulation 2 of the 21 March Regulations or Regulations 4 and 5 of the 26 March Regulations *ipso facto* suffers an inability to use. It is a question of fact and both Regulations identify potential areas of permitted use.

166 J§270 {**C/3/112**}. HAG wrongly says at §55 of its Appellant's Case {**B/3/97**} that it was necessary to have "*one of the very narrow "reasonable excuses" as stipulated in Regulation 6(2).*" In fact, as the Court rightly stated here, there was a general "*reasonable excuse*" exception and specific instances were identified as being included within that general exception.

167 FCA Appellant's Case §83 {**B/2/59**}.

this passage of the judgment "*erroneously elides the "use" of the premises with the different concept of generating profit and/or conducting business operations.*"[168]

111. The Court did not make such an elementary error. Rather, it was recognising that even if a business "*relied on physical presence of customers*"[169], it could nonetheless use those premises for the purposes of contacting those customers at their home. In this regard, at trial Hiscox gave the example of a tailoring business making clothes on the premises to be delivered to customers, or the cake-maker baking cakes to be delivered. Similar examples that further prove the point are provided by worked examples in HAG's own Appellant's Case, such as the Pilates and Yoga studio live-streaming from its studio, the marketing agency whose employees could still use its specialised print room, and a retail business that ran a delivery service.[170] In each case the insured, in the Court's words, "*could operate or come to operate by contacting customers at home*". HAG's examples, far from suggesting the Court was wrong to say that it would be a rare case where Regulation 6 created an inability to use insured premises, in fact support the Court's conclusion. This might explain why in its Appellant's Case, HAG's points with regard to Regulation 6 (at §§54 and 55) are expressly dependent upon the Court accepting what HAG says is the "*proper construction of inability to use*".[171]

112. Finally, the FCA argues that Regulation 6 could cause an "*inability to use*" even for Category 5 businesses such as a solicitors or an accountancy practice, but this is said to be because they are "*unable to use their premises for ordinary business purposes to a material extent.*"[172] The point is thus founded on an incorrect reading of "*inability to use*". Nonetheless, "*inability to use*" raises a question of fact; there might be inability to use for a Category 5 business on a correct interpretation of that phrase, but it would be a rare case. The point is an important one because, as the Court recorded, it is estimated that about 65% of the policies affected by this case are in Category 5.[173]

113. The critical point in relation to Category 5 businesses is that (even if Hiscox does not succeed in Ground 8 of its appeal and persuade this Court that Regulation 6 is in principle irrelevant

---

168 HAG Appellant's Case §55 {**B/3/97**}.

169 J§270 {**C/3/112**}.

170 Examples 2, 4, and 5 in Annex 1 of the HAG Appellant's Case {**B/3/99-100**}.

171 HAG Appellant's Case §54 {**B/3/97**}: "*In the light of the proper construction of "inability to use" as set out above, the Court was wrong to hold that "the cases in which Regulation 6 would have caused an "inability to use" premises would be rare.*"

172 FCA Appellant's Case §82 {**B/2/58**}.

173 J§243 {**C/3/105**}.

as regards inability to use), there was no general inability to use. Not only were such businesses not ordered to close, but the premises could be used, and work done for customers there, if it was not reasonably possible to do work from home. The FCA failed to grapple with this at trial and still fails to address the position of Category 5 businesses adequately. Both it and HAG focus instead upon restaurants, cafés and the like in respect of which specific restrictions were imposed. The position of Category 3 businesses is *a fortiori*; they were expressly permitted to remain open.

114. The effect of the general and specific exceptions to Regulation 6 means that if an accountant needed to read an important file in his office, which he could not remove from the office for reasons of security, he was permitted to go to his business premises for that purpose, and to spend the day reading through the file. Myriad other examples might be given in relation to professional persons, such as a solicitor who has a large set of physical files in her office which she needs to read, and cannot accommodate at home, or a barrister who attends chambers to appear before the Supreme Court because he has inadequate internet or videoconferencing facilities at home. There is a further general point: the technology needed for people to work from home – telephone systems, servers etc. may be based at and used from the premises and will need to be serviced and maintained by staff there.

