Claim No: FL-2020-000018

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

Before Lord Justice Flaux and Mr Justice Butcher

B E T W E E N:

THE FINANCIAL CONDUCT AUTHORITY

Claimant

-and-

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

Defendants

SKELETON ARGUMENT OF ARCH (D1)
FOR TRIAL COMMENCING 20 JULY 2020

Bundles: The Court has been provided with electronic bundles. References below are to those bundles.
Pre-reading (4 days): The Court is respectfully requested to pre-read as per the Claimant's suggested reading list.

This Skeleton Argument refers to and attaches Annexes A, B and C: Annex A is Arch's summary of how it has approached each Category of business (referred to below); Annex B is Arch's response to the FCA's "example" on the Arch1 wording, namely a business called "EE"; and Annex C is Arch's response to certain passages from the FCA Trial Skeleton set out in tabular form.

Section A: Introduction

1. This is the Skeleton Argument of the First Defendant (**Arch**)[1] for the trial of this matter which has been expedited by the Court and admitted to the Financial Markets Test Case Scheme under CPR PD51M.[2] As the Court knows, the FCA has brought a

[1] An insurer authorised by the Prudential Regulation Authority and regulated by the FCA (FCA Register Number 229887)
[2] Pre-Trial Directions §§1 – 2 [**A/20/2**]

"test case" against a number of insurers subject to its regulation (the **Defendants**) which have each consented to take part pursuant to a Framework Agreement dated 31 May 2020 ("**the Framework Agreement**"). The purpose is to resolve whether the terms of certain insurance policies written by the Defendants require that claims by policyholders be paid in respect of some or all business interruption losses arising in the context of Covid-19 and Government controls imposed because of it.[3]

2. The Court is to determine the correct interpretation and application of relevant policy terms (representative of disputed issues) in relation to a set of agreed facts (essentially background narrative) and assumed facts (essentially illustrative factual scenarios as to how certain businesses were affected which the Court may draw upon to assist).[4] The key issues are whether on the agreed and assumed facts policyholders can establish (1) coverage under the policies; and (2) the necessary causal link between the assumed losses sustained by policyholders and any relevant peril, event or circumstance that is covered by relevant terms in the policies, including to take into account the relevance (if any) of a trends clause or similar/ equivalent provision (if any).

3. The policy wording written by Arch that is to be considered is found in three Arch Policies (the "**Arch Policies"**):

   (1) the Arch OGI Commercial Combined Policy (**"Arch CC"**);

   (2) the OGI Retailers Policy (**"Arch Retailers"**); and

   (3) the Powerplace (Offices & Surgeries) Policy (**"Arch Offices & Surgeries"**).

4. The key provisions of the Arch Policies are materially the same. In the Particulars of Claim, the FCA has referred to the Arch Policies collectively as the "**Arch1**" wording (set out below), and the FCA has designated the Arch CC policy as the "lead" Arch1 wording. Extracts from Arch1 are set out at Schedule 1 of the Particulars of Claim **[A/2/56-A/2/59]**. They comprise: (1) a Government or Local Authority Action extension (the "**GLAA Extension**"); and (2) two provisions which refer to other

[3] Framework Agreement Background Recitals: A, B **[F/1/1]**
[4] Framework Agreement Clause 1.1, Clause 1.3 **[F/1/4]**

trends and circumstances being taken into account when calculating the value of the indemnity (the "**Trends Language**").

5. Arch also has a particular interest in wording written by the Seventh Defendant (**RSA**), known as the **RSA3** wording **[B/1/35-36]**, which is in most respects[5] identical to wording used by Axiom Underwriting, in which Arch acquired majority ownership in 2019. Arch supports the written submissions of RSA in this regard and reserves the right to make oral submissions as necessary on the RSA3 wording at trial.

6. Arch does not seek to address matters which do not concern it, including (1) the case on prevalence (which it is common ground is of no relevance to the FCA's case against Arch);[6] and (2) submissions of the intervening parties, the Hospitality Insurance Group Action (**HIGA**) and the Hiscox Action Group (**HAG**). Neither intervention directly impacts the Arch1 wording.

7. A timetable for the hearing may be found at **[A/16/1-2]**. In summary:
   7.1. The hearing is listed for 8 days from 20 July 2020 to 30 July 2020.
   7.2. The first 3 days of trial (20 to 22 July) are allocated to the FCA for opening submissions and to HIGA and HAG.
   7.3. The following 4 days (23 and 27-29 July) are allocated to the Defendants. The plan is that counsel for Arch will make oral submissions for approximately 1 hour on Day 6 (Tuesday 28 July 2020).
   7.4. Day 8 (30 July) is allocated to the FCA for reply submissions.

Section B: Relevant factual background

8. The presence of SARS-CoV-2 and COVID-19 in England and Wales since early 2020 forms the backdrop to this case. It is common ground between the FCA and Arch

[5] There is a potential difference between the Contamination or Pollution Clause in RSA3 (B/19/93) and Axiom Exclusion C4. In Axiom Exclusion C4, it is clear that sub-clause c) applies only where pollution or contamination causes a non-excluded peril to operate, and not where epidemic or disease causes a non-excluded peril to operate. RSA argues that the same is the effect of the RSA3 wording, where the words "Pollution and/or Contamination" in sub-paragraph L(a)(bis) appear in bold and in capitals. See generally §52 of the POC at **[A/2/34]**, §55 of RSA's Amended Defence at **[A/12/21]** and §57 of the FCA's Reply at **[A/14/29].** The FCA has refused to permit the Axiom wording to be included in the trial bundles.

[6] See §22 of the FCA's Reply confirming that the declarations sought in §28 of the POC are not sought against Arch. **[A/14/14]**

that from 3 March 2020, COVID-19 has been an emergency which is likely to endanger life within the UK for the purposes of Arch1: see Arch Defence §7.2 **[A/7/1-22]**.

9. There is also no dispute as far as Arch is concerned that certain steps taken by UK public authorities including the Government in response to the COVID-19 emergency have interrupted and interfered with many businesses and their activities. The significant steps for the purpose of Arch1 are the following:

   9.1. The Health Protection (Coronavirus, Business Closure) (England) Regulations 2020 (the "**21 March Regulations**") and the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (the "**26 March Regulations**") which mandated certain businesses to close their Premises;[7] and

   9.2. The Government's advice on 20 March 2020 and 23 March 2020 to the effect that certain premises should be closed (the "**20 March Advice**" and the "**23 March Advice**").[8]

10. When referring to the UK, and specifically to the above Regulations and/or Advice, it is important to note that the Government legislation and guidance varied (albeit to a limited degree) in its application between England, Wales, Scotland and Northern Ireland. In short:

   10.1. For England, Wales and Scotland, the 26 March Regulations came into force on the same date (albeit with some additional requirements in Wales and Scotland): see §18.21-22 of the POC [**A/2/11-12**]. See also §§60, 62 of the Agreed Facts (1) [**C/1/31-32**]. References below to 26 March Regulations accordingly can be taken to have affected England, Wales and Scotland.

   10.2. The 21 March Regulations are limited to England (see §18.16 POC **[A/2/11]**). However, the Health Protection (Coronavirus, Business Closure) (Wales) Regulations 2020 came into force that day also (albeit they are not listed in the Agreed Facts). In any event, the 21 March (Wales) Regulations were subsequently revoked by Regulation 2 of the 26 March Health Protection

[7] See Agreed Facts (1), §48, §59 **[C/1/24,31].**
[8] See Agreed Facts (1), §46, §53/54 **[C/1/21-22, 26-28]**

(Coronavirus) (Wales) Regulations 2020 and therefore effectively subsumed by the 26 March Regulations (see above sub-paragraph).

10.3. The Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020 were similar to the English equivalent: see Agreed Facts (1) at §48 **[C/1/24]**.

10.4. The 23 March Advice (at §54 of the Agreed Facts **[C/1/27]**) stated that: "as of 2pm on 21 March 2020, closures on the original list from 20 March are now enforceable by law in England and Wales." That is a reference to the 21 March Regulations for England and Wales which came into effect at 2pm on 21 March. The 23 March Advice also stated that "a business operating in contravention of the Health Protection (Coronavirus, Business Closures) Regulations 2020 will be committing an offence. As agreed with the devolved administrations, these measures will be extended to Scotland and Northern Ireland by Ministerial Direction once the Coronavirus Bill is in force".[9] It is clear, therefore, that there was no Scottish equivalent of the 21 March Regulations at the time the 23 March Advice was issued. The 23 March Advice therefore seems to apply to Scotland as well slightly differently - i.e. it was not yet an offence in Scotland for a business to operate but it soon would be.

10.5. As to the 20 March Advice, that was stated to be "between all the formations of the UK" (Agreed Fact (1) §46 **[C/1/21]**).

11. The practical effect of the above Regulations and Advice are considered in more detail below.

12. Other steps were taken by the UK public authorities which had an adverse effect on businesses; however, for reasons explained in more detail below, these would not be triggers for coverage under the Arch1 wording. Such steps include the following categories of statements and guidance, which are set out in more detail at Arch Defence §§49.1 - 49.9 **[A/7/15-16]** and in Agreed Facts 1 **[C/1/1]**:

[9] See Agreed Facts (1) §39 as concerned Northern Ireland **[C/1/17]**

12.1. Instructions on social-distancing, including guidance on the two metre rule published on 4 March 2020 (Agreed Facts 1 §15 **[C/1/6]**), an update from Mr Matt Hancock, Secretary of State for Health and Social Care, to the House of Commons on 11 March 2020 (Agreed Facts 1 §19 **[C/1/7]**), guidance published by the UK government on social distancing (Agreed Facts 1 §22 **[C/1/9]**), the statement by the Prime Minister on 22 March 2020 instructing the public to stay two metres apart and follow the social distancing advice (Agreed Facts 1 §35 **[C/1/14]**), and the guidance published by Public Health England on physical distancing on 23 March 2020 (Agreed Facts 1 §37 **[C/1/14]**);

12.2. The requirement for 'quarantining' including the requirement that individuals who returned from infected areas quarantine for 14 days in accordance with the Health Protection (Coronavirus) Regulations 2020 (Agreed Facts 1 §10 **[C/1/5]**);

12.3. The requirement for isolation for individuals with confirmed or possible COVID-19 infections, including a statement from the UK Government on 12 March 2020 asking those with symptoms to self-isolate for 7 days (Agreed Facts 1 §20 **[C/1/8]**), guidance published on 12 March 2020 (Agreed Facts 1 §21 **[C/1/8]**), the statement from the Prime Minister on 16 March 2020 requesting the public to undertake 14 days' household isolation if someone displays symptoms (Agreed Facts 1 §23 **[C/1/9]**), and the statement from the Prime Minister on 11 May 2020 that anyone who has symptoms or is in a household where someone has symptoms should not leave their house and should self-isolate (Agreed Facts 1 §59 **[C/1/31]**);

12.4. Instructions and advice to avoid non-essential travel, including the government advertising campaign of "stay home, stay safe, save lives", the statement from the Prime Minister on 16 March 2020 requesting the public to avoid non-essential travel and work from home if possible (Agreed Facts 1 §23 **[C/1/9]**), and the statement by the Prime Minister on 10 May 2020 that public transport should be avoided if at all possible and to work from home if possible (Agreed Facts 1 §58 **[C/1/30]**);

12.5. Government advice or restrictions on movement, including the statement made by the Prime Minister on 23 March 2020 that people will only be allowed to leave their home for shopping for basic necessities, one form of exercise a day, any medical need, to provide care or help a vulnerable person, and travelling to and from work but only where absolutely necessary and work cannot be done from home (Agreed Facts 1 §38 **[C/1/17]**), and Regulation 6 of the 26 March Regulations which prohibited individuals from leaving the place where they are living without reasonable excuse (Agreed Facts 1 §43 **[C/1/20]**);

