**IN THE SUPREME COURT OF THE UNITED KINGDOM**

**CLAIM NO: FL-2020-000018**

**ON APPEAL FROM**
**THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS**
**COMMERCIAL COURT (QBD)**
**FINANCIAL LIST**
**FINANCIAL MARKETS TEST CASE SCHEME**
**Neutral Citation: [2020] EWHC 2448 (Comm)**

**BETWEEN**

**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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# FCA'S APPLICATION FOR PERMISSION TO APPEAL

## PAGE 5 OF PTA FORM:
## INFORMATION ABOUT THE DECISION BEING APPEALED

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1. The FCA seeks permission to appeal the Order made in the expedited business interruption test case heard in July 2020 by a Divisional Court under the Financial Markets Test Case Scheme, Judgment having been given on 15 September 2020 and the final Orders made at a consequentials hearing on 2 October 2020.[1]

2. This appeal raises several important points of principle on which many thousands of COVID-19-related business interruption insurance claims depend. The Defendants' appeals for which they seek permission raise several additional but inter-related important points of principle.

[1] As the Orders have not yet been finalised or sealed by the Court, references to the Orders are to the drafts currently being exchanged between the parties. It is not anticipated that the paragraph numbering will change in the final Orders.

3. The FCA's appeal would be the first time the Supreme Court or House of Lords will have addressed business interruption insurance, and specifically:

3.1. Whether, in adjusting a claim, an insurer can reduce the indemnity payable where one element of a composite insured peril, for example the COVID-19 outbreak in the United Kingdom, has caused a reduction in revenue prior to the policy being triggered by the occurrence of other elements of the composite peril (e.g. public authority action responding to the COVID-19 emergency), notwithstanding that: (a) the Court below has held (correctly) that an insurer cannot reduce the indemnity merely because but for the composite insured peril there would still have been present certain elements of that peril reducing revenue during the indemnity period; and (b) the Court below disapproved *Orient-Express Hotels Ltd v Assicurazioni Generali SpA* [2010] EWHC 1186 (Comm); [2010] Lloyd's Rep IR 531. The Order and Judgment below permit the "trends" clauses on which the Defendants relied in this regard to operate in a way which is contrary to their commercial purpose and/or to the intentions of the parties.

3.2. Whether prevention of access wordings requiring 'actions' of a public authority (or that restrictions have been 'imposed' or closure 'enforced') are triggered by instructions or advice of Government falling short of legislation and not having the force of law. This issue determines whether a business which was explicitly told to close, or whose customers were told to avoid it, by Prime Ministerial statements to the nation, can claim under these Wordings. The Order and Judgment below give an uncommercially and over-formalistically narrow scope to these clauses.

3.3. Whether business interruption wordings requiring 'prevention of access' or 'inability to use' are satisfied by partial rather than total closure of the business or premises. This issue determines whether (for example) a restaurant that is prohibited from feeding customers on its premises, but can continue to send food by delivery service and does so, can claim under these wordings. Again, the Order and Judgment below give an uncommercially narrow scope to these common clauses that are intended to cover interference to the operation of businesses through the insured premises including where it falls short of total interruption.

3.4. Whether, in contrast to all other disease clause wordings which the Court considered, QBE2-3 were only intended to cover local-only outbreaks and, if so, how the counterfactual is to be applied when calculating the indemnity (including by reference

to 'trends' clauses). For example, where cover is triggered by occurrence of a notifiable disease within a 25 mile radius of the premises, is the insured covered only to the extent interruption was caused by the disease within that area? (Although this point arises on the FCA's appeal in relation to the QBE2-3 Wordings, a version of this issue also arises on all of the Insurers' appeals.) The Court below wrongly concluded that, as an exception to the disease wordings before it, QBE2-3 were only intended to cover local-only outbreaks and that the counterfactual should assume the occurrence of COVID-19 beyond the policy area.

## A. NARRATIVE OF THE FACTS

4. The facts of this dispute are the facts of the global and national COVID-19 pandemic and the UK-wide Government action taken in response to it from 16 March 2020 onwards, by announcements and legislation, both directing what individuals must and must not do (as regards avoiding unnecessary travel, working from home, etc) and ordering businesses to close. The factual background is essentially agreed between the parties and is summarised at Judgment [10]-[60].

5. The test case considers the impact for business interruption insurance purposes of the UK Government's national measures, including by means of distinct but similar legislation in each of England, Wales, Scotland and Northern Ireland which is considered further in the immediately following section of this Application. The test case did not consider (nor need this appeal consider) whether the relevant policies were triggered by measures applied locally (rather than nationally) such as the Leicester lockdown imposed in July 2020.

## B. STATUTORY FRAMEWORK

6. The two main statutory instruments of relevance to this appeal are the Health Protection (Coronavirus, Business Closure) Regulations 2020 enacted on 21 March 2020 in England ("**the 21 March Regulations**"), and the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 enacted on 26 March 2020 in England ("**the 26 March Regulations**"), and the equivalent legislation in Wales, Scotland and Northern Ireland.

7. That legislative framework, and the announcements and orders made by the Government, distinguished between different types of business that were conveniently divided in argument and the Judgment into 7 categories (see Judgment [53]). Whether and when an insuring clause

is triggered may (especially for Prevention of Access-type clauses) depend upon the category to which the business belongs.

