IN THE SUPREME COURT OF THE UNITED KINGDOM
ON APPEAL FROM
THE HIGH COURT OF JUSTICE, BUSINESS AND PROPERTY COURTS
COMMERCIAL COURT (QBD)
FINANCIAL LIST
FINANCIAL MARKETS TEST CASE SCHEME

Neutral Citation: [2020] EWHC 2448 (Comm)

BETWEEN:

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

Appellants

-and-

THE FINANCIAL CONDUCT AUTHORITY

Respondent

APPLICATION FOR PERMISSION TO APPEAL
OF THE SECOND APPELLANT (ARGENTA)

A. Introduction

1. This document contains additional information about the application for permission to appeal made by the Second Appellant, Argenta Syndicate Management Limited (**"Argenta"**). It has been filed together with applications for permission to appeal made (or to be made) by five other insurers (the **"Appellant Insurers"**). The Respondent (the **"FCA"**) has also filed its own application for permission to appeal.

2. Argenta's application is accompanied by a joint document produced by the Appellant Insurers, which sets out: (i) a narrative of the facts; (ii) the statutory framework; (iii) a chronology of the proceedings; and (iv) reasons why the appeal should be heard on an expedited basis.

3. As noted in that joint document, Argenta's application for permission to appeal is made pursuant to section 13(1) of the Administration of Justice Act 1969 (the **"AJA 1969"**) and it follows the order of Flaux LJ and Butcher J dated 2 October 2020, which

certified, for the purposes of section 12(1) of the AJA 1969, that the alternative conditions in section 12(3A) of that Act are satisfied in relation to these proceedings and that the Appellant Insurers (including Argenta) each has a sufficient case for an appeal to the Supreme Court under Part II of the AJA 1969 to justify an application for leave to bring such an appeal. Argenta's proposed grounds of appeal are set out in Appendix 1 hereto.

4. The Respondent (the **"FCA"**), which was also granted a certificate under section 12 of the AJA 1969, filed its own application for permission to appeal on 13 October 2020. The issues raised by the FCA's proposed grounds of appeal overlap with the proposed grounds of appeal of Argenta and the other Appellant Insurers. For example, as explained below, ground 3 of Argenta's proposed grounds of appeal (set out in Appendix 1) is closely related to ground 4 of the FCA's proposed grounds of appeal.

B. Issues before the Court appealed from

5. Of the policy wordings selected by the FCA for inclusion in this test case, two are policies issued by Argenta:

   (1) the 'HIUA Guest House and B&B Insurance' policy wording (which, as the name suggests, provides cover for businesses that operate a guesthouse or bed and breakfast in the UK); and

   (2) the 'HIUA Holiday Home and Self-Catering Accommodation' policy wording (which provides cover for businesses that operate holiday homes and other self-catering accommodation in the UK).

6. The business interruption (**"BI"**) section in these two policies is materially identical, and the 'HIUA Guest House and B&B Insurance' policy wording (referred to in the Judgment as **"Argenta 1"**) was selected as the 'lead' policy for the purposes of the FCA's claim against Argenta.

7. The only insuring clause in Argenta 1 that the FCA argued responds to claims based on loss caused by the Covid-19 pandemic was extension 4(d) in the BI section (**"Extension 4(d)"**). That clause is an example of what the Court referred to in its Judgment as 'disease clauses' (as distinct from 'hybrid clauses' and 'prevention of access clauses'),

i.e. clauses providing cover for loss caused by occurrences of a notifiable disease within a specified distance of the insured's premises.

8. Extension 4(d) provides as follows:

> "The **COMPANY** will also indemnify the **INSURED** as provided in The Insurance of this Section for such interruption as a result of
>
> …
>
> **4. Defective Sanitation NOTIFIABLE HUMAN DISEASE Murder or Suicide**
>
> …
>
> (d) any occurrence of a **NOTIFIABLE HUMAN DISEASE** within a radius of 25 miles of the **PREMISES** …"

9. The cover provided by Extension 4(d) is subject to, *inter alia*, a specific exclusion that applies to "*any loss arising from those **PREMISES** that are not directly affected by the occurrence, discovery or accident*".

