

# Application Notice

CPR Part 23

- You must complete Parts A **and** B, **and** Part C if applicable
- Send any relevant fee and the completed application notice to the court with any draft order, witness statement or other evidence
- It is for you (and not the court) to serve this application notice

## You should provide this information for listing the application

Time estimate 0 (hours) 30 (mins)

Is this agreed by all parties? Yes  No 

Please refer to the Financial List Guide and the Commercial Court Guide for details of how applications should be prepared and will be heard, or in a small number of exceptional cases can be dealt with on paper.

## Part A

1. Where there is more than one claimant or defendant, specify which claimant or defendant ~~(The claimant)~~(The defendant)<sup>(1)</sup>

The Third Defendant

2. State clearly what order you are seeking (if there is room) or otherwise refer to a draft order (which must be attached) intend~~(s)~~ to apply for an order (a draft of which is attached) that<sup>(2)</sup> grants certificates under section 12 of the Administration of Justice Act 1969 in the terms set out in the draft order.

3. Briefly set out why you are seeking the order. Identify any rule or statutory provision because<sup>(3)</sup> the alternative conditions set out in section 12(3A) of the Administration of Justice Act 1969 are satisfied in relation to these proceedings, and a sufficient case for an appeal to the Supreme Court under Part II of the Act has been made out to justify an application for leave to bring such an appeal.

|   |   |
|---|---|
| <b>In the</b>                           | <b>High Court of Justice<br/>Chancery Division<br/>Financial List<br/>Royal Courts of Justice</b>   |
| <b>Claim No.</b>                        | FL-2020-000018  |
| <b>Warrant no.</b><br>(if applicable)   |   |
| <b>Claimant(s)</b><br>(including ref.)  | The Financial Conduct Authority   |
| <b>Defendant(s)</b><br>(including ref.) | (1) Arch Insurance (UK) Limited<br>(2) Argenta Syndicate Management<br>(3) Ecclesiastical Insurance Office Plc<br>(4) Hiscox Insurance Company Limited<br>(5) MS Amlin Underwriting Limited<br>(6) QBE UK Limited<br>(7) Royal & Sun Alliance Insurance Plc<br>(8) Zurich Insurance Plc |
| <b>Date</b>                             | 28 September 2020   |

## Part B

\*~~(The claimant)~~(The defendant)<sup>(1)</sup> wishes to rely on: *tick one*

the attached ~~(witness statement)(affidavit)~~ \_\_\_ (the claimant)(the defendant)<sup>(1)</sup>'s statement of case  
evidence in Part C overleaf in support of this application

**Signed**

chris wilkes

(Applicant)(s legal representative)

**Position or  
office held**

Partner

(if signing on  
behalf of firm,  
company or  
corporation)

4. If you are not already a party to the proceedings, you must provide an address for service of documents

Address to which documents about this claim should be sent (including reference if appropriate)<sup>(4)</sup>

|  |               |                           |
|--|---------------|---------------------------|
| DAC Beachcroft LP<br>The Walbrook Building<br>25 Walbrook<br>London<br><br>Ref: CJW/EIG002-1488639 | If applicable |                           |
|  | Tel. no.      | 020 7894 6800             |
|  | Fax no.       | 020 7894 6801             |
|  | DX no.        | 45 London                 |
|  | Postcode      | EC4N 8AF                  |
|  | e-mail        | cwilkes@dacbeachcroft.com |

**Part C**

Claim No. FL-2020-000018

**(Note: Part C should only be used where it is convenient to enter here the evidence in support of the application, rather than to use witness statements or affidavits)**

\*(The claimant)(The defendant)<sup>(1)</sup> wishes to rely on the following evidence in support of this application:

**Statement of Truth**

~~\*(I believe)~~ The applicant believes) that the facts stated in this application notice are true

\*I am duly authorised by the applicant to sign this statement

Full name.....CHRISTOPHER JOHN WILKES.....

Name of ~~\*(Applicant)~~ ~~(s litigation friend)~~ (s legal representative).....

DAC BEACHCROFT LLP.....

**Signed**

Chris wilkes

~~\*(Applicant)~~ ~~(s legal representative)~~

**Position or office held**

(if signing on behalf of firm, company or corporation)

Partner

*\*delete as appropriate*

**Date**

24 Sep 2020



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| Mon, 28 Sep 2020 12:38:44 +0100 | Document emailed to cwilkes@dacbeachcroft.com (18.134.10.67)                                |
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| Mon, 28 Sep 2020 12:36:00 +0100 | Envelope generated by Angela Bilardi (165.225.16.230)                                       |

Third Defendant  
Christopher John Wilkes  
Fourth  
CJW4  
28 September 2020

**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**

**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**

---

**FOURTH WITNESS STATEMENT OF  
CHRISTOPHER JOHN WILKES**

---

**I, CHRISTOPHER JOHN WILKES, of DAC Beachcroft LLP, 25 Walbrook, London EC4N  
8AF, will say as follows:**

1. I am a solicitor of the Senior Courts and a Partner in the firm of DAC Beachcroft LLP. I have conduct of this matter on behalf of the Third and Fifth Defendant. I now give this statement on behalf of the Third Defendant. For convenience, in this Statement, I shall

refer to this firm as “DACB” or “we”, to the Claimant as “the FCA”, to the Third Defendant as “Ecclesiastical” and to the Fifth Defendant as “MS Amlin”.

2. The facts and matters in this Statement are true insofar as they are within my own knowledge. Where facts and matters are not within my knowledge, I state the source of my belief and confirm that they are true to the best of my knowledge and information.
3. There is now produced and shown to me a paginated bundle of true copy documents marked “CJW4”. All references to documents in this statement are in the format **[Exhibit CJW4/page reference]** unless otherwise stated.
4. Unless otherwise stated, I use the same definitions in this witness statement as those in my third witness statement dated 28 September 2020 made on behalf of MS Amlin.

**Introduction and the need for a protective application under section 12 of the Administration of Justice Act 1969**

5. Ecclesiastical has been successful in these Financial Markets Test Case Scheme proceedings. The Court has held that there is no cover under the two Ecclesiastical policy types considered in these proceedings (Ecclesiastical 1.1 and 1.2) because the provision 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*”, referred to in the Judgment as the ‘infectious disease carve-out’, applies (see [373]-[377] of the Judgment<sup>1</sup>).
6. There is therefore no reason for Ecclesiastical to bring an appeal, and it would not wish to do so provided that the Court’s decision on the infectious disease carve-out is not subject to challenge.
7. As at the date of this statement, I am unsure of whether the FCA intends to appeal the Court’s Judgment on the infectious disease carve-out. I also understand from speaking to Ms Christina Dyke of Ecclesiastical that Ecclesiastical is similarly unsure of what the FCA’s plans are. I am also not aware of whether there might be any interveners who intend to appeal that part of the Court’s judgment.
8. I am, however, aware of the possibility that a party to these proceedings (or indeed an intervener) may apply for a ‘leapfrog’ certificate under section 12 of the Administration of Justice Act 1969 (“**the 1969 Act**”). I note that the Framework Agreement entered into between the parties expressly contemplates the possibility of a leapfrog appeal at

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<sup>1</sup> <https://www.bailii.org/ew/cases/EWHC/Comm/2020/2448.html>

paragraph 8.3 [**Exhibit CJW4/5-26**], and the FCA has already asked the Supreme Court Registry about the possibility of an expedited hearing in the Michaelmas term of 2020 (I refer to an email from Herbert Smith Freehills LLP of 28 July 2020 [**Exhibit CJW4/27**]).