8. In brief, the categories are: Category 1: restaurants, cafes, bars and pubs; Category 2: cinemas, theatres, gyms etc; Category 3: essential retailers including food retailers, pharmacies, banks; Category 4: non-essential retailers; Category 5: other businesses including professional services businesses and factories; Category 6: holiday accommodation; Category 7: a residual category, principally places of worship and schools and other educational establishments.

9. In very simple terms, Categories 1, 2, 4, 6 and 7 were ordered to close/cease all face-to-face business save for limited exceptions, whereas Categories 3 and 5 were not, although their trade was affected (in some cases severely) by the restrictions on inessential movement placed on all customers, employees and business proprietors.

## C. CHRONOLOGY OF PROCEEDINGS

10. The FCA and the eight Defendants agreed a 'Framework Agreement' which came into force on 1 June 2020 (referred to in Judgment [2]), by which the parties agreed to commence proceedings for declaratory relief on an expedited basis to seek to achieve certainty as to the COVID-19 business interruption coverage issues, with the FCA representing the interests of policyholders for the purposes of such proceedings. The parties agreed to bear their own costs.

11. The parties also agreed in clause 8 that, if there was to be an appeal, it should be expedited, and to explore the possibility that such an appeal would be a leapfrog appeal.

12. On 9 June 2020 the FCA filed and served a Claim Form in the Commercial Court (Financial List), and the Particulars of Claim, and issued an application for the claim to be admitted to the Financial Markets Test Case Scheme in Practice Direction 51M and for the trial to be expedited.

13. On 16 June 2020, Butcher J heard the first Case Management Conference, admitted the Claim to the Test Case Scheme,[2] and gave directions to trial.

14. On 23 June 2020, the Defendants served their Defences, and the FCA served a single joint Reply on 3 July 2020.

[2] The test case is understood to have been the first case heard under the Scheme. PD 51M has since been revoked on 1 October 2020 and is no longer a pilot - its provisions are now found in PD 63AA paragraph 6.

15. At a second CMC on 26 June 2020, the Court considered joinder and other applications, acceding to the applications of the Hiscox Action Group ("**HAG**") and the Hospitality Insurance Group Action to join the proceedings as interveners.

16. The trial took place over 8 days from 20-23 and 27-30 July 2020, heard by Butcher J (a Financial List judge) together with Flaux LJ (a Lord Justice of Appeal) in accordance with the directions that had been given. This panel was permitted by [2.5(d)] of the Financial Markets Test Case Scheme[3] because the case was one of particular importance or urgency.

17. Judgment was handed down on 15 September 2020.

18. The consequentials hearing was held on 2 October 2020. The Court considered submissions as to the form of declarations to be made, as ultimately set out in the Court's Order of 2 October 2020 (references below to the "**Order**" are to this order). By a separate order of the same date, the Court also granted leapfrog certificates pursuant to s.12(1) of the Administration of Justice Act 1969 to the FCA, the First, Second, Fourth, Fifth, Sixth and Seventh Defendants, and HAG; granted those parties and the Third Defendant permission to appeal to the Court of Appeal (to be pursued if the application for permission to make a leapfrog appeal to this Court were refused); and refused the application of QIC Europe Limited to be added as a new party and given permission to appeal.

## D. ISSUES BEFORE AND ORDERS MADE BY THE COURT BELOW

19. The test case primarily focussed on questions of construction and/or law. There was no disclosure, nor was there any contested witness evidence and no sample claims were before the Court. The case proceeded on the basis of written and oral submissions and certain agreed facts documents (as to the disease, relevant government actions, etc) and assumed fact patterns to be used as illustrations.

20. The Court addressed whether 28 clauses in the 21 lead policies written by the 8 Defendants[4] would respond to the national UK Government action taken from 16 March 2020 onwards. (There were a number of other 'follower' or 'non-lead' wordings that it was agreed were in many cases materially identical to the 21 lead policies, and the lead and non-lead wordings had

[3] Now [6.5(d)] of PD 63AA.

[4] And labelled for convenience: Arch1, Argenta1, Ecclesiastical 1.1 and 1.2, Hiscox1, 2, 3 and 4, MSAmlin1, 2 and 3, QBE1, 2 and 3, RSA1, 2.1, 2.2, 3 and 4, and Zurich1 and 2.

been selected with the aim of addressing issues arising in many wordings across the market including those underwritten by insurers not party to the test case.)

21. The trial focused on issues of coverage (including exclusions) and causation, and also included issues as to "prevalence" (how, in general terms, the occurrence of COVID-19 was to be proven in a particular case). Although there was consideration in the context of causation and the appropriate counterfactual of how in general terms the indemnity was to be measured under the quantum machinery in the wordings, particular points as to how an indemnity was to be adjusted and quantified were not raised, in keeping with there being no sample claims considered.

22. There were three categories of coverage clause considered:

    22.1. 'Disease clauses' - those triggered by the occurrence of disease alone, typically within a certain distance of the insured premises (see further Judgment [80-81]).

    22.2. 'Prevention of access clauses' - those triggered by public authority intervention preventing or hindering access to, or use of (or similar), the premises (see further Judgment [306]).

    22.3. 'Hybrid clauses' - those which are a hybrid of disease clauses and prevention of access clauses (see further Judgment [242]).