12.6. Statements as to the risk level in the UK or globally, including the raising of the risk level by the UK Department of Health and Social Care and Public Health England from very low to low on 22 January 2020, from low to moderate on 30 January 2020, and from moderate to high on 12 March 2020 (Agreed Facts 1 §6, §7 and §20 **[C/1/3,8]**), the declarations by the WHO that COVID-19 was a Public Health Emergency of International Concern and that it was a pandemic (Agreed Facts 1 §8 and §18 **[C/14,7]**), and the UK Government announcement that COVID-19 was a notifiable disease (Agreed Facts 1 §16 **[C/1/6]**);

12.7. General guidance, including the guidance published by the Department of Health and Social Care on 3 March 2020 (Agreed Facts 1 §14 **[C/1/6]**), and the guidance and advice frequently published and updated by NHS England;

12.8. Restrictions on mass gatherings, including the statement by the Prime Minister on 23 March 2020 that gatherings of more than two people in public will be stopped and all social events including weddings and baptisms (Agreed Facts 1 §38 **[C/1/17]**), and Regulation 7 of the 26 March Regulations, which enacted the prohibition on gatherings of more than two people except where the persons are members of the same household, where the gathering is necessary for work purposes, to attend a funeral, or where reasonably necessary as defined in regulation 7(d) (Agreed Facts 1 §43 **[C/1/20]**); and

12.9. The partial closure of schools, including the announcement on 18 March 2020 by the Prime Minister that schools would be closed from 20 March 2020 other than for teachers, vulnerable children and the children of essential workers (Agreed Facts 1 §28 **[C/1/10]**).

13. The FCA refers to a meeting which apparently took place on or around 17 March[10] between the Economic Secretary to the Treasury and "the insurance industry" to the effect that "the insurance industry" would pay out on advisory closures rather than only on mandatory closures. To the extent any such meeting is relied on or relevant at all, it does not concern Arch, which was not invited to and did not attend any such meeting. Further, no one who did attend any such meeting was authorised to represent Arch and Arch did not agree anything with the Government either in the course of any meeting or otherwise: Witness Statement of Ms Valder §8-9 **[D/1/2]**. The FCA has indicated that it does not admit, but does not challenge, Ms Valder's evidence on this subject.[11] Any submissions which may made by the FCA which are based on that meeting or any alleged agreement reached at that meeting do not apply to Arch.

14. Although this is not directly in issue in the test case, Arch wishes to put on record that it has sought to approach claims from policyholders under Arch1 in a fair manner. Where Government or local authority action or advice has required or advised the closure of insured Premises – whether under the 21 March and/or 26 March Regulations; or pursuant to the 20 March Advice and/or the 23 March Advice - Arch has accepted the claim in principle under the Government and Local Authority Extension ("**the GLAA Extension**") in Arch1. In such circumstances, Arch has paid or offered to pay Policyholders 35% of their net loss of income (up to the GLAA Extension limit of £25,000) attributable to the closure period, to reflect the fact that it is only the net loss of income due to the closure (if any), and not the loss of income due to the general effects of the pandemic such as the restrictions (other than closure) imposed by UK public authorities, falls in consumer confidence and

[10] See for example POC §18.11, §18.12 **[A/2/9]**
[11] See Reply §12.1 **[A/14/7]**.

consumer spending, or the economic downturn, which is recoverable. Arch reserves the right to change its approach in light of the rulings of the Court.

15. Where Premises have not been required to be closed, or where closure was not recommended, Arch has taken the position that the GLAA Extension does not respond.

16. The inclusion of Arch in this test case is to resolve uncertainties concerning the Arch1 wording. To this extent, and insofar as it is relevant to construe the Arch Policies against the factual matrix in which they were concluded (as to which, see below), the following background facts may be relevant:

    16.1. All of the Arch Policies were sold exclusively through an online portal which could be accessed only by brokers (Valder §7 **[D/1/2]** which is admitted by the FCA);

    16.2. All the policyholders with these policies were represented by and acted through authorised intermediaries at the time of placement (Valder §6 **[D/1/2]** which is also admitted by the FCA[12]).

17. When considering the effect of the 20 March and the 23 March Advice and the 21 March and 26 March Regulations, it is worth noting that Arch policyholders with the Arch1 wording are almost entirely the types of businesses classified by the FCA in paragraph 19 of its Particulars of Claim and at §65 of the FCA's Trial Skeleton Categories 2, 3, 4 and 5 (Valder §10 **[D/1/2],** which is admitted by the FCA). This data is recorded and set out in the spreadsheet at Exhibit KV1 **[D/2/1-21]**. Although the FCA's Trial Skeleton, when addressing Arch1, focuses a great deal of attention on businesses in Category 1, a degree of perspective and restraint is called for: only 0.4% of Arch1 policies are for businesses in Category 1.

18. All policyholders also receive a Schedule, referred to in the Arch Policies. An exemplar Schedule is at **[D/3/1-11]**. When construing clauses in the Arch Policies which refer to the Schedule, such as the definition of "the Premises" and "the

[12] Reply §39 **[A/14/20]**

Business" (see below) it may assist and be convenient for the Court to have the sample Schedule to hand.

Section C: Construction of the policies

C1: Relevant principles of construction

19. The Defendants have co-authored a joint note on relevant principles of construction which Arch hereby adopts **[I/5/1]**.

20. There are a few additional points to make in relation to Arch specifically:

    20.1. The Arch Policies were only available for sale through brokers, who in the ordinary way acted for the policyholders and whose duties would ordinarily include a duty to consider the suitability of the policy for the policyholder's needs. The FCA's assertions (Reply §40) **[A/14/21]** that those who purchased the policies had little experience of the insurance market and "potentially limited broker advice and discussion" are mere assertions (no evidence has been adduced). The assertions are ultimately irrelevant even if true, given the fact that all Arch1 policies were sold through authorised insurance intermediaries.

    20.2. The Arch Policies must each be construed as a whole, and independently of the language used in different policy wordings issued by other insurers.

    20.3. The meaning of the Arch Policies cannot and does not change depending on the size of the policyholder's business or the perceived sophistication of the policyholder.

    20.4. The alleged use of epidemic and pandemic exclusions by some insurers in some contexts, if and insofar as it occurs, is irrelevant to the issues of construction of the Arch Policies. It is irrelevant that Arch did not include an epidemic or pandemic exclusion clause in the Arch Policies if, on the objective construction of the Arch Policies, the cover does not extend to such perils.

20.5. The amount of the limit of indemnity, whether for the main business interruption section or for the individual BI extensions, is also irrelevant to the proper construction of the coverage (contrary to the assertion of the FCA eg at Reply §58.5) **[A/14/30]** and in the Trial Skeleton at §477) **[I/1/171]**.

C2: Business Interruption cover under the Arch Policies

21. The main BI cover in the Arch Policies responds where there is damage to property. Such damage may be to the Premises where the Business is carried on, or to the Policyholder's property at the Premises. The Arch Policies also contain a number of Business Interruption extensions (the so-called "Clauses") (collectively the **"Extensions"**).

22. The Arch Policies do not provide an indemnity against all risks of business interruption or interference. Unsurprisingly, most of the BI Extensions (including the GLAA Extension) are connected with risks affecting the property of the Policyholder or the Premises. Where the BI extensions are not concerned with risks affecting the property of the Policyholder or the Premises, the risks are carefully defined and mostly concern physical damage or bodily injury to third parties (see for example, Arch CC Extension (9) concerning BI losses caused by damage to customers' premises, and Arch CC Extension (14), concerning BI losses caused by the death or disablement of directors/partners) **[B/2/36-37]**.

23. It is common ground that:

23.1. The main BI cover in the Arch Policies does not respond, because there has been no relevant damage to property.

23.2. The extension for Disease, Infestation and Defective Sanitation in the Arch Policies does not respond, because that extension applies only to diseases on a closed list which does not include Covid-19.

23.3. None of the other extensions applies to claims for business interruption arising in connection with Covid-19.

24. The FCA's case for coverage under the Arch Policies is therefore based solely on the GLAA Extension in each of the Arch Policies.

C3: The GLAA Extension (Construction)

25. The GLAA Extension in Arch CC **[B/2/36]** provides:

> *"We will also indemnify You in respect of reduction in Turnover and increase in cost of working as insured under this Section resulting from…*
>
> ***Government or Local Authority Action***
>
> *Prevention of access to The Premises due to the actions or advice of a government or local authority due to an emergency which is likely to endanger life or property.*
>
> *We will not indemnify You in respect of*
>
> *(1) any incident lasting less than 12 hours*
>
> *(2) any period other than the actual period when the access to The Premises was prevented*
>
> *(3) a Notifiable Human Infectious or Contagious Disease as defined in the current relevant legislation occurring at The Premises*
>
> *The maximum We will pay under this Clause is £25,000, or the Business Interruption Sum Insured or limit shown in the Schedule, whichever is the lower, in respect of the total of all losses occurring during the Period of Insurance."*

26. The same provision appears at Clause 8 in Arch Retailers [**B/23/29**] and Arch Offices & Surgeries **[B/24/28]**.

27. The GLAA Extension indemnifies policyholders, subject to its terms, in respect of an interruption or interference with the Business (as identified in the applicable Policy Schedule):

- proximately caused by ("resulting from") a prevention of access to the Premises (as identified in the applicable Policy Schedule);
- which prevention of access is proximately caused by ("due to") actions or advice of a government or local authority;
- which actions or advice are in turn proximately caused by ("due to") "an emergency which is likely to endanger life or property".

28. All the words of causation used in the GLAA Extension ("resulting from" and "due to") are words which connote proximate causation, which is the default standard for causation in an insuring clause: see MacGillivray on Insurance Law (Sweet & Maxwell, 14th Edition, 2018) §21-001 **[K/203/3]**; and Christopher Butcher QC in Mance, Goldrein and Merkin (eds.), Insurance Disputes (Routledge, 3rd Edition, 2011) at §7.14 **[K/204/5]**. This appears to be accepted by the FCA: Trial Skeleton at §442 **[I/1/161]**. The FCA's qualification to its acceptance – "subject to the intentions of the parties" - is not explained and is not understood.

29. The GLAA Extension provides, in effect, that if the policyholder's Premises cannot be accessed to carry on the Business by reason of the order or advice of government or local authority made in response to an emergency likely to endanger life or property, the Policy will pay for the losses caused by the prevention of access (no more and no less).

30. The relevant "trigger" (to use the FCA's word), or the insured risk, is the prevention of access to the Premises occurring in certain circumstances. The "trigger" is plainly not (as contended by the FCA) the emergency. The second and third sentences of §448 of the FCA's Trial Skeleton are just wrong: the GLAA Extension is not "triggered" by the emergency. The assertion that an "element of cover" was "triggered" for the entire UK on 3 March 2020 is legally incoherent. The emergency is the first step in a chain; what might be called an originating cause in a different context. The GLAA Extension is only triggered where there is a prevention of access to insured Premises as a result of government or local authority action or advice which is in turn a response to, and a result of, a qualifying emergency.

31. The FCA repeats the same error at §470 of the Trial Skeleton **[I/1/169]**, asserting that reasonable people would understand the GLAA Extension to be cover "for losses due to emergencies". But reasonable people would surely read the GLAA Extension (headed "Government or Local Authority Action") and would see that it requires an order or advice of government or local authority which prevented access to the Premises.