9. At present, it is at least possible, therefore, that the FCA or an intervener may seek to challenge the Court's decision on the infectious disease carve-out by applying to leapfrog to the Supreme Court.
10. Solely to avoid any risk of being shut out from cross-appealing the Court's decisions on causation and counterfactuals in relation to the Ecclesiastical policy wordings (see paragraphs 385 to 389, 503-530 of the Judgment), Ecclesiastical applies for a leapfrog certificate in the terms of the order attached to its application dated 28 September 2020 ("**the Application**") [**Exhibit CJW4/1-4**]. It does so in order to protect its ability to cross-appeal in the event that the FCA and/or any interveners appeal in relation to the infectious disease carve-out. It may not need to make any subsequent application for permission to appeal, and it hopes that it will not need to do so. The Application is made by the deadline of 4pm on 28 September imposed by paragraph 4 of the order of 15 September 2020.

#### **The leapfrog application**

11. Attached to this statement, at Appendix 1, are the proposed grounds on which Ecclesiastical intends to rely should it need to cross-appeal.
12. The grounds of cross-appeal identify what Ecclesiastical considers to be errors of law in the Judgment in relation to (a) the proper characterisation of the insured perils in the relevant Ecclesiastical "prevention of access" wordings ("**the Ecclesiastical POA wordings**"); (b) the correct approach to causation and counterfactuals under the Ecclesiastical POA wordings; and (c) the Court's conclusions in relation to the decision of Hamblen J in *Orient-Express Hotels Ltd v Assicurazioni Generali* [2010] Lloyd's Rep IR 531.
13. The grounds of cross-appeal relate to the declarations to be made by the Court ("**the Ecclesiastical Causation Declarations**") which will embody or reflect, in terms or effect, the decision of the Court in relation to the Ecclesiastical POA wordings on causation and counterfactuals, addressed at paragraphs 385 to 389, 503-530 of the Judgment.

14. Ecclesiastical seeks a certificate pursuant to section 12(1) of the 1969 Act certifying that:
  - 14.1 The conditions in section 12(3A) – referred to as “*the alternative conditions*” – for the granting of a leapfrog certificate are satisfied in relation to the Ecclesiastical Causation Declarations (see section 12(1)(a) of the 1969 Act); and
  - 14.2 A sufficient case for an appeal to the Supreme Court has been made out to justify Ecclesiastical’s application for leave to bring such an appeal (see section 12(1)(b) of the 1969 Act).
15. As mentioned above, I have provided a third witness statement in these proceedings (also dated 28 September 2020) on behalf of MS Amlin and its application for a leapfrog certificate under section 12 of the 1969 Act. I incorporate by reference everything in that statement *mutatis mutandis*. In particular, what is said there as to why (a) the MS Amlin grounds of appeal involve points of law of general public importance, (b) the alternative conditions in section 12(3A) of the 1969 Act are satisfied, and (c) the other requirements for the granting of a certificate under the 1969 Act are met, apply equally to the Application by Ecclesiastical.
16. I would, however, make the following few additional points:
  - 16.1 I specifically confirm that the Ecclesiastical POA wordings are not ‘one-off’ wordings. They are standard form wordings which have been purchased by a large number of policyholders. In particular, I have consulted with Ms Christina Dyke of Ecclesiastical about the numbers of insureds potentially affected by the construction of the Ecclesiastical POA wordings in the context of the COVID-19 pandemic, and she informs me that the number of policies written on Ecclesiastical 1.1-1.2 in March 2020 was 29,815 and that this number has not materially changed. She mentions that Ecclesiastical is a major insurer for most churches of the Church of England and many schools and charities.
  - 16.2 I also believe that there are other wordings in the market which are materially identical or similar to the Ecclesiastical POA wordings. I note, for example, that the Arch Government or Local authority Action Extension considered by the Court in these proceedings is in similar terms to the Ecclesiastical POA wordings.

- 16.3 I believe Ecclesiastical’s wordings were included within the scope of the present proceedings because of their general importance and the number of parties who may be affected by their proper construction.
- 16.4 Finally, in relation to the specific grounds of appeal in Appendix 1 relating to the Ecclesiastical Causation Declarations, so far as I am aware, there is no English law authority on the proper construction of prevention of access extensions to business interruption cover, although these are extensions that are commonly purchased by insureds. Clarity on the proper construction of such clauses would therefore be of importance to the insurance market and to English law on business interruption insurance. Further, the proper construction of insured perils which contain more than one limb (referred to in the Judgment as “composite perils”) and the correct approach to causation and counterfactuals in relation to such perils is potentially of wider import still. I have already addressed in my third witness statement, the significance of having Supreme Court authority on the correctness of the ***Orient-Express*** decision.
17. I believe that all the statutory conditions under the 1969 Act for the granting of a leapfrog certificate are met in respect of the Application, and respectfully request the Court to exercise its discretion in favour of granting a leapfrog certificate.

**Statement of truth**

I believe that the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

*Chris Wilkes*

Signed .....[Chris Wilkes \(Sep 28, 2020, 2:25pm\)](#).....

**CHRISTOPHER JOHN WILKES**

28 Sep 2020

Date .....

**Appendix 1 to**

**Fourth Witness Statement of Christopher John Wilkes**

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**EIO's Grounds of Cross-Appeal**

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1. The Court erred in law in wrongly identifying the insured peril in the “prevention of access” clauses in EIO 1.1 and EIO 1.2:
  - a. The insured peril was not, as the Court held, a “*composite*” peril “*involving three interconnected elements: (i) prevention or hindrance of access to or use of the premises (ii) by any action of government (iii) due to an emergency which could endanger human life*” (Judgment, [385], [530]).
  - b. On a true construction of the “prevention of access” clauses in EIO 1.1 and EIO 1.2 the insured peril was the prevention or hindrance of access to or use of the premises, where such prevention or hindrance has occurred by the specified reason (*viz.* by reason of action of government, police or local authority) in specified circumstances (*viz.* where the action was due to an emergency which could endanger human life or neighbouring property).
  
2. Consequently, the Court erred in law in holding that the counterfactual applicable, whether on the basis of the loss of income and trends clauses in EIO 1.1 and EIO 1.2, or otherwise, required not only the prevention or hindrance to be stripped out but, in addition, the government action and also the emergency, i.e. the COVID-19 pandemic, and all its economic and social effects (Judgment, [386]-[388], [530]). The Court should have held that:
  - a. As a matter of general law and/or principles of causation in insurance law and/or on an application of the loss of income and trends provisions in EIO 1.1 and EIO 1.2, a factual (“but for”) causation test had to be applied (at a minimum);
  - b. The insured could not recover any losses which were not factually caused (and, therefore, not proximately or otherwise caused) by the insured peril;

- c. The only causative chain of events to be stripped out in the counterfactual for the purposes of assessing the losses which would not have occurred “but for” the insured peril is the prevention or hindrance of access or use of the insured premises as caused by action of government, police or local authority as itself caused by the emergency endangering human life. The emergency *per se*, and all its effects, was not to be stripped out of the counterfactual (*i.e.* insofar as the emergency itself caused other losses or formed part of a different causal chain causing other losses).
3. The Court further erred in law in concluding that its counterfactual “*accords with commercial and practical reality*” and that EIO’s approach was “*an artificial one which ignores the inextricable connection between the various elements of the insured peril...*” (Judgment, [388]). That conclusion is wrong (in its assessment of commercial and practical reality) and inconsistent with the proper ambit of the insured peril under the “prevention of access” clauses in EIO 1.1 and 1.2, and with the indemnity principle.
4. The Court erred in law in holding, by reference to the example of the church collection in [389] of the Judgment, that an insured was entitled to recover all loss of income caused by the COVID-19 pandemic from when the insured peril was triggered. The Court should have held that the insured’s recoverable losses would be limited to the losses that would not have occurred “but for” the insured peril, properly construed (see paragraph **Error! Reference source not found.** above).
5. The Court erred in law in holding that ***Orient-Express Hotels Ltd v Assicurazioni Generali*** [2010] Lloyd’s Rep IR 531 was distinguishable as a matter of principle and/or was wrongly decided.