23. By its Order of 2 October 2020, as elaborated upon in the Judgment dated 15 September 2020, the Court below decided the following issues.

<u>The question of how local the outbreak and public authority response must be, and causation</u>

24. A core issue was whether on the proper construction of the policies: (a) they provide cover in relation to effects of COVID-19 only insofar as it occurred locally and therefore covered only the effect of public authority action responding directly to such a localised outbreak, with the result that the effect of COVID-19 outbreaks beyond the policy area was a competing, non-insured cause which is distinct from the insured peril; or (b) whether the purpose of the requirement that the disease should be present in the specified policy area was to impose a requirement that the disease outbreak should have made a local appearance in order for there to be cover, so that a national outbreak (and the national response to it) was not a competing cause in relation to the local appearance of the disease. In particular, if a disease had to occur within 25 miles of the premises to trigger cover, but the disease was present throughout the

country, did the interruption have to result only from the 'part' of the disease which was within 25 miles, and was the indemnity only against interruption and losses that would not have been suffered had there been no disease within 25 miles *but still disease elsewhere*?

25. A related issue was whether and how the elements of a composite peril must be left out of account when considering the counterfactual for the purposes of measuring the indemnity. If prevention of access has to be due to public authority actions due to an emergency, is the indemnity only against interruption and losses that would not have been suffered had there been no public authority actions *but still the emergency* or does one assume that none of the ingredients of the composite peril had occurred?

*Disease clauses*

25.1. By Order [10] it was declared that there was cover under 6 disease clauses (Argenta1, MSAmlin1-2, QBE1, RSA3 and RSA4) for the effects of COVID-19 and the national response to it if the disease occurred or manifested within the policy radius of the premises. In particular, the Court declared that the insured peril is the disease, provided it makes an appearance within the radius, and not only the 'part' of the disease which appeared within the radius. (Alternatively, the part of the disease within the radius was, together with the 'rest' of the disease, an effective cause of the national action). Because the peril insured against is therefore 'the disease', the counterfactual for the indemnity calculation is therefore a world without the disease, *i.e.* without COVID-19 anywhere in the country. *Argenta, MSAmlin, QBE and RSA obtained certificates in relation to these declarations and are likely to apply to the Supreme Court in relation to them.*

25.2. In contrast, by Order [12] it was declared that 2 other disease clauses in QBE2 and 3 only provided cover for business interruption attributable to the instances of COVID-19 within the relevant policy area, and not to other occurrences outside the area or a national outbreak. *The FCA seeks to appeal these declarations. See Ground 4 below.*

*Prevention of access clauses*

25.3. By Order [14.2 and 16.2] the Court declared that the 'prevention of access'-type clauses in Arch1 and Ecclesiastical1.1-1.2 were satisfied by proof of the national emergency, and did not require a local incident/event. *The insurers do not appeal these conclusions.*

25.4. In contrast, the Court declared in Order [18.1, 18.2, 18.6, 21.5-21.8, 28.1-28.2, 28.5-28.6, 33.6-33.9] that on their proper construction the 'prevention of access'-type clauses in Hiscox1, 2 and 4 'NDDA clauses', MSAmlin1-3 'AOCA clauses', RSA2.1-2.2, and Zurich1-2 (which require an incident, threat or risk or injury, danger or disturbance, or emergency likely to endanger life to be within the vicinity or a mile of the premises) required proof that it was the risk or existence of COVID-19 specifically within the neighbourhood of the premises which led to the relevant public authority action. Interruption caused by the national Government COVID-19 response therefore is not covered unless the insured could prove that it was the local incident, emergency *etc* which led to that action. *The FCA does not appeal this declaration (noting that there remains open the question of whether 'local lockdowns' would be covered by these clauses).*

*Hybrid clauses*

25.5. The Court declared by Order [10-11, 27.3, 31] that the hybrid wordings (Hiscox 1-4 'hybrid', RSA1, and RSA4 'enforced closure' clause) respond to a national response to a national disease, and not only to a localised outbreak. The Court therefore declared that the counterfactual for assessing loss is the position without the composite insured peril, *i.e.* assuming no COVID-19 and no restrictions / closure. *Hiscox and RSA obtained certificates on the correct counterfactual and are likely to seek permission to appeal on these points. Hiscox also obtained a certificate on whether the 'occurrence' in Hiscox1-3 (hybrid) was required to be local to the premises.*

26. Part of the reasoning behind the Court's conclusions summarised above was that the decision in *Orient-Express* was not determinative, because the correct causation/counterfactual test was one of policy construction and not one of law, and the insured perils in the policies before the Court were different to those in *Orient-Express*: Judgment [523-533]. The Court also said *obiter* that, if it were relevant, *Orient-Express* was wrongly decided and the Court would have declined to follow it. *All appealing Defendants obtained certificates in relation to Orient-Express and are likely to apply to the Supreme Court in relation to it.*

27. The Court declared by Order [13] that on their proper construction all of the 'trends clauses' were applicable, even if they had to be 'manipulated' to apply to the clauses at issue. *The FCA does not appeal this conclusion.* The Court also accepted the FCA's case (*e.g.* at Order [11.4(a)]) that the 'trends' clauses did not affect the causation/counterfactual question otherwise provided

by the policy wording. *All appealing Defendants obtained certificates in relation to this aspect of the trends clauses and are likely to apply to the Supreme Court in relation to them.*

