

# Application notice

For help in completing this form please read the notes for guidance form N244Notes.

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<b>Name of court</b>	<b>Claim no.</b>
<b>Fee account no.</b> (if applicable)	<b>Help with Fees – Ref. no.</b> (if applicable)
	<b>H W F</b> – <input type="text"/> <input type="text"/> <input type="text"/> – <input type="text"/> <input type="text"/> <input type="text"/>
<b>Warrant no.</b> (if applicable)	
<b>Claimant's name</b> (including ref.)	
<b>Defendant's name</b> (including ref.)	
<b>Date</b>	

1. What is your name or, if you are a legal representative, the name of your firm?

2. Are you a  Claimant  Defendant  Legal Representative  
 Other (please specify)

If you are a legal representative whom do you represent?

3. What order are you asking the court to make and why?

4. Have you attached a draft of the order you are applying for?  Yes  No

5. How do you want to have this application dealt with?  
 at a hearing  without a hearing  
 at a telephone hearing

6. How long do you think the hearing will last?  Hours  Minutes  
 Is this time estimate agreed by all parties?  Yes  No

7. Give details of any fixed trial date or period

8. What level of Judge does your hearing need?

9. Who should be served with this application?

9a. Please give the service address, (other than details of the claimant or defendant) of any party named in question 9.

10. What information will you be relying on, in support of your application?

- the attached witness statement
- the statement of case
- the evidence set out in the box below

If necessary, please continue on a separate sheet.

**Statement of Truth**

(~~He~~ believe) (The applicant believes) that the facts stated in this section (and any continuation sheets) are true.

Signed N. Bereyford Dated \_\_\_\_\_  
Applicant('s legal representative)('s litigation friend)

Full name \_\_\_\_\_

Name of applicant's legal representative's firm \_\_\_\_\_

Position or office held \_\_\_\_\_  
(if signing on behalf of firm or company)

11. Signature and address details

Signed N. Bereyford Dated \_\_\_\_\_  
Applicant('s legal representative's)('s litigation friend)

Position or office held \_\_\_\_\_  
(if signing on behalf of firm or company)

Applicant's address to which documents about this application should be sent

Postcode <input style="width: 20px; height: 15px; border: 1px solid black;" type="text"/> <input style="width: 20px; height: 15px; border: 1px solid black;" type="text"/> <input style="width: 20px; height: 15px; border: 1px solid black;" type="text"/> <input style="width: 20px; height: 15px; border: 1px solid black;" type="text"/> <input style="width: 20px; height: 15px; border: 1px solid black;" type="text"/> <input style="width: 20px; height: 15px; border: 1px solid black;" type="text"/>

If applicable	
Phone no.	
Fax no.	
DX no.	
Ref no.	

E-mail address	
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## **Continuation sheet to the First Defendant's N244 Application Notice:**

4. It was on the basis of that 'mutual objective' that the parties agreed that this test case should be expedited and heard under the Financial Markets Test Case Scheme (which, pursuant to Practice Direction 51M, applies to a claim in the Financial List that "raises issues of general importance in relation to which immediately relevant authoritative English law guidance is needed"). The Test Case Scheme permits the Court to sit at first instance, as it did in this case, with a Lord Justice of Appeal as well as a Judge of the Commercial Court. An order to that effect was made by Butcher J at the first Case Management Conference on 16 June 2020.
  
5. The Framework Agreement expressly provides that the FCA or any of the Defendants may appeal the decision of the Court subject to the normal procedural rules for doing so (clause 8.1), but that any party seeking to appeal "will seek to have their appeal heard on an expedited basis, and undertakes to take all reasonable steps to ensure that the appeal is conducted and determined on an expedited basis as soon as is reasonably practicable" (clause 8.2). Clause 8.3 of the Framework Agreement states as follows:

"In particular, and without prejudice to their obligations to seek expedition above, the Parties agree to explore the possibility and appropriateness of seeking a leapfrog appeal to the Supreme Court under PD 1.2.17 and 3.6 of the Practice Direction of the Supreme Court."
  
6. The FCA put the Supreme Court on notice of this agreement and Herbert Smith Freehills told the defendants by email on 28 July 2020 that the Registrar of the Supreme Court had told them that:

"in principle the Supreme Court could accommodate a hearing on an expedited basis during Michaelmas term 2020, subject to the point that the final decision would be for the President, Lord Reed, at the time. The Registrar also noted that Lord Reed was already aware of this matter and that in appropriate urgent previous cases the Supreme Court has sat out of term time in September."
  