10. The 'Basis of Settlement' clause in Argenta 1 provides that the indemnity is to be calculated by reference to the insured's actual gross income during the indemnity period as compared to the 'Standard Gross Income'. The definition of the term 'Standard Gross Income' contains a 'trends clause' as follows:

> "the **GROSS INCOME** during that period in the twelve months immediately before the date of the **DAMAGE** which corresponds with the **INDEMNITY PERIOD** to which such adjustments will be made as necessary to take account of the trend of the **BUSINESS** and of the variations in or other circumstances affecting the **BUSINESS** either before or after the **DAMAGE** or which would have affected the **BUSINESS** had the **DAMAGE** not occurred so that the figures thus adjusted will represent as nearly as may be practicable the results which but for the **DAMAGE** would have obtained during the relative period after the **DAMAGE**."

11. The following matters were common ground as between the FCA and Argenta at trial:

(1) that Covid-19 constituted a 'Notifiable Human Disease' for the purposes of Extension 4(d) in Argenta 1 as from the following dates: (i) 22 February 2020 in Scotland; (ii) 29 February 2020 in Northern Ireland; (iii) 5 March 2020 in England; and (iv) 6 March 2020 in Wales;

(2) that an 'occurrence' of Covid-19 for the purposes of Extension 4(d) requires there to be at least one person within the relevant 25-mile radius on the relevant

date who has contracted Covid-19 such that it is diagnosable (whether or not it has been verified by medical testing, and whether or not it is symptomatic);

(3) that an occurrence of Covid-19 within the relevant 25-mile radius for any particular policyholder, and the date of that occurrence, may be proved by a policyholder, *inter alia*, by reference to the best available scientific evidence (including, in principle, inferences from scientific studies);

(4) that an 'interruption' for the purposes of Extension 4(d) does not require a complete cessation of the business;

(5) that the 26 March Regulations caused an 'interruption' to the business of Argenta's policyholders insofar as such business was otherwise continuing as at 26 March 2020;

(6) that the insured peril in Extension 4(d) is "*an occurrence of a Notifiable Human Disease within 25 miles of the Premises*";[1]

(7) that the words "*as a result of*" in Extension 4(d) require proximate causation as between the business interruption and the occurrence of the Notifiable Human Disease within 25 miles of the insured's premises (i.e. the insured peril);[2]

(8) that no individual occurrence of Covid-19 in the UK caused the advice given or the restrictions imposed by the UK Government or the devolved administrations in response to the Covid-19 pandemic;[3] and

(9) that the 'trends' clause in Argenta 1 applies to claims under Extension 4(d), notwithstanding the reference to 'Damage' in that clause.[4]

12. The principal issues before the Court, insofar as they related to the claim against Argenta, were as follows:

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1 FCA's skeleton argument for trial, paragraph 949.

2 FCA's oral submissions at trial: Day 3, p.163 (line 23) to p.164 (line 1). See also para. 39 of the agreed List of Issues and Common Ground.

3 FCA's Reply, para. 52.

4 FCA's skeleton argument for trial, paragraph 949.

(1) Whether (as Argenta argued) the cover provided by Extension 4(d) is limited to loss proximately caused by occurrences of Covid-19 within 25 miles of the insured's premises, or whether (as the FCA argued) that cover extends to loss sustained by the insured as a result of any occurrence of Covid-19 (anywhere in the UK) provided that there has been at least one occurrence of that disease within 25 miles of the insured's premises.

(2) The issue referred to above required an assessment of the extent to which, if at all, loss sustained by policyholders due to the Covid-19 pandemic has been proximately caused by the insured peril (i.e. occurrences of Covid-19 within 25 miles of the insured's premises). In particular:

(a) whether (as the FCA argued) the presence of Covid-19 in any particular locality "*is an integral part of one single broad and/or indivisible cause, being the Covid-19 pandemic*";[5] or

(b) alternatively (as the FCA argued), whether "*each locality made its own concurrent causative contribution*" to the Covid-19 pandemic and the governmental response thereto.[6]

(3) Insofar as any loss has been proximately caused by occurrences of Covid-19 within the relevant 25-mile radius, whether (as the FCA argued) the correct counterfactual assumes the absence of any occurrences of Covid-19 anywhere in the UK (i.e. including occurrences *outside* the relevant 25-mile radius) and the public and governmental response thereto.

(4) Whether (as Argenta argued) the third specific exclusion attached to Extension 4(d) (quoted at paragraph 9 above) has the effect of excluding losses proximately caused by occurrences of Covid-19 outside the relevant 25-mile radius.

