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

REPLY

AND

DEFENCE TO COUNTERCLAIMS

REPLY

1. This is the FCA's Reply to all the Defendants' Defences.

2. The FCA's case in relation to most of the matters set out in the Defences is set out in its Particulars of Claim[1], and/or the Agreed Facts, and not repeated here. Further, the FCA will respond in its trial skeleton and not this Reply to the legal submissions and arguments advanced by the Defendants in the Defences. That should not be taken as admission or acceptance of such submissions or arguments.

3. The Defences are, in general terms, rejected. They depend upon adopting unduly restrictive meanings of particular words (such as 'prevention' and 'occurrence') and approaches to proof as to the presence of COVID-19, and causal tests prescribing unrealistic, impractical counterfactuals, depriving the cover clause of much of its apparent and intended scope, none of which reflect what the reasonable person in the position of the parties would understand.

4. Further, the Defences fail properly or at all to take account of the relevant matrix and the true nature of the insurance provided, including but not limited to (1) the insureds are generally very small businesses or SMEs, many within the jurisdiction of the FOS, (2) the insureds are generally unsophisticated purchasers of insurance, (3) the policies provide generally low, or very low, limits of indemnity for the business interruption cover, (4) the policies are meant to be (either because of their stated terms and/or their nature) readily comprehensible to these purchasers of the insurance and (5) the policies were generally purchased "off the shelf" in standard form written by insurers, whether through brokers or not.

[1] References to the Particulars of Claim, and to RSA's Defence, are to those documents as amended.

5. Save as aforesaid, and save as set out below, the FCA joins issue with each paragraph of the Defence.

A. Summary

6. The FCA does not respond to the Defendants' summaries of their Defences, wherever in their Defences they are set out, or to the Defendants' responses to the FCA's summary of the Claim. To the extent appropriate, it responds below to points pleaded in the main sections of the Defences. The detail of the FCA's arguments will be set out in its trial skeleton.

7. The non-selection of policies or cover clauses for inclusion in the test case does not amount an acknowledgment that those policies or cover clauses are of no application to COVID-19. The second sentence of paragraph 5 of Zurich's Defence is accordingly denied. Similarly, the third sentence of paragraph 8 of Argenta's Defence is denied. The assumption would be wrong for the reasons set out above, further it is denied that Argenta can in fact assume this, because the FCA has expressly stated by letters dated 5 and 9 June 2020 that the FCA does not accept that the clause does not respond and that no conclusion should be drawn from the non-inclusion of that clause and the additional issues property damage clauses would raise in the Claim.

C. The Policy Wordings and Applicable Law

8. In relation to the pleas as to the policy wordings and applicable law, save that the FCA will rely on the full Wordings at trial and reserves its position on the extent to which any variances are material:

    8.1. Arch's Defence paragraphs 5 and 10 are admitted, save that (in relation to the latter) the actual categories of business to whom Arch1 policies were issued is agreed to be as set out in Agreed Facts Document 9 (Distribution Channels).

Paragraphs 11-12 are also admitted, save that there are minor differences between the wording of the quoted clause in the OGI Commercial Combined Wording and the wording in the other two Arch1 Wordings. Paragraph 16 is admitted save that (i) it is the law of England and Wales not the law of England that applies, and it applies if the policyholder or business is in England or Wales not only England, (ii) paragraph 16.2 should read "*principal place of business*", (iii) paragraph 16.3 should read "…*the business does not have its principal place*…", and (iv) the choice in the Choice of Law clauses is expressly subject to contrary agreement between Arch and the policyholder.

8.2. As to Argenta's Defence:

(a) Argenta's Defence paragraph 5 is admitted save that the Holiday Homes Policy is in fact named the "*HIUA Holiday Home and Self Catering Accommodation*" policy. The first sentence of paragraph 6 is admitted, save that there are minor differences between the wordings which will be addressed to the extent necessary at trial. Paragraph 7 is admitted.

(b) The first sentence of paragraph 8 is admitted in the sense that the non-damage cover is by way of extensions. The second sentence is admitted. The third sentence is denied: see paragraph 7 above. The first sentence of paragraph 9 is admitted to the extent that the disease clause is the only clause that the FCA positively contends in this Claim does respond, and the quotations in paragraphs 9, 10, 12 and 13 are admitted.

(c) Paragraph 11 is admitted. The FCA's case in relation to these exclusions is set out in paragraph 50 of the Particulars of Claim and (as to exclusion (iii)) paragraph 54 below. The FCA does not dispute Argenta's rights to rely upon exclusions (i)-(ii) where applicable, but the FCA takes no

position (and does not need to take any position) as to whether and in what circumstances those limits are "*effective*".

(d) Paragraph 15 is admitted.

8.3. Hiscox's Defence paragraph 44 is admitted, save that it is denied, alternatively not admitted that the difference identified in the last two sentences is not material in that it may affect coverage or causation and will be addressed at trial to the extent appropriate.

8.4. As to QBE's Defence:

(a) Paragraph 2 and the first sentence of paragraph 3 are admitted.

(b) The summary in paragraph 4 (using the terms 'damage extensions' and 'non-damage extensions' which are not employed in the Wording) is denied. For example, in QBE1, the first extension is an extension (Additional increased cost of working) only applicable to damage to the premises. The second extension (Contract sites and transit) and third extension (Customers and suppliers premises) do indeed both include damage to property in locations other than the insured premises but are entirely different—the former refers to damage to the insured's own property, the latter does not. The fourth extension (Denial of access) and twelfth extension (Research and development) relate to damage to property and also impose a vicinity or 'at the premises' limit. The eighth extension (Lottery winners increased costs) does not require damage or vicinity. The food poisoning part of the disease extension (sub-clause (c)) does require that the food is supplied at the premises but the injury or illness can take place anywhere. There is no general intention that can

be derived from this analysis that indicates an intention to limit cover for events occurring at the premises or within a vicinity to exclude events that *also* extend beyond the premises or vicinity, or to exclude losses caused concurrently by events at the premises or within the vicinity and *also* outside them.