Pre-trigger COVID-19 trends or circumstances

28. The Court made declarations by Order [11.4] as to how and to what extent downturn in turnover predating the trigger of a composite insured peril, but attributable to elements of the peril, should be included or excluded from the counterfactual when adjusting a claim. (For example, if an insured's revenue dropped to 20% or the business closed entirely before the occurrence of COVID-19 within the radius, should that drop be factored into the question of what the revenue would have been 'but for' the occurrence of COVID-19? The declaration would give a positive answer to that question, at least in principle.) *The FCA seeks to appeal these declarations (and HAG is also expected to do so in respect of the Hiscox policies). See Ground 1 below.*

Prevention of access and hybrid coverage points

29. The Court declared by Order [17.4, 18.4, 21.2-21.4, 22.4-22.5, 27.2, 31.1, and 33.3-33.5] that the terms "restrictions imposed" (in Hiscox1-4 'hybrid'), a denial or hindrance in access "imposed" (in Hiscox1, 2 and 4 NDDA and MSAmlin2 AOCA), "action" (MSAmlin1 AOCA and Zurich1-2), "closure or restrictions" (in RSA1), and "enforced closure" (in RSA4 'enforced closure' clause) required mandatory legal force, not merely instructions or advice by Government. *The FCA seeks to appeal these declarations (and HAG is expected to appeal the decisions on the Hiscox 'hybrid' wordings). See Ground 2 below.*

30. The Court also declared in Order [14.4-14.5, 17.3, 18.5, 21.1-21.4, 22.3-22.5, 33.1-33.5] that the requirement of a "prevention" or "denial" of access (in Arch1, Hiscox1, 2 and 4 NDDA, MSAmlin1-2 AOCA, and Zurich1-2), "interruption" (in MSAmlin2 AOCA), and "inability to use" (in Hiscox1-4 'hybrid' clause)[5] are only triggered by complete closure of the business for the purposes of carrying on the business, or almost total inability to use the premises, respectively. The closure of a shop or restaurant is therefore not covered if the shop had a material pre-existing mail order business, or the restaurant a pre-existing takeaway business which can be continued. By various Orders, for example [14.5(a)][6] in relation to Arch1, the Court specifically declared that there was no cover for businesses in Categories 3 or 5. *The FCA seeks to appeal these declarations. See Ground 3 below.*

[5] And, possibly, "closure or restrictions placed on the premises" in RSA1 at Declaration 27.2.
[6] Similarly [18.5(d)] for Hiscox (NDDA), [21.4(a)] for MSAmlin1 (AOCA), [22.5(c)(i)] for MSAmlin2 (AOCA) and [33.5(a)] for Zurich.

31. By Order [32] it was declared that there was cover under the RSA4 'prevention of access' clause for any action or advice which prevented or hindered access to or use of the premises, which covered a wide range of action (including the Prime Minister's statement on 16 March 2020) and businesses (including those which closed from 20 March 2020 onwards). Further, by Order [16.2-16.4] it was declared that there would have been cover[7] for schools and churches from 23 March 2020 onwards within Ecclesiastical1.1-1.2. *These declarations are not the subject of a certificate.*

Exclusions

32. The Court declared in Order [16.4] that there was no cover under Ecclesiastical1.1-1.2 because of a complete exclusion, termed the 'infectious diseases carve-out'. *The FCA does not appeal this declaration.*

33. The Court also declared in Order [15.3, 20.3, 21.9, 22.8, 24.4, 25.3, 26.3, 27.4, 28.7, 28.8, 28.9, 29.3, and 33.10]) that a range of other exclusions relied on by insurers did not apply to the claims at issue, in particular Argenta (a clause stating that premises be 'directly affected' by the occurrence and a Micro-Organism Exclusion Clause), MSAmlin (a Pollution and Contamination Clause), QBE (a Pollution Clause and a Micro-Organism risks clause), RSA (a Pollution and Contamination clause, Exclusion (b) in RSA2.1-2.2, Exclusion (e) in RSA2.2, and General Exclusion L in RSA3) and Zurich (a Pollution and Contamination Clause). *Only General Exclusion L in RSA3 is the subject of a certificate.*

Prevalence

34. The Court declared by Order [8] the types of evidence and methodologies on which policyholders might seek to rely when proving the presence of COVID-19 in a particular location. *It is not thought that any parties have sought permission to appeal these rulings.*

## E. PROPOSED GROUNDS OF APPEAL

35. The FCA seeks permission to appeal on four grounds.

[7] The Court having found that an exclusion applied: see Order [16.1].

Ground 1: the Quantum Point

36. This point is very important and of high value. It provides a huge element of uncertainty that is likely to delay the adjustment and payment of claims even where cover has been accepted or found. Its effect is potentially particularly acute in relation to Prevention of Access/hybrid clauses when combined with the finding that, in order to trigger cover, government action or the necessary restrictions must have force of law such that the trigger will not be met until some time after customers were told on 16 March 2020 to avoid pubs, clubs and theatres, and after many businesses closed on instructions or advice of the Government (Ground 2 below).