(5) Whether (as the FCA argued) the UK Government's advice on social distancing (e.g. on 16 March 2020) and the 21 March Regulations necessarily caused an

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5 ibid, para. 214.2(b).

6 ibid.

'interruption' to the business of Argenta's policyholders, or whether (as Argenta argued) this is a question of fact to be determined in each case.

(6) The extent to which inferences about the prevalence of Covid-19 in the UK on any given date can be drawn from Government data and scientific studies.

C. Treatment of issues by the Court appealed from

13. The Judgment ([2020] EWHC 2448 (Comm)) includes the following passages, which are relevant to the FCA's claim against Argenta.

14. As to the scope of cover provided by Extension 4(d) in Argenta 1, the Court stated:

> "… we consider that the proper construction of the agreement [i.e. Argenta 1] is that the parties were not agreeing that it was the business interruption consequences of a notifiable disease only insofar as it was within the "relevant policy area" that was being insured, but the business interruption arising from a notifiable disease of which there was an occurrence within the relevant policy area." (para. 161 of the Judgment).

15. The Court held that the relevant insured peril in Argenta 1 "*is properly to be regarded as business interruption at the premises ("such interruption") as a result of Extensions 1-6. The link "as a result of" is thus within the composite insured peril*" (para.165). In other words, the Court stated that the insured peril for Extension 4(d) in Argenta 1 is 'business interruption at the premises as a result of any occurrence of a Notifiable Human Disease within a radius of 25 miles of the Premises'. The Court therefore concluded that the business interruption itself forms part of the insured peril. As noted at paragraph 11(6) above, that conclusion was contrary to the common ground that existed as between Argenta and the FCA at trial.

16. The Court held that the phrase "*as a result of*" in Extension 4(d):

> "… imports a requirement that one of Extensions 1-6 must be an effective cause of the interruption; but … the application of the causal test must give effect to and not thwart the intention of the parties. We agree that the test can be regarded as satisfied on the basis that the occurrence of the disease within the area was a part of an indivisible cause, constituted by COVID-19. Or alternatively, that each of the cases of the disease was an independent cause, and they were all equally effective in producing the government response" (para. 165).

17. In relation to the third specific exclusion attached to Extension 4(d) (quoted at paragraph 9 above), the Court indicated that this exclusion does not prevent

policyholders from recovering loss caused by occurrences of Covid-19 outside the relevant 25-mile radius (para. 166). The Court stated that the "*main significance*" of this exclusion "*is likely to be to eliminate losses arising from premises which are not within a radius of 25 miles of an occurrence of a notifiable disease*" (para. 166).

18. As for the 'trends clause' in Argenta 1, the Court accepted that this applies to claims under Extension 4(d) (which was common ground) and stated:

> "… The reference to DAMAGE in the definition of Standard Gross Income and in clause (A) of the Basis of Settlement clause should be understood as a reference to the insured peril. Given that the "trends clause" is intended simply to put the insured in the same position as it would have been had the insured peril not occurred, and given the construction which we have found to be correct in relation to the ambit of the insured peril under Extension 4(d), what this means is that one strips out of the counterfactual that which we have found to be covered under the insuring clause. This means that one takes out of the counterfactual the business interruption referable to COVID-19 including via the authorities' and/or the public's response thereto" (para. 168).

19. The Court accepted Argenta's submission that the question whether the UK Government's social distancing advice and the 21 March Regulations caused an 'interruption' to the business of any Argenta policyholders is a question of fact to be determined in each case (para. 172).

20. The Court stated that it expressed no concluded view on whether Extension 4(d) provides cover for loss caused by Covid-19 prior to the date on which it became a 'notifiable disease', but noted that any argument that Extension 4(d) provides cover for such loss would face "*formidable difficulties*" (para. 174).

21. The Court also stated that "*questions of causation are largely answered by the issue of construction, because it determines what can and what cannot be regarded as independent causes*" (para. 164; see also para. 503). The Court suggested (obiter) that the decision in *Orient-Express Hotels Ltd v Assicurazioni Generali SpA* [2010] Lloyd's Rep. I.R. 531 should not be followed, but stated that, in any event, that decision is distinguishable from the present case (para. 529).