(c) Paragraph 5 is admitted. Paragraph 6 is admitted, save that the phrase 'limited range' is not understood; these clauses cover all human notifiable diseases. Further, QBE's label (not employed in the Wordings) of "'*insured premises-related' extension*" is highly inapt, especially in connection with clauses requiring that a disease happened anywhere within a 2,000 square mile area (the 25-mile disease clauses). Paragraph 7 is not admitted: the differences between all the QBE wordings will be addressed at trial to the extent material.

(d) Paragraph 8 is denied and paragraph 8.4(b) above is repeated. The "*As such*" at the start of the paragraph falsely suggests that anything that went before supports the unsupported assertions that follow in that paragraph, which are denied.

8.5. RSA's Amended Defence paragraphs 5(a) to (d) are not admitted (although the names of the Wordings broadly support these pleas) and as to paragraph 5(e), see further paragraph 38 below.

8.6. Zurich's Defence paragraphs 18 and 20 are admitted. As to paragraph 21, see paragraph 7 above.

D. COVID-19 and the Public Authority Response to it

9. Section D of the Particulars of Claim should be read in conjunction with the Agreed Facts Document 1 (Chronology), which facts are agreed by all the parties including the FCA. Facts and matters set out in the Defences that are included in the Agreed Facts are admitted by the FCA.

10. As to the date on which COVID-19 became notifiable in Wales: Regulation 1 of the Health Protection (Notification) (Wales) (Amendment) Regulations 2020 was made on 5 March 2020, and it was with effect from 6 March 2020. To that extent Ecclesiastical/MS Amlin's Defence paragraphs 15.2, 66, and 137; QBE Defence paragraph 31.2; RSA Amended Defence paragraph 16(b) and 37(d); and Argenta paragraph 14 footnote 2 are admitted.

11. As to the 16 March 2020 statement referred to in paragraph 18.9 of the Particulars of Claim, and Hiscox's Defence paragraphs 55 and 97.3, the statement was not just advisory (although the word 'advice' was used)—it explained repeatedly what the Government was "*asking*" people to do and telling them what they "*should*" do and what the Government would "*no longer be supporting*".

12. As to the meeting on 17 March 2020 referred to in the quotation from Mr Sunak in paragraph 18.11 of the Particulars of Claim:

    12.1. It admitted that Arch, Argenta and QBE were not present (Arch's Defence paragraph 19.1, Argenta's Defence paragraph 42 and QBE's Defence paragraph 31.3) and also that Ecclesiastical and MS Amlin were not present. It is not admitted or denied that Arch, Argenta, QBE, Ecclesiastical and MS Amlin were not represented by the ABI or Lloyd's of London at the meeting; this is a matter outside the FCA's knowledge.

12.2. Hiscox, RSA, Zurich, the Association of British Insurers, and Lloyd's of London were present at the meeting.

12.3. As footnote 2 to paragraph 18.11 of the Particulars of Claim makes clear, the FCA does not positively allege that any agreement to which Mr Sunak later referred was reached. The FCA therefore does not seek to assert or deny that there was any agreement between insurers and the Economic Secretary to the Treasury as publicly announced by Mr Sunak. To that extent only, Ecclesiastical/MS Amlin's Defence paragraph 15.4(b), Hiscox's Defence paragraph 57 and RSA's Amended Defence paragraph 16(d) are admitted.

12.4. It is admitted (and has not been asserted by the FCA) that the facts and matters set out in paragraph 18.11 of the Particulars of Claim are not admissible factual matrix in construction of the Wordings. They are relied upon as demonstrating that the view that stay-at-home and equivalent orders amounted to 'closure' of businesses was expressed by the Chancellor, and was not demurred from by those Defendants who were in attendance at the meeting (namely Hiscox, RSA and Zurich), is a credible one. Had the UK Government been told that in order for the relevant insurance policies to be triggered, they needed to legislate closure, it could have done so earlier than the 21 March and 26 March Regulations. No estoppel is alleged. Save as aforesaid, paragraphs 15.3(d)(iv) and 15.5(b) of Ecclesiastical/MS Amlin's Defence is admitted.

13. As to the FCA's pleas in paragraph 19 of the Particulars of Claim in relation to the scheme of the 21 and 26 March Regulations, in combination with Government guidance and announcements:

13.1. Ecclesiastical/MS Amlin's Defence paragraphs 16.2, 33.2 and 56 and Hiscox's Defence paragraphs 61, 78 and 86 are denied. Prohibition does not require legal

force, it requires that something is forbidden by someone with authority. The Government, including through its authority to implement enforcement measures through laws or to direct other action, is able to and did prohibit through guidance and announcements (sometimes described as 'instructions' and 'rules') and would have been so understood by the reasonable citizen. They were mandatory and compulsory. Hiscox itself describes the same as prohibitions in paragraph 59.1 of its Defence. The same applies mutatis mutandis to 'prevention' and 'imposed' and 'order'.

13.2. As to Zurich's Defence paragraph 26(2), it is not admitted that 'most businesses were permitted to remain open and/or carry on business (at least to some degree)'—there is no data in evidence (or, so far as the FCA is aware, available) showing the number of businesses in each category. Further and in particular, the exceptions to closure for categories 1, 2 (and, contrary to paragraph 26(2), there were no such exceptions for category 2 in the 21 March Regulations), 6 and 7 were extremely limited (e.g. some businesses could stay open only to host blood donations), and the prohibition on all but off-site or remote provision on businesses in categories 1 and 4 amounted to closure requirements (as was explicit for category 1 in Regulation 2 of the 21 March Regulations and Regulation 4 of the 26 March Regulations, which referred to closure of parts of the business).