115. The FCA's and HAG's position also risks obscuring a further important general point. Those providing professional services have continued to provide their services or carry on businesses, albeit placing more reliance on technology (email, phone, Zoom, Skype, etc.) to assist them in doing so. These services may not have been provided in the manner that would have been considered usual (or "*normal*") in 2019, but they have nonetheless carried on. Conducting business in these ways has become normal. Further, to the extent necessary, they are allowed to use their premises to do so.

Grounds 2 and 3 in relation to the Hiscox NDDA clause

116. Hiscox is puzzled by the FCA's[174] inclusion of the Hiscox NDDA[175] clause in Grounds 2 and 3.

174 Cf. HAG, which relied solely on the PA Clause at trial: see J§398 {**C/3/144-145**}.

175 Which appears in Hiscox 1 wordings and some of the Hiscox 2 and Hiscox 4 wordings.

117. The NDDA clause provides cover where "*an incident occurring…within a one mile radius of the insured premises…results in a denial of access or hindrance in access to the insured premises, imposed by any civil or statutory authority or by order of the government or any public authority.*"[176] The Court below rightly concluded that the clause did not provide cover because neither the COVID-19 pandemic nor the presence of a person within the radius of the insured premises with COVID-19 was an "*incident*" as required by the NDDA clause, and also because the causal link required by "*results in*" was not satisfied: the cause of government restrictions was the national pandemic which was not an "*incident*", and even if the presence of a person within the radius could be described as an "*incident*", any such localised incident was not the cause of the restrictions.[177]

118. The FCA has accepted the Court's decision on the meaning of "*incident*" in the NDDA clause and on causation,[178] and its appeal as to the meaning of "*imposed*" (Ground 2) and "*denial*" of access (Ground 3) in the NDDA clause is therefore academic. Moreover, the meaning of the word "*denial*" is doubly academic. The NDDA clause provides cover not only in respect of a "*denial*" of access, but also in respect of a "*hindrance*" in access, and Hiscox has naturally not appealed the Court's *obiter* conclusions that (i) a business required to close by either the 21 or 26 March Regulations sustained a denial of access, and that (ii) where those regulations only allowed people to access premises for limited purposes, such as to run a takeaway, there was a hindrance in access.[179] Thus, whether something short of total closure amounts to a "*denial*" of access in the NDDA is of no significance.

119. If necessary, Hiscox repeats *mutatis mutandis* its submissions in relation to the terms "*restrictions imposed*" and "*inability to use*" in the PA clause, and makes the following points:

    119.1. The fact that the NDDA clause also refers to "*by order of the Government or any public authority*" does not indicate that "*imposed*" is a *"broader additional gateway"*.[180] This point is dealt with in §67 above.

---

176 Two of the five Hiscox 2 policies have an NDDA clause that states "*within the vicinity*" instead of "*within a one mile radius*" (and also only refer to the denial or hindrance in access being imposed by "*the police or other statutory authority*") as follows: "*An incident during the period of insurance within the vicinity of the business premises which results in a denial of or hindrance in access to the business premises imposed by the police or other statutory authority.*" For example {**C/21/1554**}.

177 J§§404-407 {**C/3/146**} and 417-418 {**C/3/149**}; Declarations Order §§18.1, 18.2 and 18.6 {**C/1/13-15**}.

178 FCA Appellant's Case §121 {**B/2/68**}.

179 J§414 {**C/3/148**}.

180 FCA Appellant's Case §123 {**B/2/68**}.

119.2. With regard to "*denial of or hindrance in access*", the Court was undoubtedly correct to hold (J§415) {**C/3/149**} that Category 3 and Category 5 businesses were never subject to a denial of or hindrance in access by reason of any restriction or order imposed on them because: (i) Category 3 businesses were expressly allowed to remain open by the 26 March Regulations, which also allowed people to leave their homes in order to visit such businesses;[181] (ii) the 26 March Regulations were silent about Category 5 businesses and <u>at most</u> Regulation 6 could be said to have amounted to a <u>restriction on use</u>[182] (as opposed to access), it being a misuse of language to say that someone who could and did work from home was denied or hindered in their access to their offices.