Third Defendant  
Christopher John Wilkes  
Fourth  
CJW4  
28 September 2020

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS**  
**COMMERCIAL COURT (QBD)**  
**FINANCIAL LIST**  
**FINANCIAL MARKETS TEST CASE SCHEME**  
**CLAIM NO: FL-2020-000018**

**B E T W E E N:**

**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**

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**FOURTH WITNESS STATEMENT OF  
CHRISTOPHER JOHN WILKES**

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DAC Beachcroft LLP  
The Walbrook Building  
25 Walbrook  
London  
EC4N 8AF

Tel: 020 7894 6800  
Fax: 020 7894 6801

Ref: CJW/EIG002-1488639

**Solicitors for the Third and Fifth Defendants**



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**Parties involved with this document**

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| Mon, 28 Sep 2020 14:25:44 +0100 | Chris Wilkes - Signer (452c9021e220e3b1783bb591cfbef87c) |

**Audit history log**

| Date                            | Action  |
|---------------------------------|---|
| Mon, 28 Sep 2020 14:25:44 +0100 | The envelope has been signed by all parties. (165.225.196.154)                            |
| Mon, 28 Sep 2020 14:25:44 +0100 | Chris Wilkes signed the envelope. (165.225.196.154)                                       |
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| Mon, 28 Sep 2020 14:20:57 +0100 | Sent the envelope to Chris Wilkes (cwilkes@dacbeachcroft.com) for signing. (165.225.81.8) |
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Third Defendant  
Christopher John Wilkes  
Exhibit CJW4  
28 September 2020

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**

**BETWEEN**

**THE FINANCIAL CONDUCT AUTHORITY**

**Claimant**

**-and-**

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**(6) QBE UK LIMITED**  
**(7) ROYAL & SUN ALLIANCE INSURANCE PLC**  
**(8) ZURICH INSURANCE PLC**

**Defendants**

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**EXHIBIT CJW4**

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This is the exhibit marked "CJW4" referred to in the Fourth Witness Statement of CHRISTOPHER JOHN WILKES dated 28 September 2020.

Signed *Chris Wilkes*  
.....  
Chris Wilkes (Sep 28, 2020, 12:42pm)  
**CHRISTOPHER JOHN WILKES**

28 Sep 2020  
Date .....

| <b>No.</b> | <b>Document</b>   | <b>Date</b>       | <b>Page number</b> |
|------------|---|-------------------|--------------------|
| 1.         | Application Notice by Ecclesiastical Insurance Office plc | 28 September 2020 | 1 - 4              |
| 2.         | The Framework Agreement                                   | 31 May 2020       | 5 - 26             |
| 3.         | Email from Grieg Anderson at HSF                          | 28 July 2020      | 27 - 28            |



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**Audit history log**

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|---------------------------------|---|
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| Mon, 28 Sep 2020 12:42:04 +0100 | Chris Wilkes signed the envelope. (165.225.196.154)   |
| Mon, 28 Sep 2020 12:41:36 +0100 | Chris Wilkes viewed the envelope. (165.225.196.154)   |
| Mon, 28 Sep 2020 12:26:12 +0100 | Document emailed to cwilkes@dacbeachcroft.com (18.134.5.237)                                |
| Mon, 28 Sep 2020 12:26:12 +0100 | Sent the envelope to Chris Wilkes (cwilkes@dacbeachcroft.com) for signing. (165.225.16.230) |
| Mon, 28 Sep 2020 12:24:20 +0100 | Chris Wilkes has been assigned to this envelope (165.225.16.230)                            |
| Mon, 28 Sep 2020 12:23:47 +0100 | Document generated with fingerprint 0aff857357ac5990b5b6c924fca473aa (165.225.16.230)       |
| Mon, 28 Sep 2020 12:23:22 +0100 | Envelope generated by Angela Bilardi (165.225.16.230)                                       |

# Application Notice

CPR Part 23

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- Send any relevant fee and the completed application notice to the court with any draft order, witness statement or other evidence
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Is this agreed by all parties? Yes  No 

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## Part A

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The Third Defendant

2. State clearly what order you are seeking (if there is room) or otherwise refer to a draft order (which must be attached) intend~~(s)~~ to apply for an order (a draft of which is attached) that<sup>(2)</sup> grants certificates under section 12 of the Administration of Justice Act 1969 in the terms set out in the draft order.

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|   |   |
|---|---|
| <b>In the</b>                           | <b>High Court of Justice<br/>Chancery Division<br/>Financial List<br/>Royal Courts of Justice</b>   |
| <b>Claim No.</b>                        | FL-2020-000018  |
| <b>Warrant no.</b><br>(if applicable)   |   |
| <b>Claimant(s)</b><br>(including ref.)  | The Financial Conduct Authority   |
| <b>Defendant(s)</b><br>(including ref.) | (1) Arch Insurance (UK) Limited<br>(2) Argenta Syndicate Management<br>(3) Ecclesiastical Insurance Office Plc<br>(4) Hiscox Insurance Company Limited<br>(5) MS Amlin Underwriting Limited<br>(6) QBE UK Limited<br>(7) Royal & Sun Alliance Insurance Plc<br>(8) Zurich Insurance Plc |
| <b>Date</b>                             | 28 September 2020   |

## Part B

\*~~(The claimant)~~(The defendant)<sup>(1)</sup> wishes to rely on: *tick one*

the attached ~~(witness statement)(affidavit)~~ \_\_\_ (the claimant)(the defendant)'s<sup>(1)</sup> statement of case evidence in Part C overleaf in support of this application

**Signed**

chris wilkes

(Applicant)(s legal representative)

**Position or office held**

(if signing on behalf of firm, company or corporation)

Partner

4. If you are not already a party to the proceedings, you must provide an address for service of documents

Address to which documents about this claim should be sent (including reference if appropriate)<sup>(4)</sup>

|  |          |                           |          |               |  |
|--|----------|---------------------------|----------|---------------|--|
| DAC Beachcroft LP<br>The Walbrook Building<br>25 Walbrook<br>London<br><br>Ref: CJW/EIG002-1488639 | Postcode |                           | EC4N 8AF | If applicable |  |
|  | Tel. no. | 020 7894 6800             |          |               |  |
|  | Fax no.  | 020 7894 6801             |          |               |  |
|  | DX no.   | 45 London                 |          |               |  |
|  | e-mail   | cwilkes@dacbeachcroft.com |          |               |  |

**Part C**

Claim No. FL-2020-000018

**(Note: Part C should only be used where it is convenient to enter here the evidence in support of the application, rather than to use witness statements or affidavits)**

\*(The claimant)(The defendant)<sup>(1)</sup> wishes to rely on the following evidence in support of this application:

**Statement of Truth**

\*~~(I believe)~~(The applicant believes) that the facts stated in this application notice are true

\*I am duly authorised by the applicant to sign this statement

Full name.....CHRISTOPHER JOHN WILKES.....