32. The GLAA Extension is equally plainly not, contrary to the FCA's case, "pandemic cover". §449 final sentence of the FCA Trial Skeleton is plainly wrong **[I/1/163]**. The emergency in question may be of any type. It may be national, it may be regional, or it may be local. That does not matter. What matters is whether there is, in response to the emergency and as a result of the emergency, government or local authority action or advice which operates on the Premises, by requiring their closure.

33. The FCA has also devoted many pages in its Trial Skeleton to a complicated attempt to avoid the obvious point that the GLAA Extension is concerned with the closure of Premises following order or instruction, not with restrictions placed on the use which may be made of Premises, still less with restrictions placed on the movement of business owners, employees, and customers.

34. "The Premises" are the location(s) stated in the Schedule **[B/2/9; B/23/9; B/24/8]**; ordinarily where the Policyholder carries on the Business. The Business is "the business described in the statement of fact and specified in the Schedule" (see p 8). **[B/2/9]**.

35. As to the meaning of the term "prevention of access to the Premises," this is not a term defined in the Policy. It therefore bears its ordinary meaning (in accordance with Policy Condition (9) in the Arch Policies **[B/2/64; B/23/58; B/24/52]**). That meaning will also be informed by the other provisions of the Arch Policies.

36. The FCA (Trial Skeleton, §674) **[I/1/226]** appears to accept that "<u>access</u> to the Premises" refers to the means to enter the Premises.

37. "Prevention" is a non-technical term which means the action of stopping something from happening. In its ordinary sense "prevention of access to the Premises" therefore refers to something which stops the means of entering the Premises.

38. In its dealings with policyholders to date (and subject always to the outcome of this case), Arch has accepted that access to the Premises has been "prevented" where the Premises were closed in consequence of Government advice or regulations to the effect that the Premises should be closed for the purpose of carrying on the insured business. Arch has not argued that prevention requires the Premises to be physically sealed off. The insured's freedom to access closed premises for non-commercial purposes (eg to switch off the water supply or to perform essential maintenance) does not negate the existence of a prevention of access for the purposes of the policy. Arch has recognised that in its context within the GLAA Extensions, "prevention of access to the Premises" refers to something which stops access to the Premises for the purposes of carrying on the Business.

39. The FCA's case seeks to conflate prevention with hindrance, and access with use. The FCA also seeks to rewrite the clause as if it referred to "partial prevention" and/or to the prevention of access to "part of the Premises".

40. These attempts all founder on the clear and ordinary meaning of the words used in the GLAA Extension. Access to the Premises is not "prevented" by action or advice if the action or advice does not require or recommend, in effect, the closure of the Premises for the purpose of carrying on the business, even if such action or advice (a) requires the Policyholder to close part only of the Premises or (b) requires the Policyholder not to carry on certain business activities at the Premises. In those cases, the Premises may still be accessed.

41. "Prevention of access to the Premises" in the GLAA Extension is to be distinguished as a matter of ordinary language from hindrance or impairment of or restrictions on access to the Premises. In ordinary language, hindrance or impairment of, or restrictions on, access will cover something which falls short of prevention of access.

Hindrance or impairment or restriction connotes that access to the Premises for the purposes of carrying on the Business is made more difficult but not (as is the case with "prevention") impossible, unlawful or inadvisable. Hindrance or impairment of, or restrictions on, access to the Premises are not enough for the purposes of the GLAA Extension.

42. The Arch Policies, in Extension (1), refer to damage to property in the vicinity of the Premises which "hinders or prevents" access to the Premises **[B/2/35; B/23/28; B/24/27]**. There is obviously a distinction drawn in that extension between "hinders" and "prevents". Whilst Arch does not suggest that the Tennants decision or the Peter Dixon decision or later cases (FCA Trial Skeleton, §§132-135) **[I/1/52-53]** are dispositive, the judgments in those cases illustrate what "prevention" means, particularly when used in conjunction with "hindrance". "Prevention" when used in the GLAA Extension obviously does not bear a different meaning to "prevention" within Extension (1) and equally obviously does not mean "hindrance".

43. "Prevention of access to the Premises" in the GLAA Extension is also to be distinguished from restrictions placed on the use which may be made of the Premises. As a matter of ordinary language, the prevention of access to the Premises involves something of a different nature to a restriction placed or recommended on the use of the Premises. Access, and use, are different concepts. Access to the Premises is not "prevented" if the Premises can be accessed for the purpose of carrying on the Business, even if part of the Premises cannot be used or can only be used for particular purposes. In this context, it is important to note Extension (3) in the Arch Policies (the Disease, Infestation and Defective Sanitation extension which the FCA accepts does not apply on the present facts). This refers to restrictions on the "use of the Premises" on the order or advice of the competent authority. The Policy therefore recognises the difference in concept between prevention of access to the Premises, and the use of the Premises **[B/2/35-36; B/23/28; B/24/27]**. There is therefore no reason to read "prevention of access to the Premises" in the GLAA Extension as including restrictions placed on the use of the Premises.

44. The FCA has no real answer to these points, which is apparent from §441 of the FCA's Trial Skeleton **[I/1/161]**. The final sentence also involves a considerable overstatement of the facts ("the legislation or advice requires that the customer simply not attend").

45. The GLAA Extension refers to "prevention of access to the Premises". It does not refer to partial prevention of access, or prevention of access to a part of the Premises. If the Premises can still be accessed for the purposes of the carrying on of the Business, there is no prevention of access, even if (for example) one entrance to the Premises can no longer be used.

46. The FCA's Trial Skeleton contains a number of examples and propositions which have little or no bearing on the present dispute, as well as mischaracterisations of Arch's position. These serve to distract attention from the fact that at the heart of the FCA's case on Arch1 is a straightforward misreading of the "prevention of access" language of the GLAA Extension. Rather than extend this Skeleton by addressing these points, Arch addresses them (to the extent necessary) in Annex C.

47. The relevant risk under the GLAA Extension is the prevention of access to the Premises in certain circumstances, namely where government or local authority action or advice taken in response to an emergency likely to endanger life or property requires or recommends the closure of the Premises. Contrary to a central theme of the FCA's case, the relevant risk (or to use the FCA's term "trigger") is not the occurrence of the emergency. The GLAA Extension does not purport to indemnify a Policyholder whose access to Premises has not been prevented but who suffers business interruption or interference because of an emergency likely to endanger life or property. The indemnity is not against the consequences of the originating cause of the prevention of access. The GLAA Extension is not a "disease" clause, nor (as the FCA asserts at §449 of its Trial Skeleton) "pandemic cover" **[I/1/163]** and the emergency is not a "trigger" of cover nor an "element of cover".

48. Other extensions illustrate the controlled and defined circumstances in which the BI Extensions in the Arch Policies expressly provide cover in principle for business

interruption losses in the absence of damage to the Policyholder's property or of damage to, or the prevention of access to, the Premises.

49. For example:

49.1. the Loss of Attraction extension in all 3 Arch Policies applies in principle where there is damage to property in the vicinity of the Premises (eg to an anchor tenant in a shopping mall or to a local attraction such as the London Eye) which deters potential customers of the Business **[B/2/36; B/23/29; B/24/28]**;

49.2. the Essential Employees extension in Arch CC (Extension (14)) applies to provide cover for business interruption losses caused by the death or disablement of principal directors or partners **[B/2/37]**; and

49.3. the Essential Employees extension in Arch Retailers (Extension (13)) applies to provide cover for business interruption losses caused by essential employees who quit their job following a lottery win **[B/23/29]**.

50. These extensions illustrate that where it is intended to provide cover for the consequences of a reduction in customers using the Premises, or the inability or unpreparedness of employees to work in the Business, unrelated to damage to insured property or to the Premises or the prevention of access to the Premises, it is done expressly and in precisely defined circumstances.

51. The FCA's case, that the GLAA Extension applies if customers or employees or business owners faced restrictions on their movement, finds no support in the language of the GLAA Extension nor those extensions which do deal, explicitly, with reduction in customer footfall and the inability of employees to work.

Section D: Prevention of access on the facts

52. As outlined above, Arch has accepted that the COVID-19 pandemic was "an emergency likely to endanger life" from 3 March 2020. Arch has also accepted that the 20 March and 23 March Advice, and the 21 March and 26 March Regulations, were government advice or actions which were "due to" the emergency.

53. Arch's position is straightforward. The only relevant "prevention of access to the Premises" on the facts is for those Policyholders who were advised to close and did close insured Premises by the 20 March Advice or the 23 March Advice and/or who were required to close and did close insured Premises by the 21 March Regulations or 26 March Regulations. Closure in this context means closure for the purpose of carrying on the insured business.

54. By way of some simple illustrations and to preface the more detailed remarks which follow:

    54.1. Public houses were closed between 21 March 2020 (the implementation date of the 21 March Regulations) and 4 July 2020 (the date on which public houses were allowed to reopen subject to compliance with social distancing regulations).

    54.2. Non-essential retailers were closed between 24 March 2020 (the implementation date of the 23 March Advice) and 15 June 2020 (the date on which non-essential retailers were allowed to reopen subject to compliance with social distancing regulations).

    54.3. Healthcare businesses and essential retailers were expressly permitted by the 23 March Advice and 26 March Regulations to remain open.

    54.4. Offices were not closed by any of the measures put in place at any time by UK public authorities.

55. Arch does not draw a distinction between an order or advice which specifically requires closure of insured Premises (such as paragraph 4(1)(a)(i) of the 26 March Regulations) **[C/1/31]**, and an order or advice the effect of which is to require closure of insured Premises (such as paragraph 4(1)(4) of the 26 March Regulations **[C/1/31]** which refers to the cessation of the carrying on of the businesses in Part 2; an order requiring the cessation of the carrying on of a cinema business is an order which, in effect, requires the closure of the cinema). This is consistent with the Government

guidance note of 26 March 2020 **[C/1/31]** which listed "businesses and venues that must remain closed" compendiously in a single list.

56. The relevant prevention of access was for such period as closure was required or recommended.

57. The FCA's case is, with respect, inconsistent or at least unclear.

58. The most obvious example is at §434 of the Trial Skeleton **[I/1/159]**. That paragraph asserts that there was a prevention of access to the relevant Premises "for businesses in Categories 1, 2, 4, 6 and 7 only, and for all policies set out above available to those businesses" (emphasis added). (The Categories are set out at §64 of the Trial Skeleton) **[I/1/27].**

59. One could be forgiven for understanding from §434 **[I/1/159]** (and the use of the word "only") that the FCA has belatedly conceded the inevitable, which is that there was no prevention of access for Category 3 businesses (businesses which were expressly permitted to remain open) and for Category 5 businesses (businesses which were neither required to close their premises nor expressly permitted to remain open).

60. But other parts of the FCA's Trial Skeleton suggests that the FCA still maintains its case that Premises which were not required to be closed, and indeed which were expressly permitted to open, nonetheless suffered a prevention of access, because of restrictions imposed on the freedom of movement of customers or employees. That case is unsustainable on the language of the GLAA Extension.

D1: The Advice and the Regulations

61. The following is intended to be an uncontentious and chronological account of the advice, and actions, which recommended or required closure of Premises. In Annex A, Arch sets out its position on the FCA's 7 Categories (whilst noting that the FCA's Categories necessarily involve a summary of the applicable Advice and Regulations and that some of the Categories are essentially irrelevant for Arch1).

62. The 20 March Advice was to the effect that nightclubs, theatres, cinemas gyms and leisure centres should close and that pubs, bars, clubs and restaurants should not remain open for consumption of food and drink on the premises but could continue to provide take-out services.

