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

THIRD AND FIFTH DEFENDANTS' SKELETON ARGUMENT FOR CONSEQUENTIALS HEARING ON 2 OCTOBER 2020

In addition to the pre-reading identified in the Claimant's reading list for this CMC, ***the Court is invited to read: the third and fourth witness statement of Mr Chris Wilkes:*** ***{O/19}*** *and* ***{O/11}***

References to the bundles are in the following format {bundle/tab/page}

A. Issues for consideration

1. The following issues arise:

   1.1 The form of the declarations to be made to record the Court's judgment of 15 September 2020 ("**the Judgment**");

   1.2 Applications for a leapfrog certificate to appeal to the Supreme Court;

1.3 Applications for permission to appeal and/or cross-appeal to the Court of Appeal (and for an extension of time for filing an appellant's notice).

2. No issues arise in relation to costs: by paragraph 10 of the Framework Agreement, each party pays its own costs **{F/1/11}**.

B. Declarations

3. The majority of the declarations are substantially agreed – see **{N/6}**.

4. A number of points of dispute remain, however, as to:

4.1 The sections of the declarations common to two or more Insurers.

4.2 The specific declarations concerning MSA.

5. It is hoped that the areas of dispute will have narrowed by the time of the hearing.

6. The specific declarations concerning EIO (set out at paragraph 16 of the draft declarations order) are agreed and will not be addressed further in this skeleton.

7. Attached as Annex A to this skeleton is a table explaining EIO's and MSA's position in relation to each disputed declaration. The most significant area of disagreement concerns the proper application of the trends clauses, and specifically paragraph 11.3(b) of the draft declarations **{N/6/7}** – which MSA and EIO consider properly reflects the Judgment at [283], [351], [389]. Contrary to the FCA's suggestion, MSA and EIO do not regard those paragraphs of the Judgment as solely applicable to Arch and EIO. There is no logical basis for such a distinction between Insurers. This issue will be addressed by counsel for Hiscox at the hearing on Friday.

8. As regards the remaining declarations, particularly those concerning MSA, submissions will be made as necessary at the hearing.

C. Applications for a leapfrog certificate

9. MSA and (purely on a protective basis) EIO each applies for a leapfrog certificate in relation to the Supreme Court.

10. EIO's protective leapfrog application **{O/9}** is explained in the fourth witness statement of Chris Wilkes ("**Wilkes 4**")[1]. Insofar as no application is made for a certificate to appeal the Court's decision on the infectious disease carve-out, EIO will not pursue its application on Friday. If necessary, however, EIO will submit that the requirements for a certificate are plainly met for the reasons set out in Wilkes 4. Nothing further is said about EIO's protective leapfrog application in this skeleton.

Conditions to be satisfied

11. To grant a leapfrog certificate pursuant to s. 12(1) of the 1969 Act, the Court will need to be satisfied of the following:

11.1 **First**, with reference to s. 12(3A) of the 1969 Act,[2] that:

(a) A point of law of general public importance is involved in the Court's decision(s); and

(b) One of the following conditions is met: (i) the proceedings entail a decision relating to a matter of national importance or consideration of such a matter, or (ii) the result of the proceedings is so significant (whether considered on its own or together with other proceedings or likely proceedings) that, in the opinion of the Court, a hearing by the Supreme Court is justified, or (iii) the Court is satisfied that the benefits of early consideration by the Supreme Court outweigh the benefits of consideration by the Court of Appeal.

11.2 **Secondly**, that the case would be a proper one for granting leave to appeal to the Court of Appeal (s. 15(3) of the 1969 Act); and

11.3 **Thirdly**, that this Court considers in the exercise of its discretion that it ought to grant a certificate under s. 12(1) of the 1969 Act in circumstances where there is a sufficient case for an appeal to the Supreme Court (as required by s. 12(1)(b)).

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1 Partner at DAC Beachcroft LLP with conduct of the test case proceedings for EIO and MSA.

2 For the avoidance of doubt, MSA and EIO do not rely on the "relevant conditions" in s. 12(3) of the 1969 Act.

MSA's application for a leapfrog certificate

12. MSA's application for a leapfrog certificate relates to the Court's decision(s) on (a) the proper construction of the so-called disease clauses in MSA1 and MSA2 ("**the MSA Disease Clauses**"); and (b) the correct approach to causation under those clauses. These issues are addressed at paragraphs 93-113, 121-122, 175-199, 503-529, 532-533 of the Judgment.

