

## Case summary

### Issue

These appeals against the orders of the Butcher J and Flaux LJ concern the construction of certain provisions in insurance policies written by the Appellant Insurers, and obtained by a range of businesses and organisations, which purport to provide coverage in the event of business interruption. The Divisional Court considered the construction of each policy wording and the FCA, the Appellant Insurers and the Hiscox Interveners appeal on a number of points. However, broadly speaking, the Supreme Court is asked to determine:

1. certain matters of construction relating to:
  - a. "Disease Clauses" (i.e. those which can be triggered by the occurrence of severe acute respiratory syndrome coronavirus 2 ("COVID-19"), typically within a specified distance of the insured's premises);
  - b. "Prevention of Access Clauses" (i.e. those triggered by public authority intervention preventing access to, or use of, premises as a result of COVID-19); and
  - c. "Hybrid Clauses" (i.e. those clauses which contain wording from both Disease and Prevention of Access Clauses), and
2. whether the Divisional Court was correct:
  - a. to apply certain counterfactual scenarios in relation to the operation of the clauses in relevant policies which provided for loss adjustments (the "Trends Clauses"); and
  - b. in its analysis of *Orient-Express Hotels Ltd v Assicurazioni Generali S.p.A.*

### Facts

In March 2020, the UK Government began to take a series of measures to combat the transmission of COVID-19. These included informal announcements and instructions from the Prime Minister as well as the passage of primary and secondary legislation through the UK Parliament and devolved administrations. The present appeals considered the impact of these actions and measures on 28 clauses in the 21 lead policies written by the Appellant Insurers. The FCA and the Appellant Insurers agreed to submit those policy wordings for consideration with the aim of addressing issues arising from similar policies prevalent in the insurance industry.

The case was heard in July 2020 by the Divisional Court under the Financial Markets Test Case Scheme. Judgment was given on 15 September 2020 and final orders were sealed on 18 October 2020.