22. The Court also provided guidance as to the extent to which the prevalence of Covid-19 in the UK on any given date may be proved by reference to UK Government data and/or

inferences from scientific studies (paras 567-579). The issues relating to prevalence are not relevant to Argenta's proposed grounds of appeal.

D. Relevant orders made by the Court below

23. The main order made by Flaux LJ and Butcher J dated 2 October 2020 contains declarations reflecting the conclusions reached by the Court in the Judgment (as summarised above). The declarations relevant to the claim against Argenta are contained in paragraphs 1, 5, 10, 11 and 15 of the order.

24. Argenta appeals against the following declarations in paragraphs 10 and 11 of that order:

> "10. In Argenta 1 … the occurrence of a case of COVID-19 within a Relevant Policy Area is to be treated as part of one indivisible cause, namely the national COVID-19 outbreak and the governmental and public reaction, of any business interruption. Alternatively, each such occurrence of a case is to be treated as a separate, but effective cause of national action and any consequential business interruption.
>
> 11 In … Argenta1 …:
>
> 11.1 Losses do not fall to be reduced by reason of rules of factual or proximate causation, or under the trends or similar clauses, or otherwise, by reason that but for the insured peril losses would have been suffered (after the date on which cover is triggered) anyway as a result of any one or more elements of the insured peril separately or in combination, including COVID-19 (including outside any Relevant Policy Area), and/or or any consequences of it (including via the authorities' and or the public's response thereto).
>
> 11.2 The correct counterfactual when calculating an indemnity is to assume that once cover under the policy is triggered none of the elements of the insured peril were present, which:
>
> (a) for disease clauses means after the date on which cover under the policy is triggered there was no COVID-19 in the UK, or any public authority or public response thereto; …"

25. The effect of the declaration at paragraph 11.2(a) of the Court's order is that the counterfactual is required to assume the absence of occurrences of Covid-19 both within *and outside* the relevant 25-mile radius.

26. Paragraph 11.3 of the order records that the Court has made no finding in respect of the 'disease clauses' as to "*whether the correct counterfactual does or does not retain the existence or effect of public authority or public response to COVID-19 which was instigated prior to the time when cover was triggered under the policy but which was continued after that time*".

E. Proposed grounds of appeal

27. Argenta's proposed grounds of appeal are set out in Appendix 1 hereto.

28. As noted at paragraph 1 above, on 2 October 2020, the Court granted a 'leapfrog' certificate to, *inter alios*, Argenta (pursuant to section 12 of the AJA 1969), on the basis that its proposed grounds of appeal raise points of law of general public importance and that these proceedings satisfy each of the three 'alternative conditions' set out in section 12(3A) of the AJA 1969.

29. In addition, the Court granted Argenta permission to appeal to the Court of Appeal on those grounds (if required).

F. Reasons why permission to appeal should be granted

30. Each of Argenta's proposed grounds of appeal (set out in Appendix 1) raises a point of law of general public importance. This was recognised by Flaux LJ and Butcher J when they granted a 'leapfrog' certificate on 2 October 2020 under section 12 of the AJA 1969.

31. In particular, the first two of those grounds of appeal concern whether the Court was right to conclude that the relevant business interruption itself forms part of the insured peril in Extension 4(d) and, consequently, whether the Court was right to conclude that proximate causation is only required as between the loss claimed and the business interruption.

32. Argenta contends that the Court's analysis of the insured peril in Extension 4(d) is incorrect. This issue was not the subject of argument at trial in relation to Argenta 1 and the Court's conclusion is contrary to the common ground that existed as between Argenta and the FCA; for example, the FCA's skeleton argument for trial accepted that

the insured peril in Extension 4(d) was "*an occurrence of a disease within 25 miles of the premises*" (paragraph 949).

33. These are points of law of general public importance because they affect thousands of Argenta policyholders, in addition to thousands of other policyholders who have purchased cover provided by other insurers. The same issue applies to numerous other policy wordings in this test case, including RSA 3. Those policy wordings were selected by the FCA for inclusion in this test case specifically because they are representative of many other policy wordings in the market. Moreover, the Court's analysis of the insured peril in these policies raises broader issues that will affect most other (if not all) types of business interruption insurance.