Name of ~~\*(Applicant)~~(~~'s litigation friend~~)(~~'s legal representative~~).....

DAC BEACHCROFT LLP.....

**Signed**

Chris wilkes

\*~~(Applicant)~~(~~'s legal representative~~)

**Position or office held**

(if signing on behalf of firm, company or corporation)

Partner

*\*delete as appropriate*

**Date**

24 Sep 2020



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**BUSINESS INTERRUPTION INSURANCE TEST CASE  
FRAMEWORK AGREEMENT**

**This Agreement is made on 28 May 2020**

**BETWEEN**

**(1) The Financial Conduct Authority (the *FCA*);**

**AND**

**(2) the firms listed in the Schedule to this Agreement (each an *Insurer* and together, the *Insurers*);**

(each a *Party* and, together, the *Parties*).

**BACKGROUND**

- A. Covid-19 and the Government controls imposed as a result of it are causing a substantial level of loss and distress to businesses, in particular (although not solely) SMEs. A large number of claims are being made to insurers under the terms of insurance policies providing cover for (among other matters) property damage and business interruption insurance losses. Several businesses and groups of businesses have indicated their intention to challenge the rejection of their claims.
- B. The *FCA*, as the conduct regulator of insurers in the United Kingdom, has been considering many of the policies in the market and is concerned that there are a significant number of policies where there is uncertainty created by differences of opinion expressed by interested parties as to whether the terms of policies require that claims in respect of some or all business interruption losses are paid.
- C. The *FCA* has an interest in the resolution of this uncertainty through the *test case*, acting in a way that is compatible with its strategic objective to ensure the relevant markets function well and to advance its operational objectives to ensure appropriate protection for consumers and to ensure market integrity. This is in order to facilitate the *FCA*'s: (1) assessment of whether insurers are complying with their regulatory obligations in relation to the handling of claims and associated complaints;<sup>1</sup> (2) determination of its policy and principles for

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<sup>1</sup> For the avoidance of doubt, the *FCA* has no intention to 'retrospectively' apply a judgment in the *test case*. The question of whether an insurer has acted reasonably and fairly and generally in accordance with its regulatory obligations in rejecting claims will be a matter to be judged against the circumstances which existed at the time.

supervising those matters, and; (3) consideration of what if any further rules and guidance it should issue in relation to those matters.

- D. The *Insurers* have confirmed to the *FCA* their views that certain policies which they underwrite (the ***policies***) and which provide cover in principle for business interruption losses without the need for physical/property damage may not cover losses resulting from the Covid-19 pandemic (the ***coverage issue***). The *Insurers* (or some of them) further dispute whether as a matter of law and fact and in the light of the *policies* the necessary causal link to any loss suffered by customers which is the subject of claims under the *policies* can be established, including the impact, if any, of any trends clauses or similar/equivalent provisions (the ***causation issue***).
- E. The *Insurers* acknowledge that there is a dispute between them and certain policyholders in respect of the *coverage issue* and the *causation issue* (the ***disputed issues***) and the correct interpretation and effect of the terms within the *policies* relevant to those issues (the ***relevant terms***). For the purposes of this Agreement, the term policyholders is being used as a general term to refer to customers and/or policyholders and/or beneficiaries under the *policies*. The *FCA* considers that there is uncertainty (as identified at Recital B), that the fulfilment of its regulatory objectives requires that uncertainty to be resolved (as identified at Recital C), and that the dispute raises issues of general market importance. The *Insurers* and the *FCA* agree that these issues are suitable to be determined by the courts through proceedings for declaratory relief brought by the *FCA* in which the opposing arguments on the *disputed issues* are fully and properly advanced.
- F. The *Insurers* acknowledge that the proper advancement of the arguments on the *disputed issues* would be managed constructively and expeditiously by the *FCA* presenting to the Court, in the best way it considers appropriate, all arguments that the *FCA* considers should properly be raised by policyholders.
- G. The *Insurers* and the *FCA* believe that, consistently with CPR Part 1 (the overriding objective), taking into account the potential impacts of the Covid-19 pandemic on customers of the *policies* and customers with similar policies, the *disputed issues* need to be determined expeditiously and, in light of the complexity and importance of the issues, in a fair and orderly way. The potential scale of customer proceedings against insurers is likely to cause increased expense for all parties, as well (where litigation, not arbitration or other avenues, is contemplated) as the courts, and may present significant administrative problems for the courts in handling such cases. There is also a significant risk that different courts and tribunals will reach inconsistent decisions on materially similar issues, leading to further cost and uncertainty for insurers and policyholders. The resolution of the *disputed issues* in proceedings between the *Insurers* and the *FCA* is likely to save

considerable costs for policyholders and *Insurers* and resolve their disputes regarding the *disputed issues* in a shorter time. It will also achieve a swifter resolution of the uncertainty which will enable the *FCA* more quickly to fulfil its regulatory objectives.

- H. Accordingly, to ensure that the *disputed issues* are brought before the Courts in accordance with CPR Part 1, in an efficient, expeditious, and orderly way, the *FCA* and the *Insurers* have agreed that the *FCA* should commence proceedings for a declaratory judgment against the *Insurers* in the High Court of England and Wales in accordance with the terms of this Agreement as soon as possible. Both the *Insurers* and the *FCA* believe that the *disputed issues* are capable of determination in this way, and seek an outcome as soon as reasonably practicable.
- I. The ***mutual objective*** is to achieve the maximum clarity possible for the maximum number of policyholders (especially, although not solely SMEs) and their insurers consistent with the need for expedition and proportionality. It is recognised that not all issues that may arise between individual policyholders and insurers can be resolved if the objective of resolving the *disputed issues* (at least at first instance court level) is to be achieved as soon as possible and having regard to the target timetable set out in this Agreement. In particular, the *Parties* acknowledge that:
- a. Some policyholders may raise issues of law and/or fact which are not raised by the *FCA* and will therefore not be resolved in the proceedings, and in response to which Insurers may wish and should be entitled to raise defences of law and/or fact in addition to those dealt with in the proceedings.
  - b. Other issues flowing from the determination of the *disputed issues* (such as aggregation, additional causation issues specific to loss of rent and similar claims under a property owners policy and the specific quantum of any particular claims) will not form part of the *disputed issues* but will be determined according to the claims process of each *Insurer*, taking into account in particular any policy terms setting limits to claims amounts or indemnity periods. Such issues in (a) and (b) will not form part of the *disputed issues*.
- J. It is recognised that the *FCA* and its advisors will engage as it deems appropriate, consistent with the need for expedition, with policyholders on the various matters, issues and documents referred to in this Agreement and this Agreement (including in draft form) so as to meet the *mutual objective*.
- K. The *FCA* considers that the *relevant terms* and the *Insurers* are a representative sample of a wider set of policy wordings and insurers, where such wider insurers are advancing the same or similar contentions to those as set out in Recital D. The *Parties* believe that the proceedings will set a legal precedent which will be helpful to resolve

to a substantial degree the legal uncertainties relating to this wider set so as to meet the *mutual objective*.