14. As to holiday letting businesses (category 6), RSA's Amended Defence paragraph 68 is admitted. However, the Government had already instructed on 24 March 2020 that such businesses "should remain closed" (as correctly identified in Arch's Defence paragraph 49.11).

15. As to schools (category 7), Hiscox's Defence paragraph 58 and QBE's Defence paragraph 31.4, which reflects paragraph 19.7 of the Particulars of Claim, is admitted, as is Hiscox's Defence paragraph 61.7. As to Ecclesiastical/MS Amlin's Defence paragraph 16.3(b), the legal power to close schools is not relevant: the Government closed the schools by advising the schools to close in circumstances in which this was rightly understood to be a mandatory direction, as made clear in the Prime Minister's announcement of 18 March 2020: "*we think now that we must apply downward pressure, further downward pressure on that upward curve by closing the schools. So I can announce today and Gavin Williamson is making a statement now in House of Commons that after schools shut their gates from Friday afternoon, they will remain closed for most pupils – for the vast majority of pupils- until further notice.*" The Chancellor then stated on 20 March 2020: "*We have closed schools.*" The Coronavirus Act 2020 of 25 March 2020 included powers to close schools. Paragraph 56.7 of the Particulars of Claim is repeated. Paragraph 40 of Ecclesiastical/MS Amlin's Defence is denied. It is noted that Ecclesiastical/MS Amlin do not allege that anyone other than the Government closed the schools, or any legal or other basis on which or reason for which the schools closed.

16. As to churches (category 7), Ecclesiastical/MS Amlin's Defence paragraph 36 is denied. The Prime Minister expressly stated in his address of 23 March 2020 quoted in paragraph 56.4 of the Particulars of Claim that "*To ensure compliance with the Government's instruction to stay at home, we will immediately close all… places of worship."* Regulation 5(5) of the 26 March Regulations required that "*A person who is responsible for a place of worship must ensure that… the place of worship is closed…*". Paragraph 37 is admitted, save that (i) the Government advice, instructions, guidelines, announcements and legislation went well beyond 'discouraging' the use of churches and (ii) the 16 March 2020 instructions stopped mass gatherings and inessential conduct and so prevented and hindered access and use of churches.

17. As to paragraph 59.3 of Hiscox's Defence, there was no legislation in England enacting the 2m rule. However, the rule was more than advice, it was mandatory (e.g. the Prime Minister announced on 22 March 2020 "*You have to stay two metres apart; you have to follow the social distancing advice.*" The Foreign Secretary's speech on 16 April 2020 explained why the Government would not yet relax "*our social distancing measures*". On 10 May 2020, the Government announced "*You must obey the rules on social distancing*".) Further, existing employers' and occupiers' legal obligations required them to respect the 2m rule in order reasonably to protect employees and occupiers.

18. As to Arch's Defence paragraph 49 and Ecclesiastical/MS Amlin's Defence paragraph 108.2, all or the majority of relevant measures by any public body were by the Government pursuant to its strategy for responding to COVID-19. Thus, all of the examples particularised by Arch were in fact, as the FCA alleged in paragraph 56 of the Particulars of Claim, 'imposed by the same national authority (the Government)', and not 'irrespective of Government or local authority action or advice' (to quote Arch's Defence paragraph 49), save for the designations by the WHO and 'general public fear and loss of economic confidence' (although the latter too is rightly attributed to Government action by Arch). On 3 March 2020 the Government set out an 'action plan', and explained on 16 March 2020 that its "*objective is to delay and flatten the peak of the epidemic by bringing forward the right measures at the right time, so that we minimise suffering and save lives. And everything we do is based scrupulously on the best scientific advice*" referring to substantially similar things it had said on 12 March 2020.

F. <u>Prevalence of COVID-19 in the UK</u>

19. At the Second Case Management Conference for these proceedings, the Court gave the FCA permission to amend its Particulars of Claim in the form annexed to its skeleton argument for that hearing. In pleading in this Reply on the subject of prevalence, the

FCA takes into account the Court's ruling at the CMC as to the scope of issues on prevalence to be determined at the July trial and the content of the FCA's amendments to its Particulars of Claim as served.

20. The Court gave permission to amend the Particulars of Claim on the basis that the issues for determination at the July trial on the subject of prevalence would be as follows:

    20.1. the type of proof (in particular, the type of evidence which could be used, and the way in which that evidence can be used and/or applied) which could be sufficient to discharge the burden of proof (the methodology question); and

    20.2. on the assumption that the data on which the FCA relies represent the best evidence available, whether that is sufficient as a matter of principle to discharge the burden of proof.

21. It is noted that Argenta's Defence paragraph 47, Ecclesiastical/MS Amlin's Defence paragraph 20, Hiscox's Defence paragraph 65 and Zurich's Defence paragraph 30 adopt the pleaded case of the RSA Amended Defence in its response to paragraphs 23 to 28 of the Particulars of Claim and that Ecclesiastical/MS Amlin's Defence paragraph 20 also adopts the pleaded case of the Hiscox Defence in its response to paragraphs 23 to 28 of the Particulars of Claim. Statements made below in reply to the pleaded case in the RSA Amended Defence and the Hiscox Defence apply equally to the Defendants which adopt those respective pleaded cases.

22. As to Arch's Defence paragraph 24.2, the declarations sought in paragraph 28 of the Particulars of Claim are not sought against Arch.