34. Ground 3 of Argenta's proposed grounds of appeal concerns the fundamental inconsistency between the Court's approach to Argenta 1 and the very similar 'disease clauses' in QBE 2-3. Grounds 4 and 5 raise further points of law of general public importance relating to the application of the appropriate causal test under Argenta 1 to the effects of the Covid-19 pandemic. In addition, ground 6 concerns whether the Court was correct to conclude that *Orient-Express Hotels Ltd v Assicurazioni Generali SpA* [2010] Lloyd's Rep. I.R. 531 was wrongly decided.

35. Each of these legal issues is a matter of general public importance; as noted above, these issues directly affect thousands of Argenta policyholders, in addition to many other policyholders with cover provided by other insurers. They also have important implications for general principles of causation in the context of insurance law.

19 October 2020

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APPENDIX 1
ARGENTA'S PROPOSED GROUNDS OF APPEAL

Ground 1

1. The material words of Extension 4(d) in Argenta 1 are: "*The Company will also indemnify the Insured as provided in the Insurance of this Section for such interruption … as a result of … any occurrence of a Notifiable Human Disease within a radius of 25 miles of the Premises*".

2. The Court erred in law by wrongly identifying the insured peril in Extension 4(d) of Argenta 1:

   (a) The Court adopted the novel concept of a 'composite insured peril', and held that "*the insured peril is properly to be regarded as business interruption at the premises ("such interruption") as a result of one of Extensions 1-6)*" (paragraph 165). The Court therefore held that the 'business interruption' itself forms part of the insured peril in Extension 4(d). Argenta is not aware of any other case in which that approach has been adopted and it is inconsistent with the structure of Argenta 1 and with the established meaning of the term 'peril'.

   (b) On the true construction of the Argenta Policy the relevant insured peril is "*any occurrence of a Notifiable Human Disease within 25 miles of the Premises*". The business interruption is the damage to the insured's interest for which indemnity is given if, and only if, it is proximately caused by an insured peril. In other words, the interruption is the damage to the insured's business sustained by the insured as a result of a peril; that damage does not itself form part of the insured peril.

3. The Court's conclusion as to the scope of the insured peril in Extension 4(d) was contrary to the common ground that existed as between Argenta and the FCA at trial. It was common ground that: "*The insured peril is indeed an occurrence of a disease within 25 miles of the premises*" (paragraph 949 of the FCA's skeleton argument for trial). Argenta in its skeleton argument, and again in its oral submissions, expressly and clearly relied upon this common ground as the foundation of its case. Neither the FCA nor the Court, raised any dispute or question about these matters being common ground.

4. The Court's error as to the scope of the insured peril in Extension 4(d) of Argenta 1 was significant, because it led to, or contributed to, the further fundamental error identified in ground 2 below.

Ground 2

5. The Court further erred in law by concluding that the words "*as a result of*" in Extension 4(d) do not require proximate causation.

6. It is well established that, in the absence of clear words to the contrary, an insurer is liable only for losses proximately caused by the insured peril. That principle is reflected in section 55(1) of the Marine Insurance Act 1906, and it is described by the editors of MacGillivray as "*a fundamental rule of insurance law*".[7] The Court erred in concluding that proximate causation was only required as between the insured's loss and the business interruption (see paragraphs 94 and 159). That approach reduces the requirement for proximate causation to an empty form of words.

7. At paragraph 165, the Court held that the words "*as a result of*" in Extension 4(d) indicated "*effective cause*", but, critically, the Court then stated that "*the application of the causal test must give effect to and not thwart the intention of the parties*". The Court then abandoned the test of proximate causation. This was an error, because the relevant intention of the parties is expressed by the clear words of Extension 4(d), which insure against "*such interruption*" when (and only when) it is proximately caused by the defined peril, namely "*any occurrence of a Notifiable Human Disease within a radius of 25 miles of the Premises*".

8. The Court accordingly erred in law by overriding the agreed requirement of proximate causation between the insured peril and the loss by reference to an "*intention of the parties*", which the Court failed to identify and which must have been derived from considerations other than the words of the contract. It is not clear precisely what causal test the Court suggested is required by the words "*as a result of*", but it is clear that the Court did not require proximate causation as between the loss and the occurrence of Covid-19 within 25 miles of the insured's premises (see e.g. paragraphs 161 and 168).

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7 Birds, Milnes & Lynch, *MacGillivray on Insurance Law* (14th ed., 2018), para. 21-001.