In consideration of the mutual promises contained herein, the *Insurers* and the *FCA* hereby agree as follows:

## 1. ISSUES TO BE DETERMINED

- 1.1 The *Parties* agree that, in light of the *disputed issues*, the matters to be determined in these proceedings are the correct interpretation and application (by reference to each *policy* as a whole) of *relevant terms* in a sample of the *policies* appropriately representative of the *disputed issues* (the **representative sample of terms**) and their application in relation to a set of **agreed facts** and **assumed facts** including:
- (a) whether on the *agreed facts* and *assumed facts* the *policies* provide cover in principle; and
  - (b) whether on the *agreed facts* and *assumed facts* the policyholders of the *policies* can establish the necessary causal link (as a matter of the application of the law and the wording of the *policies*) between the assumed losses sustained by policyholders and any relevant peril, event or circumstance that is covered by *relevant terms* in the *policies*, including to take into account the relevance (if any) of a trends clause or similar/equivalent provision (if any).
- 1.2 The *agreed facts* will be facts necessary to resolve the *disputed issues*, such as (by way of example only) the date and nature of steps taken by the UK Government or any other relevant public authority in relation to Covid-19.
- 1.3 The *assumed facts* will be an appropriate set of illustrative factual assumptions such as (by way of example only) the nature of the affected business(es), how the business(es) were affected, whether the affected business(es) closed entirely or partially (and why), whether that was before or after the steps referred to in paragraph 1.2 of this Agreement, and the possible impact of other measures by the UK Government or any other relevant public authority in relation to Covid-19. It is recognised that the *assumed facts* are a menu of potential fact patterns which will be drawn upon by the Court and the *Parties* to assist resolution of the issues in the *test case*. For the avoidance of doubt it is not intended that all *assumed facts* will be applied to all of the *representative sample of terms* in resolving the *disputed issues*.
- 1.4 The *Parties* agree that the *disputed issues* can be most expeditiously determined by asking the Court to consider the *representative sample of terms*, the *agreed facts*, the *assumed facts* and specified **questions for determination**. A **matrix** setting out *disputed issues* which arise in relation to *the representative sample of terms* will also be prepared.

The declaratory relief pleaded will reflect the clarity sought from the Court in respect of the *questions for determination*.

## 2. PROCESS FOR AGREEING THE AGREED FACTS ETC.

- 2.1 The *agreed facts* will be agreed between the *Parties* as soon as practicable. Should full agreement not be possible with all *Insurers* on all *agreed facts*, the *FCA* will present all the *agreed facts* that have been agreed with all *Insurers* and, for the remaining *agreed facts*, the *agreed facts* in relation to the majority of *Insurers* so as to further the *mutual objective*. The *FCA* will identify which *agreed facts* are agreed by all *Insurers* and which by the majority of *Insurers*. Whilst it is not anticipated that there will be any significant disagreement, if and insofar as any relevant facts do not constitute *agreed facts*, this paragraph does not prevent the *FCA* and/or *Insurers* from advancing facts that are not agreed as part of their respective cases and the Court may determine and/or take such facts into account as it thinks fit in relation to deciding the *questions for determination*.
- 2.2 The *FCA* has provided the *representative sample of terms*, and has proposed the *matrix*, the *assumed facts* and the *questions for determination* by the Court that will enable the *disputed issues* to be determined expeditiously. The *Insurers* will by no later than 5pm on **3 June 2020** comment on the contents of the *FCA's* proposal for the *assumed facts*, *questions for determination* and *matrix* without prejudice to their right to propose additions, deletions or amendments under paragraph 2.3. The *FCA* will take the *Insurers'* comments into account in finalising its proposed *assumed facts*, *questions for determination* and *matrix* which will be included in the Particulars of Claim. The Particulars of Claim will be based on the generic reasons given by the *Insurers* for refusing indemnity under their policies including the requirements for establishing causation of loss.
- 2.3 After the Particulars of Claim have been served then each *Insurer* agrees that, prior to applying to the Court to propose any additions, deletions or amendments to the *assumed facts*, *questions for determination*, and *matrix* it shall: (i) discuss such additions, deletions or amendments with the *FCA* and the other *Insurers*; (ii) take into account any reasonable comments or objections expressed by the *FCA* or another *Insurer*; and (iii) have regard to the *overriding objective (under CPR Part 1)* and the terms of this Agreement, including paragraph 6.1. Any such application will be made at the first Case Management Conference or (if later) by **15 June 2020**.
- 2.4 The *Insurers* recognise that they will not have the population of information which was available to the *FCA* in relation to the selection of the *Insurers* or the *representative sample of terms* and the *FCA* should decide as Claimant the *representative sample of terms* given the *mutual objective*. However each *Insurer* will as soon as possible and by 5pm on **2 June 2020** comment if it considers that the *representative sample of terms* is inaccurate or incomplete so far as

its own wording and *relevant terms* are concerned. The *FCA* will take the *Insurers'* comments into account in determining if any changes need to be made to the *representative sample of terms* for accuracy and completeness. In addition, the *FCA* will accept a request from an *Insurer* to add a limited number of additional wordings written by that *Insurer* subject to the *mutual objective*. If any dispute arises in relation to either of these matters between *Insurers* and the *FCA* and cannot be resolved then this will be determined in like manner to paragraph 2.3.

- 2.5 It is acknowledged and agreed that, prior to providing the documents referred to in paragraph 2.2 to the *Insurers*, the *FCA* may also engage or have engaged as it deems appropriate with policyholders, other insurers and the Association of British Insurers in relation to these matters, including the content of the *assumed facts*, *questions for determination* and *matrix*. It is recognised that the *FCA* and policyholders may wish to share their own privileged information on a confidential (and/or common-interest basis) and the *Insurers* agree not to challenge the application of such privilege. It is recognised that the *Insurers* may wish to share privileged information with each other (and with other insurers and reinsurers) on a confidential (and/or common-interest) basis and the *FCA* agrees not to challenge the application of such privilege.
- 2.6 The *Insurers* agree that the *FCA* may disclose to policyholders, other insurers and the Association of British Insurers and publish on its website after this Agreement comes into force this Agreement, the identity of the *Insurers*, the *assumed facts*, *representative sample of terms*, *relevant terms*, *questions for determination* and *matrix* and other documents prepared for the purpose of the *test case*. The *FCA* may similarly disclose or publish the *policies* after this Agreement comes into force, with any appropriate redactions agreed in consultation with the *Insurers*.
- 2.7 Each *Insurer* will confirm by the date of serving their defence whether the *questions for determination* are the only issues of general legal principle (subject to Recital I) that each *Insurer* believes need to be determined in order to resolve the *disputed issues* in so far as they relate to whether and how each *Insurer's* terms within the *representative sample of terms* will in principle respond to a business interruption claim resulting from claims received to date made in respect of the Covid-19 pandemic by policyholders on the basis of the *agreed facts* and *assumed facts*. In so far as such positive confirmation cannot be provided each *Insurer* will, no later than the date of serving their Defence, confirm all further *questions for determination* that it considers need to be determined in order to do so together with a supporting explanation. The *Insurers* shall immediately inform the *FCA* if, at any time after service of their defence, any amendment to or deletion from the *questions for determination* mean that the confirmations in this paragraph are no longer correct. Any dispute concerning the *questions for determination*

that should be included in the *test case* shall be resolved by the Court and nothing in this clause shall prevent an *Insurer* from applying to the Court to seek permission to amend its Defence in any way it sees fit.

