



BUSINESS INTERRUPTION INSURANCE TEST CASE

PROPOSED QUESTIONS FOR DETERMINATION

9 JUNE 2020

The document is intended to be high level and encompass all 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* and the Parties' statements of case which. 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 The *Questions for Determination* is not a statement of case or a formal list of issues and it will be superseded by the statements of case and the list of issues agreed for trial.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, <u>construed as a whole and</u> applying the <i>agreed facts</i> ¹² and on the applicable permutation assumed facts, ²³ is there cover in principle under the <u>any</u> relevant non-damage head of cover insuring clause in respect of least of interruption or interference with the insured's business (or as otherwise required by the specific insuring clause in question 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 the assumed facts, the policyholders can in principle establish the necessary causal link (as a matter of the application of the leasured facts) between the assumed losses sustained by policyholders and the relevant peril, event or circumstance including taking into account the relevance (if any) of a trends clause or equivalent wording (if any and if applicable)?			
B.	GENERIC ISSUES		
3. What In principle, what effect on the business is required (e.g. what is meant by "interruption or "interference"; is closure rewhole or in part))?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?			

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As defined in the Framework Agreement para 1.4.

⁴² As defined in the Framework Agreement el.para 1.2.

As defined in the Framework Agreement el.para 1.3.

C.	DISEASE COVER ⁴				
	A clause which provides cover if there is notifiable disease or some other categorisation of disease (e.g. "human infectious or contagiou disease") either at all or within a certain radius or within the vicinity of premises.				
	The selected wordings do <u>not</u> include:				
	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.	Does "notifiable disease" (subject_Subject_to any specific policy definition)does "notifiable disease" or "human infectious or human contagious disease" or similar include COVID-19?				
	When does the trigger for each arise?				
5.	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 undefined as "area surrounding or adjacent to insured location lnsured Location in which events occur within such would be reasonably expected to have an impact on an insured lnsured or the insured's business" lnsured's Business" lnsured's Business" lnsured's Business" lnsured's Business (E.g. if undefined as "area surrounding or adjacent to insured location lnsured Location in which events occur within such would be reasonably expected to have an impact on an insured lnsured or the insured surrounding or the insured location lnsured Location in which events occur within such would be reasonably expected to have an impact on an insured lnsured l				

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.

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.

See (in the context of Denial or Prevention of Access clauses) Question <u>12_13</u> and footnote <u>21_42</u> below.

⁴ RSA type 4

⁸ RSA type 4.

- 6. If the policy requires that the disease must exist within a geographical limit of the premises (e.g. <u>1º or </u>25 miles <u>1º</u>), what is required by way of proof? In particular:<u>a) Can, can</u> the existence of COVID-19 be satisfied on the balance of probabilities-<u>:</u>
 - 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) Can the existence of COVID-19 be satisfied when there is one known 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) 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 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?
- 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?

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

Do these terms alter the answer to (6) above?

8. If a policy refers to an "outbreak" of a notifiable disease, 4 what is its meaning in the context of the policy?

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.

Hiscox type 3.

¹⁴ RSA type 4.

stipulated shall be notified to them"15 or "an outbreak of which the competent local authority has stipulated [shall/will] to		If <u>a policy</u> 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" or "an outbreak of which the competent local authority has stipulated [shall/will] be notified to them" or "an outbreak of which must be notified to the local authority" or "any additional diseases notifiable under the Health Protection Regulations (2010)", 18 what is required to be proved by the policyholder?	
		If any notifiable disease extension to cover contains a condition stating "We will only [be liable for] [pay for] the loss arising at those prer which are directly affected by the loss, discovery or accident" what is the meaning and effect of that condition?	

¹⁵ QBE type 1_-

⁶¹⁶ Argenta type 1, MS Amlin types 1 and 2, Argenta type 1, QBE type 2, RSA type 3.

¹⁷ Hiscox <u>all</u> types 1, 2 and 3.

¹⁸ RSA type 4.

MS Amlin types 1 and 2.