37. For a number of prevention of access/hybrid policies, the Court (correctly) found that, although these wordings do not respond where there is a disease or emergency without a public authority response, where all the elements of the peril are present, it is necessary to calculate the indemnity by asking what interruption or loss would have resulted absent all the elements including the public authority action and the underlying disease or emergency: see Order [11.1-11.2].[8]

38. Thus an insurer cannot reduce the indemnity (whether under the trends clause or otherwise) by demonstrating that even if the complete combination of the insured peril had not occurred, and so the cover had not been triggered, some of the elements would still have occurred and interrupted or interfered with the business. As explained at Judgment [279]:

> "We do not consider that it would give effect to the intentions of the parties for the assumption to be that there were no mandatory government restrictions and no inability to use the premises as a result specifically of such restrictions, but that the national outbreak of the disease and other governmental responses to it, and the economic and social consequences of these, were assumed to have been the same as occurred. That would not, in our judgment be how a reasonable person would understand what was agreed. It would involve an unrealistic and artificial exercise, and one which fails to recognise that the occurrence of the disease is an essential element of the insured peril, and of what the insured has covered itself against."

39. These fundamental points form the central issues on which the FCA expects to be defending an appeal by insurers.

40. However, the Court also gave certain indications in the Judgment *to the opposite effect* in relation to pre-trigger revenue depressions caused by COVID-19, specifically that a business cannot recover to the extent that COVID-19 would have depressed revenue anyway, even without public authority action triggering the cover, if COVID-19 happens to have already had such

[8] Also Judgment at [121-122, 148, 168, 191, 199, 229, 278, 347-348, 385-388, 476, and 530-533]

an effect prior to the triggering of the policy (Judgment [350]-[351] and [389]). The Court then expressly declared that, although it was a question of fact and construction in each case, it is in principle appropriate to reduce recovery in this way (Order [11.4(c)] and [11.3]), although only up to the level at which there was a pre-trigger effect: Order [11.4(d)].

41. This was an error of law.

42. First, it is directly inconsistent with the finding that on the proper construction of the wording, once all the elements of the composite peril are completed by the public authority taking qualifying action (such that cover is triggered), the policies are intended to cover losses resulting not only from that action but also from the underlying COVID-19 emergency which formed part of the insured peril; and with the finding that the wording aims to put the insured in the position as if the insured peril, including all its elements, had not occurred (Judgment [121], [148], [278-283], [298], [305], [348], [388], [476], [530-2]). Removing the insured peril in its entirety logically involves removing the effect of policyholder or third party actions taken in anticipation of that insured peril or as a result of elements of the peril. The Court was therefore wrong to hold that elements of the insured peril *could*, depending on the facts, be used by insurers to reduce the indemnity payable: the correct declaration should have been that such elements *could not* be used in this way.

43. Second, for most wordings, quantification machinery would take as the default measure the difference between actual revenue and the revenue in the same period a year earlier (i.e. before COVID-19). To reduce the indemnity for a pre-trigger COVID-19 revenue depression (or closure) requires the Court and insurer to use the trends clause to make a positive adjustment for that pre-trigger depression as a trend or circumstance, altering the position that would exist absent the trends clause, as the Court itself noted (Judgment [351]). But this contradicts the purpose of trends clauses (as dealing with the ordinary vicissitudes of commercial life, i.e. matters extraneous to the insured peril, including in the case of a composite peril all of its ingredients) and the Court's own clear and correct conclusion that trends clauses and quantification machinery are not part of the delineation of cover, and therefore it would be contrary to principle for loss to be limited by the inclusion through quantification machinery of the impact of any part of the insured peril (Judgment [121], [279], [281-[283], [348], [385-387], [476]).

44. Third, this is directly inconsistent with the Court's criticism (Judgment [523]-[529]) of *Orient-Express*. In that case the hurricane must necessarily have impacted New Orleans at least a short

time before it damaged the hotel triggering cover, and indeed it is likely that the New Orleans curfew and evacuation of 27-28 August 2005 predated the hotel being damaged. Yet the Court correctly confirmed at Judgment [527] that on the facts of *Orient-Express* "*the counterfactual was one where both the damage to the hotel and the hurricanes and their effect generally were to be stripped out*" (emphasis added), rather than assuming, for example, that a downturn due to curfew and evacuation that pre-dated the property damage would have continued absent that damage.

45. Fourth, it rewards irresponsibility and necessitates illogical distinctions. The business owner who ignores and keeps secret a rat infestation or disease outbreak until ordered to close can recover a full indemnity because there has been no pre-closure dip in revenue (see e.g. Judgment [281]), whereas the owner who voluntarily closes or discloses the rats or outbreak to his or her customers prior to being ordered to close has no or much reduced recovery. Neither the morality of this, nor the arbitrariness of recovery turning on whether an element of the peril has had a measurable effect prior to trigger, would be intended by reasonable parties. Its effect would also be to disincentivise or punish insureds from taking sensible (and contractually required) mitigating action in anticipation of insured perils, such as boarding up a restaurant to protect it from an approaching hurricane – something which would be contrary to interests of both the insured and the insurer.

46. Fifth, this was based on a misunderstanding by the Court (at Judgment [351]) that to disregard pre-trigger revenue depression would be to allow recovery of pre-trigger losses. It does nothing of the sort, but rather allows recovery of post-trigger losses during the indemnity period only (but disregarding elements of a composite insured peril which caused a pre-trigger fall in revenue and that would have continued post-trigger, where that forms part of the insured peril). Further, the point at issue here was not resolved in *New World Harbourview* [2012] HKCFA 21, [2012] Lloyd's Rep IR 537, which did concern recovery for pre-trigger losses, and did not need to be distinguished contrary to the Court's apparent view at [349]-[351].