13. MSA's application is supported by the third witness statement of Mr Wilkes ("**Wilkes 3**"). Attached as appendix 1 to Wilkes 3 are the proposed grounds of appeal on which MSA intends to rely **{O/19/12}**. They are also attached to this Skeleton for ease. They identify what MSA respectfully considers to be the errors of law in the Judgment in relation to the MSA Disease Clauses.

14. The Court is invited to read Wilkes 3 in full **{O/19}**, on the basis of which MSA submits that the conditions for granting a leapfrog certificate are satisfied.

15. MSA's grounds of appeal **{O/19/12}** (attached to this Skeleton) identify points of law of general public importance for the reasons given at [14]-[29] of Wilkes 3.[3] The following points bear emphasis:

    15.1 The MSA Disease Clauses are not 'one-off' clauses.[4] They are in standard form and the number of policyholders insured under the relevant MSA policies (MSA1 and MSA2) is very significant.[5] The MSA Disease Clauses are also in very similar form to others considered in the Judgment and available in the market. There has, moreover, never before been an English law decision on the construction of

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3 The concept of "*a point of law of general public importance*" will be familiar to the Court, including from the test applicable to arbitration appeals. It also resembles the test for permission to appeal to the Supreme Court: Supreme Court Practice Direction 3, paragraph 3.3.3.

4 See *HMV UK Ltd v Propinvest Friar LP* [2012] 1 Lloyd's Rep 416 at [43] where Longmore L.J. stated "*Section 69(3)(c) [of the Arbitration Act 1996] reflects the distinction made… between one-off cases or cases involving construction of one-off clauses on the one hand and cases of general public importance on the other.*"

5 See *Impact Funding v AIG Europe* [2017] AC 73 at [1] where the Supreme Court stated that the appeal before it raised "*a legal question of general public importance… because it concerns a term of an insurance policy, which is, or is similar to, terms in all professional indemnity insurance policies for solicitors in England and Wales…*" (see also [34]).

such standard extensions to business interruption cover.

15.2 The points of law relating to the MSA Disease Clauses have the real potential to impact hundreds of thousands of policyholders affected by the COVID-19 pandemic and the insurance and reinsurance market generally. This is a case where the importance of the answers to the questions of law goes well beyond the immediate interests of the parties.[6]

15.3 The exceptional circumstances in which this case has arisen (and its acute impact on policyholders, in particular) dictate an urgent need for finality and certainty as to the state of law on the issues raised in these proceedings.

15.4 Clarity on the issues of law relating to causation raised in MSA's grounds of appeal is of considerable importance to English insurance law and the insurance market, both in the immediate context of a pandemic likely to generate wide-ranging insurance and reinsurance claims, and in the context of wide area damage claims. The significance of the Court's rejection of Hamblen J.'s reasoning and decision on *Orient-Express* is self-evident.

16. At least one of the alternative conditions in s. 12(3A)(a)-(c) of the 1969 Act is satisfied. This is addressed at [31]-[36] of Wilkes 3 **{O/19/8-9}**.

16.1 Section 12(3A)(a): This litigation as a whole is of "*national importance*", as are many of the specific legal issues which it raises. They are important to the UK's financial and insurance markets and the UK generally (see Wilkes 3, [21]-[24], [32]-[33] **{O/19/6-7, 8-9}**). This is not a one-off private dispute where a point of law of general public importance just happens to arise.[7]

16.2 Section 12(3A)(b): The result is of great significance in legal and financial terms, and the need for finality as soon as possible for policyholders, insurers and third

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6 See *Fitzleet Estates Ltd v Cherry* [1977] 1 WLR 538 at 543 where Templeman J said in the context of an application under s 12 of the 1969 Act that "*There is a point of law of general public importance involved because the decision in the Chancery Lane case had far-reaching effects and in these days of inflation the reversal of that decision would have equally far-reaching effects.*"

7 As was the case in *Henderson v Dorset Healthcare University NHS Foundation Trust* [2017] 1 WLR 2673 at [96]-[97] where Jay J was satisfied that there was a point of law of general public importance but not satisfied that the "*national importance*" condition was met.

parties (e.g. reinsurers and brokers) drove the test case to proceed with expedition (and, indeed, at break-neck speed). There are other actual and likely disputes which will demonstrably be affected by the outcome of these proceedings (Wilkes 3, [23]-[24], [34]-[35] **{O/19/7, 9}**).