- 2.8 The *Parties* agree that, on application by the *FCA*, the Court may be asked to consider a further *relevant term* to be added to the *representative sample of terms*, and further *assumed facts* and *questions for determination* added in respect of that term. Prior to the *FCA* making an application to add any such further *relevant term*, the *FCA* may consult with such insurer(s) as it considers appropriate, having regard to the proportion of the total business written on the relevant policy wording that is underwritten by such insurer(s). If not already a *Party*, one or more of such insurer(s) will be requested to apply to join the *test case* and agree to become a *Party* to this Agreement, and the other *Insurers* will have regard to the *overriding objective (under CPR Part 1)* and the terms of this Agreement in deciding how to respond to such application and accession.

### 3. COMMENCEMENT OF PROCEEDINGS

- 3.1 Nothing in this Agreement shall prevent any *Party* from seeking further or other case management directions or substantive relief insofar as such request is consistent with and and/or promotes the *mutual objective*. Subject to the approval of the Court, the *Parties* are free to agree changes to the timetable and the terms of this Agreement that further the *mutual objective*.
- 3.2 The *FCA* will, by **9 June 2020**, file and serve a Claim Form in the Commercial Court (the ***test case***) for a declaration in respect of the issues agreed to be determined in accordance with this Agreement. The current intention is to file a Part 7 Claim in the Commercial Court, Financial List with the intention of it being admitted to and conducted under the Financial Markets Test Case Scheme.
- 3.3 The *Insurers* will be cited in the *FCA's* Claim Form as Defendants to the *test case* and will support the *FCA's* standing to bring the *test case* and support the suitability of the Financial Markets Test Case Scheme for the *test case*.
- 3.4 The *FCA* and the *Insurers* will use all reasonable endeavours to present, by **9 June 2020**, a joint application to the Court for expedition of the *test case* and its admission to the Test Case Scheme. The application will propose the timetable materially set out in paragraph 5 of this Agreement.
- 3.5 If the *FCA* and the *Insurers* are unable to agree a joint application for admission to the Test Case Scheme and for expedition, the *FCA* will make an application that it considers to be reasonable, taking into account any comments or objections raised by the *Insurers*, and the

*Insurers* shall have regard to their obligations under paragraph 6.1 in deciding how to respond to such application.

#### 4. AGREED EVIDENCE

4.1 The *FCA* and the *Insurers* shall discuss with a view to agreeing between themselves (and subject to any directions of the Court) prior to the first Case Management Conference what type of evidence, if any, will be submitted to the Court. It is expected that if any evidence is required it will be limited in nature, with as much information as possible being part of the *agreed facts*. The *FCA* expects that any evidence over and above information contained in the documents referred to in this Agreement will be limited to scientific evidence on discrete issues to assist policy interpretation.

#### 5. PROPOSED TIMETABLE

5.1 The *Parties* agree on the following target timetable (subject always to paragraph 3.1 and the supervision of the Court), which the *FCA* and the *Insurers* will invite the Court to endorse in the application for expedition:

1. The *FCA* will, by **9 June 2020**, file and serve a Claim Form in the Commercial Court;
2. Each *Insurer* to file and serve an Acknowledgement of Service as soon as practicable after service of the *FCA*'s Claim Form and in any event within 7 days;
3. The *FCA* to serve one composite set of Particulars of Claim relating to the *disputed issues* and the *policies* of each *Insurer*, and an application for expedition by **9 June 2020**;
4. A Case Management Conference to be held no later than the first available date after service of the Particulars of Claim to address (at least), use of the Financial Test Case Scheme, expedition, immediate directions, designation of judge(s) on the Financial List and/or a Lord or Lady Justice of Appeal, and listing of trial.
5. The *Insurers* to serve their Defences by **23 June 2020**. Each *Insurer* will plead separately to the part of the composite Particulars of Claim which concern it and will, so far as practicable, avoid unnecessary duplication in responding to aspects of the Particulars of Claim which are common to all *Insurers*;
6. A further Case Management Conference to be as soon as possible after **25 June 2020**.
7. The *FCA* to serve a Reply by **3 July 2020**;

8. Directions to be sought at the earliest opportunity to include (in addition to those above):
  - a. Filing and service of evidence, if any;
  - b. Settling the list of issues for trial (having regard to the *questions for determination*);
  - c. Timing and sequencing of the exchange of skeleton arguments;
  - d. Listing of trial, including time estimate, with the *Parties* seeking a trial as soon as reasonably practicable, the current intention being that such trial concludes (with the exception of any judgment) during July 2020;
  - e. If applicable, intervention or otherwise by any representatives of policyholders or any other person desiring to join the *test case*, and the form any such interventions should take (including whether any interventions should be limited to written submissions or include oral submissions).
  - f. Timetable for trial, to include time limits for oral submissions.
- 5.2 As soon as reasonably practicable, and prior to issuing the *test case* the *FCA* shall, in conjunction with the *Insurers*, liaise with the Commercial Court (such communications having commenced) to make enquiries concerning the feasibility of the target timetable and specifically in respect of the timing of:
  - (a) the hearings referred to in paragraphs 5.1.4 and 5.1.6 above; and
  - (b) the trial in paragraph 5.1(h)(d).
- 5.3 Upon signing this Agreement and prior to the *test case* being issued the *Parties* will comply with CPR 39.8 as though the *test case* had been issued and the *Parties* were parties to the *test case*.

## **6. MUTUAL OBJECTIVE, EXPEDITION, RELATED PROCEEDINGS**

- 6.1 The *Parties* agree to act at all times constructively and in good faith to promote the *mutual objective*.
- 6.2 Subject always to the *overriding* objective, each *Party* agrees to cooperate with other *Parties* and to use reasonable endeavours to ensure that final resolution of the *test case* is achieved expeditiously and so far as reasonably practicable in accordance with the above target timetable. This will include in relation to matters such as electronic service of documents.

- 6.3 Subject always to any applicable legal duties and obligations and any applicable legal privilege, *the Insurers* must regularly keep the *FCA* updated about the progress of other court or arbitration proceedings to which it is a party and which is relevant to the questions to be determined in the *test case* and provide such information as the *FCA* requests in relation to them, but for the avoidance of doubt the *FCA* will not seek to prevent such proceedings from progressing.

## 7. SETTLEMENT AND EFFECT ON THE TEST CASE

- 7.1 Where an *Insurer* (the **Settling Insurer**) settles any claim in respect of a *relevant term* in the *representative sample of terms* and the settlement has the effect that there is no longer any dispute or potential dispute between the *Settling Insurer* and its policyholders in respect of the *coverage issue* and the *causation issue* without prejudice to any other issues that may arise in resolving such claims, the *Settling Insurer* agrees to notify all other *Parties* in writing as soon as possible.
- 7.2 This shall not automatically lead to that part of the *test case* ceasing but, if the *FCA* considers that a replacement *relevant term* is required to resolve the same or similar questions that were to be determined in respect of the original *relevant terms* concerned, the *Parties* will endeavour to agree a replacement *relevant term* in a *policy* issued by an *Insurer* so that the *questions to be determined* can be properly considered by the Court.
- 7.3 Where it is not possible to identify a replacement *relevant term* in a *policy* issued by an existing *Insurer*, the *Parties* will endeavour to agree a replacement *relevant term* issued by a non-*Party* insurer that is willing to join the *test case*. Following agreement, that insurer will be invited to apply to be joined as a defendant in the *test case* and to agree to become a *Party* to this Agreement (and thereby become an *Insurer* as defined in this Agreement) and the *FCA* and the existing *Insurers* will support that application and agreement.
- 7.4 The *FCA* and the *Insurers* agree not to object to any application to amend statements of case that may be required as a result of such replacement.
- 7.5 The *FCA* and the *Insurers* agree that in the event of any amendments to the *test case* being required as a result of such replacement, they will take all reasonable steps to minimise any delay to the resolution of the *test case*.
- 7.6 If the *Parties* are unable to identify a suitable replacement *relevant term*, the *Settling Insurer* agrees to continue the *test case* to resolve the questions to be determined in respect of the original *relevant term*.
- 7.7 For the avoidance of doubt, but subject to the *Insurers'* legal obligations including under the *FCA's* rules, the *FCA* confirms (in respect of its own functions) that full and final settlements entered into

between *Insurers* and policyholders before any judgment is handed down in the *test case* will not be affected by such judgment (in itself), and that such judgment (in itself) will not give rise to any regulatory obligation to revisit such settlements.