9. The Court's conclusion that the phrase "*as a result of*" does not require proximate causation as between the loss and the insured peril (i.e. the occurrence of a 'Notifiable Human Disease' within 25 miles of the insured's premises) was contrary to the common ground that existed as between the FCA and Argenta at trial. Paragraph 39 of the agreed List of Issues and Common Ground stated that it was common ground between all parties that: "*The policyholder must establish that its losses are proximately caused by an insured peril*".[8] The scope of that insured peril was also common ground, as noted at paragraph 3 above.

10. Moreover, on day three of the trial, counsel for the FCA said the following: "*The FCA accepts that the interruption must be directly caused by the occurrence within 25 miles, because the term "resulting from" [sic] imports a proximate cause test, as Argenta also says in its skeleton argument*" (Day 3, p.163 (line 23) to p.164 (line 1)).

11. At paragraph 161, the Court stated as follows: "*In those circumstances, we consider that the proper construction of the agreement is that the parties were not agreeing that it was the business interruption consequences of a notifiable disease only insofar as it was within the "relevant policy area" that was being insured, <u>but the business interruption arising from a notifiable disease of which there was an occurrence within the relevant policy area</u>*" (emphasis added). If the Court thereby intended to identify the "*intention of the parties*" which purportedly justified a departure from the test of proximate causation, then it further erred by:

    (a) re-writing the parties' bargain in words (emphasised in the above) which were not the words of the policy and self-evidently did not have the same meaning;

    (b) mis-stating Argenta's construction (which was in the terms of the words of the policy, not the Court's re-formulation in this passage) in order to reject it;

    (c) fallaciously assuming that any matters that the parties could be assumed to have contemplated might occur (which are adumbrated at paragraph 160) must also be assumed to have been insured perils even though not stated to be such; and

    (d) failing to give effect to the intention of the parties expressed in the words of the policy that the insurance covered business interruption proximately caused by

[8] See also para. 218 of the FCA's skeleton argument for trial.

"*any occurrence of a Notifiable Human Disease within a radius of 25 miles of the Premises*".

12. The Court's conclusion as to the causal test required by Extension 4(d) removes any requirement for an insured to demonstrate that all (or, indeed, any) of its loss has been proximately caused by an occurrence of a 'Notifiable Human Disease' within the relevant 25-mile radius.

13. Rather, the words "*any occurrence … within a radius of 25 miles of the Premises*" are – on the Court's interpretation – reduced to an arbitrary precondition to be met before an insured can recover an indemnity for any and all loss caused by the Covid-19 pandemic in general (this is clear, for example, from paragraph 113 (which concerned the 'disease clause' in RSA3) and paragraph 226 (concerning QBE1); see also paragraph 532). As noted above, that interpretation is contrary to the clear words of Extension 4(d).

14. The Court conceded that this was "*undoubtedly a significant argument*" (paragraph 102), but the Court failed to give any adequate answer to this fundamental objection to the case put forward by the FCA.

Ground 3

15. The Court further erred by holding that Argenta's policy was distinguishable from QBE 2-3, whose operative words were almost identical, on the basis that the latter but not the former referred to the insured matters (properly, but not in the Court's view, perils) as "*the following events*".

16. The Court correctly held that the word "*events*" in QBE 2-3 indicates "*that what is being insured is matters occurring at a particular time, in a particular place and in a particular way*". As the Court stated in relation to QBE 2:

> "In the first place, the insuring clause [in QBE2] itself identifies the matters in (a) to (f) as "events". This indicates that what is being insured is matters occurring at a particular time, in a particular place and in a particular way: see the dictum of Lord Mustill in *Axa Reinsurance v Field* [1996] 1 WLR 1026 at 1035 as to the meaning of "event". This is the context within the clause in which Clause 3.2.4(c) refers to "any occurrence of a notifiable disease". Given the reference to "events", and taken with the nature of the other matters referred to in (a), (b) and (d) to (f), <u>the emphasis in (c) appears to us in this clause not to be</u>

> on the fact that the disease has occurred within 25 miles, but on the particular occurrences of the disease within the 25 miles. It is the "event" which is constituted by the occurrence(s) of the disease within the 25-mile radius which must have caused the business interruption or interference." (paragraph 231, emphasis added)