16.3 Section 12(3A)(c): The benefits in terms of time, finality, and cost of early consideration by the Supreme Court (rather than first proceeding to the Court of Appeal) are self-evident in the exceptional circumstances of this case (Wilkes 3, [36] **{O/19/9}**).

17. This is a proper case for granting leave to appeal to the Court of Appeal (see s. 15(3) of the 1969 Act).[8] This is addressed below in the context of the application for permission to appeal to the Court of Appeal. In summary, there is (i) a compelling reason for the appeal relating to the MSA Disease Clauses to be heard, and (ii) a real prospect of success on the appeal.

18. The requirement in s. 12(1)(b) of the 1969 Act is met, and it would be appropriate for the Court to exercise its discretion to grant a certificate in such circumstances: see Wilkes 3, [39]-[41] **{O/19/10}**.

18.1 S. 12(1)(b) requires that "*a sufficient case for an appeal to the Supreme Court under this Part of this Act has been made out to justify an application for leave to bring such an appeal*". This does not require the Court to forecast what the likely decision of the Supreme Court will be on any permission to appeal application. What is required is that "*a plausible case can be presented*".[9] That is plainly satisfied here given the real prospects of success on appeal (as to which see below) and given the importance of having guidance on the important questions of law to which such an application would give rise.

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8 See *Henderson v Dorset Healthcare University NHS Foundation Trust* [2017] 1 WLR 2673 at [100], *per* Jay J.

9 See *Fitzleet Estates Ltd v Cherry* [1977] 1 WLR 538 at 543 *per* Templeman J. See also *Henderson v Dorset Healthcare University NHS Foundation Trust* [2017] 1 WLR 2673 at [103] where Jay J said "*I do not accept the claimant's submission that the test applied by the Supreme Court in relation to applications for permission to appeal to itself applies to applications for section 12 certificates. The subsection requires the ascertainment of a "sufficient case" which, to my mind, entails a range of considerations, some merits-based, some discretionary.*"

18.2 As to the general discretion under s. 12(1) of the 1969 Act to grant a certificate,[10] the present case is within both the "*spirit*" and the "*letter*" of the leapfrog mechanism: see *IRC v Church Commissioners for England* [1975] 1 WLR 251, 272 *per* Megarry J. MSA's application for a certificate meets the purpose of the leapfrog procedure of saving time and expense by cutting out an intermediate tier of appeal: *Ceredigion CC v Jones* [2007] 1 WLR 1400 at [19], *per* Lord Bingham.

19. For the above reasons, MSA respectfully invites the Court to grant a leapfrog certificate.

D. Permission to appeal to the Court of Appeal

20. MSA, and on a purely protective basis EIO, also seek permission to (cross-)appeal to the Court of Appeal under CPR 52.3 and CPR 52.6. The grounds of (cross-)appeal are those attached as appendix 1 to Wilkes 3 **{O/19/12}** and Wilkes 4 **{O/11/6}**. They are also attached to this Skeleton for ease.

21. As for MSA, the need to appeal to the Court of Appeal will arise in the following circumstances:

21.1 The Court refuses MSA's application for a leapfrog certificate, or

21.2 Such a certificate is granted but (a) no application is made to the Supreme Court for permission to appeal, or (b) permission to appeal is refused by the Supreme Court, or (c) permission to appeal is granted by the Supreme Court on terms which are not accepted by MSA (see s. 13(5) of the 1969 Act and Practice Direction 3 to the Supreme Court Rules, paragraphs 3.3.11(d), 3.6.15, 3.6.16).

22. As for EIO, permission to cross-appeal the Court's relevant decisions on causation and counterfactuals is sought on a protective basis in case of an application to this Court or the Court of Appeal for permission to appeal in relation to the infectious disease carve-out. Otherwise, EIO will not be appealing the Judgment: see Wilkes 4, [5]-[6] **{O/11/2}**.

23. In respect of both applications, it is submitted that the requirements for granting permission in CPR 52.6(1) are met.