23. As to the FCA's right to rely on expert evidence, and the allegations made in Argenta's Defence paragraph 45, RSA's Amended Defence paragraph 19, Ecclesiastical/MS

Amlin's Defence paragraph 18, Hiscox's Defence paragraph 63, QBE's Defence paragraph 33 and Zurich's Defence paragraph 28, the FCA refers to the above two issues as identified by the Court at the Second CMC.

24. As to the Relevant Policy Area referred to in the Particulars of Claim at paragraph 22, the admissions made in RSA's Amended Defence paragraph 20, Argenta's Defence paragraph 46, Ecclesiastical/MS Amlin's Defence paragraph 19, Hiscox's Defence paragraph 64, QBE's Defence paragraph 34 and Zurich's Defence paragraph 29 are noted.

25. As to the statement in paragraph 23 of the Particulars of Claim, that "*policyholders may be able to prove a case of COVID-19 at a particular location by specific evidence in a particular case*", the admissions in RSA's Amended Defence paragraph 21(a) and QBE's Defence paragraph 35.1 are noted.

26. As to the ability to rely on NHS hospital death data as evidence of a case of COVID-19 at a particular location in a particular case:

    26.1. the admission in QBE's Defence paragraph 35.2 is noted; and

    26.2. RSA's Amended Defence paragraph 21(b) is admitted, save that it is denied that such data may not "*without more, be an accurate or reliable indicator as to the location of any particular death or deaths*". For example, a policyholder can prove the presence of at least one case of COVID-19 within the Relevant Policy Area on a particular date if, on that date, the daily death data for a particular NHS trust show at least one death and (a) as appears to be admitted in RSA's Amended Defence paragraph 21(b), there is only one hospital in that particular NHS trust and that hospital is in the Relevant Policy Area, or (b) if all hospitals in that particular NHS trust are within the Relevant Policy Area.

27. As to the ability to rely on evidence of a hospital or care home in the Relevant Policy Area even without a registered death, QBE's Defence paragraph 35.3 and Hiscox's Defence paragraph 65.1 are admitted, but paragraph 23 of the Particulars of Claim simply alleges that the evidence on which a policyholder may rely to prove a case of COVID-19 at a particular location in a particular case *includes* evidence of a hospital or care home in the Relevant Policy Area. For example, a policyholder should be able to rely on public reports of cases of COVID-19 at a care home (even without registered deaths) and the fact that the relevant care home is located in the Relevant Policy Area.

28. As to the existence and content of the Reported Cases, the qualified admissions made in RSA's Amended Defence paragraph 22(a) and QBE's Defence paragraph 36 are noted. It is further noted that RSA's Amended Defence paragraph 22(a) makes no admission "*as to the relevance of such data*", whether for the purposes of calculating the Undercounting Ratio "*or otherwise*" and QBE's Defence paragraph 36 denies "*the relevancy of such data in these proceedings*". The FCA maintains the position as to Reported Cases taken in its Particulars of Claim, including that the Reported Cases may be relied on by a policyholder for the purposes of calculating an Undercounting Ratio.

29. As to the levels of testing, diagnosis and reporting of cases of COVID-19 in the UK, and the actual presence of COVID-19 in the UK as compared with the number of cases reflected in the Reported Cases, the admissions in RSA's Amended Defence paragraph 23 and QBE's Defence paragraph 37 are noted.

30. As to the Imperial Analysis, the Cambridge Analysis and the Undercounting Ratio referred to at paragraph 26 of the Particulars of Claim (as amended):

    30.1. the admissions made in RSA's Amended Defence paragraph 24(a) and (b) and QBE's Defence paragraph 38 are noted;

30.2. as to RSA's Amended Defence paragraph 24(c):

(a) it is not alleged by the Claimant (and no part of the Particulars of Claim would suggest) that either the Imperial Analysis or the Cambridge Analysis "*sought to create or model an Undercounting Ratio*"; the Particulars of Claim simply indicate that based on estimations, such as those found in the Imperial Analysis or the Cambridge Analysis, a policyholder may calculate the ratio between the estimated actual number of cases and the Reported Cases;

(b) further, it is denied that the term "*Undercounting Ratio*" is used by the Claimant "*as a mathematical formula whereby the actual incidence of COVID-19 in any particular area of England can reliably be estimated from Government reported data or confirmed cases of COVID-19*"; instead, the Undercounting Ratio simply refers to the ratio of estimated cases (derived from expert analysis or reports) to Reported Cases, and then the Undercounting Ratio can be *applied* to determine prevalence in particular areas;

(c) the denial that the models used by the Imperial Analysis or the Cambridge Analysis can "*reliably be used to derive such an Undercounting Ratio*" has been superseded by the amendment to the Particulars of Claim at paragraph 26, which now refers to "*reasonably*" (rather than "*reliably*") estimating the ratio – emphasising that this is a reasonable methodology;

(d) as to the allegations in relation to the Imperial Analysis and the Cambridge Analysis made at RSA's Amended Defence paragraph 24(c)(ii):

(i) as per the amendments to the Particulars of Claim, a policyholder may reasonably rely on the Imperial Analysis or Cambridge Analysis as a type of evidence in determining an Undercounting Ratio, and it is open to the policyholder or an insurer to rely on "*another relevant publicly available analysis from a suitably qualified institution*" to determine an Undercounting Ratio;

(ii) a policyholder may reasonably rely on the Imperial Analysis as a type of evidence insofar as it is a "*publicly available analysis*", now published in the journal Nature, and from "*a suitably qualified institution*", being Imperial College London; similarly, the Cambridge Analysis is publicly available and emanated from "*a suitably qualified institution*", being Cambridge in conjunction with Public Health England (**'PHE"**);

(iii) it is an inherent feature of statistical models that assumptions will be incorporated into the model, and given the COVID-19 virus is novel, it is inevitable that some assumptions may not yet have been verified, and may not be for some time – but this does not prevent reasonable reliance on such models from "*a suitably qualified institution*";

(iv) the Cambridge Analysis was based on a 2009 model that had been addressed in a peer-reviewed publication and was considered suitable by Cambridge itself and PHE as forming the basis for modelling COVID-19 scenarios, and again therefore a policyholder may reasonably rely on it;

(v) given relevant Defendants have elsewhere admitted the utility of death data, the allegation in RSA's Amended Defence paragraph 24(c)(ii)(4) is inconsistent with that admission;

(vi) none of the statements made would prevent reasonable reliance by a policyholder on the Imperial Analysis or the Cambridge Analysis, or the models (potentially subject to the same, similar or other assumptions, etc) of another "*suitably qualified institution*".