47. Finally, it disregards the emerging nature of the peril. Where a policy provides cover against the effects of a notifiable disease, which could encompass a new disease like SARS, the parties must be taken to have anticipated that a new infectious and contagious disease might emerge and spread in a highly complicated way, which would be difficult to predict and "fluid", as the Court correctly held at Judgment [104]. Whilst the policy trigger provides a commencement date for indemnity, it would be undermining of the cover that was granted if the effect of the emergence of the disease prior to the policy being triggered by it could be taken into account so as to reduce and perhaps eliminate any claim for loss for the period following the triggering

of the policy by virtue of its emergence. Some pre-trigger events cannot be severed from the insured peril in its complete form. Just as a hotel that spends the days before a hurricane preparing the hotel and ensuring it is safely closed and organised ought not to have its fall in income for those days taken into account in the quantification of a claim for business interruption for property damage that the hurricane caused, a business that closed or suffered a dramatic loss of revenue in the days leading up to 21/26 March Regulations should not be subject to any reduction in respect of that.

Ground 2: the Mandatory/Force of Law Point

48. A number of the wordings are triggered by public authority 'action' or 'enforced closure' or restrictions being 'imposed'. The relevant terms are "restrictions imposed" (in Hiscox1-4 'hybrid'), a denial or hindrance in access "imposed" (in Hiscox1, 2 and 4 NDDA and MSAmlin2 AOCA), "action" (in MSAmlin1 AOCA and Zurich1-2), "closure or restrictions" (in RSA1), and "enforced closure" (in RSA4 'enforced closure' clause). The Court was wrong to find (Judgment [266-267], [294], [303], [407-8], [434-5], [439], [497]) and declare (Order [17.4, 18.4, 21.2-21.4, 22.4-22.5, 27.2, 31.1, 33.2-33.5]) that only the imposition of legally binding prohibitions (here the 21 March and 26 March Regulations) could satisfy these triggers. This was an error of law.

49. On their proper construction these clauses are intended to respond at the very least where a business closes as a result of explicit public authority instructions to do so, and where a business's customers are told to avoid it. It is commercially absurd to construe the wordings as not covering a business's or its customers' compliance with a direct instruction by the national Government where compliance was expected (such as the Prime Minister's statements on 16, 20, 23 and 24 March 2020). It would be wrong to conclude that these policies are only intended to respond where the public authority action comprises a legally enforceable prohibition, particularly where the clause does not explicitly provide for such narrow cover. Again, the effect of this conclusion would be to punish businesses which complied with direct instructions (because they would have no cover until they were legally mandated to close), and reward those which flouted them. When combined with Ground 1 above, its effect is potentially to reduce a policy indemnity to zero for pubs, clubs, theatres and other such businesses.

50. It is important not to view these facts with hindsight. A business ordered to close may not have known whether that order would have been followed up with legally binding action, and

certainly would not have conducted a constitutional analysis as to whether it was strictly legally binding (either directly or indirectly, *e.g.* through duties of care or Health and Safety at Work legislation). Where a public authority takes steps knowing that they will be met with compliance, and rendering mandatory action unnecessary, a policyholder complying with those steps should be able to recover.

51. The Court based its conclusion on the premise that "*it is only something which has the force of law which will prevent access*" (Judgment [434]) despite having elsewhere confirmed correctly that 'prevention' does not connote legal impossibility (Judgment [431], [464], [494]), which is self-evident given that other clauses (such as those quoted in [308] and considered in [310]) are triggered by prevention of access resulting from public authority *advice*.

52. This leaves the significance of the terms 'action', 'imposed' and 'enforced' themselves, but these terms do not require such a narrow reading. Most obviously, there was no basis for such a narrow reading of 'action', a very broad term as a matter of ordinary language, and especially in the context of public authorities who can be anticipated frequently (perhaps usually) to act in ways falling short of legislation or other legally-backed prohibitions.

Ground 3: the Total Closure Point

53. A number of the wordings require proof of a "prevention" or "denial" of access (in Arch1, Hiscox1, 2 and 4 NDDA, MSAmlin1-2 AOCA, and Zurich1-2), "interruption" (in MSAmlin2 AOCA), "inability to use" (in Hiscox1-4 'hybrid' clause), or "closure or restrictions placed on the premises" (in RSA1). The Court was wrong to find (Judgment [268-270, 294-296,[9] 325-336, 414-416, 431-433, 439 and 494-496) and declare (Order [14.4-14.5, 17.3, 18.5, 21.1-21.4, 22.3-22.5, 27.2 and 33.1-33.5]) that the prevention of access wordings (Arch1, Hiscox1, 2 and 4 NDDA, MSAmlin1-2 AOCA, and Zurich1-2) and hybrid wordings (Hiscox1-4 hybrid and RSA1) are only triggered by complete closure of the business for the purposes of carrying on the business, or almost total inability to use the premises, respectively.

