IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
FINANCIAL LIST

Claim No. FL-2020-000018

BETWEEN:

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

(1) MURRAY & EMILY PULMAN T/A THE POSH PARTRIDGE
(2) BLUEBERRY ENTERPRISES LIMITED
(3) OTHERS INSURED BY QBE UK LIMITED OR AVIVA INSURANCE LIMITED

The 'HIGA' Interveners

(1) COMFOMATIC LIMITED
(2) 368 OTHERS INSURED BY HISCOX INSURANCE COMPANY LIMITED

The 'HAG' Interveners

SKELETON ARGUMENT OF THE SECOND DEFENDANT (ARGENTA) FOR THE HEARING ON 2 OCTOBER 2020

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*References to the hearing bundle are in the form **[Bundle/Tab]***

A. INTRODUCTION

1. This skeleton argument is filed on behalf of the Second Defendant, Argenta Syndicate Management Limited (**"Argenta"**), and it addresses three issues:

   (1) the declarations to be made consequential upon the Court's judgment dated 15 September 2020 (the **"Judgment"**);

   (2) the application filed by Argenta on 28 September 2020 seeking a certificate (a **"Leapfrog Certificate"**) certifying that Argenta's proposed grounds of appeal are suitable for an appeal directly to the Supreme Court; and

   (3) permission to appeal to the Court of Appeal (if required).

B. DECLARATIONS

2. The parties have been seeking to agree a draft order that sets out declarations reflecting the Judgment. The terms of that draft order are now largely agreed, but there remain a number of outstanding issues.

3. For convenience, the draft order proposed by the Defendants (collectively) is appended to this skeleton argument. The declarations that relate specifically to Argenta in paragraph 15 are agreed. The principal outstanding issue affecting Argenta concerns the wording of the declaration in paragraph 11, which relates to causation and the 'trends clauses'.

4. The Defendants have proposed the following wording for the declaration in paragraph 11.2(a):

> "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 **further** public authority or public response thereto **(beyond that which had already occurred at the date when cover under the policy was triggered)**;"

5. The Claimant (the **"FCA"**) has objected to the wording in bold in this paragraph, on the basis that it is said not to reflect the Judgment. Argenta recognises that the wording

of the declaration in paragraph 11.2(a) of the Defendants' draft order goes beyond the express words found in the Judgment. However, Argenta believes that it reflects the true effect of the Judgment as to the construction of the 'disease clauses', including extension 4(d) of the business interruption section of Argenta1 (**"Extension 4(d)"**), in cases where there was no occurrence of Covid-19 within the relevant policy area until after 26 March 2020, i.e. after the date on which the 'national lockdown' was imposed.[1] Even if this is wrong, it is in the interests of all concerned that the matter is clarified, rather than left unclear which would be the effect of the FCA's draft declarations.

6. The Court has held that the relevant insured peril in Argenta1 is "*business interruption at the premises ("such interruption") as a result of Extensions 1-6*" (see paragraph 165 of the Judgment). In other words, the Court has stated that the insured peril for Extension 4(d) in Argenta1 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]*".

7. If there were no occurrences of Covid-19 within 25 miles of a policyholder's premises until after 26 March, Extension 4(d) will not provide cover for losses caused by the 'national lockdown'; in such a case, those restrictions were imposed prior to the date on which cover under the policy was triggered, so the 'national lockdown' and its consequences cannot be said to have been caused by the insured peril, or to 'arise from' the relevant 'occurrence'. Further, the appropriate counterfactual should exclude only public authority restrictions relating to Covid-19 imposed after cover under the policy was triggered, i.e. after there was an occurrence of Covid-19 within 25 miles of the insured's premises.

8. Argenta's interpretation of the Judgment is supported by the following considerations:

   (1) At paragraph 99 of the Judgment,[2] the Court set out the arguments made by the FCA in relation to the relevant 'disease clause' in RSA3 (which is similar to Extension 4(d) in Argenta1, save that it includes the word "*following*"). That paragraph of the Judgment makes it clear that the FCA argued that the 'disease

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1 Pursuant to the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 and the equivalent measures for Scotland, Wales and Northern Ireland.

2 **[N/1]**.

clauses' provide an indemnity for losses caused by government measures imposed after cover under the policy has been triggered:

> "The way in which Mr Colin Edelman QC, on behalf of the FCA, put this case was that in each case when and where there was the occurrence of a Notifiable Disease within the 25 mile radius, that occurrence was an effective cause of the **subsequent** government measures and interference with the insured's business. The government's decisions were based on the fact that there were such occurrences in a very large number of places. The decisions were accordingly based on all of those occurrences. He said that the way in which this should be analysed is either that there was one indivisible cause, namely the disease, of which all the outbreaks formed part, or that there were many different concurrent effective causes, none of which is excluded…" (Emphasis added)

The Court accepted that argument in paragraphs 111 and 112 in relation to RSA3, and stated that the same reasoning applies to Argenta1 (see paragraphs 159 and 165 of the Judgment). The word 'subsequent' in the passage quoted above demonstrates that the FCA was not seeking to suggest that any of the 'disease clauses' provide cover for losses caused by government restrictions imposed before cover under the policy is triggered (i.e. before an occurrence of Covid-19 within the relevant policy area).

(2) The same can be seen in paragraph 155 of the Judgment, where the Court summarised the FCA's arguments in relation to the construction of Extension 4(d) in Argenta1:

> "The FCA contends that COVID-19 within the 25 mile radius was at least *an* effective and proximate cause of the interruption. The government was responding to the presence of COVID-19 around the country, and **if there was a case of the disease within 25 miles of the premises that was a part of what the government and the public were responding to**." (Emphasis added)

Again, this passage demonstrates that FCA's case focused on loss caused by government measures imposed after cover under the policy had already been triggered, i.e. after an occurrence of Covid-19 within 25 miles of the insured's premises.