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[10] See the word "*may*" in the last line of s. 12(1) of the 1969 Act.

24. There is some other compelling reason for the appeal to be heard in relation to both the applications for permission to appeal by MSA and cross-appeal by EIO: CPR 52.6(1)(b). The points made in section C above and in Wilkes 3 **{O/19}** in the context of the leapfrog application, particularly in relation to general public importance and the public interest in an appeal in these proceedings, amount to a "*compelling reason for the appeal to be heard*". This is sufficient for permission to be granted. The appeal and cross-appeal would also have real prospects of success.

25. There are real prospects of success on MSA's grounds of appeal at appendix 1 to Wilkes 3 **{O/19/12}** and attached to this Skeleton.

25.1 The grounds of appeal (page 12 *ff* in Wilkes 3) identify the Court's errors of law on the proper construction of the insured peril in the MSA Disease Clauses and on causation.

25.2 Those grounds speak for themselves. The Court will also have well in mind MSA's case on construction, from which flowed its case on causation, which the Court itself described as "*undoubtedly a significant argument*" (Judgment, [102], [189]).

25.3 MSA's grounds of appeal are, respectfully, good. At a minimum, they have real prospects of success.

26. If necessary, there are real prospects of success on EIO's protective grounds of cross-appeal attached as appendix 1 to Wilkes 4 **{O/11/6}** and attached to this Skeleton. Those grounds identify the Court's errors of law in relation to (a) the proper characterisation of the insured perils; (b) the correct approach to causation and counterfactuals; and (c) the Court's conclusions in relation to the *Orient-Express* decision. These issues are addressed at paragraphs 385 to 389, 503-530 of the Judgment.

E. Time limits for filing a Court of Appeal appellant's notice

27. The following extensions of time for the filing of an appellant's notice pursuant to CPR 52.12.

27.1 If no leapfrog certificate is granted: The period for filing any appellant's notice be extended pursuant to CPR 52.12(2)(a) until 4pm on 23 October 2020.

(a) Paragraph 3 of the Court's order of 15 September 2020 envisaged that appellant's notices would be filed within 7 days of the consequentials hearing. However, that order was agreed at a time when it was thought that the consequentials hearing would not take place until mid-October.

(b) In light of the bringing forward of the date for the consequentials hearing, a period of 21 days from the date of the consequentials hearing is requested for the filing of any appellant's notice.

27.2 If a leapfrog certificate is granted: The period for filing any appellant's notice be extended pursuant to CPR 52.12(2)(a) until 14 days after the expiry of the period set out in s. 13(5) of the 1969 Act.[11]

(a) S. 13(5) of the 1969 Act and the Practice Directions to the Supreme Court Rules (see Practice Direction 3, paragraphs 3.3.11(d), 3.6.15, 3.6.16) contemplate that an appellant may pursue an appeal to the Court of Appeal where (a) no application is made to the Supreme Court within one month of the granting of the leapfrog certificate, (b) an application is made, but permission is refused by the Supreme Court, or (c) permission is granted on terms but the prospective appellant declines to proceed on those terms.

(b) To cater for those possibilities, MSA (and, protectively, EIO) seek an order for the extension of time for the filing of an appellant's notice in the terms indicated.

F. Conclusion

28. The Court is asked to grant (a) the declarations in the terms sought by EIO and MSA, (b) a leapfrog certificate in the terms proposed by MSA (and EIO if necessary) in the draft order accompanying the application(s), and (c) permission to appeal and cross-appeal

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11 "*Without prejudice to subsection (2) of this section, no appeal shall lie to the Court of Appeal from a decision of the judge in respect of which a certificate is granted under section 12 of this Act until—*

(a) the time within which an application can be made under this section has expired, and

(b) where such an application is made, that application has been determined in accordance with the preceding provisions of this section."

to the Court of Appeal with the extensions of time and on the bases set out above.