## **8. APPEALS**

- 8.1 The *FCA* or any *Insurer* may appeal the decision of the Court determining the issues in the *test case* subject to the normal procedural rules for seeking permission for, and making appeals.
- 8.2 Where the *FCA* or any *Insurer* seeks to appeal the decision of the Court, whether to the Court of Appeal or beyond, that *Party* will seek to have their appeal heard on an expedited basis, and undertakes to take all reasonable steps to ensure that the appeal is conducted and determined on an expedited basis as soon as is reasonably practicable.
- 8.3 In particular, and without prejudice to their obligations to seek expedition above, the *Parties* agree to explore the possibility and appropriateness of seeking a leapfrog appeal to the Supreme Court under PD 1.2.17 and 3.6 of the Practice Directions of the Supreme Court.

## **9. CO-ORDINATION OF LEGAL REPRESENTATION**

- 9.1 The *Parties* agree that, taking into account the need for the *test case* to be resolved expeditiously (including therefore the need to resolve the issues within a practical trial length) and at proportionate cost, the *Parties* should use their best endeavours to co-operate.
- 9.2 The *Insurers* agree, so far as reasonably practicable and efficient in the time available, to coordinate their correspondence with the *FCA's* solicitors relating to the *test case* and their written and oral submissions to the Court so as to minimise duplication, albeit that:
  - (a) each *Insurer* and the *FCA* recognises that each *Party* has separate independent legal representation and each of the *Insurers* has written different *policies* and *relevant terms*; and
  - (b) accordingly, each *Insurer* remains entitled to communicate and make submissions separately.
- 9.3 For the avoidance of doubt, nothing in this paragraph 9 shall preclude each *Insurer* appointing its own counsel and firm of solicitors to advise and represent it in the *test case*.

## **10. COSTS**

- 10.1 Each *Party* is to pay its own costs of and associated with the *test case* and its own costs of any appeals initiated by any *Party*, and accordingly no *Party* will seek an order for costs against any other.

## **11. PUBLICITY**

- 11.1 The *Parties* agree that this Agreement is not confidential and that this Agreement and the following documents may be published or disclosed to any person: the *representative sample of terms, agreed facts* and *assumed facts*, the *matrix*, and the *questions for determination*.
- 11.2 All pleadings, orders, skeleton arguments and evidence or other documents provided to or deployed in court shall be published by the *FCA* to the extent and in the manner and at the time directed by the Court at the first Case Management Conference save that the *Insurers* agree that the *FCA* may publish its own pleadings, orders, skeleton arguments evidence and documents.
- 11.3 The *Parties* agree that, in principle, publication of the *representative sample of terms, agreed facts, assumed facts, the matrix, the questions for determination, all pleadings, orders, skeleton arguments and evidence or other documents* provided to or deployed in court is necessary for transparency and to achieve the *mutual objective*. The *Parties* recognise that certain disclosures will take place after this Agreement comes into force, as set out in paragraph 2.5 and 11.1 above, and agree to this without reservation.
- 11.4 If a *Party* considers there is any reason why any documents should not be disclosed as envisaged in paragraph 11.2 and 11.3 of this Agreement then it must identify that material as soon as possible (and, unless impracticable, before it is deployed in or to Court) and provide reasons to the *FCA* as to why it should not be disclosed. If there is any dispute in relation to publication of this material then the Court hearing the *test case* will be asked to decide the issue. For the avoidance of doubt, paragraph 11 of this Agreement does not require any *Party* or the *FCA* to share any information which is subject to legal professional privilege.
- 11.5 This Agreement does not prevent or restrict the *FCA* from disclosing any confidential information (as defined in section 348 of the Financial Services and Markets Act 2000) as permitted under the provisions of section 349 of that Act.

## **12. THIRD PARTY RIGHTS**

- 12.1 This Agreement does not give rise to any rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Agreement.

## **13. COMPETITION**

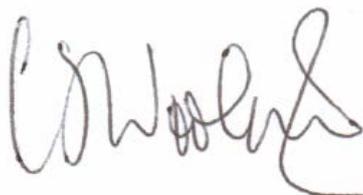
- 13.1 This Agreement does not affect the *Insurers'* obligations under competition law, and it remains their responsibility to assess and

ensure their compliance. In the event that any *Insurer* considers that anything required to carry out the terms of this Agreement engages their obligations under competition law, the *Insurers* agree to put in place appropriate mechanisms with a view to ensuring that the *test case* continues and the *disputed issues* are determined according to the timetable specified by the Court. If any *Insurer* considers, after having taken competition law advice, that those arrangements will not be effective, the *Insurer* may consult with the *FCA*.

#### 14. GENERAL

- 14.1 Words and phrases in italics have the meanings given to them where they appear in bold italic text.
- 14.2 No *Insurer* may contend that any documents or information sought by the *FCA* in the exercise of its regulatory functions are not to be produced because of the existence of the *test case* (subject to the usual constraints attaching to the exercise of the *FCA*'s powers). For the avoidance of doubt, paragraph 2.4 addresses the sharing of privileged information between *Insurers* and reinsurers.
- 14.3 This Agreement may be executed in any number of counterparts, but is effective as between each *Insurer* and the *FCA* when executed by both of them.
- 14.4 A copy of the signature page to this Agreement that is sent electronically shall constitute adequate proof of the execution of this Agreement by the relevant *Party*.
- 14.5 This Agreement and any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with it or its subject matter or formation shall be governed by and construed in accordance with the law of England and Wales. The English courts shall have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement and the *Parties* submit to the exclusive jurisdiction of the English courts.
- 14.6 This Agreement will come into force at 7am on 1 June 2020.

Signed for and on behalf of **The Financial Conduct Authority**



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14.6 This Agreement will come into force at 7am on 1 June 2020.

Signed for and on behalf of **The Financial Conduct Authority**

By: \_\_\_\_\_

Signed for and on behalf of **MS Amlin Underwriting Limited**

By: Tom Clumati

Signed for and on behalf of **Arch Insurance (UK) Limited**

By: \_\_\_\_\_

Signed for and on behalf of **Argenta Syndicate Management Limited**

By: \_\_\_\_\_

Signed for and on behalf of **Ecclesiastical Insurance Office Plc**

By: \_\_\_\_\_

By: \_\_\_\_\_

Signed for and on behalf of **Arch Insurance (UK) Limited**

By: *Clyde & Co LLP* (solicitors for Arch Insurance (UK) Limited)

Signed for and on behalf of **Argenta Syndicate Management Limited**

By: \_\_\_\_\_

Signed for and on behalf of **Ecclesiastical Insurance Office Plc**

By: \_\_\_\_\_

Signed for and on behalf of **Hiscox Insurance Company Limited**

By: \_\_\_\_\_

Signed for and on behalf of **QBE UK Limited**

By: \_\_\_\_\_

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14.6 This Agreement will come into force at 7am on 1 June 2020.