(3) In relation to RSA3, the Court made it clear that the business interruption or interference must be subsequent to the occurrence of Covid-19 within 25 miles

of the insured's premises, and that there must also be some casual connection between the two (see paragraph 95 of the Judgment). Neither of those requirements could be satisfied in respect of loss caused by government measures imposed before any occurrence of Covid-19 within 25 miles of the insured's premises. Further, paragraph 102 of the Judgment states that, in the Court's view, RSA3 only provides cover for the consequences of Covid-19 "*from the time of that occurrence*", i.e. an occurrence of the disease within 25 miles (see also paragraph 113[3]). That cover cannot extend to the consequences of government measures adopted before cover under the policy has been triggered. As noted above, the Court applied the same reasoning to Argenta1 (see paragraph 159 of the Judgment).

(4) The same result is reached by an application of the 'trends clause' in Argenta1, which the Court accepted is applicable to claims under Extension 4(d). In paragraph 168 of the Judgment, the Court stated as follows in relation to that 'trends clause':

> "… 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."

This is to the same effect as paragraph 122, relating to the 'trends clause' in RSA3. Read together with paragraphs 102 and 113[4] it is implicit that what the Court requires to be taken out of the counterfactual is the effect of Covid-19 (including the governmental and public response thereto) as from the date on which cover under the policy is triggered, i.e. as from the date on which there is an occurrence of Covid-19 within 25 miles of the insured's premises, but not

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[3] "… there is cover under RSA 3 for any business interruption which an insured can show resulted from COVID-19, including by reason of the actions, measures and advice of the government, and the reaction of the public in response to the disease, **from the date when the disease occurred in the relevant 25 mile radius**" (emphasis added).

[4] As noted above, paragraphs 102 and 113 of the Judgment state that the 'disease clause' in RSA3 only provides cover for the consequences of Covid-19 from the time when Covid-19 occurred within the relevant policy area.

including any response that occurred prior to the trigger date but still continued beyond it.

(5) Further support for this interpretation of the Judgment is found in paragraph 296, which concerns the 'hybrid clause' in RSA1:

> "The phraseology used is that the closure or restriction must be as a result of the notifiable disease manifesting itself at the premises or within a 25 mile radius … In the same way as for a number of the "disease clauses", we consider that there will be satisfaction of this requirement of the clause, **if and from the time that there has been a case of the disease within the 25 mile radius, and this can be regarded as having led to (resulted in) the closure or restrictions placed on such premises on 26 March because it was part of one cause of those restrictions,** which were imposed by the government as a response to a national picture which was made up of the individual local parts." (Emphasis added)

Again, this indicates that the 'disease clauses' provide cover for loss caused by government restrictions relating to Covid-19 only if those restrictions are imposed after the date on which cover under the policy is triggered, i.e. after the date on which there is an occurrence of Covid-19 within the relevant policy area.

9. The purpose of the declarations to be made by the Court is to provide certainty. Indeed, the Framework Agreement, concluded by the parties dated 31 May 2020 in connection with these proceedings, emphasised the mutual objective of achieving "*the maximum clarity possible*" for both policyholders and insurers.[5] The FCA's draft declarations make no attempt to resolve the ambiguity referred to above. That is unsatisfactory; even if Argenta's interpretation of the Judgment is not accepted, the declarations to be made by the Court should clarify this issue one way or another.

10. There also appears to be a dispute about the wording of paragraph 11.3(b) of the Defendants' draft order, which states as follows:

> "If there was a measurable downturn in the turnover of a business due to COVID-19 before the insured peril was triggered, then it is in principle appropriate for the counterfactual to take into account the continuation of that measurable downturn and/or increase in expenses as a trend or circumstance (under a trends clause or similar) in calculating the indemnity payable in respect

[5] See recital I in the Framework Agreement **[R/1]**.

of the period during which the insured peril was triggered and remained operative …"

11. The 'HAG' interveners object to this paragraph, and assert that *all* consequences of the Covid-19 pandemic (including those that occurred prior to the date on which cover under the policy was triggered) should be removed from the counterfactual.[6] Argenta adopts the submissions of the Fourth Defendant, Hiscox, on this issue. In particular, the position adopted by the 'HAG' interveners is inconsistent with paragraphs 283, 351 and 389 of the Judgment, all of which make it clear that the relevant 'hybrid' and 'prevention of access' clauses (and, by analogy, also the 'disease clauses') do not provide an indemnity for a loss of revenue caused by Covid-19 prior to the date on which cover under the policy was triggered.

C. LEAPFROG CERTIFICATE

12. Argenta has filed an application seeking a Leapfrog Certificate pursuant to section 12(1) of the Administration of Justice Act 1969 (the **"1969 Act"**).[7] All of the other Defendants (save for the Eighth Defendant, Zurich), the FCA and the 'HAG' interveners have also filed applications for a Leapfrog Certificate. Accordingly, it appears to be common ground that the issues arising out of the Judgment are suitable for an appeal directly to the Supreme Court because of the exceptional public importance and urgency of this test case.

13. Argenta's proposed grounds of appeal (set out in Appendix 1 to its Application Notice[8]) raise points of law of general public importance. In particular, the first four 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. 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 Argenta1 and the Court's conclusion is contrary to the common ground that existed as between Argenta and the

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6 See e.g. paras 12-17 of the second witness statement of Richard Leedham, dated 28 September 2020 **[O/29]**.

7 **[S/1]**.

8 **[O/7]**.

FCA; 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 of the FCA's skeleton[9]), and did not include the business interruption itself.

14. 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 (including many insurers which are not parties to this test case). The same issue applies to numerous other policy wordings in this test case, including RSA3. 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.