<u>Ground 1: The Pre-Trigger Peril/Quantum point</u>

120. The main submissions on behalf of Insurers on this point are advanced by the First Respondent, Arch Insurance UK Limited ("Arch") and Hiscox accordingly only makes limited submissions in the particular context of its wordings.

121. Hiscox argues Ground 1 (and it is raised and argued by the FCA and HAG) on the logically necessary assumption that the Court was correct in relation to the counterfactual, something which Hiscox challenges on its own appeal (its own Grounds of Appeal 1 to 4). If the Court was incorrect, Ground 1 falls away.

<u>Alleged inconsistency with the Court's finding in relation to the counterfactual</u>

122. The FCA and HAG argue[183] that the Court's treatment of the pre-inception downwards trend is inconsistent with its conclusion and reasoning in relation to the counterfactual. It is not; the treatment is perfectly logical for the reasons given by Arch and below.

123. Looking at this point in the Hiscox context, the Court reasoned as regards the counterfactual that once the peril is triggered, one takes out all of the elements of the PA clause, in particular (i) inability to use due to (ii) restrictions imposed following (iii) the occurrence of a notifiable disease, because what the insured has protected itself against is "*the fortuity of being in a situation in which all those elements are present*" (J§278) {**C/3/114**}. Hiscox on its appeal argues that this

---

181 Reg.6(2)(a) {**E/3/20**}.

182 Not, be it noted, an <u>inability</u> to use.

183 FCA Appellant's Case especially §§24-27 {**B/2/37-38**}; HAG Appellant's Case §14 {**B/3/82**}.

formulation ("*all those elements are present*") ignores the necessary causal combination, but that is irrelevant for current purposes.

124. A further reason for the Court's conclusion was that the elements are inextricably linked and that it would be impossible to separate their effects (J§§279-282) {**C/3/115**}. Again, this conclusion and the reasoning is challenged by Hiscox on its appeal. For current purposes, one assumes it is correct.

125. It does not follow at all from the Court's reasoning on the counterfactual that one should ignore a prior downwards trend.

126. First, such a trend occurred when not all of the insured elements were present. That – a situation in which not all the elements were present (and acting in causal combination) – was not the fortuity against which the insured had protected itself. The trend is an uninsured effect. It should not, therefore, be removed from the counterfactual or disregarded as a trend, because it is not, at that point, part of the insured peril.[184]

127. Secondly, §33 of the FCA Appellant's Case relies on the inextricability found by the Court as between the post-trigger effects of (i) the disease and (ii) the other elements in the peril. This alleged inextricability is addressed in Hiscox's Appellant's Case.[185]

128. However, on no possible view does any difficulty of extrication apply pre-trigger. There is at that stage nothing to extricate or to separate from the insured peril, because it had not occurred, and only COVID-19 and its impact short of "*restrictions imposed*" etc. had occurred. Any prior downturn is clearly not due to the insured peril and can be taken into account in order to calculate the starting level of income for the period of the operation of the insured peril.

129. There is therefore no inconsistency as suggested by the FCA or HAG. There is, however, an illogicality in the other direction in the Court's reasoning, which is relevant to Insurers' counterfactual appeal. Losses caused by COVID-19, which are not due to restrictions imposed and the other elements of the insured peril, are not the subject of the indemnity because they are not consequences of the insured peril. It is common ground that such losses

---

184 ***Orient-Express*** supports the proposition that something which is not part of the insured peril should not be disregarded as a trend at §57: "*The assumption required to be made under the Trends clause is "had the Damage not occurred"; not "had the Damage and whatever event caused the Damage not occurred*"" {**E/31/931**}.