63. Arch accepts that for pubs, bars, clubs and restaurants which did not previously provide take-out services, the effect of the advice was to require the closure of the Premises. Access to the Premises for the purposes of the Business was prevented, because the Premises were not able to be opened to customers without the policyholder making a fundamental change to its Business. For Premises which were closed pursuant to this advice, there was a qualifying "prevention of access". (As noted above, Arch's Policyholders on Arch1 do not include many business which fall within this group).

64. For businesses which already provided takeaway food or drink from the Premises, the advice to cease permitting consumption on the premises does not mean that there was a "prevention of access to the Premises," when clearly there was not. The advice did not prevent the Premises being accessed, both by the business owner and employees and by customers, for the purposes of using an existing takeaway service.

65. As for the 21 March Regulations:

    65.1. Arch has accepted that these prevented access to the Premises for those policyholders whose businesses carried on at the Premises fell within Part 2 of the Schedule;

    65.2. Arch does not accept that these prevented access to the Premises for those policyholders whose business carried on at the Premises prior to 21 March included the provision of food or drink for consumption off the Premises. The Premises could still be accessed for the purposes of carrying on the insured business, even if part of the business (food/drink for consumption on the premises) was now prohibited and part of the Premises (the area for consumption on the premises) could not be used.

66. As for the 23 March Advice, Arch has accepted that this instructed the closure of all shops selling non-essential goods, libraries, playgrounds, outdoor gyms and places of worship. Where Premises falling within these categories were closed pursuant to this advice, Arch has accepted that there was a qualifying prevention of access.

67. As for the 26 March Regulations, and for policyholders whose business carried on at insured Premises fell within Schedule 2 Part 2 but to which the 21 March Regulations did not already apply, Arch has accepted that where Premises falling within the categories set out in Schedule 2 Part 2 were closed, there was a qualifying prevention of access. Arch has not drawn the supposed distinction between actions or advice requiring closure of insured Premises, and actions or advice requiring cessation of the business carried on at the Premises, referred to by the FCA at Trial Skeleton §436 **[I/1/160]**. Arch has accepted that the GLAA Extension has been engaged in relation to Policyholders whose Business carried on at insured Premises falls in Schedule 2 Part 2, because the effect of the 26 March Regulations ordering cessation of the Business carried on at the Premises (eg cessation of the business of operating a cinema) was to prevent access to the Premises (the cinema) for the purposes of the carrying on of the Business. The Government guidance of 26 March 2020 refers to "businesses and venues that must remain closed" compendiously, and includes Schedule 2 Part 2 businesses [**C/1/31]**.

68. As for businesses falling within Schedule 2 Part 1 of the 26 March Regulations, Arch does not accept that the effect of the 26 March Regulations was to "prevent access to the Premises" for those policyholders whose business carried on at the Premises already included the provision of food or drink for consumption off the Premises. The Premises were not required to be closed, the policyholder could still undertake at least a part of the insured business from the Premises and access to the Premises was not prevented.

69. The 26 March Regulations plainly did not "prevent access to the Premises" for insured businesses falling within Part 3 of Schedule 2, because access to the Premises for the purpose of carrying on those businesses was expressly permitted. The FCA's

case to the contrary[13] is extraordinary (and as noted above it may be that the FCA has now conceded the point at §434 of the Trial Skeleton **[I/1/159]** although the FCA has since denied that). This is an important issue for Arch. As appears from Arch's factual evidence[14], 73% of Arch Retail policies were issued to businesses in this category (Category 3 in the FCA's categorisation). The FCA's case that there was a prevention of access to premises which were expressly permitted to remain open involves a considerable rewriting of the GLAA Extension. The fact that such businesses may have had to comply with advice or regulation on social distancing, safety and hygiene, and owed legal duties as employers and occupiers the discharge of which may have become more onerous, does not mean that access to the Premises was thereby prevented.

70. As to insured businesses to which paragraph 5(1) of the 26 March Regulations applied, access to the Premises continued to be expressly permitted for the purpose of carrying on the business to the extent permitted by the exception to paragraph 5(1)(a). It was only where the Premises (and not merely part of the Premises) were required to be closed by paragraph 5(1)(b) that there was a qualifying prevention of access.

71. In the case of insured businesses which did not fall within any part of the Schedule to any of the Regulations and which were not the subject of the advice to close by the 20 or 23 March Advice, none of the action taken or advice provided by the government at any time prevented access to the Premises. Again, the FCA's case to the contrary is surprising (and the FCA now denies having conceded the point at §434 of the Trial Skeleton) **[I/1/159]**.

72. There is an obvious and fundamental objection to the FCA's overarching case that the other official orders or advice adopted in response to the COVID-19 pandemic prevented access to insured Premises for the purposes of the GLAA Extension in the Arch Policies. The various actions or advice on social distancing, working from home, lockdown and suchlike set out at paragraph 12 above, plainly did not prevent

[13] See, for example, PoC §46.1 **[A/2/30]**
[14] See [**D/2/2]**

access to insured Premises, even if they resulted in less use (or, in some cases, no use) being made of insured Premises and even if they resulted in additional expense for businesses (eg in ensuring social distancing for employees or customers or in complying with existing legal duties as employers or occupiers).

73. On any view, the FCA case goes much too far. The FCA's pleaded case is that there was a prevention of access for those premises which were not required to be closed, indeed for those premises expressly permitted to remain open (Category 3) and those neither expressly permitted to remain open nor required to close (Category 5), because of restrictions placed on people leaving their home. See eg POC §46.1 **[A/2/30]**.

74. But even if it were correct (which it is not) for the focus to be on those who might wish to use the Premises, rather than on the Premises themselves, the steps put in place by the UK public authorities did not include an absolute prohibition on people leaving their homes. By paragraph 6(1) of the 26 March Regulations any person with a reasonable excuse was allowed to leave his or her home at any time. Paragraph 6(2) of the 26 March Regulations gave a non-exhaustive list of reasonable excuses.

75. Paragraph 6(2)(f) of the 26 March Regulations expressly provided that it would be a reasonable excuse for a person to leave the place where they are living to travel for the purposes of work, where it was not reasonably possible for that person to work from the place where they were living. Paragraph 6(2)(f) of the 26 March Regulations therefore permitted business owners and/or his, her or its employees to travel to, and be at, the Premises for the purpose of conducting work which it was not reasonably possible to do from home[15].

76. Similarly, in relation to businesses whose customers or clients would ordinarily attend the Premises, they could still do so to the full extent permitted by (i) the general language of "reasonable excuse" in paragraph 6(1) and/or (ii) the specific language of paragraph 6(2)(a) of the 26 March Regulations.

[15] The Government's 10 May 2020 advice positively urged such people to go to work. See Agreed Facts 1, entry for 10 May 2020.

77. The FCA's case that a prevention of access arose to any Premises by the restrictions of movement of persons (whether owners, staff or customers) is therefore without any foundation.

78. To summarise Arch's position: the GLAA extension is only engaged where insured Premises were required to be closed for the purpose of carrying on the insured business by the 21 March Regulations or the 26 March Regulations or were instructed to close by the 20 March Advice or the 23 March Advice and were closed. The prevention of access continued for so long as the Premises in question were required or recommended to be closed and remained closed. There was otherwise no prevention of access to the Premises for the purposes of Arch1.

79. Arch has not sought to rely on the exclusion at (3) in the GLAA Extension, which does not apply because Covid 19 is not a *Notifiable Human Infectious or Contagious Disease* within the policy definition.

D2: The Categories

80. In Annex A, Arch provides a summary of Arch's position on the seven Categories of business addressed by the FCA at §64 of the FCA's Trial Skeleton **[I/1/27]**.

D3: The FCA's Assumed Facts Example for Arch

81. The FCA's Assumed Facts Example for Arch (p 173 of the Trial Skeleton) **[I/1/173]** is addressed by Arch in Annex B **[I/9/1].**

Section E: The indemnities available

E1: The indemnity available under the GLAA Extension in the event of a qualifying prevention of access

82. For those Policyholders whose Premises were required or recommended to be closed and were closed, the indemnity available under the GLAA Extension is to be calculated in accordance with the provisions of the Business Interruption Section. This is confirmed by the introductory words of the Extensions.

83. The indemnity under the GLAA Extension is capped by an aggregate limit of £25,000 or the Business Interruption Sum Insured or limit shown in the Schedule (whichever is the lower): see the closing words of the GLAA Extension cited at paragraph [25] above. As stated above, the amount of the indemnity is irrelevant to the construction of the GLAA Extension. It is also irrelevant to the incidence of the burden of proof (see further below).

84. In the case of Arch CC, reading the introductory words of the Extensions with the GLAA Extension, the indemnity is as follows: "We will also indemnify You in respect of reduction in Turnover and increase in cost of working *as insured under this Section* resulting from… the prevention of access to the Premises" (emphasis added) **[B/2/35]**.

85. For Arch Retailers, the indemnity is "We will also indemnify You in respect of loss of income *as insured under this Section* resulting from… the prevention of access to the Premises." **[B/23/28]**

86. For Arch Offices & Surgeries, the indemnity is "We will also indemnify You in respect of loss of income *as insured under this Section* resulting from… the prevention of access to the Premises." **[B/24/27]**

87. In each case, therefore:

87.1. the indemnity is in respect of loss which "result from" the prevention of access to the Premises (where "result from" has its ordinary insurance meaning of "proximately caused by"); and

87.2. the indemnity is in respect of loss "*as insured under this Section*", ie the indemnity is to be calculated in accordance with the method set out in the main provisions of the BI section.

88. The indemnity which is provided is plainly not in respect of all business losses incurred by reason of that which has caused the government or local authority action

or advice requiring or recommending closure, ie the emergency. Rather, it is in respect of the loss resulting from the prevention of access.

89. The precise manner of separating out the insured and uninsured losses is a matter of adjustment which is beyond the scope of these proceedings. It is, however, a perfectly ordinary example of adjustment, in the same way that an allowance for betterment is made when new property is exchanged for old in the course of a material damage claim, or an allowance for generally (un)favourable trading conditions is made when calculating a business interruption loss.

E2: The indemnity under Arch CC: Gross Profit

90. For Arch CC, the indemnity is in respect of the loss of Gross Profit "*resulting from*" the prevention of access to the Premises: see Cover (1) **[B/2/34]**. (The Book Debts cover, Cover (2), will not ordinarily be applicable to a claim under one of the Extensions).

91. The Gross Profit cover states "we will indemnify You in respect of any interruption or interference with the Business *as a result of* Damage occurring during the Period of Insurance". "As a result of" again connotes proximate cause.

92. The amount payable is agreed to be "in respect of reduction in Turnover, the sum produced by applying the Rate of Gross Profit to the amount by which, *due to the Damage*, the Standard Turnover exceeds the Turnover during the Indemnity Period (a defined term: see p 32 **[B/2/33]**)" (emphasis added) and "in respect of increase in cost of working, any additional expense You necessarily and reasonably incur solely to prevent or limit a reduction in Turnover during the Indemnity Period which but for such additional expenses would have taken place *due to the Damage*".

93. The Basis of Settlement clause which then follows repeats much of what appears in the clause headed Gross Profit **[B/2/34]**.

94. "Turnover" is defined (p 33 **[B/2/34]**) as the money paid or payable to the Policyholder for goods or services in the course of the Business at the Premises.

95. Rate of Gross Profit is defined (p 32 **[B/2/33]**) as "Gross Profit earned on the Turnover and expressed as a percentage of Turnover, during the financial year before the date of the Damage". Standard Turnover is defined (pp 32-33 **[B/2/33-34]**) as "the Turnover during that period in the 12 months immediately before the date of the Damage which corresponds with the Indemnity Period".