15. Argenta's other proposed grounds of appeal raise further points of law of general public importance relating to application of the appropriate causal test under Argenta1 to the effects of the Covid-19 pandemic. In addition, the final proposed ground of appeal 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. These issues are matters of general public importance; as noted above, they directly affect thousands of Argenta policyholders, in addition to many other policyholders with cover provided by other insurers (including many insurers which are not parties to this test case). They also have important implications for general principles of causation in the context of insurance law.

16. For the reasons set out in its Application Notice, Argenta's proposed grounds of appeal satisfy each of the alternative conditions for a Leapfrog Certificate in section 12(3A) of the 1969 Act:

    (1) this test case "*entail[s] a decision relating to a matter of national importance or consideration of such a matter*" (s.12(3A)(a) of the 1969 Act);

[9] **[I/1]**.

(2) the result of this test case is "*so significant*", whether considered on its own or together with claims by policyholders that are likely to follow from it, "*that ... a hearing by the Supreme Court is justified*" (s.12(3A)(b)); and

(3) "*the benefits of earlier consideration by the Supreme Court outweigh the benefits of consideration by the Court of Appeal*" (s.12(3A)(c)).

17. Argenta's proposed grounds of appeal are also such that, apart from the provisions of Part II of the 1969 Act, this would be a proper case for an appeal to the Court of Appeal (see s.15(3)).

18. If the Court grants a Leapfrog Certificate, Argenta will promptly file an application at Supreme Court seeking permission to appeal. Such an application will, in any event, need to be filed within one month (pursuant to section 13(1) of the 1969 Act and paragraph 3.6.8 of Supreme Court Practice Direction 3).

D. PERMISSION TO APPEAL

19. Argenta also seeks permission to appeal to the Court of Appeal, to be used only in the event that the Supreme Court declines to grant permission (or in the event that the Court does not grant a Leapfrog Certificate). For the reasons noted above, Argenta's proposed grounds of appeal have a real prospect of success and, as such, it is appropriate for the Court to grant Argenta permission to appeal on that basis.

20. If the Court grants such permission, Argenta respectfully requests the Court to grant a further extension of time for Argenta to file an Appellant's Notice at the Court of Appeal (pursuant to CPR 52.12(2)),[10] until 14 days after the date on which the Supreme Court determines any application for permission to appeal. To the extent that the Supreme Court grants permission, then this further extension of time will become redundant.

[10] Paragraph 3 of the Court's order dated 15 September 2020 **[N/2]** extended time for the filing of any Appellant's Notice until 7 days after the hearing on 2 October, or such later date as may be ordered at that hearing.

30 September 2020

SIMON SALZEDO Q.C.
MICHAEL BOLDING

Brick Court Chambers
7-8 Essex Street
London,
WC2R 3LD

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

DATED: 2 October 2020

BETWEEN

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

***draft* ORDER**

UPON the trial of the claim on 20-23 and 27-30 July 2020

AND UPON Judgment being handed down on 15 September 2020

AND UPON the terms in this Order reflecting those used in the Judgment (including the 'Categories' set out at paragraph 53 of the Judgment)

IT IS DECLARED THAT:

Disease

1. COVID-19 is a human infectious or contagious disease, and became notifiable on 5 March 2020 in England and on 6 March 2020 in Wales, within Argenta1, Hiscox1-4 (hybrid clauses), MSAmlin1-2 (disease clauses), QBE1-3, RSA1 (hybrid clause) and RSA3-4 (disease clauses).

2. However, COVID-19 is deemed under RSA4 (disease clause) to have been a notifiable disease since 31 December 2019.

3. COVID-19 "occurred" on 5 March 2020 in England and on 6 March 2020 in Wales within Hiscox1-3 (hybrid clauses).

4. COVID-19 occurred within the "Vicinity" (as defined in RSA4) of all premises in England and Wales on 31 January 2020 (RSA4, disease clause).

5. There was COVID-19, and COVID-19 was "sustained" or "occurred" within a given radius of the premises in Argenta1, Hiscox4 (hybrid), QBE2-3 and RSA3, wherever a person or persons contracted COVID-19 so that it could be diagnosed, whether or not it was verified by medical testing or a medical professional and/or formally confirmed or reported to the PHE and whether or not it was symptomatic, and was/were within that radius of the premises at a time when they could still be diagnosed as having COVID-19.

6. There was "*illness sustained by any person resulting from*" COVID-19 within a radius of 25 miles of the premises in MSAmlin1-2 (disease clauses), when any such person was infected with and/or was suffering from COVID-19, whether or not they were diagnosed with COVID-19, and were within that radius of the premises at a time when they could still be diagnosed as having COVID-19.

7. COVID-19 was "manifested" within QBE1 and RSA1, within a radius of 25 miles of the premises, wherever a person displayed symptoms of, or was diagnosed with, COVID-19 and was/were within a 25 mile radius of the premises.

8. **Prevalence**

   8.1. What evidence may prove actual prevalence will vary depending on the factual context, and for the purposes of different policies (for example, some policies have a relevant policy area of 3.14 square miles (in the case of a one mile radius) or 1,963.5 square miles (in the case of a 25 mile radius), as well as the particular timing and location of a claim. Different inferences might be drawn from a combination of underlying data in different contexts.