185 §§18-19, 66-76 and 82-89 {**B/6/161-162**}, {**B/6/172-176**}, {**B/6/177-179**}.

are not recoverable before the inception of the insured peril for that very reason: they have not been caused by the insured peril. They are uninsured effects of COVID-19.

130. When the insured peril is triggered, however, the nature of the indemnity does not magically change. The insured and uninsured perils and consequences remain the same. There is no more reason for indemnifying the insured in respect of the uninsured consequences of COVID-19 after the insured peril begins to operate than there is in the period before it.[186] (The inextricability point relied on by the Court is wrong for reasons advanced elsewhere.[187])

Thirteenth Chime

131. The FCA explains[188] the Court's decision on the counterfactual in these terms:

> "…*the Court's findings necessarily mean that for the post-trigger period the parties intended that the insured recover for losses that would have occurred even without the public authority restrictions*." (Double underlining is Hiscox's emphasis)

132. If one pauses to consider that statement, in the context of the Hiscox PA clause, it is remarkable. The FCA contends that the insured recovers under a public authority clause losses which would have occurred even without the public authority restrictions. How can that be right? Hiscox's promise was to hold the insureds harmless against loss caused by public authority restrictions of certain types. Now, those public authority restrictions are said to be inessential to the breach of the insurer's promise to hold harmless; the breach occurs even without them. The contract therefore is no longer a contract of indemnity: it has become something else. The FCA is driven to argue the correctness of this proposition to support its position on the pre-inception downturn, but the argument in fact reveals the fallacy in the counterfactual as found by the Court and advocated by the FCA.

Specific alleged incoherence in the Judgment below

133. The FCA argues[189] that the relevant Declarations[190] are incoherent in stating that the downturn (i) has to be "*measurable*" and (ii) can only be used to reduce revenue to "*no more than the level at which it had previously occurred*". These elements of the Declarations were stipulated

---

186 The FCA contends otherwise, and in doing so is forced to advance what, at least in the context of the PA Clause, is a highly ambitious submission: see §§131-132 below.

187 See footnote 185 above.

188 FCA Appellant's Case §29 {**B/2/39**}.

189 FCA Appellant's Case §§26 and 27 {**B/2/38**}.

190 Declarations 11.4(c) and 11.4(d), respectively {**C/1/7-8**}.

for by the FCA itself. This can be seen from the FCA's suggested Order in this respect, as put before the Court below for the consequentials hearing.[191]

134. Furthermore, if one accepts that the Court was correct in its conclusion that one needs to strip all the impact of COVID-19 out of the counterfactual once the insured peril is triggered, these stipulations are logical. First, and obviously, in order to be taken into account as a trend something must be measurable. Secondly, if one is taking out the whole of the impact of COVID-19 once the insured peril bites, it would be wrong to include any further downwards continuation of the trend. One can take into account that income has dropped by, say 30%, before the insured peril is triggered, but if one could show that it would subsequently have dropped further, say by another 20%, that would be to cut across the conclusion that the entire impact of COVID-19 is removed once the insured peril operates.

Supposed failure of Court to distinguish between a pre-inception downturn and an indemnity for pre-inception loss

135. The Court did not make the basic error attributed to it by the FCA and HAG[192] of confusing a pre-inception downward trend with a direct indemnity for pre-trigger loss. Hiscox refers to Arch's Respondent's Case at §13. The FCA and HAG[193] rely upon the second sentence of J§351 which reads in full:

> "*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.*"

136. If a 10% pre-inception downturn is ignored, then once the insured peril occurs, the effect is that the 10% loss or downturn, which is a given and is uninsured, is recovered in relation to the period of operation of the insured peril. That is all the Court was (correctly) saying, as the emphasised words make clear. It was obviously not suggesting that, once the insured peril occurred, the insured somehow recovered the 10% loss for the period before inception. Nor

---

191 §§11.3(d) and (e) of the draft Order {**G/124/2347-2348**}. See also transcript of the consequentials hearing, page 47, l. 10 to page 49, l. 3 {**D/33/1652-1653**}.