96. "Gross Profit" is defined (p 32 **[B/2/33]**) as the combined value of the Turnover, closing stock and work in progress, less the combined value of opening stock and work in progress and Uninsured Working Expenses.

97. It is common ground that for a claim under the GLAA Extension, "Damage" when used in the Gross Profit and Basis of Settlement clauses, in the definitions of Gross Profit and Standard Turnover, and in the Trends Language[16], is to be read as referring to the prevention of access to the Premises for the purposes of a claim under the GLAA Extension. See FCA Trial Skeleton at §464 **[I/1/168]**.

98. The use of the word "Damage" reflects the fact that the BI section is primarily intended to cover loss sustained through business interruption caused by property damage. In the case of a claim under the main business interruption insuring clause, "Damage" is precisely the contingency which is insured. Given the clear indication, in the introductory words of the Extensions, that the indemnity under the Extensions is to be calculated in the same way as the primary BI cover, it is plain that "the Damage" in the Gross Profit and Basis of Settlement clauses, in the definitions of Gross Profit and Standard Turnover, and in the Trends Language, when applied to a claim under any of the Extensions, is to be read as a reference to the contingency which is insured by such Extension. In relation to a claim under the GLAA Extension, the term "Damage" is to be read as a reference to the "prevention of access to the Premises".

[16] Arch Defence §58 **[A/7/19]**

99. Where there has been damage to property, the measure of the BI indemnity is the reduction in turnover caused by the Damage, and any expenses incurred to prevent or limit a reduction in turnover, by reason of the Damage. If and to the extent that the same reduction in turnover would have been suffered by the business in any event, ie but for the Damage, it is not covered, as it is not due to the Damage. The agreed indemnity is not the reduction in turnover caused by whatever it was that caused the Damage.

100. The result is no different where one of the BI Extensions applies, such as the GLAA Extension. The indemnity is the reduction in turnover caused by the prevention of access, and any expenses incurred to prevent or limit a reduction in turnover caused by the prevention of access. To the extent that any reduction in turnover would have been suffered in any event, but for the qualifying prevention of access, that reduction in turnover is not covered.

101. Proof of "but for" causation is therefore a necessary element of proving recoverable loss of turnover caused by a prevention of access to the Premises. To the extent that the loss of turnover would have been suffered in any event, irrespective of the operation of the insured contingency, there can be no recovery.

E3: Calculation of the indemnity under Arch CC

102. The measure of the available indemnity in the Gross Profit cover starts with a comparison between the turnover achieved by the business during the indemnity period and the turnover in the 12 month period before the Damage (or, here, the commencement of the prevention of access). BI policies frequently so provide.

103. Turnover in the 12 month period before the Damage or the prevention of access would only be a truly reliable comparator if the business was operating in a steady state over time, which would be unusual. The policy is not a financial guarantee of the financial results of the previous 12 months: it is a policy of indemnity. An adjustment to the formula is therefore called for, inter alia to accommodate matters which would have affected the turnover even if the insured peril had not happened.

Unless such an adjustment is made the policyholder is bound to receive an amount which is greater or less than its actual loss.

104. The requirement for adjustment is implicit in the concept of indemnity insurance. It is often expressed also in a trends clause. In Arch CC, the trends clause is to be found under the definition of Standard Turnover **[B/2/33-34]**, where the Trends Language appears:

> *"Rate of Gross Profit and Standard Turnover may be adjusted to reflect any trends or circumstances which (i) affect The Business before or after the Damage (ii) would have affected The Business had the Damage not occurred.*
>
> *The adjusted figures will represent, as near as possible, the results which would have been achieved during the same period had the Damage not occurred."*

105. The underlined words confirm that loss of turnover which would have happened in any event, but for the Damage, is not indemnified.

106. The final sentence in the Trends Language confirms that the intention is that the combination of the prior turnover benchmark, and the adjustment to reflect trends and circumstances, will produce ("as near as possible") an assessment of the loss of gross profit which would have been achieved but for the Damage. Otherwise, the BI policy would become something that it is not: a guarantee of the past performance of the business.

107. In the ordinary BI case of damage to insured property, there can be no doubt that in calculating the measure of the available indemnity, the italicized words – "had the Damage not occurred" – in the Trends Language mean that one is called on to consider the position which would have applied if the Damage had not occurred. See, for an example of an orthodox application of a trends clause in the case of property damage, the decision of HHJ Davies QC in *Contact (Print and Packaging) Ltd v Travelers Insurance* [2018] EWHC 83 (TCC) at [265] to [284] **[K/173/64]**. One does not consider the position which would have applied if the Damage had not occurred and

whatever had caused the Damage had also not occurred. See *Orient-Express* at [57] **[J/106/11]**.

108. The Trends Language applies, where the claim is under the GLAA Extension, reading "the Damage" as "the prevention of access to the Premises". This is (at least broadly) accepted by the FCA: see FCA Trial Skeleton §464 **[I/1/167]**.

109. The Trends Language confirms that there is no indemnity provided by Arch CC for any reduction in turnover which would have been suffered by the business in any event, ie but for the prevention of access. The relevant counterfactual is therefore mandated by the Policy: what would have been the financial outcome for the business in the indemnity period if there had been no prevention of access? The task is no different in nature from the award of damages in ordinary breach of contract cases.

110. Contrary to the FCA's case (see eg §478-479) **[I/1/171]**, there is no limitation on the type of trends or circumstances which are to be reflected in the adjustment of the Rate of Gross Profit and/or Standard Turnover and there is no reason to read either word, or the phrase as a whole, narrowly. "Trends" is apt to refer to patterns in the business. Standard Turnover in the 12 months prior to the Damage may not reveal whether the business is growing or shrinking. "Circumstances" is any relevant factor affecting the business. It is "any" and therefore all trends or circumstances (1) which affect the Business before or after the prevention of access to the Premises or (2) which would have affected the Business but for the prevention of access to the Premises which are to be reflected by an adjustment in the Rate of Gross Profit and/or the Standard Turnover.

111. There is nothing in the Trends Language which requires the trend or circumstance to be something extraneous to the event or state of affairs which gives rise to the prevention of access.

112. Nor is there anything in the Trends Language which limits the circumstances which are relevant to "the ordinary business vicissitudes" (cf FCA Trial Skeleton §479)

[I/1/171]. In any event, it is unclear what the FCA would regard as an "ordinary business vicissitude". The economic recession brought on by the pandemic, which has affected and will continue to affect the turnover of numerous businesses, including many businesses whose premises were not required to be closed, would appear to qualify as an "ordinary business vicissitude".

113. The aim of the adjustment is to ensure that the Policyholder is indemnified for no less than, but no more than, the losses caused by the prevention of access. The adjustments are all with a view to ensuring that the adjusted figures "represent, as near as possible, the results which would have been achieved during the same period had the [prevention of access] not occurred." This is consistent with, indeed an expression of, the basic principle of indemnity.

114. Whether there is damage to insured property, or a prevention of access to the Premises, the relevant counterfactual called for by the Trends Language is the absence of the Damage, or the absence of the prevention of access to the Premises. The Trends Language does not permit an adjustment to be made on the assumption that whatever was the ultimate cause of the damage to insured property, or the prevention of access, must also be left out of account for the purpose of defining and applying the counterfactual.

115. The Trends Language can operate in a Policyholder's favour, as well as against. It is not a restriction on cover. There is no reason to read it narrowly. Take the example of a Category 3 shop which suffered a fire and was unable to open and operate during April 2020 because of fire damage. But for the damage, the food shop would quite conceivably have done double the business in April 2020 than it had done in April 2019, because shoppers were encouraged to shop locally during the pandemic. The Trends Language (as well as ordinary principles of indemnity) requires that such circumstances be taken into account (by an upward adjustment to Standard Turnover and/or the Rate of Gross Profit) in calculating the BI loss caused by the fire damage. (That a trends clause may operate in favour of the policyholder is illustrated by *Sugar Hut Group & Ors v AJ Insurance* [2014] EWHC 3352 (Comm) (see eg at [33]-[38]))**[K/155/10-11]**.

E4: The indemnity under Arch Retailers (loss of Income) and Arch Offices & Surgeries (loss of Gross Income)

116. As Arch CC has been designated as the lead Arch1 wording, the position under Arch Retailers and Arch Offices & Surgeries can be stated briefly.

117. In relation to Arch Retailers, the indemnity stated in the Business Interruption section is "in respect of loss of income *resulting from* Damage to property used by You at The Premises…" **[B/23/27]**. (The cover on Book Debts is inapplicable to a claim under the Extensions). The amount payable is "the amount by which the Income falls short of the Income which would have been received during the Indemnity Period *due to* the Damage" "less any savings during the Indemnity Period in respect of business charges or expenses payable out of income which reduce or stop *due to* the Damage" (emphasis added).

118. In the context of a claim for losses resulting from a prevention of access to the Premises which falls within the GLAA Extension, this is to be read as if references to Damage are references to the "prevention of access to the Premises". This gives effect to the introductory words of the Extensions ("we will also indemnify You in respect of loss as insured under this Section resulting from…). This is common ground: see the FCA's Trial Skeleton at §481 **[I/1/171]**.

119. In relation to Arch Offices & Surgeries, the appropriate indemnity under the GLAA Extension will depend on whether the Policyholder has opted for Option A – Gross Income or Option B – Increased Expenses. (The cover in respect of Book Debts, if purchased, would not apply to a claim under the GLAA Extension). Where the Policyholder has opted for Option A, the amount payable is "the amount by which the Income falls short of the Income which would have been received during the Indemnity Period *due to* the Damage", less any savings during the Indemnity Period **[B/24/36]**. As with Arch Retailers, for a claim under the GLAA Extension it is common ground that "Damage" in the Gross Income clause is to be read as referring to the prevention of access to the Premises. See FCA Trial Skeleton, §481 **[I/1/172]**.

120. The indemnity in Arch Retailers, under the Income clause, and in Arch Offices & Surgeries, under the Gross Income clause, is essentially the difference between the income earned during the indemnity period and the income which would have been earned during that period but for the Damage, less any savings made by reason of the Damage. As with Arch CC, proof of "but for" causation is contractually required as a minimum. It is only income which would have been earned, but was lost because of the prevention of access, which is covered. Income which would have been earned, but was lost, because of other circumstances is not covered.

121. In the typical case of damage to insured property, the agreed indemnity under the Income clause (Arch Retailers) or Gross Income clause (Arch Offices & Surgeries) is in respect of loss of income caused by the Damage, not the loss of income caused by whatever it was which caused the Damage. The same applies where the relevant event is a prevention of access which qualifies under the GLAA Extension.

122. The indemnity in Arch Retailers and Arch Offices & Surgeries is not expressed to be calculated by reference to Standard Turnover and Rate of Gross Profit in the 12 month period prior to the Damage. There is therefore no need for a trends clause to provide for adjustments to Standard Turnover and/or Rate of Gross Profit. (The reference to "the figures adjusted will represent as near as possible the figures which would have been obtained as at the date of the Damage had the Damage not occurred" in both policies applies expressly to Item on Book Debts, not to the Income or Gross Income clause).

123. In calculating the indemnity, it is necessary to assess the income which would have been received during the Indemnity Period if there had been no Damage. This exercise in assessment, as a matter of practice, may start with the income which had been earned by the business in the preceding 12 months (or another convenient period), adjusted to reflect trends and circumstances which would have affected the business in any event (ie assuming no insured Damage) during the indemnity period. Or the exercise may start with budgeted income figures for the indemnity period. But these are ultimately matters of assessment. However, the assessment is

performed in practice, the contractual target is an assessment of the shortfall in income which has been caused by the Damage. That assessment must necessarily take into account economic factors which would have affected the business if the Damage had not occurred. As noted above, proof of "but for" causation is contractually required in the same way as under the Trends Language in Arch CC. The FCA concedes as much: see FCA Trial Skeleton §483 **[I/1/172]**.