17. Similarly, in relation to QBE 3, the Court stated:

> "The "disease clause" in QBE 3 shares with QBE 2's the reference to cover being for the consequence of any of the "events" in (a) to (f), and the phrasing of (c) in terms of "an occurrence" of a notifiable disease. Proviso (i) to Clause 3.4.8 refers to an "incident". On these bases we consider that this clause too is confining cover to the consequences of certain happenings, in particular specific occurrences of the disease within the radius, as opposed to other happenings or events, including instances of people contracting the disease outside the radius …" (paragraph 237, emphasis added)

18. These passages are fundamentally inconsistent with the Court's conclusions as to the effect of Extension 4(d) in Argenta 1. The insured peril in Argenta 1 is "*any occurrence of* …", as set out more fully in ground 1 above. Contrary to the Judgment, the words "*any occurrence of* …" in Extension 4(d) have at least the same implication of discreteness as the word "*events*" in QBE 2-3.

19. The Court appeared to recognise this when discussing the scope of 'disease clauses' in MSA 1-2, at paragraph 196: "*the fact that the relevant MSA clauses do not refer to an "occurrence" makes it, to our minds, relatively straightforward to conclude that the cover extended to the effects of a notifiable disease if and from the time it is within the 25 mile radius and is not limited to the specific effects only of the instances of the disease within the radius*".

20. Indeed, in paragraph 231 of the Judgment (quoted above), the Court stated that "*the emphasis*" of the 'disease clause' in QBE 2 "*appears to us in this clause not to be on the fact that the disease has occurred within 25 miles, but on the particular occurrences of the disease within the 25 miles*" (paragraph 231, emphasis added). The use of the phrase "*any occurrence*" in Extension 4(d) of Argenta 1 leads to the same conclusion.

21. The same may be said of the words of the third specific exclusion attached to Extension 4(d), which applies to: "*any loss arising from those PREMISES that are not directly affected by the occurrence discovery or accident*" (emphasis added). When considering the effect of clause 3.2.4(h) of QBE 2, the Court stated: "*These uses of the word*

"incident" appear to us to reinforce the fact that the clause is concerned with specific events, limited in time and place" (paragraph 232). That conclusion applies equally to the words "*occurrence discovery or accident*" in the third specific exclusion in Extension 4(d) of Argenta 1.

22. The FCA also recognises the fundamental inconsistency between the Court's conclusions as to Argenta 1 and QBE 2-3, because that inconsistency forms the basis for ground 4 of the FCA's proposed grounds of appeal against the Court's ruling on the latter policies.

Ground 4

23. The Court erred in law in holding that "*the occurrence of the disease within the area was a part of an indivisible cause, constituted by COVID-19*" (paragraph 165).

24. There is no concept known to the law of a "*part of an indivisible cause*". One event either is or is not a proximate (or effective, as held by the Court) cause of another. The test of causation is not satisfied by characterising the relevant event ("*the occurrence of the disease within the area*") as being "*part of*" a wider event or concept ("*Covid-19*").

25. Such an approach is obviously wrong, because every event is part of wider circumstances and it would be impossible for the parties or the Court to determine the right scope of the wider circumstances which would count as the proximate cause in any given eventuality.

26. Even on the Court's findings on the present case, the width of the supposed "*indivisible cause*", "*Covid-19*", is so vague as to be unworkable.

Ground 5

27. The Court erred in law and/or fact in concluding that, alternatively, Extension 4(d) provides cover on the basis that each occurrence of Covid-19 in the UK was an independent, equally effective cause of the loss (paragraph 165).

28. The Court accepted at paragraph 533 that this analysis was "*less satisfactory*". It was in fact an absurd analysis. On no reasonable basis of factual or legal reasoning could it

be said that any single occurrence of Covid-19 (including many asymptomatic and untested occurrences which would forever remain unknown) is an effective or proximate cause of all the consequences of the Covid-19 crisis in the UK. There was no evidence before the Court to support any such assertion, and no legal basis upon which the Court could draw such a conclusion. Indeed, the Court stated at paragraph 418 of the Judgment that: "*it simply cannot be said that any … localised incident of the disease caused the imposition by the government of the restrictions*".

Ground 6

29. The Court was wrong in its approach to the 'trends' clause. The Court wrongly held that the decision of Hamblen J in *Orient-Express Hotels Ltd v Assicurazioni Generali SpA* [2010] Lloyd's Rep. I.R. 531 should not be followed and that the 'trends' clause should operate as if the whole Covid-19 pandemic in the UK and all its consequences was part of the peril insured against.