30.3. as to Hiscox's Defence paragraph 65.2, the statements made by the FCA above in response to RSA's Amended Defence paragraph 24(c) in relation to modelling assumptions are repeated;

30.4. as to the last sentence of QBE's Defence paragraph 38.2, it is denied that the FCA is not entitled to the declarations sought in paragraph 28.3 and 28.4 of the Particulars of Claim, since they are capable of declaration within the scope of the issues identified by the Court.

31. As to what the content of the Cambridge Analysis shows, as set out at paragraph 27 of the Particulars of Claim, the admissions in RSA's Amended Defence paragraph 25 and QBE's Defence paragraph 38 are noted. As to whether the content is "*accurate or reliable*", the comments above as to the amendments to the Particulars of Claim and "*reasonable*" use by a policyholder are repeated.

32. As to the declaration sought at paragraph 28.1 of the Particulars of Claim, the admission in QBE's Defence paragraph 38.1.3 is noted. The non-admission in RSA's Amended Defence paragraph 26 is unfounded, since the Reported Cases encompass both daily and cumulative reported cases, and a policyholder may rely, as a type of evidence, on

relevant daily totals to show the presence of infectious (i.e., active) cases of COVID-19 in a Relevant Policy Area, or on cumulative totals to show the number of Reported Cases up to and including a particular date. In any event it is denied, if alleged, that the occurrence or manifestation of COVID-19 has to coincide with the interruption or interference; the former may predate the latter and nevertheless trigger an insured peril. Hiscox's Defence paragraph 65.3 is denied: without prejudice to the case in paragraph 38 of the Particulars of Claim (that one case anywhere is an 'occurrence' within Hiscox1-3 which has no vicinity limit), even one case in the Relevant Policy Area will constitute an "*incident*" or "*occurrence*".

33. As to the declaration sought at paragraph 28.2 of the Particulars of Claim, and the statements in RSA's Amended Defence paragraph 26 in relation to the use of cumulative totals, as stated above, a policyholder may rely, as a type of evidence, on relevant daily totals to show the presence of infectious (ie, active) cases of COVID-19 in a Relevant Policy Area, or on cumulative totals to show the number of Reported Cases up to and including a particular date.

34. As to the declaration sought at paragraph 28.3 of the Particulars of Claim, it is noted that RSA's Amended Defence paragraph 27 has denied the entitlement to the declaration, without explanation. The denial has now been superseded, since the amendments to the Particulars of Claim seek a declaration that the number "*can reasonably be estimated* by applying "*an appropriate*" Undercounting Ratio (rather than a declaration that the number is "*at least as great as*" the number derived by applying "*the*" Undercounting Ratio).

35. As to the declarations sought at paragraph 28.4 of the Particulars of Claim, and the allegation in RSA's Amended Defence paragraph 28 that averaging deaths across a local authority area, or Reported Cases across a regional, UTLA or LTLA Zone is "*not a*

reliable guide to the distribution of COVID-19 as it is inherently unlikely that cases of COVID-19 would be evenly distributed":

35.1. the amended Particulars of Claim now plead a methodology whereby averaging (whether of Reported Cases or as uplifted by an appropriate Undercounting Ratio) would be treated as a rebuttable presumption of prevalence of COVID-19;

35.2. the amended Particulars of Claim therefore state, at paragraph 28.4, "*subject, in any given case, to either a policyholder or an insurer being entitled to assert and show that the application of the methodologies set out below would be unreliable in relation to any particular Relevant Policy Area or that* ***some weighting other than the average is appropriate***" (emphasis added), a case of COVID-19 will be treated as having been present based on the methodologies set out. Accordingly, it will be open to either the policyholder or an insurer to show that a non-averaging methodology, such as one involving a different weighting, would be appropriate;

35.3. in relation to an averaging methodology relating to Reported Cases or other relevant data (and as one means to address the matters set out above in this paragraph concerning whether cases would be "evenly distributed"), a policyholder could (a) determine the population size of the Relevant Policy Area and compare this to the population size for the Region, LTLA or UTLA zone for which there are Reported Cases or other relevant data and within which the Relevant Policy Area is located; and (b) attribute such Reported Cases or other relevant data according to the comparison set out at (a).

36. As to the declaration sought at paragraph 28.4(d) of the Particulars of Claim, the admission in QBE's Defence paragraph 38.1.3 is noted. As to RSA's Amended Defence

paragraph 28(b) in relation to NHS hospital death data and cumulative totals in Reported Cases, the pleas above as regards those data are repeated.

37. As to the declaration sought at paragraph 28.4(e) of the Particulars of Claim, and the allegations made at RSA's Amended Defence paragraph 28(c), the FCA's pleas above in relation to hospital data and averaging are repeated.