54. This was an error of law in construing the policies that undermines their commercial purpose. These are not catastrophe policies, only engaged when the business is totally closed and revenue has dropped to zero. They calculate the indemnity by reference to the actual revenue earned (rather than assuming there is no revenue). The indemnity period continues for as long

[9] It is not entirely clear whether the Court found that a premises which closed in part would be covered under RSA1. RSA1 is therefore included in this Ground for completeness.

as the business is 'affected by' the peril. They require steps to be taken to minimise revenue losses. They can be written for businesses which operate a number of activities, not only those with a single income stream. And the Court decided that all of these wordings do not require a total cessation of activities (save for MSAmlin2): Arch requires only loss of income, MSAmlin1 and Zurich require 'interruption *or interference* with the business', and while Hiscox requires 'interruption' alone, the Court rightly construed that word as meaning disruption or interference, not just complete cessation (see Order [17.2]).[10]

55. Accordingly, and given that the wordings do not (although could) specify that a 'prevention of access' or 'inability to use' must be *total* or *complete*, the cover is intended to respond where a material part of a business and/or its premises is closed down, or cannot be accessed by a material proportion of its customers. Just because a local book shop that is ordered to shut its doors to all customers can continue its 10% telephone order business, or a restaurant that is ordered to close its dining room can continue a (often minor) takeaway business from its kitchen, does not mean that there is no prevention of access or inability to use within the meaning of the wordings. The prevention arises because all dine-in customers are forbidden from dining in (not merely hindered from doing so). The industrious and prudent continuation of a part of a business, or diversification into new revenue streams, go to reduce loss, not to prevent cover altogether.

56. Indeed, the Court correctly concluded that there could be a prevention of access where the pre-existing activities had to cease but the business was able to continue on a different basis, a "fundamental change" to the business from that described in the policy schedule such as a restaurant starting a takeaway business it had not previously operated (Judgment [326]), and that there need not be a literal prevention of access to the premises for all purposes (Judgment [330]). The Court should have accepted the commercially commonsensical proposition that loss of at least a substantial part of the business (e.g. the face-to-face sales part) is or can be such a fundamental change and so a prevention of access/inability to use the premises. This is especially so when it is remembered that these are business interruption covers attaching to *premises* by way of extensions to property cover, not to businesses in the abstract. A restaurant/shop with its lights off and staff furloughed save in the kitchen/stockroom, because legislation has ordered it not to admit customers, has had access prevented.

[10] The FCA accordingly seeks to appeal the Court's conclusion that the same word 'interruption' in MSAmlin2 (AOCA) does require complete cessation.

57. Even the insurers were forced to accept this in unguarded moments: Arch conceded (Judgment [336]) that there was prevention of access to churches that closed by virtue of the prohibitions in the Regulations, whereas in fact all or most churches would have continued lawfully to operate for the purposes of funerals (a permitted exception in the Regulations) and so by the Court's test there would have been no prevention of access.[11]

58. The mistaken focus on whether a part of the business can be continued, rather than on access to or use of the premises, also has the potential to produce unpredictable and arbitrary distinctions – such as whether a business is 'continued' because, during closure, its owners were able to carry on some limited administrative or promotional activities (perhaps from home), or used the shuttering of premises to undertake routine maintenance or refurbishment. It would be illogical and unprincipled for the existence of cover to turn on such distinctions.

Ground 4: the Incident/Event point and the nature of disease clause cover

59. The Court correctly found in relation to the disease clauses in Argenta1, Hiscox4, MSAmlin1-2, QBE1, RSA1, RSA3 and RSA4 that the requirement that COVID-19 occur or manifest within a radius of the premises meant that the cover responded to the disease (as a whole) providing the disease came near the premises, and not just to the particular occurrences of the disease that were within the relevant policy area: *e.g.* Judgment [99]-[109] (RSA3). The opposite conclusion would, the Court rightly said, have been "*highly anomalous*": Judgment [105]. This is a fundamental point as to the intended scope of the insured peril in disease clauses which those insurers are seeking to appeal.

60. The FCA cross-appeals the Court's opposite conclusion (at [231]) in relation to QBE2-3—although the Court acknowledged it was "*not as clear*" in relation to QBE3[12]—that, exceptionally, and despite all parties contending for the same results for QBE1-3 rather than drawing a distinction between QBE1 and QBE2-3, the QBE2-3 disease wordings are uniquely confined to local-only outbreaks. The Court relied upon ancillary references to 'incident' or 'event'. The Court made an error of law in this respect.

61. The short point is that the fundamental reasons that led to the correct conclusion for all the other disease clauses (such as those identified at Judgment [102] and [104]) apply here also,

[11] The approach of the Commercial Court of Nanterre in *SA Holding Hoteliere de Paris v SA Albingia* (21 July 2020) should be preferred. It was there held that the closure of a hotel save for caregivers and hotel staff was still 'closure' of the insured establishment for the purposes of a policy of insurance.
[12] Judgment [236].

and the use of general terms 'event' or 'incident' does not change matters. This is especially so given that those terms can naturally and properly apply to a widespread outbreak of COVID-19, as was found for RSA4 where 'event' was merely "*a shorthand for what is in the various insuring clauses*"[13] and in relation to which the Court itself described the national outbreak as an 'incident' (Judgment [138]), and for Arch where the national emergency that triggered cover fit naturally within the term 'incident' in the wording.[14] It must also be remembered that on the face of the QBE2 wording the outbreak could occur over 2,000 square miles (i.e. within a radius of 25 miles of the premises), and it was clearly intended by the wording that disease across such a wide area can in principle be an 'event' or 'incident'.[15] There is no basis for a finding that a broader outbreak is fundamentally different for these purposes because, as the Court concluded in relation to the other disease clauses, the diseases covered by these clauses spread in complicated and unpredictable ways, and the clause envisages that the might be public authority action affecting a wide area (e.g. Judgment [104]).