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30 September 2020

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Annex A: Disputed Declarations of relevance to EIO and MSA[12]

Disputed declarations common to two or more Insurers

Paragraph of draft declarations order:	**Disputed declarations:**	**EIO / MSA position in relation to the disputed declaration:**	**Relevant paragraphs of the Judgment:**
8.2(e) and (f)	"(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."	The word "reliable" has been added by Insurers as indicated to make clear that insurers only accepted that the relevant analyses referred to in (e) and (f) could be used by policyholders to discharge their burden of proof *if* it was reliable: this is reflected in the Judgment at [556], [560], [576], [579].	[556], [560], [576], [579]
Deleted 11.3	Insurers have deleted the following paragraph suggested by the FCA: "The particular types of underlying data pleaded by the FCA (specific evidence, NHS Death Data, ONS Death Data and	This is potentially misleading. It could suggest that the underlying data will necessarily discharge the burden of proof if	[574]

[12] All paragraph references to the draft declaration order are to the draft sent to HSF by Insurers' solicitors at 20.26 on 29 September 2020 **{N/6}**.

	Reported Cases) will discharge the burden of proof if they are the best available evidence in a particular case."	it is the best evidence. This is inconsistent with the judgment at [574].	
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."	The underlined wording has been added by Insurers. This is not a declaration that reflects a decision of the Court as set out in its Judgment. Instead, the FCA is relying on Insurers' acceptance of the FCA's pleaded position. MSA (and other Insurers) only accepted the correctness of what is said in paragraph 8.3 here (pleaded at para 28.1 of the APoC) on the basis indicated in the underlined words (see para 39.1 of Appendix 3 to MS Amlin's written opening **{I/12/212}**).	See discussion re cumulative totals at [548]-[550], [572].
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."	Insurers have proposed the wording in the previous column instead of the FCA's proposal of "COVID-19 and the governmental and public reaction thereto were one indivisible cause." Insurers' proposal more closely reflects the Judgment at [110]-[112], [147].	[110]-[112], [147]. See also [532]-[533].
11.2(a)	"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)"	Underlined wording added by Insurers reflects what is said in the Judgment at [95], [99] (submissions made by Mr Edelman QC accepted by the Court at [111]-[112]), [102], [113], [155], [283], [296], [351], [389] to the effect that the facts and matters to be reversed in the counterfactual are those occurring *after* the insured peril had been triggered.	[95], [99], [111]-[112]), [102], [113], [155], [283], [296], [351], [389]

		MSA and EIO adopt the submissions of Argenta on this issue.	
11.3	[Not replicated for the sake of brevity] **{N/6/6-7}**	This is Insurers' proposal so as to reflect the Court's Judgment on the proper application of the trends clauses at [283], [351], [389]. MSA's and EIO's reading of the Judgment is that these paragraphs, as reflected in declaration 11.3 (and particularly sub-paragraph (b)), applies to all Insurers. MSA and EIO adopt the submissions of Hiscox on this issue.	[283], [351], [389]
Deleted 13.5	[Deleted paragraph not replicated for brevity] **{N/6/7}**	MSA does not agree this declaration addressing causation in relation to the MSA AOCA clauses. MSA has been successful on coverage under these clauses and, therefore, causation does not arise / only arises on the hypothetical basis that the Court is wrong in its conclusions on coverage. This paragraph, as drafted, conveys that the Court has concluded that there is coverage (for e.g. that there is an "incident" of disease under MSA2) when it has not. MSA has instead addressed causation in the context of the individual wordings.	[404]-[408], [414]-[418], [431]-[437], [439], [443]-[444]

Disputed declarations relating to MSA

Paragraph of draft declarations order:	**Disputed declarations:**	**MSA position in relation to the disputed declaration:**	**Relevant paragraphs of the Judgment:**

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 <u>at a time when they could still be diagnosed as having COVID-19."</u>	The underlined words have been added to make clear that people who no longer had COVID-19 (and therefore could not be diagnosed as having COVID-19) did not fall within the definition of "notifiable disease" in the MSA Disease Clauses.	[93]
Deleted paragraphs 22.3, 23.5, 24.7	These are the deleted declarations: 22.3: "The "Pollution and contamination" exclusion clause does not apply to the disease clause." 23.5: "The "Pollution and contamination" exclusion clause does not apply to the AOCA clause." 24.7: "The "Pollution and contamination" exclusion clause does not apply to the AOCA clause."	The pollution and contamination exclusion in MSA1 and MSA2 formed no part of these proceedings. While a question (question 22) was included in the Questions for Determination document on this issue **{A/5/9}**, no declarations were sought in the APoC on the issue, and it was not raised in MSA's Defence. As a result, it is not an issue addressed anywhere in the Court's judgment. In the circumstances, this is not an appropriate declaration for the Court to make.	N.A.
21.1	Declaration proposed by MSA and objected to by the FCA: "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."	This declaration properly reflects the Court's conclusions at [431]-[432] of the Judgment. The FCA has complained that this declaration is "incorrect" and "is not accurate" because "businesses which started up a new takeaway or internet business would have suffered a prevention of access" but would fall outside the scope of this declaration as they were not "totally closed". This is, however, not correct. The Court has clearly held at [432] that such businesses <u>did suffer a total closure</u> because the "business"	[431]-[432]