D. DENIAL or PREVENTION OF ACCESS COVER

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.

1011. What does the policyholder have to prove in <u>principle in</u> order to establish:

- a) "prevention of access to", 20 "prevent... access" to or "access... being prevented" or _21 "access... [will/shall] be prevented" or _22 or "prevent... access" to: 923
- b) "prevent... use of" 1024 or "use...being prevented"; 1125
- c) "denial of access" to; 1226
- d) "hindrance in access" to, 1327 "hinder... access" to 1428 or "access... being being... hindered by"; 1529
- e) "hindrance to use of", "hinder use of" or "use being use... being... hindered by"; 1632
- f) "inability to use";33
- g) "closure" of;34
- h) "enforced closure of";35 and
- i) "restrictions placed on";36

the insured premises/location (by reference in particular to the advice and legislation of the UK Government³¹, which it is intended will be part of the *agreed facts*)?

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.)?

²⁰ Arch type 1.

²¹ Ecclesiastical types 1.1 and 1.2.

MS Amlin type 1, Zurich types 1 and 2.

⁹²³ MS Amlin type 3, Arch type 1, Ecclesiastical type 1, RSA types 2.1, 2.2 and 4, Zurich all types.

¹⁰24 MS Amlin type 3, QBE RSA type 1, RSA types 2 2.1 and 32.2.

¹¹²⁵ Ecclesiastical type 1types 1.1 and 1.2.

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

Was the relevant interference, including With reference to the advice and legislation of the UK Government or steps taken by other bodies (which are to be agreed facts), due to those, if any, in principle constitute: "actions

- a) <u>"action[s]</u>"; <u>38</u>
- b) "advice"; 39
- c) "law/order/decree" order"; 40 and
- d) "restrictions";41

of, by or imposed by government (or other authority as applicable), within the context of each applicable policy?

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?

- RSA type 4.
- RSA type 1.

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

⁴⁴²⁸ MS Amlin type 3, RSA types 2 type 2.1 and 32.2.

Ecclesiastical type 1types 1.1 and 1.2.

³⁰ MS Amlin 3.

³¹ RSA Type 4.

¹⁶³² Amlin type 3, Ecclesiastical type 1, RSA types 2-1.1 and 31.2.

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.

RSA type 1.

^{37 &#}x27;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".

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.

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

⁴¹ Hiscox all types.

	12 <u>13</u> .	If the relevant actions/advice or emergency/endangerment (whether described as a "danger", "incident" or some other incident circumstance) are required to be in the "vicinity" of the insured premises, what does this mean and when is it satisfied the "vicinity" mean in principle within the context of each applicable policy (including policy definitions of "vicinity")?		
	(E.g. undefined "in the vicinity of the premises" or <u>defined as</u> "area [surrounding/adjacent] to <u>an</u> insured location in which events within such area would be reasonably expected to have an impact on an insured or the insured's business" (a).			
		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), what is required by way of proof?		

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

RSA type 4.

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

14<u>15</u>.

Do the *agreed facts* constitute an "emergency [which is] likely to endanger life" or an "emergency which could endanger human life" or a "emergency which could endanger human life" or

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 <u>patients who have been confirmed (by laboratory testing) to have COVID-19 patients</u> 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) e)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 <u>by a governmental authority or agency or a competent local authority</u> for "health reasons or concerns",⁵¹ is that established on the *agreed facts*?

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

²⁴ Ecclesiastical type 1.

⁴⁶ Ecclesiastical type 1.1 and 1.2.

²⁵ Amlin type 3.

⁴⁷ MS Amlin type 3.

⁴⁸ MS Amlin type 2.

²⁶ Zurich all types.

⁴⁹ MS Amlin type 1, Zurich all types.

⁵⁰ MS Amlin type 2.

⁵¹ RSA type 4.