   8.2. The burden of proof is on policyholders to prove the presence of Covid-19 within the relevant policy area. The following types of evidence could be used in principle

to discharge that burden on policyholders to prove the presence of COVID-19 within the relevant policy area on a particular date:

(a) specific evidence of a case or cases of COVID-19 in a particular location within the relevant policy area;

(b) data published by NHS England on a daily basis recording the number of individuals who died in NHS Hospital Trusts in England after testing positive for COVID-19 ("NHS Death Data"), where an NHS Hospital Trust has recorded such a death on a particular date and:

    (i) all hospitals in that Trust are within the relevant policy area; and

    (ii) since inferences can be drawn from the NHS Death Data as to when COVID-19 was present in that NHS Hospital Trust, an inference may be able to be drawn that COVID-19 was present in the relevant policy area at a particular date (this may be more obvious in some circumstances than others, for example if an individual died in early March 2020 after testing positive for COVID-19, it is *prima facie* likely that COVID-19 was present in the local area at the time of death);

(c) weekly data published by the Office of National Statistics recording the number of deaths that have occurred in England and Wales each week by local authority or health board where the death certificate mentions COVID-19 ("ONS Death Data"):

    (i) where the local authority or health board was entirely within the relevant policy area; and

    (ii) taking into account all of the deaths involving COVID-19 in a particular week in a particular local authority or health board area, as representing active cases in that local authority or health board area on (at the latest) the first day of that week (and it may be that the deaths in a particular week can safely be treated as active cases many days before the beginning of that week but additional evidence would be required on that).

(d) data published by the UK Government recording the number of daily lab-confirmed positive tests of COVID-19 in a particular nation, region, UTLA or LTLA ("Reported Cases"):

(i) taking into account the Reported Cases on a particular date in a particular nation, region, UTLA or LTLA together with the Reported Cases two to three days either side of that day as being active on that particular date in that nation, region, UTLA or LTLA; and

(ii) when taking into account the Reported Cases in a particular LTLA or LTLAs, the LTLA or LTLAs are entirely within the relevant policy area;

(e) a reliable distribution-based analysis – albeit absolute precision is not required to discharge the burden of proof – to demonstrate the geographical distribution of COVID-19 cases (where the policyholder relies on ONS Death Data or Reported Cases in an LTLA or another reporting area, and the relevant policy area is entirely within, or intersects, the LTLA or another reporting area);

(f) given the likely true number of cases of COVID-19 in the UK in March 2020 was much higher than that shown in the Reported Cases, a reliable undercounting analysis – albeit absolute precision is not required to discharge the burden of proof – to demonstrate the likely number of actual cases of COVID-19 in the relevant policy area; Insureds can seek both: (i) to demonstrate that the reports produced by Imperial College London and Cambridge University are such reliable analyses; and (ii) to rely upon them to discharge the burden of proof.

8.3. The true number of individuals infected with COVID-19 on relevant dates in March 2020 in a regional, UTLA or LTLA Zone is at least as great as the number of Reported Cases for those dates for that Zone, where "Reported Cases" here is referring only to the daily (and not the cumulative) totals contained in the data referred to in paragraph 8.2(d) above.

8.4. The FCA cannot use the above types of evidence or distribution-based analysis or undercounting analysis or other methodologies to establish any rebuttable presumption.

Public authority action

9. The UK Government is a government, governmental authority or agency, public authority, competent public authority, civil authority, competent civil authority, competent local authority and/or statutory authority within the different wording to this effect in Wordings (Arch1, Ecclesiastical1.1-1.2, Hiscox1-4, MSAmlin1-3, RSA2.1-2.2, RSA4, Zurich1-2).

Causation and trends clauses

10. In Argenta1, MSAmlin1-2, RSA3-4, QBE1(disease clauses), and RSA1 (hybrid clause); 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 Arch1 (denial of access clause), Argenta1, MSAmlin1-2, RSA3-4, QBE1 (disease clauses), Hiscox1-4, RSA 1 (hybrid clause):

    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 further public authority or public response thereto (beyond that which had already occurred at the date when the policy was triggered);

(b) for prevention of access clauses, means (for example) no prevention or hindrance, no government action and no emergency; and

(c) for hybrid clauses means (for example) no inability to use the premises, no public authority restrictions and no national COVID-19 outbreak.

11.3. As to the proper application of the trends clauses declared applicable in declaration 13 below:

(a) What amounts to a trend or circumstance will be a question of fact and construction of the policy terms in each case, and may require an upwards or downwards adjustment;

(b) If there was a measurable downturn in the turnover of a business due to COVID-19 before the insured peril was triggered, then it is in principle appropriate for the counterfactual to take into account the continuation of that measurable downturn and/or increase in expenses as a trend or circumstance (under a trends clause or similar) in calculating the indemnity payable in respect of the period during which the insured peril was triggered and remained operative; and

(c) Any such continuation must be at the level at which it had previously occurred.

12. In QBE2-3:

12.1. There is interruption or interference in consequence of any occurrence(s) of COVID-19 (as to which, see declaration 5 above) within the Relevant Policy Area only if any interruption or interference was caused by such occurrence(s), as distinct from COVID-19 outside that area.

12.2. Where the test in the immediately prior sub-paragraph is satisfied, the correct counterfactual is to assume that the particular occurrence(s) of COVID-19 which triggered cover under the policy (i.e. the relevant "event") had not occurred within the Relevant Policy Area, but that any other occurrence(s) of COVID-19 within and/or outside that Area continued, and there remains cover for losses that would

not have been suffered had the particular occurrence(s) of COVID-19 which triggered cover under the policy not occurred.

13. The trends clauses contained in the business interruption sections of all the Wordings are applicable to claims under the item(s) of additional cover or extension(s) of cover in those policies considered here (save, in the case of QBE1-3, insofar as inconsistent with more specific provisions as to quantification).

Arch

14. As regards Arch1:

14.1. Declaration 11 above is repeated.

14.2. From 3 March 2020 there was an emergency likely to endanger life.

14.3. Each of the matters pleaded in the Amended Particulars of Claim (**APoC**) sub-paragraphs 18.4, 18.6-18.7 (second and third sentences), 18.9-18.10, 18.14-18.24, and 18.26 was actions or advice of government.

