



BUSINESS INTERRUPTION INSURANCE TEST CASE

QUESTIONS FOR DETERMINATION

9 JUNE 2020

The document is intended to be high level and encompass the 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*,¹ based on the Parties’ statements of case. These 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 The *Questions for Determination* is not a statement of case or a formal list of issues and it will be superseded by the statements of case and the list of issues agreed for trial. Its purpose is to identify the scope of the litigation and for initial case management, as contemplated by paragraphs 2.2 to 2.8 of the Framework Agreement.

A.	CENTRAL QUESTIONS
1.	Under the policy wording in question, construed as a whole and applying the <i>agreed facts</i> ² and on the applicable permutation(s) if any of the <i>assumed facts</i> , ³ is there cover in principle under any relevant non-damage insuring clause 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) by the COVID-19 pandemic (including its effects)?
2.	Where coverage in principle is established pursuant to (1) above, whether on the <i>agreed facts</i> and on the applicable permutation(s) if any of the <i>assumed facts</i> , the policyholders can in principle establish the necessary causal link between 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 or equivalent wording (if applicable)?
B.	GENERIC ISSUES
3.	In principle, what effect on the business is required in order for it to be interrupted or interfered with for the purposes of references in cover clauses to “interruption” or “interference” with the insured business?

¹ As defined in the Framework Agreement para 1.4.

² As defined in the Framework Agreement para 1.2.

³ As defined in the Framework Agreement para 1.3.

C.	<p>DISEASE COVER⁴</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.
4.	<p>Subject to any specific policy definition does “notifiable disease”⁵ or “human infectious or human contagious disease” or similar⁶ include COVID-19?</p>
5.	<p>If the disease is required by a particular policy to be in the “vicinity” of the insured premises, what does this mean in principle? (E.g. if undefined⁷ or defined as “area surrounding or 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”⁸)</p>

⁴ In some cases, Disease cover includes a Denial/Prevention of Access component (e.g. Hiscox’s public authority wording). The applicable *Assumed Questions for Determination* should be applied for each element of such hybrid clauses.

⁵ RSA type 1.

⁶ Argenta type 1, Ecclesiastical types 1.1 and 1.2 exclusions, Hiscox types 1 to 3, MS Amlin types 1 and 2, QBE types 1 to 3, RSA types 3 and 4, RSA type 2.2 exclusion.

⁷ See (in the context of Denial or Prevention of Access clauses) Question 13 and footnote 42 below.

⁸ RSA type 4.

6.	<p>If the policy requires that the disease must exist within a geographical limit of the premises (e.g. 1⁹ or 25 miles¹⁰), what is required by way of proof? In particular, can the existence of COVID-19 be satisfied on the balance of probabilities:</p> <ul style="list-style-type: none"> a) by inference given the average known or scientifically inferred (given the lack of testing) incidence of it in the UK, or in a particular area of the UK, and its population? How should this be determined in an urban area versus a rural area? How should it be determined on a given date? To what extent can under-reporting, death certificates recording COVID-19 and symptomless carriers be taken into account? b) when there is one laboratory-confirmed case of COVID-19 in the appropriate area? c) where there is one case of classic COVID-19 symptoms but without laboratory confirmation or medical diagnosis in the appropriate area? d) when there is a hospital or similar facility housing patients, in the appropriate area or a hospital housing patients who have been confirmed (by laboratory testing) to have COVID-19 or who have classic COVID-19 symptoms but without laboratory confirmation or medical diagnosis?
7.	<p>If a policy refers to “occurrence” of notifiable disease,¹¹ or has a requirement for the disease to be “manifested”¹² 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>If a policy refers to “an occurrence” of a notifiable disease, on the true construction of the policy to what extent (if at all) is the occurrence required to be local and/or specific to the insured or the insured’s business, activities, premises or property?¹³</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,¹⁴ what is its meaning in the context of the policy?</p>

⁹ Hiscox type 4, QBE type 3.

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

¹¹ Argenta type 1, Ecclesiastical types 1.1 and 1.2, Hiscox types 1.

¹² QBE type 1, RSA type 1, RSA type 4.