7. The grounds of appeal set out in Appendix 1 satisfy the statutory conditions for a Leapfrog Certificate in section 12(3A) of the Administration of Justice Act 1969 Act, in

that each of those grounds of appeal involves a point of law of general public importance, and:

- a. this test case “entail[s] a decision relating to a matter of national importance or consideration of such a matter” (s.12(3A)(a) of the 1969 Act);
  - b. the result of this test case is “so significant”, whether considered on its own or together with claims by policyholders that are likely to follow from it, “that ... a hearing by the Supreme Court is justified” (s.12(3A)(b)); and
  - c. “the benefits of earlier consideration by the Supreme Court outweigh the benefits of consideration by the Court of Appeal” (s.12(3A)(c)).
8. This test case concerns 21 lead policy wordings and, as noted in paragraph 7 of the Judgment, may potentially affect around 700 types of policies across 60 different insurers and around 370,000 policyholders. One Arch policy (known as Arch-1) was selected by the FCA to represent a form of “prevention of access” wording which will be relevant to large numbers of policyholders in the UK.
  9. Ultimate legal certainty is required in circumstances where neither individual policyholders nor reinsurers are party to the test case or bound by its outcome as a matter of *res judicata*. It is common ground that very large numbers of policyholders have suffered significant losses as a result of the Covid-19 pandemic and the UK Government’s response to it. The issues therefore need to be authoritatively determined as a matter of urgency as reflected in the terms of the Framework Agreement.
  10. The witness statement of Matthew Brewis (the Director of General Insurance and Conduct Specialists at the FCA), dated 9 June 2020, included the following:

“The matter [i.e. the test case] is urgent because insureds with policies in respect of which legal uncertainties arise as to whether there is cover for business interruption losses, and which are underwritten by the defendants and other insurers that wrote materially similar policies, are suffering widespread financial distress on a very large scale ...” (paragraph 8).

“It is the FCA’s view that it is therefore a matter of compelling public interest to provide urgent legal certainty for the benefit of the FCA, policyholders, the defendant insurers and the wider insurance market” (paragraph 70).

“... it is hoped that an early judgment following a trial in July 2020 would allow policyholders’ cover, if and where cover is found to exist, to be confirmed as quickly as possible to facilitate the continuation of their businesses (to the extent they have survived in the meantime). This would be subject to the impact of any appeal. I note also that business interruption losses arising from the COVID-19 pandemic may still be incurred by an operating business (for example, due to social distancing requirements), although the extent of any cover will depend on the policy terms. Resolution of the issues in this claim therefore remains urgent even where businesses are entitled to resume operations from June 2020” (paragraph 72).

11. The grounds of appeal set out in Appendix 1 concern the extent to which policyholders’ losses fall within the scope of the Arch-1 wording. The proposed grounds of appeal have a realistic prospect of success. If an appeal is required to proceed via the Court of Appeal, that will significantly prolong the length of these proceedings (especially bearing in mind the risk that an appeal to the Supreme Court ultimately occurs in any event).
12. This application has been made within 14 days of the Judgment, i.e. the period specified by section 12(4) of the 1969 Act, and prior to the deadline stated in paragraph 4 of the order made by Flaux LJ and Butcher J dated 15 September 2020. If the Court grants a Leapfrog Certificate as requested, Arch will promptly apply to the Supreme Court for permission to appeal pursuant to section 13(1) of the 1969 Act.

## Appendix 1

### Grounds of appeal

1. The Court erred in holding that the insured peril under Arch-1 was a “composite peril” which included (1) the prevention of access; (2) the action of government and (3) the emergency or incident. The Court accordingly erred in holding that the comparison required for the assessment of the business interruption loss is between the performance of the business as a consequence of the prevention of access to the premises due to the actions or advice of the government due to the emergency and what the performance would have been had there been no emergency and thus no government actions or advice and no prevention of access to the premises.
2. Having held (correctly) that the emergency was not an insured peril under Arch-1 and that social distancing advice and Regulation 6 of the 26 March 2020 Regulations did not prevent access to insured premises, the Court was wrong to hold that where insured premises were required to be closed, the losses which could be recovered would include losses which the policyholder would have suffered in any event by reason of the emergency and by the social distancing advice and Regulation 6.
3. The Court further erred in its construction of the Arch-1 ‘trends’ clause, in particular that the clause required word “Damage” should be replaced with the “composite peril”, thereby reversing-out both the Damage and whatever had caused the Damage, such that the ‘trends’ clause should operate as if the whole Covid-19 pandemic and all its consequences was part of the peril insured against.
4. The Court was wrong to hold that the decision in *Orient-Express Hotels Ltd v Assicurazioni Generali SpA* [2010] Lloyd’s Rep. I.R. 531 was distinguishable from the present case and/or should not be followed in that it was wrongly decided. It was correctly decided.