14.4. There was prevention of access to the premises due to the actions or advice of a government due to an emergency which was likely to endanger life (the COVID-19 outbreak):

(a) For those businesses which were required to close the premises by the 21 March or 26 March Regulations;

(b) For Category 1 businesses which closed in response to the 20 March statement, 21 March or 26 March Regulations, save where the business continued to operate a takeaway service constituting more than a *de minimis* part of its pre-existing business which it continued to operate;

(c) For Category 2 businesses which closed in response to the 20 March statement, 21 March or 26 March Regulations;

(d) For Category 4 businesses which closed completely pursuant to Regulation 5 of the 26 March Regulations (this being a question of fact in the case of

Category 4 businesses which did not close completely pursuant to that Regulation); and

(e) For Category 7 businesses which closed in response to the 23 March statement.

14.5. There was no prevention of access to the premises due to the actions or advice of a government due to an emergency which was likely to endanger life (the COVID-19 outbreak):

(a) For Category 3 and Category 5 businesses; and

(b) As a result of the advice, instructions and regulations as to social-distancing, self-isolation, lockdown and restricted travel and activities, 'staying-at-home' and home-working given on 16 March 2020 and on many occasions subsequently (including Regulation 6 of the 26 March Regulations and as set out in paragraphs 18.9, 18.14, 18.15(b), 18.16 to 18.24, and 18.26 of the APoC) ("**the Social Distancing and Related Action**").

Argenta

15. As regards Argenta1:

15.1. Declarations 1, 5, 10 and 11 above are repeated.

15.2. As for the meaning of "interruption":

(a) The advice, instructions and/or announcements pleaded at APoC paragraphs 46 and 49 were capable of causing an interruption to the business of policyholders.

(b) It is a matter of fact to be determined in each case whether there was "interruption" to the business of policyholders by reason of the 16 March statement.

(c) The 21 March Regulations were capable of causing an 'interruption' to the business of policyholders located in England, insofar as those policyholders operated a bar and/or restaurant in their accommodation and insofar as such

business was otherwise continuing, this being a matter of fact to be determined in each case.

(d) The 26 March Regulations (and equivalent Regulations in Wales) caused an 'interruption' to the business of policyholders located in England and Wales insofar as such businesses were otherwise continuing and insofar as bookings did not fall within any of the exceptions.

15.3. As for exclusions:

(a) If there was an occurrence of COVID-19 within a radius of 25 miles of the premises, those premises were directly affected by the occurrence within the meaning of Exclusion (iii).

(b) The Micro-Organism Exclusion Clause does not apply to the disease clause.

Ecclesiastical

16. As regards Ecclesiastical1.1-1.2:

16.1. In relation to the provision in Ecclesiastical1.1-1.2 excluding "*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*" ("**the infectious disease carve-out**"):

(a) "*competent local authority*" means whichever authority is competent to impose the relevant restrictions in the locality on the use of the premises, including central government;

(b) The actions of the government in response to COVID-19, including the 20 and 23 March government advice and the 21 March and 26 March Regulations, were "*the order or advice of the competent local authority as a result of an occurrence of an infectious disease*"; and

(c) Accordingly, the infectious disease carve-out applies and there is no cover in respect of the closure of or restriction in the use of the premises.

16.2. There was an emergency which could endanger human life from 12 March 2020.

16.3. Access to or use of the premises, for churches and schools, was hindered by action of government due to an emergency which could endanger human life (the COVID-19 outbreak) from 23 March 2020 and not before.

16.4. If the infectious disease carve-out did not apply and there were cover, declaration 11 above would be applicable.

Hiscox

17. As regards Hiscox1-4 (hybrid clauses):

17.1. Declarations 1, 3, 10 and 11 above are repeated as regards Hiscox1-3, and declarations 1, 5, 10 and 11 above are repeated as regards Hiscox4.

17.2. As regards Hiscox 1 and 4 *"*interruption*"* includes interference or disruption, not just a complete cessation of the insured's *"*business*"* or *"*activities*"*. Whether there has been such an "interruption" is a matter of fact in each case.

17.3. As regards Hiscox1-4, "inability to use" means something significantly different from being hindered in using or similar. There will not be an "inability to use" the insured premises merely because an insured cannot use all of the premises and equally there will not be an ability to use the insured premises by reason of any and every departure from their normal use. Partial ability to use the premises might be sufficiently nugatory or vestigial as to amount to an "inability to use" the premises, depending on the facts.

17.4. As regards Hiscox 1-4 (hybrid):

(a) The words "restrictions imposed" mean something mandatory that has the force of law, the only relevant such matters being those promulgated by statutory instrument and in particular Regulation 2 of the 21 March and Regulations 4 and 5 of the 26 March Regulations. "Restrictions imposed" do not necessarily have to be directed to the insured or the insured use of premises and Regulation 6 is capable of being a "restriction imposed". Social Distancing and Related Action otherwise were and are not "restrictions imposed". Whether such restrictions caused an inability to use is a question of

fact. Cases in which Regulation 6 would have caused an "inability to use" the insured's premises would be rare; whether there were such cases is a question of fact.

(b) Insureds carrying on businesses in Category 3 and Category 5 did not suffer an "inability to use" their premises due to "restrictions imposed" within the meaning of Hiscox1-4.

17.5. As regards Hiscox1-3, the word "following" imports some sort of causal connection and the "restrictions" imposed must follow the "occurrence" of a notifiable disease. As regards Hiscox1-3 any relevant restrictions imposed 'followed' the "occurrence" of COVID-19 as a notifiable disease on 5 March 2020 in England and 6 March 2020 in Wales.