¹³ Hiscox type 3.

¹⁴ RSA type 4.

9.	If a policy refers to a disease or outbreak being notifiable to the [competent] local authority (e.g. “an outbreak of which the local authority has stipulated shall be notified to them” ¹⁵ or “an outbreak of which the competent local authority has stipulated [shall/will] be notified to them” ¹⁶ or “an outbreak of which must be notified to the local authority” ¹⁷) or “any additional diseases notifiable under the Health Protection Regulations (2010)”, ¹⁸ what is required to be proved by the policyholder?
10.	If any notifiable disease extension to cover contains a condition stating “We will only [be liable for] [pay for] the loss arising at those premises which are directly affected by the loss, discovery or accident” ¹⁹ , what is the meaning and effect of that condition?

¹⁵ QBE type 1

¹⁶ Argenta type 1, MS Amlin types 1 and 2, QBE type 2, RSA type 3.

¹⁷ Hiscox all types.

¹⁸ RSA type 4.

¹⁹ MS Amlin types 1 and 2.

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>
11.	<p>What does the policyholder have to prove in principle in order to establish:</p> <ul style="list-style-type: none"> a) “prevention of access to”,²⁰ “access... being prevented”,²¹ “access... [will/shall] be prevented”,²² or “prevent... access” to;²³ b) “prevent... use of”²⁴ or “use...being prevented”;²⁵ c) “denial of access” to;²⁶ d) “hindrance in access” to,²⁷ “hinder... access” to²⁸ or “access... being... hindered by”;²⁹ e) “hinder use of”³⁰, “hinders the use of”³¹ or “use... being... hindered by”;³² f) “inability to use”;³³ g) “closure” of;³⁴ h) “enforced closure of”;³⁵ and i) “restrictions placed on”;³⁶ <p>the insured premises/location (by reference in particular to the advice and legislation of the UK Government³⁷, which it is intended will be part of the <i>agreed facts</i>)?</p> <p>If the policy requires closure of the 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>

²⁰ Arch type 1.

²¹ Ecclesiastical types 1.1 and 1.2.

²² MS Amlin type 1, Zurich types 1 and 2.

²³ MS Amlin type 3, RSA types 2.1, 2.2 and 4.

²⁴ MS Amlin type 3, RSA type 2.1 and 2.2.

²⁵ Ecclesiastical types 1.1 and 1.2.

²⁶ Hiscox type 1, some Hiscox type 2, Hiscox type 4, MS Amlin type 2.

²⁷ Hiscox type 1, some Hiscox type 2, Hiscox type 4, MS Amlin type 2.

12.	<p>With reference to the advice and legislation of the UK Government or steps taken by other bodies (which are to be <i>agreed facts</i>), which of those, if any, in principle constitute:</p> <ul style="list-style-type: none"> a) “action[s]”;³⁸ b) “advice”;³⁹ c) “order”;⁴⁰ and d) “restrictions”;⁴¹ <p>of, by or imposed by government (or other authority as applicable), within the context of each applicable policy?</p> <p>In particular, applying the <i>agreed facts</i>, what does the policyholder have to prove in order to establish the above and on what dates would these likely be established?</p>
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²⁸ MS Amlin type 3, RSA type 2.1 and 2.2.

²⁹ Ecclesiastical types 1.1 and 1.2.

³⁰ MS Amlin 3.

³¹ RSA Type 4.

³² Ecclesiastical types 1.1 and 1.2.

³³ Hiscox all types. However, this phrase appears in Hiscox’s public authority wording, which is treated as the Disease cover in this list. The phrase is not in its denial of access wording – see footnote 4 above.

³⁴ RSA type 1.

³⁵ RSA type 4.

³⁶ RSA type 1.

³⁷ ‘UK Government’ in the *Questions for Determination* includes, where appropriate, the devolved administrations of Scotland, Wales and/or Northern Ireland. The parties agree that the UK Government falls within the term “government”.

³⁸ Amlin type 3, Arch type 1, Ecclesiastical types 1.1 and 1.2, MS Amlin types 1 and 3, RSA type 2.1, 2.2 and 4, Zurich types 1 and 2.