124. In the context of a claim under the GLAA Extension, in assessing the shortfall (if any) in income which was caused by the closure of the Premises, the assessment must necessarily take into account economic factors which would have affected the business if there had been no closure. To ignore such factors (or to ignore some but allow for others) would be contrary to the agreed indemnity.

Section F: The available indemnity on the facts

125. Arch has taken the position in its dealings with Policyholders whose Premises were closed because of a requirement to close, or advice to close, the Premises pursuant to the 20 or 23 March Advice or the 21 or 26 March Regulations, that the GLAA Extensions insure against the Policyholder's loss of turnover/loss of income, and any increase in cost of working, which resulted from the advice or requirement to close the Premises, less the Policyholder's savings of fixed costs (such as rent), variable costs (such as labour, raw materials and packaging), and the Government's Financial Support measures. (The precise calculation of turnover/income, and the extent to which such savings are to be taken into account, are not the subject of the test case).

126. Arch has also taken the position that it is only loss of turnover/loss of income suffered as a result of the prevention of access which is indemnifiable, that is, the loss of turnover or loss of income which is over and above the loss of turnover or loss of income which would have been suffered in any event by the Policyholder by reason of the general effects of the pandemic, the nationwide restrictions on movement, falls

in consumer confidence and consumer spending, and the economic downturn. It is this which is, in effect, challenged by the FCA as a matter of principle.

127. Even if the insured Premises had remained open, it is Arch's position that in most if not all cases the Policyholder would have earned less income, and less profit, than would have been budgeted for the period of actual closure because of the circumstances identified in Paragraph 126 above, which have affected numerous other businesses which were not required to close and which did remain open and which nonetheless suffered a steep fall in trade. Whether and to what extent this is true for particular Policyholders is not the subject of the test case but it is an issue which Arch is entitled to raise in dealing with claims.

128. There are many examples of businesses which closed before there was any government action or advice requiring closure.

129. There are many examples of businesses which were not ordered to close but which decided to close on economic grounds owing to the reduced level of trade.

130. There are many examples of business which were not ordered to close and remained open but suffered a significant reduction in turnover because of the fall in consumer confidence.

131. There are also many examples of businesses which were required to close and which were permitted to, and did, re-open from 15 June 2020 or 4 July 2020 but which have since experienced significantly reduced turnover (compared to last year) since reopening because of significantly reduced consumer confidence.

132. These are all issues which can and should be worked through in the adjustment of individual claims where the GLAA Extension applies. The FCA's attempt to prevent Arch from doing so involves a rewriting of Arch's rights under the Policies.

133. There are 6 interrelated reasons why, contrary to the FCA's case, the circumstances identified in Paragraph 126 are not to be ignored as a matter of principle in

calculating the indemnity available under the GLAA Extension where there has been a qualifying prevention of access to the Premises.

133.1. First, the GLAA Extension does not insure against the consequences of the emergency such as the nationwide restrictions on movement, the falls in consumer confidence and consumer spending, nor the economic downturn. The risk insured against is the risk that access to the Premises is prevented in certain specified circumstances, ie pursuant to government or local authority action or advice due to an emergency. The FCA's case to the contrary conflates the peril with the originating cause of the peril. The indemnity should be no wider than the ambit of the insured peril.

133.2. Second, the GLAA Extension, and the measure of indemnity provisions, require proof of causation once the Extension has been triggered by a qualifying prevention of access[17]. Loss of turnover or loss of income which would have been suffered in any event are not losses which are caused by the prevention of access.

133.3. Third, ordinary principles of indemnity insurance, and of contract law, provide that losses which would have been incurred in any event, ie but for the breach of contract, are irrecoverable. In indemnity insurance, the obligation of the insurer is to hold the insured harmless against loss caused by the insured peril. The insurer is not obliged to hold the insured harmless against losses which it would have suffered in any event if the insured peril had not occurred. See *Endurance Corporate Capital v Sartex Quilts* [2020] EWCA Civ 308 at [35] and [36] **[K/184/8]**: the general object of an award of damages for breach of contract is to put the claimant in the same position so far as money can do it as if the breach had not occurred (at [36]) **[K/184/8]**.

133.4. Fourth, the Trends Language in Arch CC expressly requires adjustment to be made to Standard Turnover and Rate of Gross Profit to reflect any and all

[17] For an application of the requirement that the claimed losses be proximately caused by the insured peril in a non-damage business interruption case, see *PMB Australia Ltd v MMI General Insurance Ltd* [2002] QCA 361, Queensland Court of Appeal, esp. at [12]-[16] **[K/102/5-6]**.

trends and circumstances which would have affected the business but for the prevention of access. All of the matters referred to in Paragraph 126 above are (or at least are likely to have been or are at least potentially) trends or circumstances which would have affected the Policyholder's business, and turnover, even if the Premises had not been closed. The Trends Language requires these matters to be taken into account. The extent to which they would have affected the Policyholder's business, and turnover, is a matter for adjustment in individual cases.

133.5. Fifth, the measure of indemnity in Arch Retailers and Arch Office & Surgeries is to be calculated, in effect, by reference to the amount by which actual income falls short of the income which would have been received due to the closure of the premises. The policy language again requires proof of but for causation as a minimum. In assessing what income would have been received if the premises had not been closed, there is no contractual support for the FCA's case that one ignores all of the circumstances set out in Paragraph 126 above and assumes no Covid 19, no emergency, and no government action.

133.6. Sixth, there is nothing artificial or unrealistic about drawing a distinction between the economic effects of the pandemic, which have affected all or most businesses, and which are not insured under Arch1, and the economic effects of a requirement or recommendation to close the Premises.

134. More detailed submissions on the Defendants' approach to causation (and the FCA's flawed approach to causation) are set out in the Defendants' Joint Skeleton argument on causation, which Arch has co-authored and adopts.

135. The FCA's case on burden of proof (see eg Reply §61 **[A/14/32]**) is also incorrect. The Policyholder bears the legal burden of proving the operation of an insured peril, causation[18] and the proper measure of indemnity. There is nothing in the Arch Policies to suggest that the burden of proof is reversed. How, in a particular case, the

[18] See eg *Borealis AB v Geogas* [2011] 1 Lloyd's Rep 482 at [43] per Gross LJ **[K/138/9]**. See also *PMB Australia*, op cit, at [19] **[K/102/7]**.

Policyholder may discharge its burden, and how (as a matter of practice) Arch may seek to show how the economic effects of the pandemic, the economic downturn, etc, would have affected the Policyholder's business even if it not been required to close the Premises, are not matters that can sensibly be resolved in a test case without actual examples.

Section G: The appropriate declarations

136. Arch has accepted that where insured Premises were required to be closed by the 21 March Regulations or the 26 March Regulations or were recommended to be closed by the 20 March Advice or the 23 March Advice and were closed, there was a prevention of access to The Premises due to government action or advice which was due to an emergency likely to endanger life for the purposes of Arch1. That prevention of access continued for so long as closure was required or recommended and the Premises remained closed. However, none of the other assumed facts satisfy the requirements of Arch1.

137. For those Policyholders for whom there was a prevention of access to insured Premises, Arch1 does not cover business interruption losses which were not proximately caused by the prevention of access; nor business interruption losses which would have occurred anyway but for the prevention of access.

138. In light of the foregoing, Arch will seek the following declarations from the Court in relation to Covid-19 business interruption claims under Arch1:[19]

    (1) Where insured Premises were required to close by reason of the 21 March Regulations and/or the 26 March Regulations or were recommended to close by the 20 March Advice and/or the 23 March Advice and were closed, there was a prevention of access to the Premises due to government action or advice which was due to an emergency likely to endanger life for the purposes of Arch1. None of the other Assumed Facts satisfy the requirements of the GLAA Extension in Arch1.

[19] Arch Defence §68 **[A/7/21].** The third declaration sought in relation to Arch Retailers and Arch Offices & Surgeries has been slightly reframed in this skeleton. If necessary, Arch will seek permission to amend §68.

(2) Where insured Premises were required to close by reason of the 21 March Regulations and/or the 26 March Regulations or were recommended to close by the 20 March Advice and/or the 23 March Advice and did close, the policyholder is obliged to prove on the balance of probabilities that, but for the prevention of access to The Premises, the claimed business interruption losses would not have been incurred. The appropriate counterfactual is that there was no governmental or local authority action or advice preventing access to the Premises but all other factors remain unchanged.

(3) The Arch1 Trends Language in Arch CC, and the indemnity provision in Arch Retailers and Arch Offices & Surgeries, also requires the calculation of any losses to take into account any trends or circumstances which would have affected the Business save for the prevention of access to The Premises.

JOHN LOCKEY QC

JEREMY BRIER

14 July 2020

Essex Court Chambers

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Attached:

Annexes A, B and C

Claim No: FL-2020-000018

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

Before Lord Justice Flaux and Mr Justice Butcher

B E T W E E N:

THE FINANCIAL CONDUCT AUTHORITY

Claimant

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Defendants

ANNEX A TO THE SKELETON ARGUMENT OF ARCH (D1)

The table below sets out a summary of Arch's position in respect of the application of coverage to each Category referred to by the FCA in paragraph 19 of their Particulars of Claim (**"PoC"**) and Paragraph 64 of the FCA's Trial Skeleton. References are given to where the Category is addressed in Arch's Skeleton Argument. The table deals only with what the FCA terms the "trigger"; it does not engage with the arguments of causation or trends and circumstances.

Category (reference in PoC)	**Arch's position concerning coverage in relation to each category**	**References in Arch's Skeleton**
<u>Category 1</u> Hospitality including restaurants, cafes, bars and public houses **PoC §19.1** **Trial Skeleton §64.1**	**24** businesses in Category 1 are insured under Arch Retailers and **0** businesses in Category 1 are insured under Arch CC or Arch Offices & Surgeries. In total, **0.40%** of all holders of Arch Policies fall within Category 1 (Agreed Facts 9 §2 **[C/15/2]**). There is no single answer applicable to Category 1 businesses. Arch accepts that for pubs, bars, clubs and restaurants whose business did not previously include the provision of take-out services, the effect of the advice and subsequent Regulations was to require the closure of the Premises. Access to the Premises for the purposes of the Business was prevented because the Premises were not able to be opened to customers without the policyholder making a fundamental change to its Business. For Premises which were closed pursuant to the advice and subsequent Regulations, there was a qualifying "prevention of access". But for those policyholders whose business previously include the provision of take-out services, the effect of the advice was not to require the closure of the Premises. Such businesses were allowed to continue to sell food and drink for consumption off the premises. There was therefore no prevention of access to the Premises for the purposes of carrying on the Business. If it is appropriate to consider the position of customers, there was nothing in the advice or Regulations concerning restrictions on the movement of people which prevented them	§§49 - 51, §52.2, §55

	entering premises to buy takeaway food or drink. As was stated in the guidance issued on 26 March 2020, "people can continue to enter premises to access takeaway services". The FCA's case to the contrary (eg §441 final sentence) is wrong. If it is appropriate to consider the position of business owners and employees, Paragraph 6(2)(f) of the 26 March Regulations permitted business owners and/or his, her or its employees to travel to, and be at, the Premises for the purpose of conducting work which it was not reasonably possible to do from home. That would include the preparation and sale of takeaway food and drink.	
<u>Category 2</u> Leisure including cinemas, theatres, nightclubs, gyms, and hairdressers **PoC §19.2** **Trial Skeleton §64.2**	**632** businesses in Category 2 are policyholders under Arch Policies which amounts to **10.50%** of all holders of Arch Policies. **537** of those businesses are insured under Arch CC; **95** are insured under Arch Retailers (Agreed Facts 9 §2 **[C/15/2]**). Arch accepts that there was a prevention of access to the Premises for the purposes of the GLAA Extension for Policyholders under Arch1 whose Premises were used for businesses falling within Category 2 and which were required to cease those businesses and to close them.	§52.1, §53, §54