- If the definition of the appropriate authority <u>applying to the clause providing cover in each applicable policy</u> does not state "government³³", ²⁸ but instead specifies "public authority", ²⁹ competent [P/p]ublic [A/a]uthority", ³⁰ "a competent local authority", ³⁴ "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 is "the police or other statutory authority" ⁵⁸, would the requirement be met-on the basis that:
 - a) on the basis that the UK Government is a 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?

³³ Amlin type 1, Zurich all types.

[&]quot;government" is included in MS Amlin type 2, Arch type 1, Ecclesiastical types 1.1 and 1.2, Hiscox 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". Hiscox 4.

²⁹53 Hiscox types 1, 2, and type 3.

³⁰⁵⁴ MS Amlin type 3, RSA type 2.

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				
16 <u>17</u> .	. 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:				
	a.	a. The loss and 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) of fact of disease identified in Q11 above by action/advice/order (as the case may be) of the government or other relevant authority of 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, and the required "emergency" or "danger" or "threat" or "risk" or "occurrence of disease" or "discovery of an organism" or "incident" (as applicable)?				
	<u>d.</u>	e. 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)?			
17 <u>18</u> .	8. What is the applicable test for causation in the context of each of the policy wordings and, in particular, where the following words are undoes each require a proximate cause or something narrower or broader and if so, what?				
	a) "resulting from"; ³⁴ 59				
b) "which results in"; ³⁵		"which results in";3560			
	c)	"as a result of";3661			
	d)	"caused by"; ^{37,62}			
	e)	"following"; ³⁸ 63			
	f) "arising from"; ³⁹ 64				

³⁴⁵⁹ MS Amlin type-types 1 and 3, Arch type 1, Ecclesiastical type 1.1 and 1.2, QBE types 2 and 3.

³⁵⁶⁰ MS Amlin type 2, Hiscox type 1, some Hiscox type 2.

³⁶⁶¹ MS Amlin type 1, Argenta type 1, Ecclesiastical type 1.1 and 1.2, QBE type 2, RSA types 1 and 4.

³⁷⁶² MS Amlin type 2, Hiscox all types, QBE type 1.

³⁸⁶³ MS Amlin type types 1 and 2, Hiscox all types, RSA type 3, Zurich all types.

³⁹⁶⁴ QBE type 1 (PBCC040120 only).

	g) "due to"; ⁴⁰ 55 h) "as a consequence of", "in consequence of" or "in consequence"; ⁴⁴ 66			
	i) "because of"; ⁴² 67			
j) "directly resulting from"; ⁶⁸ and				
k) "directly affected by"; ⁴⁴ and				
	k) "resulting solely and directly from". 4569			
	Do the answers differ where such words are used in the context of particular exclusions?			
18 <u>19</u> .	What relevance do 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 have, if any, in relation to the any test for causation to be applied to causation of loss?			
	be applied to causation of loss?			
19 20.	be applied to causation of loss? Is If there is more than one potentially operative cause? If so, 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?			
19 20.	Is If there is more than one potentially operative cause? If so, 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			

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

⁴¹⁶⁶ QBE type 2all types, Zurich all types.

⁴²⁶⁷ MS Amlin type 3.

⁶⁸ Ecclesiastical type 1.2.

⁴⁴___Amlin type 1, Argenta type 1.
4569 MS Amlin type 2, Hiscox all types.

Argenta type 1.

21 <u>22</u> .	If there is an exclusion relating to "pollution" or "contamination", 4771 does this apply? If it includes references to "epidemic" or and/or "disease" does it apply even (and, if so, how). How, if at all, does it apply to disease cover?		
<u>23.</u>	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", 23 what is the proper interpretation of this provision and in what circumstances would it apply?		
<u>24.</u>	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", 24 what is the proper interpretation of this provision and in what circumstances would it apply?		
<u>25.</u>	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? [25]		

⁴⁷⁷¹ MS Amlin types 1 and 2, QBE all types, RSA type 3, Zurich all types.
72 RSA type 3.

⁷³ Ecclesiastical type 1.1 and 1.2. ⁷⁴ Ecclesiastical type 1.1 and 1.2.

⁷⁵ Argenta.

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