



BUSINESS INTERRUPTION INSURANCE TEST CASE

PROPOSED QUESTIONS FOR DETERMINATION

The document is intended to be high level and encompass all potential issues arising from the wordings neutrally. The Framework Agreement at 5.1.8(b) expressly provides for the settling of a list of issues for trial having regard to the Questions for Determination and based on the Parties' statements of case which are likely to narrow down what is in dispute. The Questions for Determination is not a statement of case or a formal list of issues.

A.	CENTRAL QUESTIONS
1.	Under the policy wording in question, applying the agreed facts ¹ and on the applicable permutation(s) of the assumed facts , ² is there cover in principle under the relevant non-damage head of cover in respect of loss arising as a result of interruption or interference with the insured's business (or as otherwise required by the specific insuring clause in question)?
2.	Where coverage in principle is established pursuant to (1) above, whether on the agreed facts and on the applicable permutation(s) of the assumed facts , the policyholders can establish the necessary causal link (as a matter of the application of the law and the wording of the policies) between the assumed losses sustained by policyholders and the relevant peril, event or circumstance that is covered, including taking into account the relevance (if any) of a trends clause (if any and if applicable)?
B.	GENERIC ISSUES
3.	What effect on the business is required (e.g. what is meant by "interruption or "interference"; is closure required (and if so in whole or in part))?

¹ As defined in the Framework Agreement cl.1.2.

² As defined in the Framework Agreement cl.1.3.

C.	<p>DISEASE COVER</p> <p>A clause which provides cover if there is notifiable disease or some other categorisation of disease (e.g. “human infectious or contagious disease”) either at all or within a certain radius or within the vicinity of premises.</p> <p>The selected wordings do <u>not</u> include:</p> <ul style="list-style-type: none"> a) clauses that have an exhaustive list of notifiable diseases which does not include COVID-19; and b) clauses which require the disease to be present on the insured premises or within 1 mile of the insured premises (without an alternative of the disease being within a broader limit such as 25 miles).
4.	<p>Does “notifiable disease” (subject to any specific policy definition) or “human infectious or human contagious disease” include COVID-19? When does the trigger for each arise?</p>
5.	<p>If the disease is required to be in the "vicinity" of the insured premises, what does this mean?</p> <p>(E.g. if undefined³ or defined as “area surrounding/adjacent to insured location in which events occur within such area would be reasonably expected to have an impact on an insured or the insured’s business”⁴)</p>
6.	<p>If the policy requires that the disease must exist within a geographical limit of the premises (e.g. 25 miles), what is required by way of proof? In particular:</p> <ul style="list-style-type: none"> a) Can the existence of COVID-19 be satisfied on the balance of probabilities by inference given the average known or scientifically inferred (given the lack of testing) incidence of it in the UK and its population? How should this be determined in an urban area versus a rural area? b) Can the existence of COVID-19 be satisfied when there is one known case in the appropriate area? c) Can the existence of COVID-19 be satisfied when there is a hospital or similar facility housing COVID-19 patients in the appropriate area?

³ See (in the context of Denial or Prevention of Access clauses) Question 12 and footnote 21 below.

⁴ RSA type 4.

7.	<p>If a policy refers to “occurrence” of notifiable disease, or has a requirement for the disease to be “manifested” by any person or illness to be “sustained by any person” as a result of disease within a required area, what is the meaning of these expressions in the context of the policy and when does the trigger apply?</p> <p>Do these terms alter the answer to (6) above?</p>
8.	<p>If a policy refers to an “outbreak” of a notifiable disease, what is its meaning in the context of the policy?</p>
9.	<p>If policy refers to a disease or outbreak being notifiable to the local authority (e.g. “an outbreak of which the local authority has stipulated shall be notified to them”⁵ or “an outbreak of which the competent local authority has stipulated [shall/will] be notified to them”⁶ or “an outbreak of which must be notified to the local authority”⁷) or “any additional diseases notifiable under the Health Protection Regulations (2010)”,⁸ what is required to be proved by the policyholder?</p>

⁵ QBE type 1.

⁶ Amlin types 1 and 2, Argenta type 1, QBE type 2, RSA type 3.

⁷ Hiscox types 1, 2 and 3.

⁸ RSA type 4.