Signed for and on behalf of **The Financial Conduct Authority**

By: \_\_\_\_\_

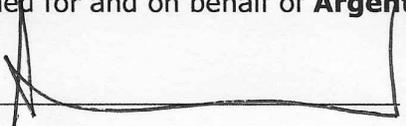
Signed for and on behalf of **MS Amlin Underwriting Limited**

By: \_\_\_\_\_

Signed for and on behalf of **Arch Insurance (UK) Limited**

By: \_\_\_\_\_

Signed for and on behalf of **Argenta Syndicate Management Limited**

By:  \_\_\_\_\_

Signed for and on behalf of **Ecclesiastical Insurance Office Plc**

By: \_\_\_\_\_

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Signed for and on behalf of **The Financial Conduct Authority**

By: \_\_\_\_\_

Signed for and on behalf of **MS Amlin Underwriting Limited**

By: \_\_\_\_\_

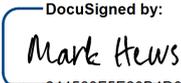
Signed for and on behalf of **Arch Insurance (UK) Limited**

By: \_\_\_\_\_

Signed for and on behalf of **Argenta Syndicate Management Limited**

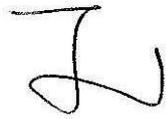
By: \_\_\_\_\_

Signed for and on behalf of **Ecclesiastical Insurance Office Plc**

By:  \_\_\_\_\_  
DocuSigned by:  
244568F5E20B4D0...  
Mark Hews

Group Chief  
Executive  
Officer

Signed for and on behalf of **Hiscox Insurance Company Limited**

By: 

Bob Thaker, Chief Executive Officer

Signed for and on behalf of **QBE UK Limited**

By: \_\_\_\_\_

Signed for and on behalf of **Royal & Sun Alliance Insurance plc**

By: \_\_\_\_\_

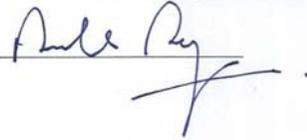
Signed for and on behalf of **Zurich Insurance Plc**

By: \_\_\_\_\_

Signed for and on behalf of **Hiscox Insurance Company Limited**

By: \_\_\_\_\_

Signed for and on behalf of **QBE UK Limited**

By:  \_\_\_\_\_

Signed for and on behalf of **Royal & Sun Alliance Insurance plc**

By: \_\_\_\_\_

Signed for and on behalf of **Zurich Insurance Plc**

By: \_\_\_\_\_

Signed for and on behalf of **Hiscox Insurance Company Limited**

By: \_\_\_\_\_

Signed for and on behalf of **QBE UK Limited**

By: \_\_\_\_\_

Signed for and on behalf of **Royal & Sun Alliance Insurance plc**

A handwritten signature in black ink, appearing to read "J. Polyan", is written over a light grey rectangular background.

By: \_ \_\_\_\_\_

Signed for and on behalf of **Zurich Insurance Plc**

By: \_\_\_\_\_

Signed for and on behalf of **Royal & Sun Alliance Insurance plc**

By: \_\_\_\_\_

Signed for and on behalf of **Zurich Insurance Plc**

A handwritten signature in black ink that reads "Tulsi Naidu". The signature is written in a cursive, flowing style.

By: Tulsi Naidu, UK Chief Executive

Schedule  
Insurer parties

1. MS Amlin Underwriting Limited
2. Arch Insurance (UK) Limited
3. Argenta Syndicate Management Limited
4. Ecclesiastical Insurance Office Plc
5. Hiscox Insurance Company Limited
6. QBE UK Limited
7. Royal & Sun Alliance Insurance plc
8. Zurich Insurance Plc

## Bilardi Angela

---

**From:** Anderson, Greig <Greig.Anderson@hsf.com>  
**Sent:** 28 July 2020 14:16  
**To:** Joanna.Page@AllenOvery.com; Neil.Beresford@clydeco.com;  
Dan.Scott@clydeco.com; S&STestCase@simmons-simmons.com;  
Michelle.Allison@simmons-simmons.com; Chloe.Morris@simmons-simmons.com;  
Maeve.Hanna@AllenOvery.com; Karolina.Latasz@AllenOvery.com;  
Lawson.Caisley@AllenOvery.com; Russell.Butland@AllenOvery.com;  
Felix.Zimmermann@simmons-simmons.com; Rosalie.Hart@clydeco.com;  
Harry.Speak@Simmons-Simmons.com; Tiffany.Chow@simmons-simmons.com;  
Gilbert, Ilana; Wilkes, Chris; Bilardi Angela; Wang, Nelson;  
Benedict.Keatinge@clydeco.com; Toby.Rogers@clydeco.com;  
Andrew.Blair@clydeco.com; Flavia.Solimano@clydeco.com;  
Sabrina.Sardo@clydeco.com; Helen.Coates@dwf.law; Andrew.Pickavant@dwf.law;  
Mark.Wing@clydeco.com; Chris.Lagar@dwf.law; Ruth.Fletcher@clydeco.com;  
C&C\_Zurich\_TestCase@clydeco.com; A&OTestCase@AllenOvery.com;  
DWFTestCase@dwf.law; Andrew.Pickavant@dwf.law; Poppy.Hitchen@clydeco.com;  
Daniel.Croock@clydeco.com; Meredith.White@clydeco.com; DACBeachcrofttestcase  
**Cc:** Pegden, Antonia; Davé, Nikita; Lewis, Paul; McNally, Sarah  
**Subject:** FCA BI Test Case - FL-2020-000018 - Update on communications with Supreme Court [HS-London\_11.FID2451729]

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*Strictly confidential*

Dear Sir/Madam

This note updates you on initial communications we have had this week with the Registrar of the Supreme Court.

Given the urgency of this test case and with conclusion of the High Court trial now impending, we wrote to the Registrar of the Supreme Court yesterday to put the Supreme Court on notice of the test case and the parties' agreement in the Framework Agreement to expedite any appeal and explore the possibility of a leapfrog appeal to the Supreme Court. Our letter also enquired as to the availability of the Supreme Court to hear any leapfrog appeal on an expedited basis during Michaelmas term 2020 were permission for such an appeal to be granted to any of the parties. In a follow-up telephone call, the Registrar confirmed to us that in principle the Supreme Court could accommodate a hearing on an expedited basis during Michaelmas term 2020, subject to the point that the final decision would be for the President, Lord Reed, at the time. The Registrar also noted that Lord Reed was already aware of this matter and that in appropriate urgent previous cases the Supreme Court has sat out of term time in September.

We agreed to update the Registrar following conclusion of the High Court trial if and when we have any indication from the Judges as to when their Judgment may be handed down. Do please let us know if insurers would like to be copied on that correspondence.

Yours faithfully

Herbert Smith Freehills LLP

**Greig Anderson**  
Partner

Herbert Smith Freehills LLP

T +44 (0) 207 466 2229 M +44 (0) 7809 200 361 F +44 (0) 20 7374 0888

[www.herbertsmithfreehills.com](http://www.herbertsmithfreehills.com)

[www.linkedin.com/in/greig-anderson-3348a72b/](https://www.linkedin.com/in/greig-anderson-3348a72b/)

INSURANCE TEAM OF THE YEAR, Legal Business Awards 2019

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