³⁹ Arch type 1, Ecclesiastical types 1.1 and 1.2 exclusions, RSA types 2.1, 2.2 and 4.

⁴⁰ Ecclesiastical types 1.1 and 1.2, Hiscox 1, 2 and 4, MS Amlin type 2.

⁴¹ Hiscox all types.

13.	<p>If the relevant actions/advice or emergency/endangerment (whether described as a “danger”, “incident” or some other circumstance) are required to be in the "vicinity" of the insured premises, what does the “vicinity” mean in principle within the context of each applicable policy (including policy definitions of “vicinity”) ?</p> <p>(E.g. undefined “in the vicinity of the premises”⁴² or defined as “area [surrounding/adjacent] to an 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”⁴³).</p>
14.	<p>If the policy requires that the relevant actions/advice or emergency/endangerment (whether described as “danger”, “incident” or some other circumstance) must apply to, or must have occurred within, a geographical limit of the premises (e.g. 1 mile, 25 miles),⁴⁴ what is required by way of proof?</p>

⁴² Some Hiscox type 2, MS Amlin types 1 and 3, Zurich all types, RSA type 2.1 and 2.2.

⁴³ RSA type 4.

⁴⁴ Hiscox types 1 and 2, MS Amlin type 2, RSA type 1.

15. Do the *agreed facts* constitute an “emergency [which is] likely to endanger life”⁴⁵ or an “emergency which could endanger human life”⁴⁶, or a “threat or risk of damage or injury”,⁴⁷ “incident”⁴⁸ or “a danger or disturbance”⁴⁹ or “incident”⁵⁰ in the required area?
- If so, from what date?
- In particular, do the *agreed facts* constitute an emergency (or emergency likely to endanger life or danger or incident as required):
- a) If a hospital or other facility housing patients who have been confirmed (by laboratory testing) to have COVID-19 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) If premises are located in a sparsely-populated rural area given the general level of COVID-19 in the population and fears of spreading?
 - d) Without any additional evidence, given the average known or scientifically inferred (given the lack of testing) incidence of it in the UK, or in a particular area of the UK, and its population?
- If the policy requires closure by a governmental authority or agency or a competent local authority for “health reasons or concerns”,⁵¹ is that established on the *agreed facts*?

⁴⁵ Arch type 1 (with square bracketed text), RSA types 2.1 and 2.2.

⁴⁶ Ecclesiastical type 1.1 and 1.2.

⁴⁷ MS Amlin type 3.

⁴⁸ MS Amlin type 2.

⁴⁹ MS Amlin type 1, Zurich all types.

⁵⁰ MS Amlin type 2.

⁵¹ RSA type 4.

16.	<p>If the definition of the appropriate authority applying to the clause providing cover in each applicable policy does not state "government",⁵² but instead specifies "public authority",⁵³ "competent [P/p]ublic [A/a]uthority",⁵⁴ "a competent local authority",⁵⁵ "the police, other law enforcement agency, military authority, governmental authority or agency",⁵⁶ or "the [P/p]olice or other competent [L/l]ocal, [C/c]ivil or [M/m]ilitary authority",⁵⁷ "the police or other statutory authority"⁵⁸, would the requirement be met:</p> <ul style="list-style-type: none"> a) on the basis that the UK Government qualifies as a "governmental authority" "public authority" or "competent public authority" or "civil authority"; b) where the "local authority" or "police" or other "civil authority" or "statutory authority" are required to implement and enforce the Government's requirements; c) if there exists "local authority" or police advice; or d) if there exists actual "local authority" or "police" enforcement action?
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⁵² "government" is included in MS Amlin type 2, Arch type 1, Ecclesiastical types 1.1 and 1.2, Hiscox type 1, some Hiscox type 2 and Hiscox 4.

⁵³ Hiscox type 3.

⁵⁴ MS Amlin type 3, RSA type 2.

⁵⁵ Ecclesiastical type 1.1 and 1.2, RSA type 4.

⁵⁶ RSA type 4.

⁵⁷ MS Amlin type 1, Zurich all types.