192 FCA Appellant's Case §§31-32 {**B/2/39-40**}; HAG Appellant's Case §§19-21 {**B/3/84**}.

193 FCA Appellant's Case §31 {**B/2/39**}; HAG Appellant's Case §20 {**B/3/84**}.

can the Court be criticised for using the word "*losses*": the FCA itself, in its skeleton below, dealt with this point under the heading "*Pre-Trigger Losses*".[194]

The relevant Hiscox clauses

137. The Court's conclusion that a pre-inception downwards trend must be taken into account in assessing income during the indemnity period is supported by the relevant Hiscox clauses.

138. As the FCA notes,[195] the Hiscox 1-4 loss of income clauses[196] do not refer to the equivalent period in the prior year and require one to ascertain the difference between "***your*** *actual* ***income*** *during the* ***indemnity period*** *and the income it is estimated* ***you*** *would have earned during that period, or if this is* ***your*** *first trading year, the difference between* ***your income*** *during the* ***indemnity period*** *and during the period immediately prior to the loss…*"[197]. This provision on its own, without consideration of the indemnity period clause, requires a pre-trigger downward trend to be taken into account, because the estimated income referred to is clearly what would have been earned but for the insured peril. This is reinforced by the fact that if the insured is in the first year of trading, one is required to look at income during the period immediately prior to the loss as the comparator.

139. The indemnity period clause puts this beyond any doubt. The indemnity period is "*the period, in months, beginning at the date when…the restriction is imposed, and lasting for the period during which* ***your income*** *is affected as a result of such…restriction*."[198] Assuming as the Court held (J§276) {**C/3/144**} that restriction is shorthand for the insured peril, this clearly means the effect of a downwards trend prior to the insured peril can and must be taken into account, because effects cannot precede causes. The indemnity period clause requires one only to look at effects of the restriction and a prior downwards trend due to COVID-19 is, by definition, not such an effect.

---

194 FCA trial skeleton §267 {**G/138/2387**}.

195 FCA Appellant's Case §39 {**B/2/42-43**}, footnote 26 {**B/2/37**}.

196 {**C/6/403**}.

197 The loss of gross profit basis of cover, which is not mentioned by the FCA, is not referable to a previous period either. It applies to any reduction in income during the indemnity period (as well as giving increased costs of working and alternative hire costs cover) {**C/6/403**}. The rate of gross profit {**C/6/400**} which is mentioned by the FCA at footnote 35 of its Appellant's Case is relevant to this cover, not the loss of income cover. However, the same points which are made by Hiscox in relation to the loss of income cover apply equally to the loss of gross profit basis of cover, particularly because it is concerned with reduction in income during the indemnity period.

198 {**C/6/399**}.

140. The trends clauses are expressly to the same effect. All trends clauses contain words materially the same as "*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, 249, 251 and 253 {**C/3/106-109**}.[199]

141. These clauses therefore allow and indeed require a pre-trigger downturn to be taken into account. As implicitly recognised by both the FCA and HAG, it would be sufficient if just the trends clauses required it.[200]

New World Harbourview

142. This case is given extended treatment by the FCA in its Appellant's Case at §§48-52 {**B/2/46-48**}. However, it is of very limited relevance.

143. As the FCA submits, the pre-trigger downturn point was not argued in that case.[201] This was recognised below by the FCA in its written[202] and oral submissions "*That demonstrates…they didn't actually argue whether you should then adjust those figures to take out the disease, because if I had been arguing that case that would have been my submission*"[203]. No Insurer suggested the case had dealt with this point, or sought to rely on the case to rebut this point.

144. It is unlikely that, as the FCA and HAG[204] contend, the Court below failed to fully appreciate or misunderstood the case; especially as the Court correctly recorded at J§349 {**C/3/132**} what the FCA terms[205] the "*central holding*" in the case, namely that any loss occurring before the insured peril is not covered. This is not a complicated concept. In any event the Court did not rely upon the case in reaching its conclusion on this point: J§§350-351 {**C/3/133**}.