17.6. As regards Hiscox4 "restrictions imposed" "followed" an "occurrence" of COVID-19 within one mile of the insured's premises if they were both temporally posterior to that particular local "occurrence" and were a response to the outbreak of which that local occurrence formed part.

18. As regards Hiscox1-2 and Hiscox4 (NDDA clauses):

18.1. The NDDA clauses in Hiscox1-2 and Hiscox4 do not provide cover in respect of business interruption losses caused by the restrictions imposed by the government in response to the national COVID-19 pandemic.

18.2. The national COVID-19 pandemic was not and is not an "incident" and nor is it "an incident occurring…within a one mile radius of the insured premises" (Hiscox1-2 and Hiscox4) nor "an incident occurring…within the vicinity of the premises" (Hiscox2). Nor is there an "incident" if someone infected with COVID-19 so that it is diagnosable is present within a one mile radius (Hiscox1-2 and Hiscox 4) or vicinity (Hiscox2).

18.3. As regards Hiscox1 and Hiscox4, *"*interruption*"* includes interference or disruption, not just a complete cessation of the insured's *"*business*"* or *"*activities*"*. Whether there has been such an "interruption" is a matter of fact in each case.

18.4. Only the 21 March and 26 March Regulations could lead to a denial or hindrance on access "imposed" by any civil or statutory authority or by order of the government or any public authority (Hiscox1-2, Hiscox4), or by the police or other statutory authority (Hiscox2).

18.5. As regards (i) denial of access or hindrance in access imposed by any civil or statutory authority or by order of the government or any public authority, and (ii) denial of or hindrance in access imposed by the police or other statutory authority:

(a) There was a denial of access for businesses required to close by the 21 March or 26 March Regulations;

(b) There was a hindrance of access where under the Regulations people were only allowed to access the premises for limited purposes;

(c) There was not a denial or hindrance of access by reason of the Social Distancing and Related Action (including Regulation 6 of 26 March Regulations);

(d) There was not a denial or hindrance of access to Category 3 or Category 5 businesses.

18.6. The cause of the imposition of the restrictions was the pandemic which cannot be described as an "incident". Even if the presence of someone with COVID-19 within the radius or in the vicinity could be said to be an incident (which it cannot) it cannot be said that any such localised incident of the disease caused the imposition by the government of the national restrictions.

19. As regards Hiscox 1-4 (hybrid), subject to any terms of the policy that an insured is able to demonstrate permit recovery after restrictions have ceased, e.g. as to the definition of the indemnity period, an insured cannot claim in respect of loss sustained before the commencement or after the cessation of insured peril, and the correct counterfactual can only assume that the insured peril applies from the time that the restrictions are imposed and only for as long as they are imposed.

MSAmlin

20. As regards MSAmlin1-2 (disease clauses):

    20.1. Declarations 1, 6, 8, 10 and 11 above are repeated.

    20.2. Accordingly, there is cover under MSAmlin1-2 (disease clauses) for any business interruption following COVID-19, including by reason of the actions, measures and advice of the government, and the reaction of the public in response to COVID-19, from the date when there was COVID-19 in the relevant 25 mile radius of the insured premises.

21. As regards MSAmlin1 (AOCA clause):

    21.1. Access to an insured's premises is only prevented where the premises have been totally closed for the purposes of carrying on the insured's pre-existing business.

    21.2. "*action by the police or other competent local, civil or military authority*" will only be "*action… where access will be prevented*" if such action has the force of law.

    21.3. There was "*action by the… competent local, civil… authority… where access will be prevented*" for those businesses which were required to totally close the premises by reason of Regulation 2 of the 21 March Regulations and Regulations 4 and 5 of the 26 March Regulations and did so as a result.

    21.4. There was not "*action by the… competent local, civil… authority… where access will be prevented*":

        (a) For Category 3 and Category 5 businesses;

        (b) For businesses which were required to close the premises by the 21 March Regulations and/or the 26 March Regulations but continued to operate a service (for example, takeaway) constituting more than a *de minimis* part of its pre-existing business;

        (c) By reason of Regulation 6 of the 26 March Regulations;

        (d) By reason of any matter relied upon by the FCA other than Regulation 2 of the 21 March Regulations and Regulations 4 and 5 of the 26 March Regulations.

21.5. The matters relied on by the FCA, including the government action in imposing the 21 March and the 26 March Regulations in response to the COVID-19 pandemic, were not "*following a danger or disturbance in the vicinity of the premises*".

21.6. Accordingly, there is no cover under the MSAmlin1 (AOCA clause) in respect of business interruption losses caused by the action of the government taken in response to the national COVID-19 pandemic. There will only be cover if in a particular case the risk of COVID-19 in the vicinity (in the sense of neighbourhood) of the insured premises, as opposed to the country as a whole, led to qualifying public authority action preventing access and all other coverage requirements in MS Amlin 1 (AOCA clause) are met.

22. As regards MSAmlin2 (AOCA clause):

22.1. The COVID-19 pandemic was not and is not an "incident", nor was it or is it an "incident within a one mile radius" of the insured premises. Nor was or is there an "incident" if someone with COVID-19 is present within a one mile radius.

22.2. There was "interruption" only where there was complete cessation.

22.3. Only the 21 March and the 26 March Regulations could lead to a denial or hindrance in access "*imposed by any civil or statutory authority or by order of the government or any public authority*"; action which did not have the force of law, such as government advice or recommendations, could not.

22.4. Without prejudice to the declarations at paragraphs 22.1 to 22.3 above, as regards denial of or hindrance in access:

(a) There was a denial of access for businesses required to close by the 21 March and/or 26 March Regulations;

(b) There was a hindrance of access where under the 21 March and/or 26 Regulations people were only allowed to access the premises for limited purposes;

(c) There was not a denial or hindrance of access:

(i) For Category 3 and Category 5 businesses;

(ii) By reason of Regulation 6 of the 26 March Regulations;

(iii) By reason of any other matter relied upon by the FCA.