		specified in the schedule could no longer be carried on from the premises and the insured is carrying on a new "business" by running the new takeaway or internet business. The declaration is, therefore, accurate.	
21.2	Declaration proposed by MSA and objected to by the FCA: ""*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"	This declaration should be included. It accurately records what the Court has decided in relation to the proper construction of the MSA1 AOCA Clause at [434] of the Judgment.	[434]
21.3, 21.4(b)	21.3: "There was "*action by the… competent local, civil… authority… where access will be prevented*" <u>for those businesses which were required to totally close the premises</u> by reason of Regulation 2 of the 21 March Regulations and Regulations 4 and 5 of the 26 March Regulations <u>and did so as a result</u>~~, save where the business continued to operate a takeaway or internet service constituting more than a de minimis part of its existing business~~." 21.4(b): "There was not "*action by the… competent local, civil… authority… where access will be prevented*":… (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…"	The changes reflected in underlining and strikethrough in 21.3 have been proposed by MSA, as has para 21.4(b). As for the additions, it is only those businesses under the identified Regulations which were required to totally close and which did in fact close that can be said to have had their "*access… prevented*". This reflects the Judgment at [431]-[434]. As for the deletion, MSA does not agree to the inclusion of the words "*save where…*" etc. because what is set out therein is not an exception to what is said before. It is an example of where there has not been a total closure: see [432] of the Judgment. It is thus not appropriately included in 21.3 and ought to be included as an example in 21.4(b), as has been done by MSA.	[431]-[434]

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."	Additional wording in underlining added by MSA to reflect more closely [437] of the Judgment.	[437]
22.1	"The ~~national~~ 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 ~~infected~~ with COVID-19 ~~so that it is diagnosable~~ is present within a one mile radius."	Changes shown in underlining and strikethrough added by MSA to reflect [405] of the Judgment.	[405]
22.4	[Not replicated for brevity] **{N/6/16}**	Additions made by MSA for the sake of clarity.	[414], [439]
22.5	[Not replicated for brevity] **{N/6/16}**	Amendments made by MSA to reflect [417]-[418] of the Judgment.	[417]-[418]
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."	Underlined wording has been added by MSA to reflect [444] of the Judgment and MSA's position that causation issues for the MSA AOCA clauses ought to be dealt within the individual wordings rather than in the general causation section of the declarations.	[444]

Appendix 1 to

Third Witness Statement of Christopher John Wilkes

MS Amlin's Grounds of Appeal

Proper construction of the insured peril

1. The Court erred in law in wrongly identifying the insured peril in the MSA Disease Clauses.

   a. The Court was wrong to construe the MSA Disease Clauses as providing cover for all the business interruption consequences at or in connection with an insured's premises of COVID-19 both within and outside the 25 mile radius provided that there had been at least one instance of COVID-19 within the 25 mile radius (Judgment, [102][2], [108]-[109], [113], [532]). On the true construction of the MSA Disease Clauses, cover is only provided for the business interruption consequences at or in connection with an insured's premises of a person or persons within the 25 mile radius of the insured premises sustaining illness resulting from COVID-19.

   b. Further, the Court was also wrong to conclude that the absence of any reference to an "occurrence" in the MSA Disease Clauses – unlike in other clauses before the Court, namely RSA 3 and Argenta 1 – makes it "*relatively straightforward to conclude that the cover extended to the effects of a notifiable disease if and from the time it is within the 25 mile radius and is not limited to the specific effects only of the instances of the disease within the radius*" (Judgment, [196]). In so holding, the Court erred by failing to give effect to the specific words used in the MSA Disease Clauses, and in particular the definition of notifiable disease which, in both policies, requires the insured to prove "*illness sustained by any person resulting from*" COVID-19 within the 25 mile radius of the insured premises.

   c. Further, the Court was also wrong in failing to conclude that (i) the reference to "*illness sustained by any person*" resulting from COVID-19 in the definition of "*notifiable disease*" in the MSA Disease Clauses was materially equivalent to an

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[2] A number of the paragraph references in these Grounds of Appeal are to paragraphs in the Judgment addressing the "disease clause" in RSA 3. This is because the Court has held that its conclusions in relation to RSA3 apply to the MSA Disease Clauses: see Judgment, [189], [191].