H. Policy Intention

38. The Wordings are all wordings emanating from the Defendants and/or to be treated as such for construction purposes. This means that the Defendants are each the *proferens* for the purposes of *contra proferentem* construction in cases of ambiguity. RSA Amended Defence paragraphs 5(e) and 31(a) allege that RSA4 was a standard broker form wording drafted by brokers on which RSA was invited to underwrite risks. As is now accepted by RSA in its amendment to delete its original paragraph 34(b), RSA expressly agreed (alternatively is estopped from denying) that, per Interpretation clause ix (on p15), the Wording:

> is accepted by and adopted as the wording of the Insurer, notwithstanding that the policy or part thereof, may in fact, have been put forward in part or full by the Insured and/or its brokers or other representatives.

39. It is admitted that policies on the Arch, Argenta, QBE, RSA and Zurich Wordings were sold through insurance intermediaries, as set out in Agreed Facts Document 9 (Distribution Channels), and as alleged in Arch's Defence paragraph 29, Argenta's Defence paragraph 49(1), QBE's Defence paragraphs 41.2 and 41.5, RSA's Amended Defence paragraph 31(b) and Zurich's Defence paragraphs 32 and 34(3). In circumstances where they have not asserted that their policies were sold only through intermediaries, it is inferred that some Ecclesiastical, Hiscox and MS Amlin policies on their Wordings were also sold directly to policyholders

40. However, the distribution channel is irrelevant. These are all insurer standard form wordings. They were, typically and as the Defendants all must have known, sold not to a sophisticated policyholder, but rather (in most cases, and as follows from their standard form nature) an SME which is the business equivalent of a consumer, i.e. a business with little experience of the insurance market, potentially limited broker advice and discussion (such as in the case of online sales, which essentially involved the completion of online pro formas), and no knowledge of previous insurance case law. In that regard, Argenta's Defence paragraph 49(2) and RSA's Amended Defence paragraph 30(b) are denied. Further, in relation to RSA's Amended Defence paragraph 30(b)(i) and (ii), whilst it is admitted that the parties are taken to have contracted against the background of longstanding, established and authoritative decisions and lines of authority, it is denied that the decision of Mr Justice Hamblen in *Orient Express Hotels v Assicurazioni Generali* [2010] Lloyd's Rep IR 531 is such a decision or line of authority and in any event, it did not relate to non-damage covers/extensions and was a decision on a particular wording. Further, if it is incorrect as a matter of legal principle, as the Claimant contends, it is not relevant background, and as a first instance decision was always susceptible to being overturned. As to paragraph 30(b)(iii), it is denied that matters such as these were reasonably available to the contracting parties and/or would reasonably have been considered as something affecting the interpretation of the Wordings. It is therefore unnecessary for the FCA to plead further to such irrelevant and inadmissible matters.

41. It is admitted that (as the FCA has previously stated) policies of insurance providing BI cover do not generally provide specific cover for losses consequent upon pandemics, as set out in Argenta's Defence paragraph 52 and RSA's Amended Defence paragraph 33(b). The Wordings, however, did provide such cover.

42. In the Defendants' Defences to Particulars of Claim section H they allege that the admitted lack of pandemic exclusions in the relevant cover clauses is irrelevant (Ecclesiastical/MS Amlin's Defence paragraph 25, QBE's Defence paragraphs 42.5 and 65.6, RSA's Amended Defence paragraph 33(c)), that pandemic exclusions in *other* cover clauses in the same Wording but not the cover clauses in issue show that the insurer did not want to cover pandemics in the policy as a whole (Hiscox's Defence paragraph 70.3, Zurich's Defence paragraph 35(5)), and even that especially clear words would be needed to provide cover for pandemics (Argenta's Defence paragraph 52, RSA's Amended Defence paragraph 33(c)).

43. The relevance of pandemic exclusions arises in the following circumstances: the Wordings provide cover that on their face, could be triggered by pandemic or other wide-area disease provided the requirements of the Wording(s) are met. In those circumstances, had loss resulting from pandemics been intended to be excluded, then the reasonable person would anticipate that it would have been excluded by clear words. It would be obvious to the reasonable person that this could be done. For example, RSA's Amended Defence paragraph 94(a) sets out two forms of wording which the Defendants could have included in their policies had they intended the policies not to cover loss caused by a disease, emergency or public authority intervention beyond the specified locality and/or which would have occurred in the absence of disease, emergency or public authority intervention within the specified locality. Further, where a pandemic exclusion is present in the same policy as a relevant Wording but has not been applied to it, in circumstances in which the Wording could on its face be engaged by wide-area disease, then that demonstrates a positive decision not to exclude losses from pandemics. The Defendants contend that the prima facie cover for these losses is excluded not by clear words addressing the issue, but rather by words such as 'due to' and 'caused by' or trends clause wording when read in a particular way. Those phrases

do not, on an objective construction, have the dramatic effect of excluding the contemplated pandemic underlying cause as the Defendants contend.

I. The Disease Trigger

44. It is noted, as acknowledged in Ecclesiastical/MS Amlin's Defence paragraph 28, that they alone of the Defendants have refused to plead to the paragraphs and sections of the Particulars of Claim in Sections I to M in order, wrongly justifying this by the need to refer to the words of the Wordings in their context. Further, they alone of the Defendants have refused to make any reference back to each of the paragraphs 41 to 52 of the Particulars of Claim (whether in the order in the Particulars of Claim or otherwise), although do not seek to justify this. This makes it very difficult for the FCA (and, it presumes the Court) to understand Ecclesiastical/MS Amlin's case. It has also led, inevitably, to a failure by Ecclesiastical/MS Amlin to deal with pleaded points in the Particulars of Claim: see paragraphs 47.3 and 48.1 below.

45. Paragraphs 39(a), (b) and (d) of RSA's Amended Defence are admitted.

46. As to Hiscox's Defence paragraph 75, the basis for the alleged 'implied' requirement that the term 'occurrence' in a coverage clause with no express vicinity limit nevertheless requires "*a small-scale event which must be local and/or specific to the insured, its business, activities or premises*" is not understood but, in any event, the allegation is denied. Alternatively, insofar as there is an implied vicinity limit, paragraphs 41.3 and 43 of the Particulars of Claim are repeated with respect to it.