62. The Court fell into error in reading general and common ancillary clauses, such as aggregation clauses or exclusion clauses regulating cover where there are multiple premises, as intended to cut down the scope of the insured peril. The Court rightly rejected this sort of argument at Judgment [456] when advanced by RSA (who said that an ancillary use of the word 'prevention' was intended to cut back the insured peril which was expressly defined to include 'hindrance' as well as prevention), but then fell into the same error itself for example when swayed in construing QBE2 by the reference to 'incident' in the aggregation clause[16], even though the same clause is present in QBE1 which the court found was not restricted to local-only outbreaks.

## F. REASONS WHY PERMISSION TO APPEAL SHOULD BE GRANTED

63. This case and the Grounds set out above are of general public importance and national importance, and are urgent.

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[13] Judgment [145]. Notifiable disease within the Vicinity was described in clauses 17 and 42 (quoted at [127]) as an "event" and "Covered Event", yet 'event' was held to encompass a nationwide outbreak [138-40], also [142-3]. The Court should not have been swayed (Judgment [231]) in relation to QBE2-3 by case law on the meaning of 'event' in aggregation clauses in reinsurance contracts. The Court rightly took the opposite approach to another common example of aggregation wording ("occurrence") in construing the Hiscox hybrid clauses at [271] and correctly gave it a broader meaning.

[14] Quoted in Judgment [308].

[15] See Judgment [231]. Similarly, in *Silversea* at [p66] Tomlinson J held that numerous State warnings given from September 2001 to the end of 2002 were a single "occurrence".

[16] Quoted in Judgment [208], relied on in Judgment [232].

64. The FCA received reports from insurers that some 700 types of policies across more than 60 insurers and 370,000 policyholders could potentially be affected by the Court's decision at first instance. It is not possible to give a reliable estimate of how many of those policies, insurers and policyholders may be affected by the issues under appeal or the value of the claims that those policyholders have brought or may bring, but the FCA considered in June 2020 that the value of c.8,500 claims was approximately £1.2 billion – see the FCA's CMC1 skeleton at [31b]. The total value of affected claims is therefore very high. The Court's decision will also impact BI claims more generally, the reinsurance industry, and the approach taken by other jurisdictions to COVID-19-related BI claims. The public interest in the decision has accordingly been very high.

65. The above Grounds are each of general importance. They relate:

(i) in the case of Ground 1 (which is inter-related with Ground 2): to the general issue of causation and loss adjustment at the heart of most relevant policies in the market,

(ii) in the case of Grounds 2 and 3: to how commonly used terms defining the trigger in public authority wordings are to be applied to the COVID-19 events, and

(iii) in the case of Ground 4, to the way the insured peril is to be characterised on the proper construction of certain disease clause wordings exemplified by QBE2-3.

66. These Grounds are inter-related, for example affecting whether a business can recover from 16 March 2020, or only from 26 March 2020 at an indemnity depressed by revenue falls between 16 and 26 March. The Grounds (especially 1 and 4) also interrelate closely with points on which Insurers seek to appeal to the Supreme Court and in relation to which a certificate was granted. They are also novel points of law on which there is no Supreme Court guidance. (In particular, the Supreme Court has never considered in any detail the application of business interruption insurance, or the application of causation principles to composite perils.)

67. In admitting this case to the Financial Markets Test Case Scheme, and sitting as a Divisional Court including a Financial List judge and a Lord Justice of Appeal, the Court below confirmed that the case raises issues of general importance in relation to which immediately authoritative English law guidance is needed, and that the case is one of particular importance or urgency (PD51M [2.1] and [2.5(d)]). The Divisional Court then determined that all three of the alternative conditions set out in s12(3A) of the Administration of Justice Act 1969 were satisfied for the purposes of granting the certificate: *i.e.* that the proceedings entail a decision

relating to a matter of national importance or consideration of such a matter; that the result of the proceedings is so significant (whether considered on its own or together with other proceedings or likely proceedings) that a hearing by the Supreme Court is justified; and that the benefits of earlier consideration by the Supreme Court outweigh the benefits of consideration by the Court of Appeal (s12(3A)(c)).[17]

68. The urgency arises out of the desperate financial position of thousands of businesses whose possible insurance policy payouts depend upon this test case, and now, this appeal. The urgency was accepted and reflected in the highly expedited timetable that was imposed (with the parties' agreement) by the Court. There continues to be a pressing need for expedition and urgent resolution of the issues that will pave the way for payment to be made by insurers across the country on their business interruption policies, in accordance with the final legal position established by this inherently final appeal. The urgency justifies bypassing the Court of Appeal, especially where, as here (and unusually), the issues have already been considered by a two-member Divisional Court including a Lord Justice of Appeal. The FCA therefore invites the Supreme Court to grant it permission to appeal on all 4 grounds identified above.

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**12 October 2020**

[17] Order of 2 October paragraph 1; consequentials hearing transcript p180.