D.	<p>DENIAL or PREVENTION OF ACCESS COVER</p> <p>A clause which provides cover where some form of authority so acts or some happening is required as to prevent or restrict access to or use of the insured premises.</p>
10.	<p>What does the policyholder have to prove in order to establish:</p> <ul style="list-style-type: none"> a) “prevention of access to”, “prevent... access” to or “access... being prevented” or “access... [will/shall] be prevented”;⁹ b) “prevent... use of”¹⁰ or “use...being prevented”;¹¹ c) “denial of access” to;¹² d) “hindrance in access” to,¹³ “hinder... access” to¹⁴ or “access... being hindered by”;¹⁵ e) “hindrance to use of”, “hinder use of” or “use being hindered by”;¹⁶ f) “inability to use”;¹⁷ g) “closure” of;¹⁸ h) “enforced closure of”;¹⁹ and i) “restrictions placed on”;²⁰ <p>the insured premises/location (by reference in particular to the advice and legislation of the UK Government, which it is intended will be part of the agreed facts)?</p> <p>If the policy requires closure of whole or part of the premises, does that make any difference, and what then is required (e.g. the Regulations or advice requiring closure of the business, the Regulations or advice requiring people to stay at home save for limited circumstances and employers to provide social distancing, a specific closure order, etc.)?</p>

⁹ Amlin type 3, Arch type 1, Ecclesiastical type 1, RSA types 2 and 4, Zurich all types.

¹⁰ Amlin type 3, QBE type 1, RSA types 2 and 3.

¹¹ Ecclesiastical type 1.

¹² Amlin type 2, Hiscox type 1, some Hiscox type 2.

¹³ Amlin type 2, Hiscox type 1, some Hiscox type 2.

¹⁴ Amlin type 3, RSA types 2 and 3.

¹⁵ Ecclesiastical type 1.

¹⁶ Amlin type 3, Ecclesiastical type 1, RSA types 2 and 3.

¹⁷ Hiscox all types.

11.	<p>Was the relevant interference, including the advice and legislation of the UK Government or steps taken by other bodies (which are to be agreed facts), due to:</p> <ul style="list-style-type: none"> a) "actions"; b) "advice"; c) "law/order/decreed"; and d) "restrictions"; <p>of, by or imposed by government (or other authority as applicable)?</p> <p>In particular, applying the agreed facts, what does the policyholder have to prove in order to establish the above and on what dates would these likely be established?</p>
12.	<p>If the relevant actions/advice or emergency/endorsement or some other incident are required to be in the "vicinity" of the insured premises, what does this mean and when is it satisfied?</p> <p>(E.g. undefined "in the vicinity of the premises"²¹ or "area [surrounding/adjacent] to insured location in which events occur within such area would be reasonably expected to have an impact on an insured or the insured's business"²²).</p>
13.	<p>If the policy requires that the relevant actions/advice or emergency/endorsement must apply to a geographical limit of the premises (e.g. 1 mile, 25 miles), what is required by way of proof?</p>

¹⁸ RSA type 1.

¹⁹ RSA type 4.

²⁰ RSA type 1.

²¹ Amlin types 1 and 3, Zurich all types.

²² RSA type 4.

14.	<p>Do the agreed facts constitute an “emergency [which is] likely to endanger life”²³ or an “emergency which could endanger human life”²⁴), or a “threat or risk of damage or injury”,²⁵ or “a danger or disturbance”²⁶ in the required area?</p> <p>In particular, do the agreed facts constitute an emergency (or emergency likely to endanger life or danger or as required):</p> <ul style="list-style-type: none"> a) If a hospital or other facility housing COVID-19 patients is in the required area? b) If premises are located in a well-populated area given the general level of COVID-19 in the population and fears of spreading? c) Without any additional evidence, given the average known or scientifically inferred (given the lack of testing) incidence of it in the UK and its population? <p>If the policy requires closure for “health reasons or concerns”,²⁷ is that established on the agreed facts?</p>
15.	<p>If the definition of the appropriate authority does not state "government",²⁸ but instead specifies "public authority",²⁹ "competent [P/p]ublic [A/a]uthority",³⁰ "a competent local authority",³¹ "the police, other law enforcement agency, military authority, governmental authority or agency",³² or "the [P/p]olice or other competent [L/l]ocal, [C/c]ivil or [M/m]ilitary authority",³³ is the requirement met on the basis that:</p> <ul style="list-style-type: none"> a) the UK Government is a “public authority” or “competent public authority” or “civil authority”; b) the "local authority" or "police" or other “civil authority” are required to implement and enforce the Government's requirements; c) there exists “local authority” or police advice; or d) there exists actual “local authority” or “police” enforcement action?