J. Presence of the Disease within a Certain Distance from the Premises

47. As to the responses to the FCA's plea in paragraph 41 that COVID-19 had 'occurred', been 'sustained' or 'manifested' where a person had contracted it such that it was diagnosable (whether or not it was in fact verified by medical testing or a medical

professional and/or formally confirmed or reported to the PHE and whether or not it was symptomatic):

47.1. The admission in Argenta's Defence paragraph 55(1) is noted.

47.2. The admission in QBE's Defence paragraph 47(3) that COVID-19 may "*in certain circumstances*" have 'occurred' or 'manifested' is noted but not understood. QBE fails to advance a case as to what these terms mean or why they are not always satisfied by the contraction of COVID-19 as alleged in paragraph 41 of the Particulars of Claim. Further, paragraph 47.3 of QBE's Defence is denied. Undetected and/or undiagnosed occurrences/manifestations of COVID-19 were a principal cause of the Government's action (and paragraph 42 of the Particulars of Claim is repeated).

47.3. MS Amlin's position in the Ecclesiastical/MS Amlin Defence paragraph is unknown. It accepts in Defence paragraphs 68.2 and 82 that COVID-19 was 'sustained by' a person where "*the presence of COVID-19*" is proven (including, per Defence paragraph 20, by "*particular evidence in a particular case*") but inexplicably neither admits nor denies the plea in paragraph 41 of the Particulars of Claim that proving a diagnosable case of contraction of COVID-19 suffices. MS Amlin has not set out the nature of its case on this point and so strictly should be taken to have admitted it (CPR 16.5(3) and (5)).

47.4. Hiscox's position in Hiscox's Defence paragraph 77.1 that COVID-19 did not 'occur' until medically verified is denied. There is nothing in the term 'occurrence' to justify such an unrealistic approach. Paragraph 41 of the Particulars of Claim alleges that contraction of COVID-19 amounts to occurrence of COVID-19, and Hiscox's claim in the last sentence of paragraph

77.1 of its Defence that this plea amounts to "*another example of the FCA proposing unorthodox methods of proof*" is not understood.

47.5. RSA's position in RSA Amended Defence paragraph 40(b) that COVID-19 had only occurred or 'manifested itself' when actually diagnosed is denied. Occurrence or manifestation of COVID-19 can be proven by other evidence than medical testing, including but not limited to statistical or similar evidence of incidence, and section F of the Particulars of Claim is repeated. There is nothing in the terms 'occurring' or 'manifested itself' to justify the unrealistic approach adopted by RSA.

48. The positions in Hiscox's Defence paragraphs 80-1; MS Amlin's Defence paragraphs 51, 78 and 88-9; RSA's Amended Defence paragraphs 45(b); and Zurich's Defence paragraph 43; are that although there was a general public nationwide emergency in the UK, there was not as the FCA alleges an 'incident' (Hiscox1-2 & 4 and MSAmlin2), 'danger' (MSAmlin1), 'threat or risk' (MSAmlin3), 'emergency likely to endanger life' (RSA2.1-2), 'health reasons or concerns' (RSA4) and 'danger' (Zurich1-2) everywhere in the UK and so (in so far as necessary) in the vicinity or within 1 mile of everywhere in the UK, but

48.1. without (in the case of MSAmlin1 & 3, RSA2.1-2, RSA4 and Zurich1-2) pleading to the FCA's alternative case in paragraph 43 of the Particulars of Claim that proof of contraction of a case of COVID-19 in the vicinity/within 1 mile is sufficient; and

48.2. without (in all cases) advancing to the Court any positive case as to what would amount to such an incident/danger/emergency etc on the facts of this case and how it can be proven.

49. In RSA's Amended Defence paragraph 40(c) it alleges that fewer than 50% of those with symptoms being tested under what is now Pillar 1 of the UK Government's testing programme returned a positive test result. This is not admitted, not being a matter as to which any evidence has been agreed (or even advanced) through the Agreed Facts process or otherwise. It is also vague, and unclear what its significance is intended to be—the reliability of the tests is not a matter which this Court can assess, having no evidence of the same and no expert evidence having been sought by RSA. In any event, the FCA does not allege that the presentation of any COVID-19 symptoms is alone always sufficient to establish that a person did in fact have COVID-19. Paragraph 41 of the Particulars of Claim alleges that COVID-19 occurred or was manifested whenever a person had contracted COVID-19 whether or not they were symptomatic, which means that (i) symptoms were not necessary to prove contraction of the disease, (ii) the key thing to be proven is contraction. In contrast, RSA's Amended Defence paragraph 40 denies that it can be proven that a person had COVID-19 unless there was an actual diagnosis of COVID-19, although it provides no basis for this strange reading of what it means for an illness or disease to 'occur' or 'manifest'.

50. It is admitted that Government's advice and restrictions were given and imposed pursuant to a single strategy in relation to COVID-19's presence and spread in every part of the UK, as RSA's Amended Defence paragraph 44 avers. It is admitted that prevention of the spread of COVID-19 and preventing the capacity of the NHS being overwhelmed were some of the objectives of this strategy, but not all. The objectives included, for example and in particular, minimising the number of people in the UK who died, in all areas of the UK.

51. Further, RSA's Amended Defence paragraph 45(c) alleges that the closure for health reasons or concerns must be "*attributable to an event in the 'Vicinity' of the Premises*". These last words are not part of the Wording and have no basis there or elsewhere. Similarly,

in so far as RSA's Defence paragraph 46(a) suggests that the relevant health reasons or concerns must relate to something at the Premises or in the "Vicinity" thereof, that is also unwarranted and denied.