⁵⁸ Some Hiscox type 2.

E.	CAUSATION
17.	<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> <ol 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 identified in Q11 above by action/advice/order (as the case may be) of the government or other relevant authority or the fact of (notifiable) disease within the required proximity of the premises (if any)? c. The closure or other restriction (where closure or restriction is required), alternatively the advice or action of the relevant authority, <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)? d. The interruption to or interference with the business and the required “emergency” or “danger” or “threat” or “risk” or “occurrence of disease” or “discovery of an organism” or “incident” (as applicable)?
18.	<p>What is the applicable test for causation in the context of each 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> <ol style="list-style-type: none"> a) “resulting from”;⁵⁹ b) “which results in”;⁶⁰ c) “as a result of”;⁶¹ d) “caused by”;⁶² e) “following”;⁶³ f) “arising from”;⁶⁴

⁵⁹ MS Amlin types 1 and 3, Arch type 1, Ecclesiastical type 1.1 and 1.2, QBE types 2 and 3.

⁶⁰ MS Amlin type 2, Hiscox type 1, some Hiscox type 2.

⁶¹ MS Amlin type 1, Argenta type 1, Ecclesiastical type 1.1 and 1.2, QBE type 2, RSA types 1 and 4.

⁶² MS Amlin type 2, Hiscox all types, QBE type 1.

⁶³ MS Amlin types 1 and 2, Hiscox all types, RSA type 3, Zurich all types.

⁶⁴ QBE type 1 (PBCC040120 only).

	<p>g) “due to”;⁶⁵</p> <p>h) “as a consequence of”, “in consequence of” or “in consequence”;⁶⁶</p> <p>i) “because of”;⁶⁷</p> <p>j) “directly resulting from”;⁶⁸ and</p> <p>k) “resulting solely and directly from”.⁶⁹</p> <p>Do the answers differ where such words are used in the context of particular exclusions?</p>
19.	What is the proper interpretation and effect of the trends clauses or equivalent provisions in the policy wordings (if applicable) or any other clauses addressing a relevant counterfactual in relation to quantification, in relation to any test to be applied to causation of loss?
20.	If there is more than one potentially legally relevant of loss what are they and what is their legal effect, if any, on recovery? In particular what effect would the existence of more than one potentially legally relevant cause have to the application (if any) of any hypothetical counterfactual or the “but for” test?
F.	POTENTIAL EXCLUSIONS
21.	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”, ⁷⁰ does this term include SARS-CoV-2?
22.	If there is an exclusion relating to “pollution” or “contamination”, ⁷¹ does this apply? If it includes references to “epidemic” and/or “disease” ⁷² does it apply (and, if so, how). How, if at all, does it apply to disease cover?

⁶⁵ Arch type 1, Ecclesiastical types 1.1 and 1.2, Hiscox all types, RSA type 2.

⁶⁶ QBE all types, Zurich all types.

⁶⁷ MS Amlin type 3.

⁶⁸ Ecclesiastical type 1.2.

⁶⁹ MS Amlin type 2, Hiscox all types.

⁷⁰ Argenta type 1.

⁷¹ MS Amlin types 1 and 2, QBE all types, RSA type 3, Zurich all types.

⁷² RSA type 3.

23.	If the policy contains an exclusion in relation to its denial or prevention of access cover excluding, or stating with respect to what is not covered, “any period when access to the premises was not prevented or hindered”, ⁷³ what is the proper interpretation of this provision and in what circumstances would it apply?
24.	If the policy contains an exclusion in relation to its denial or prevention of access cover excluding, or stating with respect to what is not covered, “closure or restriction in the use of the premises due to the order or advice of the competent local authority as a result of an occurrence of an infectious disease”, ⁷⁴ what is the proper interpretation of this provision and in what circumstances would it apply?
25.	If there is an exclusion “for any loss arising from” the premises “that are not directly affected by the occurrence discovery or accident” does this apply? ⁷⁵

⁷³ Ecclesiastical type 1.1 and 1.2.

⁷⁴ Ecclesiastical type 1.1 and 1.2.

⁷⁵ Argenta.