22.5. As to causation:

(a) The cause of the imposition of restrictions was the national COVID-19 pandemic, which was not "*an incident*".

(b) The FCA cannot establish that the restrictions imposed in response to COVID-19 were caused by "*an incident*".

(c) Even if the presence of a person with COVID-19 within the radius or in the vicinity could be said to be "*an incident*", which it cannot, it cannot be said that any such localised incident of COVID-19 caused the imposition by the government of restrictions in response to COVID-19.

22.6. Accordingly, there is no cover under the MSAmlin 2 (AOCA clause) in respect of business interruption losses caused by the action of the government taken in response to the national COVID-19 pandemic.

23. As regards MSAmlin3:

23.1. COVID-19 falls within "*injury*".

23.2. The government action in response to COVID-19 (including the 21 March and 26 March Regulations):

(a) Amounted to "*action by a competent public authority*".

(b) Did not amount to prevention of access to or use of the premises or hindrance of access to those Category 5 premises insured under MSAmlin3;

(c) May amount to hindrance of use of the premises, this being a question of fact in each case;

(d) Was not taken "*following threat or risk of damage or injury in the vicinity of the premises*".

23.3. Accordingly, there is no cover under MSAmlin3 in respect of business interruption losses caused by the action of the government taken in response to the national COVID-19 pandemic. There will only be cover if in a particular case the risk of COVID-19 in the vicinity (in the sense of neighbourhood) of the insured premises, as opposed to the country as a whole, led to qualifying public authority action hindering use, and all other coverage requirements in MS Amlin 3 are met.

QBE

24. As regards QBE1:

24.1. Declarations 1, 7, 8, 10, 11 and 13 above are repeated.

24.2. Human action and/or intervention including those measures listed in APoC paragraphs 46 and 47, including the Social Distancing and Related Action, could in principle cause interference with the insured business.

24.3. If COVID-19 was manifested at or within a 25 mile radius of the insured business (as to which see Declaration 7), there will be cover under the disease clause in QBE1 from the date COVID-19 was manifested in the 25 mile radius of the insured business for losses caused by interruption of or interference with the insured businesses caused by COVID-19 (including the governmental reaction thereto pleaded at APoC sub-paragraphs 18.9, 18.14, 18.15(d), 18.16 to 18.24 and 18.26 and the public reaction thereto). For the avoidance of doubt: (i) it is not necessary for the interruption of or interference with the insured business to have been caused by the manifestation of COVID-19 within the 25 mile radius, as distinct from its manifestation outside the radius; and (ii) the correct counterfactual is as set out in Declaration 11.

24.4. The "Pollution" exclusion clause does not apply to the disease clause.

25. As regards QBE2:

25.1. Declarations 1, **Error! Reference source not found.**5, 8, 12 and 13 above are repeated.

25.2. Human action and/or intervention including those measures listed in APoC paragraphs 46 and 47, including the Social Distancing and Related Action, could in principle cause interference with the insured business.

25.3. The "Pollution" exclusion clause does not apply to the disease clause.

26. As regards QBE3:

26.1. Declarations 1, 5, 8, 12 and 13 above are repeated.

26.2. Human action and/or intervention including those measures listed in APoC paragraphs 46 and 47, including the Social Distancing and Related Action, could in principle cause interference with the insured business.

26.3. The "Micro-organism risks" and "Pollution or Contamination" exclusion clauses do not apply to the disease clause.

RSA

27. As regards RSA1:

27.1. Declarations 1, 7, 10 and 11 above are repeated.

27.2. There:

(a) was "closure or restrictions placed on the premises" for any business in Category 6 from 26 March 2020 as a result of Regulation 5(3) 26 March Regulations; but

(b) was not "closure or restrictions placed on the premises" as a result of the Social Distancing and Related Action.

27.3. Accordingly, there is cover under RSA1 for Category 6 businesses from 26 March 2020 for any business interruption following COVID-19, by reason of closure or restrictions placed on the Premises, where COVID-19 was "manifested" within 25 miles of the insured premises on or before 26 March 2020.

27.4. The "Pollution and Contamination" exclusion clause does not apply to the disease clause.

28. As regards RSA2.1-2.2:

28.1. The word "*vicinity"* connotes neighbourhood, the area surrounding the premises. The UK cannot be described as the "*vicinity"* of the insured premises.

28.2. There could only be cover if the insured could demonstrate that an emergency by reason of COVID-19 in the vicinity of the insured premises led to the national actions or advice of the government.

28.3. Each of the matters pleaded at APoC sub-paragraphs 18.8-18.9, 18.14, 18.15(b), 18.16 (the 21 March Regulations), 18.17-18.19, 18.21 (the 26 March Regulations), 18.22, and 18.26 was actions or advice of a competent Public Authority within RSA2.1-2.2.

28.4. There was "actions or advice… which prevents or hinders the use or access to the Premises":

(a) In principle by reason of the 20, 21, 23, 24 and/or 26 March measures pleaded in APoC paragraph 47 with respect to any businesses ordered to close the premises in full or in part.

(b) From 20 March for businesses which closed part of their business (such as an eat-in part of a restaurant) following the 20 March statement.

(c) From 21 or 26 March where Regulation 2 of the 21 March Regulations or Regulations 4 and 5 of the 26 March Regulations required the business to close.

(d) From 26 March, depending on the particular facts of the case, if and to the extent that Regulation 6 of the 26 March Regulations prohibited a potential customer from visiting non-essential retail premises at all or only permitted that customer to do so for the purposes of essential purchases.