<u>Category 3</u> Essential shops including food retailers, pharmacies, petrol stations, banks, medical or other health services **PoC §19.3** **Trial Skeleton §64.3**	**38.40%** of all holders of Arch Policies fall within Category 3. Of the total **2311** businesses in Category 3, **1992** of those businesses are insured under Arch Retailers policies and **319** are insured under Arch Offices & Surgeries policies (Agreed Facts 9 §2 **[C/15/2]**). These businesses were expressly permitted to remain open by Regulation 5(1) of the 26 March Regulations. There was no prevention of access to their Premises. Restrictions on movement of people did not prevent access to the Premises. In any event, Paragraph 6(2)(f) of the 26 March Regulations expressly provided that it would be a reasonable excuse for a person to leave the place where they are living to travel for the purposes of work, where it was not reasonably possible for that person to work from the place where they were living. Paragraph 6(2)(f) of the 26 March Regulations therefore permitted business owners and/or his, her or its employees to travel to, and be at, the Premises for the purpose of conducting work which it was not reasonably possible to do from home. That would include running a Category 3 business. As for customers of Category 3 shops, they could continue to use these shops to the full extent permitted by (i) the general language of "reasonable excuse" and (ii) the specific language of paragraph 6(2)(a) of the 26 March Regulations. The FCA's argument that it was more <u>expensive</u> for these businesses to operate (see Paragraph 19.3 of the POC) does not on any view involve a "prevention of access to the Premises". The FCA has come close to conceding that there was no prevention of access for Arch1 for businesses in Category 3: see FCA Trial Skeleton at §434 which does not refer to Category 3 but has shied away from expressly doing so.	§56, §61, §62

<u>Category 4</u> Shops offering goods for sale or hire **PoC §19.4** **Trial Skeleton §64.4**	**756** businesses in Category 4 are policyholders under Arch Policies. Businesses in Category 4 amount to **12.56%** of all holders of Arch Policies. **613** of those policyholders were insured under Arch CC policies; **143** policyholders were insured under Arch Offices & Surgeries (Agreed Facts 9 §2 **[C/15/2]**). There is again no single answer to Category 4. For those Policyholders who used their Premises (prior to the relevant action or advice) solely for the purposes of in person sales, then it is accepted that the effect of the advice, and subsequently the Regulations, was to require closure of the Premises and therefore the prevention of access to the Premises, save for any business which provided hot or cold food for consumption off the premises (see paragraph 5(2) of the 26 March Regulations). For those Policyholders who also used their Premises for online, telephone or postal sales, there was no prevention of access to the Premises, as the Premises could continue to be used for those purposes. Restrictions on movement of people did not prevent access to the Premises. If (which is denied) it is relevant to consider the position of the business owner and/or employees, they remained free to travel to the Premises to work on online, telephone or postal sales pursuant to Paragraph 6(2)(f) of the 26 March Regulations to the extent that such work could not be carried on at home. Customers were also not prohibited from visiting the Premises if there was a reasonable excuse for them to do so: see the reasonable excuse carve-out in paragraph 6(1) of the 26 March Regulations.	§53, §57

<u>Category 5</u> Other businesses not expressly prohibited to close or permitted to stay open, including manufacturers and accountants' offices **PoC §19.5** **Trial Skeleton §64.5**	**2293** businesses in Category 5 are policyholders under Arch Policies. Businesses in Category 5 amount to **38.10%** of all holders of Arch Policies. **1312** of those businesses were insured under Arch CC policies, while **981** were insured under Arch Offices & Surgeries policies (Agreed Facts 9 §2 **[C/15/2]**). There was no prevention of access to the Premises for businesses within Category 5. As the FCA accepts, these were businesses which were <u>not</u> required or advised to close. Even if it is relevant to consider restrictions on movement, business owners and their employees were expressly permitted to use the Premises if working from home was not reasonably possible. Customers of Category 5 businesses were also not prohibited from visiting the Premises if there was a reasonable excuse for them to do so: see the reasonable excuse carve-out in paragraph 6(1) of the 26 March Regulations. The FCA has come close to conceding that there was no prevention of access for Arch1 for businesses in Category 5: see FCA Trial Skeleton at §434 which does not refer to Category 5 but has shied away from expressly doing so. Rarely, if ever, will the closure of insured Premises prevent a professional services firm from carrying on its business. Advice can continue to be provided, and instructions received, by telephone or videoconference. Further, to the extent that face-to-face meetings are necessary, such would not be contrary to the regulations or advice, and they can take place at almost any premises, including the customer's premises if they have remained open. There is, in most cases, no relationship between the availability of the insured premises and the continuity of the business.	§58

<u>Category 6</u> Holiday and similar accommodation **PoC §19.6** **Trial Skeleton §64.6**	None of the businesses within the scope of Category 6 are insured by the Arch Policies (Exhibit KV1 **[D/2/2]**).	
<u>Category 7</u> Nurseries, schools and places of worship **PoC §19.7** **Trial Skeleton §64.7**	Only **2** businesses in Category 7 are policyholders under Arch CC policies. Businesses in Category 7 amount to **0.03%** of all holders of Arch Policies (Agreed Facts 9 §2 **[C/15/2]**). Arch has accepted that the 23 March Advice instructed the closure of all places of worship and that where places of worship were closed pursuant to the 23 March Advice, there was a qualifying prevention of access. Nurseries and educational establishments were not ordered to be closed; they were permitted to remain open for teachers, vulnerable children, and children of critical workers. If insured Premises remained open for that purpose, there cannot sensibly have been a prevention of access to those Premises.	§53

Claim No: FL-2020-000018

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Before Lord Justice Flaux and Mr Justice Butcher

B E T W E E N:

THE FINANCIAL CONDUCT AUTHORITY

Claimant

-and-

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Defendants

ANNEX B TO THE SKELETON ARGUMENT OF ARCH (D1)

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1. In this document, Arch responds to the Arch1 – Assumed Facts Example (Category 5) at p 173 of the FCA's Trial Skeleton (the **Example**).

2. Although Arch does not offer any commentary on the reasonableness of the assumed facts, Arch should not be taken to have admitted that the assumed facts are reasonable. For example, the assertion that there was a drop in income after closure because people like to see their financial advisers "face to face" seems far-fetched. It ignores the availability of telephone and video consultations. It ignores the possibility of undertaking face-to-face meetings, where such are necessary (as opposed to simply preferred), elsewhere than at the insured Premises. It further ignores the fact that investment decisions, especially in the volatile trading conditions brought about by the

pandemic, are influenced by more than the availability of in person meetings at the business premises of the service provider.

3. Further, however realistic the Example may be (and Arch has important reservations in that regard), the facts as stated are plainly not insured by the GLAA extension. The FCA's adoption of the Example illustrates (1) a mischaracterisation of the insured event, or "trigger"; and (2) a disregard for the proper approach to causation.

The insured event

4. The background is the admitted fact that businesses in Category 5 were not required or even advised to close their Premises for the purpose of carrying on their business.

5. This is implicitly recognised in the Example: EE chose to close the office on 17 March 2020 because the number of customers attending the premises in person was dwindling. Numbers were dwindling not because of any order or advice preventing EE from hosting client meetings at its premises, but because of the public information campaign and social distancing advice. At no time, whether before or after 17 March, was EE affected by an order or advice which prevented its employees or customers from attending the Premises. EE rather made a choice to close.

6. The conclusion in the Example, that there was a prevention of access to EE's Premises from 17 March 2020, is based on an impermissible logical leap as follows:
   a. It is common ground that there was an emergency likely to endanger life from 3 March 2020.
   b. It is agreed that due to that emergency the Government took action and gave advice.
   c. *Arguendo* it is further agreed that "due to" that action/advice the firm's five employees "had to" work at home "because they could".
   d. But then comes the (impermissible) leap: "This was prevention of access".

7. There is no actual connection between the Government action/advice and "prevention of access". The connection is between the action/advice and employees working from

home because they were able to do so. Had the employees not been able to work effectively at home for any reason, they were not obliged to do so. Paragraph 6(2)(f) of the 26 March Regulations expressly preserved the right of employees to attend their place of work where it was not reasonably possible to work or to provide services from their place of living.

8. The crux of the issue is therefore about the personal circumstances of the employee. The Example does not relate at all to any prevention of access to the Premises.

9. Only by a complete misreading of "prevention of access" to mean "did not have to go into the office" (and by ignoring the fact that they could have if they did need to) can the FCA reach its conclusion.

10. Even if it is appropriate in this context to consider the restrictions placed on people's movement (rather than on the Premises), the Regulations did in fact permit EE's employees to use the Premises (and to travel to and from the Premises) if it was not reasonably possible for them to work from home. EE's employees were not prohibited from using the Premises, nor were they even advised against using the Premises, if they were unable to perform their functions effectively from home.

Causation

11. There is further no factual connection between the interruption to the business and the opening or non-opening of the insured Premises. Unlike a shop, which has physical goods to sell, or a healthcare provider which has physical equipment installed in its premises, an independent financial adviser may undertake meetings at any location. A necessary face-to-face meeting has not been prevented by any UK Government order or advice. It may take place at any premises that are allowed to be open. The meeting may even take place at the client's own premises which, if they were office premises, were not required to close.

12. Therefore, even if it is accepted that a prevention of access to the insured Premises had occurred, such prevention would not have been in any way causative of any loss. The insured activity could have continued, even making use of any necessary face-to-face meetings, at any alternative location, if a personal meeting was required.

Conclusion

13. The Example demonstrates that the business was able to continue, and did in fact continue, serving the needs of its clients. It was not prevented from servicing those needs, whether at the Premises or elsewhere and there is no good reason to suppose that the reduced trading volumes were due to the fact that EE's employees, or its clients, did not attend meetings at the Premises (as though the location of the meeting realistically made any difference). Such an assumption is naïve. It is far more realistic to suppose that other factors (most obviously the volatile market conditions and people's preoccupation with other matters such as re-adjusting to the lockdown) caused reduced trading volumes.

14. The Example also recognises that clients were unwilling to visit the Premises due to fear of COVID-19 and no new customers were engaging EE, from as early as 1 March 2020. That was before any "prevention of access" as alleged by the FCA. On any sensible view, the GLAA Extension does not provide any indemnity for losses prior to an alleged prevention of access.

15. The Example also demonstrates the soundness of Arch's counterfactual and the unsoundness of FCA's case. Clients did not visit the premises due to fear of COVID-19 from 1 March onwards and no new clients engaged the firm (presumably because of fear of COVID-19 and/or because of fear of looming economic recession). Even if one assumes that in person contact between financial adviser and client is important to turnover, it is perfectly reasonable to suppose that even without the closure of the Premises from 17 March 2020, and even without the government regulations about staying at home, there would have been a significant reduction in EE's income because fear of COVID-19 would reduce or eliminate in person contact, wherever it occurred.

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ANNEX C TO THE SKELETON ARGUMENT OF ARCH (D1)

Arch addresses below certain paragraphs of the FCA's Skeleton Argument insofar as it relates to Arch. Where a paragraph is not referred to below it does not mean Arch admits the contents of all or part of it.