Authorities relied upon by HAG

145. Brief reference should be made to authorities relied on by HAG in §17 of its Appellant's Case {**B/3/83**}. HAG submits that the suggestion that an insurer can, through the operation of a trends clause, adjust downwards for the effect of (an element of) the insured peril is absent

---

199 The Court held (J§§275-276) {**C/3/114**} that, to the extent such clauses did not refer expressly to restrictions, they needed to be manipulated.

200 FCA Appellant's Case §40{**B/2/43**}; HAG Appellant's Case §§15-17{**B/3/83**}.

201 FCA Appellant's Case §51{**B/2/47-48**}.

202 FCA trial skeleton §§312-313 {**G/5/27**}.

203 Day 2, page 122, ll. 11-24 {**G/23/178**}.

204 FCA Appellant's Case §50{**B/2/47**}; HAG Appellant's Case §22{**B/3/84-85**}.

205 FCA Appellant's Case §48{**B/2/46**}.

from case law and contrary to accepted understanding. The two cases cited[206] take the matter no further, as they were cases where the insured peril was fire. The textbook[207] cited in support of this supposed understanding is also referring to a simple damage case; in any event, the passage cited does not support the existence of any understanding, but states simply that the trends clause seeks to accommodate influences which would have occurred but for the incident itself (where the incident is the insured peril, namely damage or destruction of property).[208]

Hiscox's statement at the consequentials hearing

146. The FCA[209] seeks to rely on a supposed "*concession*" in Hiscox's skeleton argument for the consequentials hearing on 2 October 2020 in relation to the announcement of the 21 and 26 March Regulations on 20 and 23 March respectively. There was no concession. Hiscox simply confirmed as a matter of fact the approach that it has taken and will continue to take when adjusting any valid claims:

> "*(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.*"[210]

147. This statement makes two things clear. First, there is no cover for an insured who closed voluntarily prior to the coming into force of the 21 March and the 26 March Regulations for the period of that voluntary closure.[211] Secondly that Hiscox has not treated and will not treat a voluntary closure following the announcement of those regulations as representative of a

---

206 ***Polikoff Ltd v North British and Mercantile Insurance Co Ltd*** [1936] 55 Lloyd's Rep 279 {**F/38**}; ***Sugar Hut Group Ltd v AJ Insurance*** [2014] EWHC 3352 (Comm) {**F/46**}.

207 ***Riley on Business Interruption*** (10th edn, 2016) at §§3.26 and 3.28 {**E/50/1396**} and {**E/50/1397**}.

208 See the definition of "*incident*" at ***Riley*** §3.4 {**E/50/1380**}.

209 FCA Appellant's Case footnote 28{**B/2/40**}, §§35{**B/2/41**} and 71{**B/2/55**}. Hiscox's position is inaccurately recorded in all of these.

210 {**G/16/149**}.

211 Given the clarity of this statement, there is no justification for the FCA's reliance on "*Hiscox's concession*" to support its argument that "*restrictions imposed*" refer to some earlier date: FCA Appellant's Case §71{**B/2/55**}.

trend. That is all. Hiscox has not "*confirmed that it will treat those instructions [20 and 23 March] as anticipatory of the later Regulations.*"[212]

148. The statement was made to address what Hiscox considered to be an inaccurate suggestion as to how it would treat the announcements when adjusting claims that had been made by HAG in connection with its application for a leapfrog certificate.[213] Further, contrary to the FCA Appellant's Case,[214] leading counsel for Hiscox was not "*pressed*" for reasons as to why Hiscox made this voluntary statement. Rather, in the course of submissions concerning the form of the Declarations, Butcher J asked whether the position as confirmed at (2) in the text quoted at §146 above was intended to give effect to the Court's judgment and, if so, whether it was adequately reflected in the draft of what became Declaration 11.4(c). It was in answer to that narrow query that leading counsel for Hiscox made the statement incompletely cited by the FCA at §35 of its Appellant's Case: "*it isn't giving effect to your Lordships' judgment. It is something that has happened since the judgment, and that is one of the reasons why I say it doesn't belong in a series of declarations, which are intended to give effect to your Lordships' judgment. Whether or not it's a concession or whether it might be argued that it is a logical corollary of what your Lordships have said doesn't matter. Hiscox have taken this position from a loss adjusting point of view and for other reasons. Because they are content to say what they have said, they haven't examined what the legal basis of it is. That's their position. It may not have a legal basis in your Lordships' judgment, it may be the consequence of orthodox loss-adjusting principles, or it may just be common sense. Who knows.*"[215]