²³ Arch type 1, RSA type 2.

²⁴ Ecclesiastical type 1.

²⁵ Amlin type 3.

²⁶ Zurich all types.

²⁷ RSA type 4.

²⁸ “government” is included in Amlin type 2, Arch type 1, Ecclesiastical type 1, Hiscox type 1 and some Hiscox type 2. The parties agree that the Regulations and advice from the UK Government fall within the term “government”.

²⁹ Hiscox types 1, 2, and 3.

³⁰ Amlin type 3, RSA type 2.

³¹ RSA type 4.

³² RSA type 4.

³³ Amlin type 1, Zurich all types.

E.	CAUSATION
16.	<p>The policy wordings usually contain a number of separate causal links. What is the necessary causal link that must be established on a particular policy wording between:</p> <ul style="list-style-type: none"> a. The loss <u>and</u> the interruption to or interference with the business? b. The interruption to or interference with the business <u>and</u> the closure or other restriction (where closure or restriction is required) or fact of disease? c. The closure or other restriction (where closure or restriction is required) <u>and</u> the required “emergency” or “danger” or “threat” or “risk” or “occurrence of disease” or “discovery of an organism” or “incident” (as applicable)?
17.	<p>What is the applicable test for causation in the context of the policy wordings and, in particular, where the following words are used, does each require a proximate cause or something narrower or broader and if so, what?</p> <ul style="list-style-type: none"> a) “resulting from”;³⁴ b) “which results in”;³⁵ c) “as a result of”;³⁶ d) “caused by”;³⁷ e) “following”;³⁸ f) “arising from”;³⁹ g) “due to”;⁴⁰ h) “as a consequence of”, “in consequence of” or “in consequence”;⁴¹

³⁴ Amlin type 3, Arch type 1, Ecclesiastical type 1, QBE type 2.

³⁵ Amlin type 2, Hiscox type 1, some Hiscox type 2.

³⁶ Argenta type 1, Ecclesiastical type 1, RSA types 1 and 4.

³⁷ Amlin type 2, Hiscox all types, QBE type 1.

³⁸ Amlin type 2, Hiscox all types, RSA type 3, Zurich all types.

³⁹ QBE type 1 (PBCC040120 only).

⁴⁰ Arch type 1, Ecclesiastical type 1, Hiscox all types, RSA type 2.

⁴¹ QBE type 2, Zurich all types.

	<ul style="list-style-type: none"> i) “because of”;⁴² j) “directly resulting from”;⁴³ k) “directly affected by”;⁴⁴ and l) “resulting solely and directly from”.⁴⁵
18.	What relevance do the trends clauses in the policy wordings (if applicable) or any other clauses addressing a relevant counterfactual in relation to quantification have, if any, in relation to the test for causation to be applied?
19.	Is there more than one potentially operative cause? If so, what is their legal effect, if any, on recovery? In particular what effect would the existence of more than one legally relevant cause have to the application (if any) of any hypothetical counterfactual or the “but for” test?
F.	POTENTIAL EXCLUSIONS
20.	If there is an exclusion for loss arising out of or relating to a “micro-organism of any type, nature of description, including but not limited to any substance whose presence poses an actual or potential threat to human health”, ⁴⁶ does this term include SARS-CoV-2?
21.	If there is an exclusion relating to “pollution” or “contamination”, ⁴⁷ does this apply? If it includes references to “epidemic” or disease ⁴⁸ does it apply even to disease cover?

⁴² Amlin type 3.

⁴³ Ecclesiastical type 1 (nurseries only).

⁴⁴ Amlin type 1, Argenta type 1.

⁴⁵ Amlin type 2, Hiscox all types.

⁴⁶ Argenta type 1.

⁴⁷ QBE all types, RSA type 3, Zurich all types.

⁴⁸ RSA type 3.