Paragraph in FCA Skeleton	**Arch's response**
129	The first sentence is plainly wrong. Prevent means prevent. It does not include hindrance or restriction. The final sentence is also wrong. The prevention must be of access to the Premises. Restrictions on customer or employee movements do not prevent access to the Premises.
131-136	The cases are not suggested to be dispositive. But they illustrate the meaning given to "prevent", particularly when used with "hinder."
137	The reason why the Royal Society for the Prevention of Accidents is so named is actually very unhelpful to the FCA. Its expressly stated aim is <u>to prevent</u> accidents in the sense of making them stop completely. Its website is clear about this: "At the Royal Society for the Prevention of Accidents (RoSPA), we have been working towards our vision for life, **<u>free from</u>** serious accidental injury, since 1916." (Emphasis supplied).
140	Arch has not argued, and does not argue, that the possibility that a business would ignore Government closure advice or recommendation means that there was no prevention of access. The FCA is setting up a straw person.
141	The GLAA Extension refers to prevention of access to The Premises. Restrictions on certain people attending the Premises are not sufficient.
144	Partial closure is not sufficient for Arch 1.
145	Social distancing advice does not prevent access to the Premises. Nor do social distancing rules.
148	Restrictions on individuals' freedom of movement do not prevent access to the Premises.

151	The FCA's case that there is a prevention of access for (in particular) Categories 3 and 5 is wrong.
152	The decision in SAS Maison Rostang does not reflect English law and the (very brief) reasoning is not persuasive.
430	It is correct that Arch has not taken this position. However, the Zurich wording is a disease wording. The Arch wording concerns a Prevention of Access clause (the GLAA Extension). It does not respond where there is a "disease outside the premises" but rather if the premises cannot be accessed to carry on the business by reason of the order or advice of government or local authority made in response to an emergency (e.g. COVID-19). The conflation between a disease clause and a PoA clause runs through the FCA's arguments.
433	There is no contradiction here: partial closure is not the same as complete closure. Where a premises is required to or advised to close such that the business at the premises cannot be carried on (by reason of the 21/26 March Regulations or the 20/23 March Advice) then there is qualifying coverage under the GLAA Extension. However, actions/advice which requires only partial closure (§433.3) or where there is "*actions or advice on social distancing*" [etc] (§433.4) (which does not equate to any closure) do not trigger coverage. In short, a business which cannot serve customers from its premises has suffered a qualifying prevention of access whereas a business which can continue to operate and serve customers from part of its premises has likely not. These are distinct situations and there is nothing contradictory about their having different outcomes in terms of coverage under the GLAA Extension.
434	The omission of a reference to Category 3 (essential retail) and 5 (service businesses) appears to be an admission on the part of the FCA that there was no prevention of access within the meaning of the GLAA Extension for businesses within those Categories. The FCA's position appears to be that access was only prevented to businesses in Categories 1, 2, 4, 6 and 7. In correspondence, however, the FCA has indicated that its case '*remains as set out in its PoC para 46.1 and 47 and Schedule 1*'. The position is confused.
435-436	Requiring closure rather than a business ceasing is neither unduly narrow nor contrary to common sense. The GLAA Extension expressly concerns "prevention of access to the Premises". The FCA's argument conflates "access to the Premises" with "use of the Premises", which is not the wording of Arch's GLAA Extension. No arbitrary results follow because there is a clear "line in the sand" between government or local authority action or

	advice which does not require the closure of the Premises - and that which does not, even if such action or advice (a) requires the policyholder to close part of the Premises or (b) requires the policyholder not to carry on certain business activities at the Premises. The analysis is not, as asserted in §436, a pure category-by-category answer but rather an answer determined by reference to the access to the business in question. See Annex B. There is no "single answer" to category 1 but rather it will depend (for example) on whether the Business could be carried on. There will have been a prevention of access for Category 2 (again, see Annex B) and to that end, the last two sentences of §436 are not understood.
437	Arch has been clear in its Defence [ref, §7.9] that the 20 March 2020 Advice and 23 March 2020 Advice qualifies as advice from government or local authority that prevented access to the Premises for the purposes of carrying on the Business. Arch has also not taken the point that access for "cleaning, doing the accounts etc." amounts to access. This is another "straw person" which the FCA has put up to knock down, without focusing on Arch's actual case that the test is whether the Premises can be accessed for the purposes of the carrying on of the Business.
438	Asking *for whom* access to the Premises was prevented does not take matters further. The focus of the GLAA Extension is on the ability to access the Premises in order to carry on the business. It is not concerned with the freedom of movement of customers. The general lockdown described in this paragraph did not prevent customers accessing the Premises. It discouraged, and then prohibited, customers from leaving their homes without reasonable excuse.
439	The FCA has (again) misunderstood or mischaracterised Arch's position. Arch does not base its Defence on an assertion that "*there was no 'prevention' because there was nothing to stop people disregarding the Government's advice*". Government advice that office workers should work from home and not attend office premises may reduce the use of the Premises. But it does not involve any prevention of access to the Premises.

	In any event, the advice was not unqualified: work at home if you can, only shop for essential items, attend a healthcare professional for medical need. None of this prevents access to the Premises in question. §439 is also inconsistent with §434. If the FCA accepts (as it appears to in §434) that where a business was not ordered to close by the Regulations, such as those businesses in Categories 3 and 5, access to the Premises was not prevented, then it is irrelevant whether Government advice was that customers or employees should avoid attending the Premises as far as possible.
440	The relevant question is whether the policyholder's Premises could be accessed to carry on the Business by reason of governmental order or advice. A statement such as a restaurant that is permitted to sell take-aways "has had its access prevented for its business purposes" is clearly wrong. First, as a matter of fact, there is or was no prohibition on customers accessing a restaurant to collect a takeaway. Regulation 4(1)(b) of the 26 March Regulations simply requires that "*if a business sells food or drink for consumption off the premises, [it must] cease selling food or drink for consumption on its premises during the emergency period.*" The position was made clear in the Government's 26 March 2020 guidance: "people can continue to enter premises to access takeaway services". Second, again by considering the core business of a restaurant the FCA is conflating "access to the Premises" with "use of the Premises." In any event, the core business, or a core business, of such a restaurant may be to provide takeaway food. McDonald's is an obvious example. In such circumstances, what prevention of access has in reality occurred? As for the FCA's bar example: it is indeed Arch's position that where a bar sells takeaway food or drink, access to the Premises has not been prevented for the purposes of carrying on the Business whereas if a bar did not sell takeaway food or drink prior to the relevant government or local authority advice/regulations, access has been prevented for the purposes of carrying on the Business. The FCA's example of a bar which decides it is *uneconomic* to continue operating its side-business given the furlough scheme or too dangerous for employees is an example of where the Government action

	or advice did not cause prevention of access (but something else which is not insured, e.g. reduced consumer demand).
441	The final sentence is factually inaccurate. Regulation 6(1) of the 26 March Regulations provided that "*no person may leave the place where they are living without reasonable excuse*". See further Annex B (category 5) and the "EE" example addressed in Annex C.
443-446	Running through all this is the FCA's conflation of a prevention of access clause with a disease clause. Contrary to the FCA's suggestion (see esp. §446) disease does not trigger the GLAA Extension.
447	The prevention of access clause does not extend to a wide area. The prevention of access clause responds to a prevention of access to the Premises. The cover scheme is not as the FCA represents it to be. The distinction between the disease clause and the prevention of access clause is not in terms of the proximity limit in the disease clause and the absence of such a limit in the prevention of access clause. Rather, the difference between the clauses is that one responds to the presence of a disease and the other responds to a prevention of access to the premises.
[448-]449	This is not pandemic cover as a pandemic is not the trigger under the prevention of access clause. Taking the examples used at §454, if the FCA alleges that the GLAA Extension responds to a pandemic, the FCA must surely also allege that it responds to other catastrophes. Such a construction is inconsistent with the wording of the clause itself.
450-1	The FCA's position is not understood. The only complete defence upon which Arch relies under the GLAA Extension is in relation to businesses which were not ordered to close. The defence is simple: there was no prevention of access. Arch does not rely upon causation as a "complete defence" in respect of claims concerning businesses which were advised or recommended to close.
454	In the hypothetical scenario that the FCA proposes where a customer has "*an embarrassment of riches of triggered perils*", Arch's position means that the insurer would have no causation defence and the policyholder would be able to recover. All the operative causes would be insured.

	NB: This was <u>not</u> the problem which arose in *Orient Express*. In *Orient Express* only one cause was insured (the BI which directly arose from the damage to the hotel) and the other cause was not insured (i.e. the imposition of a curfew and the evacuation of New Orleans). The Tribunal construed "directly arising from" to determine what the insured peril was.
457	Again, the FCA is trying to characterise the GLAA Extension as a disease clause. COVID-19 is not the insured event. The GLAA Extension is labelled in the Policy as the Government or Local Authority Action clause.
458	The broad generalisation is (a) not accepted and (b) irrelevant. If, to give one example, an access road is closed due to a sinkhole appearing in it, the emergency will not have other effects on affected businesses save through government or local authority action.
459 - 460	The wording of Extension 3(d) is materially different to the wording of the GLAA Extension. Extension 3(d) provides that Arch will indemnify a policyholder in respect of reduction in Turnover and increase in cost of working as insured resulting from "*the occurrence of… vermin or pests at The Premises... where use of The Premises is restricted on the order or advice of the competent authority*". The insured peril under Extension 3(d) is the occurrence of vermin or pests, as the FCA recognises at §460. It is the emergency, not the restriction of use. Extension 3(d) will respond if there are vermin or pests on The Premises.
461	Paragraph 7.2 of Arch's Defence states: "it is denied that the Government or Local Authority Action Clause provides an indemnity for all of the policyholders' business interruption losses caused by the emergency." The critical point is that the GLAA Extension responds to preventions of access due to the actions or advice of a government or local authority and not to decisions made of their own volition by cautious or public-spirited owners. Few, if any, policies of insurance put the insured contingency in the hands of the policyholder's conscience.
462	The test for causation set out by Arch does not require "*a near impossible calculation of the alternative world*" as the FCA suggests. Many contract damages calculations, and all indemnity calculations, require an examination of a hypothetical. The hypothetical in this case involves an assessment of the income of the business if access had not been prevented. There is plenty of publicly available information about declining footfall, declining demand, etc.
463	The burden of proof is on the policyholder to prove that all the loss claimed was caused by the insured contingency. Nonetheless, Arch has not put policyholders to proof where there has been a qualifying prevention of access. It has offered

	35% as a fair and reasonable gesture.
464	Arch notes the FCA's acknowledgment that the Trends Language responds to non-damage events.
465	The FCA appears to be suggesting that the Trends Language requires an unyielding application of the prior year's business results. Such an approach may be appropriate for a valued policy but is not appropriate for a policy of indemnity.
472	The purpose of a counterfactual is to see what would happen if all remained unchanged but the triggering event (i.e. the closure order). In the FCA's example, the triggering event is not removed and various other elements of the facts are modified or ignored (e.g. social distancing requirements, lockdown and consumer confidence). The assumption is therefore that customers flocked to the only open restaurant in the country. Other factors such as those examples above, and the presence of coronavirus in the population, must be unchanged rather than ignored.
477	The limit of £25,000 is irrelevant to the question of construction. The Arch Policies are indemnity policies, not fixed value policies.
478 - 479	It is not understood why the word "trend" is said to be "narrow". In any event "circumstances" is not. It does not have an "endless meaning" but relates to external factors which affect the business which is necessarily broad.