HAG's appeal

149. Hiscox does not understand why HAG is pursuing its appeal on Ground 1. In HAG's application for permission to appeal[216] it stated that it believed it would be appropriate to withdraw Ground 1 if Hiscox confirmed that its statement (in §146 above) at the consequentials hearing regarding the announcements on 20 and 23 March would not be withdrawn, whatever the outcome of any appeal. Hiscox provided that confirmation by way of a letter from Allen & Overy LLP dated 18 October, explaining further that what was said at the consequentials hearing applied to all Hiscox policyholders, not just the very small

212 FCA Appellant's Case §35 {**B/2/41**}; also §71 {**B/2/55**}.

213 Second Witness Statement of Richard Leedham, §14 {**G/4/10**}; §34 of Hiscox skeleton for the consequentials hearing {**G/16/148**}.

214 FCA Appellant's Case §35 {**B/2/39**}.

215 Consequentials hearing transcript, page 63, l. 13 to page 64, l. 15 {**D/33/1656**}.

216 §§21 first sentence and §29 {**A/2/46**} and {**A/2/48**}.

proportion in HAG.[217] In reply, HAG's solicitors said they were "*grateful for*" this "*helpful confirmation*" and offered to discuss the withdrawal of Ground 1 on being provided with Hiscox's application for permission to appeal to this Court.[218] Hiscox could not and cannot see that there is anything to discuss. HAG has the confirmation it sought, which it expressly said would make withdrawal of Ground 1 appropriate.

CONCLUSION

150. Hiscox invites the Court to dismiss Grounds 1, 2 and 3 of the appeals of both the FCA and HAG for the following among other reasons:

Ground 1

150.1. The Court below was correct to hold that if there was a measurable downturn or increase in expenses due to COVID-19 before the insured peril was triggered, the calculation of any indemnity payable in respect of the period during which the insured peril operated can in principle take into account the continuation of that measurable downturn and/or any increase in expenses as trends or circumstances.

Ground 2

150.2. The Court below was correct to hold that the words "*restrictions imposed*" in the PA clause mean something that has the force of law and that the only relevant such matters were the 21 March and 26 March Regulations.

Ground 3

150.3. The Court below was correct to hold that the words "*inability to use*" in the PA clause mean what they say and are not be equated with hindrance or disruption to normal use, and cannot be satisfied merely because an insured cannot use all of its premises, unless that partial use is sufficiently nugatory or vestigial as to amount to an inability to use on particular facts.

---

217 "*Hiscox…has not treated and will not treat a voluntary closure by a business prior to being required to do so following the announcements by the Prime Minister on 20 and 23 March 2020 with respect to the 21 and/or 26 March Regulations (as applicable) and before their coming into effect as representative of a trend. This position is not dependent upon the outcome of the Test Case or any appeal and indeed is not specific to the Hiscox policyholders in the HAG.*" {**G/31/222**}.

218 Letter of Mischon de Reya to Allen & Overy dated 19 October {**G/32/224**}.

Grounds 2 and 3 in relation to the NDDA clause

150.4. The appeal in respect of the NDDA clause is academic. Moreover, the Court below was correct to hold that:

150.4.1. "*imposed*" in the NDDA clause means something that has the force of law; and

150.4.2. Category 3 and 5 businesses did not suffer from any denial or hindrance in access within the meaning of the NDDA clause.

JONATHAN GAISMAN QC
ADAM FENTON QC
MILES HARRIS*
DOUGLAS GRANT

7 KING'S BENCH WALK
*4 NEW SQUARE

9 November 2020