28.5. The matters relied on by the FCA, including the government action in imposing the 21 March and the 26 March Regulations in response to the COVID-19 pandemic, were not "*actions or advice… due to an emergency likely to endanger life or property in the vicinity of the Premises*".

28.6. There will be cover if in a particular case a COVID-19 emergency in the vicinity of the premises, as opposed to the country as a whole, led to qualifying public authority action or advice.

28.7. Exclusion (b) in Extension F, RSA2.1-2.2, does not limit cover only to where access to the premises was prevented.

28.8. Exclusion (e) in Extension F, RSA2.2, is a financial limit of £10,000 for any loss as a result of infectious or contagious diseases.

28.9. The "Pollution and Contamination" exclusion clause in RSA2.2 does not apply to the disease clause.

29. As regards RSA3:

29.1. Declarations1, 5, 10 and 11 above are repeated.

29.2. Accordingly, there is cover under RSA3 for any business interruption which an insured can show resulted from COVID-19, including by reason of the actions, measures and advice of the government, and the reaction of the public in response to COVID-19, from the date when the disease occurred in the relevant 25 mile radius of the insured premises.

29.3. General Exclusion L does not exclude claims arising out of the COVID-19 epidemic.

30. As regards RSA4 (Disease clause):

30.1. Declarations 1, 2, 4, 10 and 11 above are repeated.

30.2. There is cover for losses caused by interruption of or interference with the insured business as a result of COVID-19 (including the governmental reaction thereto pleaded at APoC sub-paragraphs 18.9, 18.14, 18.15(d), 18.16 to 18.24 and 18.26 and the public reaction thereto) occurring in the UK.

31. As regards RSA4 (Enforced Closure clause):

31.1. There was "enforced closure of an Insured location by any governmental authority or agency or a competent local authority for health reasons or concerns occurring within the Vicinity of an Insured Location":

(a) For those businesses which were required to close all or part of their premises by the 21 March or 26 March Regulations; and

(b) By reason of the 20, 21, 23, 24 and/or 26 March measures pleaded in APoC paragraph 47 with respect to any businesses ordered to close (or directed to close with a compulsory order for closure being made if they do not) the premises in full or in part; but

(c) Advice, exhortations or social distancing and stay at home instructions do not constitute "enforced closure".

31.2. The March 2020 enforced closures were imposed by the government for "health reasons or concerns" which occurred within the Vicinity of all Insured Locations.

32. As regards RSA4 (Prevention of Access – Non Damage clause):

32.1. Each of the matters pleaded at APoC sub-paragraphs 18.8- 18.9, 18.14, 18.15(b), 18.16 (the 21 March Regulations), 18.17-18.19, 18.21 (the 26 March Regulations), 18.22, and 18.26 was actions or advice of a governmental authority or agency.

32.2. The actions and advice pleaded at APoC sub-paragraphs 18.9, 18.14, 18.15(b), 18.16 to 18.24, and 18.26 of the APoC were in the Vicinity of all premises in the UK.

32.3. There were "actions or advice of the…governmental authority or agency in the Vicinity of the Insured Locations … which prevents or hinders the use or access to the Premises":

(a) By reason of the 20, 21, 23, 24 and/or 26 March measures pleaded in APoC paragraph 47 with respect to any businesses which closed or which were ordered to close the premises in full or in part (such as the eat-in part of a restaurant).

(b) If the Social Distancing and Related Actions, depending on the facts of the case, hindered the use of Insured Premises, for example because they prohibited a potential customer from visiting non-essential retail premises at all or only permitted that customer to do so for the purposes of essential purchases.

Zurich

33. As regards Zurich1-2:

33.1. Access to an insured's premises is only prevented where the premises have been totally closed for the purposes of carrying on the insured's business;

33.2. "*action by the Police or other competent Local, Civil or Military authority*" will only be "*action… whereby access thereto shall be prevented*" if such action has the force of law;

33.3. The only "*action*" of the government relied upon by the FCA that would qualify under these wordings is the imposition of the 21 and 26 March Regulations and any subsequent Regulations or legislation with the force of law;

33.4. There was "*action by the… competent Local, Civil… authority… whereby access* [to an insured's premises] *shall be prevented*", where, by reason of Regulation 2 of the 21 March Regulations and Regulations 4 and 5 of the 26 March Regulations, and/or any subsequent Regulations or legislation having the force of law, those premises were totally closed for the purposes of carrying on the insured's business.

33.5. There was no such prevention of access:

(a) For Category 3 and Category 5 businesses;

(b) For businesses which were required to close the premises by the 21 March Regulations and/or the 26 March Regulations but continued to operate a service (for example, takeaway) constituting more than a de minimis part of its pre-existing business;

(c) By reason of Regulation 6 of the 26 March Regulations;

(d) By reason of any matter relied upon by the FCA other than Regulation 2 of the 21 March Regulations and Regulations 4 and 5 of the 26 March Regulations;

33.6. The undefined term "*vicinity"* has a local connotation of the neighbourhood of the premises and connotes an immediacy of location; the whole of the UK cannot be described as in the "vicinity" of the insured premises;

33.7. The phrase "*a danger or disturbance in the vicinity of the Premises*":

(a) contemplates an incident specific to the locality of the premises;

(b) indicates that this is narrow localised cover; and

(c) does not indicate a continuing, countrywide state of affairs;

33.8. Accordingly, there could only be cover if the risk of COVID-19 in the vicinity (in that sense of neighbourhood – see declarations 33.6 and 33.7 above) of the insured premises, as opposed to in the country as a whole, led to qualifying civil authority action preventing access to those premises. It is highly unlikely that that could be demonstrated in any particular case; and

33.9. None of the matters relied upon by the FCA, including the government action in imposing the 21 and 26 March Regulations in response to the COVID-19 pandemic, constitute action taken following a danger or disturbance in the vicinity of the premises.