"*event*", and (ii) consistently with its approach to event language in QBE 2 and 3 the reference to "*illness sustained by any person*" meant that the cover was intended to be confined to the results of relatively local cases (as at [231] of the Judgment), and, therefore (iii) cover is only provided for the business interruption consequences at or in connection with an insured's premises of a person or persons within the 25 mile radius of the insured premises sustaining illness resulting from COVID-19.

Causation

2. Without prejudice to paragraph 4 below, even if the Court was correct to hold that "*following*" in the MSA Disease Clauses did not import a proximate cause requirement but imported a "*looser causal connection than proximate cause*" (Judgment, [95], [111], [194]), the Court erred in law (i) in adopting a supposed concept of causal connection which did not involve a test of factual (i.e. "but for") causation; and/or (ii) in failing to hold that such a "*looser causal connection*" required, at a minimum, the application of a factual (i.e. "but for") causation test, and/or (iii) in failing to hold that "*any* ***notifiable disease*** *within a radius of twenty five miles of the premises*" was neither a factual nor proximate cause of loss suffered by insureds.

3. The Court was further wrong as a matter of law to hold that, even if "*"following" imports the requirement of proximate causation*" the requirement is "*satisfied in a case in which there is a national response to the widespread outbreak of a disease*" because "*the proximate cause of the business interruption is the Notifiable Disease of which the individual outbreaks form indivisible parts*" (Judgment, [111]; see also [532]), or alternatively, that each individual occurrence of COVID-19 in the UK was a separate but equally effective proximate cause of the government action and the loss caused to insureds (Judgment, [112], [533]).

   a. In so holding, the Court erred by (i) failing to give effect to the specific words used in the definition of notifiable disease which, in both policies, requires the insured to prove "*illness sustained by any person resulting from*" COVID-19 within the 25 mile radius of the insured premises and (ii) failing to recognise that the illness sustained by any one person is not indivisible from the illness sustained by another person and so (iii) failing to conclude that "*individual outbreaks*" do not form an indivisible part of a "***notifiable disease***" (as defined).

b. The Court should have concluded (i) that the causal connecter "*following*" required at least the application of a factual (i.e. "but for") causation test, and (ii) that cases of "*illness sustained by any person resulting from*" COVID-19 within the 25 mile radius of the insured premises were neither a factual nor proximate cause of loss suffered by insureds.

4. The Court further erred in law by failing to hold that, on a proper construction of the MSA Disease Clauses, the word "*following*" in the MSA Disease Clauses imported a proximate cause requirement (Judgment, [94]-[95]). Instead, the Court wrongly held that "*following*" imported a "*looser causal connection than proximate cause*" and that it did not require "but for" causation, without any explanation of the concept being applied of causal connection which was not a "but for" cause (Judgment, [194]; see also [94]-[95]).

5. To the extent it matters, the Court erred in law in holding that the insured peril is the "*composite peril of*" interruption of or interference with the business following any notifiable disease within a radius of twenty five miles of the insured premises (Judgment, [94]). The insured peril was any notifiable disease (as defined) within 25 miles of the premises.

6. The Court further erred in law in its approach to the so-called "trends clauses". While it (rightly) accepted that the "trends clauses" in MSA1 and MSA2 applied to the non-damage coverage clauses including the MSA Disease Clauses (Judgment, [198]), it was wrong to hold that on an application of the trends clauses to the MSA Disease Clauses, "*the business interruption referable to COVID-19 including via the authorities' and/or the public's response thereto*" had to be stripped out of the applicable counterfactual (Judgment, [122], [199]).

7. 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.

Appendix 1 to

Fourth Witness Statement of Christopher John Wilkes

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.