52. As to the second sentence of Argenta's Defence paragraph 56, it is not alleged that the advice given and/or restrictions imposed by the UK Government (or any of the devolved administrations) were caused by any *particular* local occurrence of COVID-19, but they were caused by the outbreak of COVID-19 which was no more than an aggregate of local occurrences of COVID-19 throughout the UK. Paragraphs 42-43, 53.1, 56.8 and 68 of the Particulars of Claim are repeated. While the FCA agrees with Argenta that 'emergency' clauses do respond to nationwide pandemics, it is denied as alleged in paragraph 57 of Argenta's Defence that the absence of cover defined by reference to an 'emergency' confirms Argenta's proposed construction of its Lead Policy or any other part of its case.

L. Interruption or Interference

53. As to RSA's Amended Defence paragraph 49(a), the FCA relies on the totality of Government measures summarised in paragraph 18 of the Particulars of Claim but also including those in the Agreed Facts Document 1 (Chronology).

M. Exclusions

Argenta

54. Paragraph 62 of Argenta's Defence is admitted. As to the exclusion "*for any loss arising from those PREMISES that are not directly affected by the occurrence*" quoted at paragraph 10 of that Defence, it is admitted that this requires the occurrence of disease at the premises or within 25 miles to have directly affected the PREMISES. This excludes losses (save to the relevant directly impacted property) where the entire insured's

business across multiple insured guest houses/holiday cottages (all of which are 'Premises') is interrupted as a result of e.g. public authority concerns requiring closure and cleansing of all the guest houses/cottages arising out of food poisoning, disease or vermin at only one of them (for example, due to concerns as to the business operator's hygiene or sanitation levels, or that the disease might have spread through staff to the other guest houses/cottages). The losses sought in the present Claim were all of premises directly affected by the relevant peril. It is denied (as appears to be alleged in paragraphs 19, 24, 51(3), 63(8) of the Defence) that this exclusion indicates or means that losses concurrently attributable to the disease occurring outside the premises/outside 25 miles are irrecoverable.

Ecclesiastical

55. Paragraph 34 of Ecclesiastical/MS Amlin's Defence is denied for the reasons given in paragraph 51 of the POC, save that the powers set out in paragraph 34.3(a) are admitted (although it is denied that they 'inform and reinforce' the meaning alleged by these Defendants).

RSA

56. Paragraphs 32(b), 33(d), 54, 72 and 79 of RSA's Amended Defence (in relation to RSA2.2) are denied. The relevant public authority action clause includes an exclusion "*e) As a result of infectious or contagious disease any amount in excess of £10,000*". The qualification in the second half of this wording (omitted in the quotation in paragraphs 54 and 72) makes clear that this operates as a £10,000 limit rather than an exclusion of all infectious or contagious disease. The exclusion makes grammatical and commercial sense; and is an exclusion that falls to be construed contra proferentem against RSA if, contrary to the FCA's case, it were unclear; and the alleged 'manifest formatting error' and the attempt to rectify by construction are denied.

57. Paragraphs 32(a), 33(d), 55 and 84 of RSA's Amended Defence (in relation to RSA3) are denied for the reasons set out in POC paragraph 52. RSA's construction requires some words of the exclusion in clause L(a) ("*and disease*") to be ignored when the exclusion is being applied to the disease clause without any textual or other basis for identifying that reasonable people would know this was intended. Further, the decision to delimit by definition the Perils covered by clause L(b) but not those in clause L(a)(bis) (which has a different function) would be reasonably understood to be deliberate. The better construction is that the exclusion does not apply where the disease peril is engaged, and that Peril in L(a)(bis) (whether or not also in L(b)) was intended to include disease.

N. Causation

58. The FCA's case on causation is set out in Section N of its Particulars of Claim. The FCA here pleads only these few further responsive points:

58.1. Just because a matter is caused by or results from one thing does not mean (i) it is not also caused by and results from another and/or (ii) that the two things are not inextricably linked so as to amount to a single cause or single set of concurrent interdependent causes at least for the purposes of application of a 'but for' test. This is especially true where one of the things (COVID-19 in the UK) is the underlying cause of the other (such as the presence of the disease within the Relevant Policy Area) or where one of the things (such as the presence of the disease within the Relevant Policy Area) is an indivisible part of the other (the COVID-19 outbreak in the UK).

58.2. Where an insuring provision includes more than one qualifying requirement into the trigger for cover so that each requirement has to be satisfied for cover to respond, the question of what has to be excluded under a counterfactual

involves ascertaining the presumed contractual intention as a matter of construction and applying commercial and common sense.

58.3. Where a policy contemplates (expressly or impliedly) an underlying cause and that underlying cause must have been contemplated as being of a nature which would or might have a range of effects capable of causing business interruption losses, losses concurrently caused by both the insured effect and the contemplated underlying cause ought in principle to be recoverable, otherwise the cover expressly provided is largely illusory.

58.4. Thus:

(a) the causal language relating to public authority action following disease or emergencies cannot objectively have been intended to exclude losses that were concurrently caused by both the qualifying public authority action, and by non-qualifying public authority action or other effects of the disease or emergency contemplated by the insuring clause;

(b) stipulating that a disease must occur within a vicinity is not effective to indicate to the reasonable reader that any non-local part of the same disease outbreak is a separate competing cause that could prevent cover, or is to be retained in a 'but for' counterfactual so as to potentially eliminate or substantially reduce cover, or dramatically increase cover to include windfall profits.

The proper construction of such terms is the opposite.

58.5. This is supported by the unreality of the counterfactuals contended for by the Defendants, and the impracticality and disproportionality (such as to applicable limits) of seeking as a matter of fact to demonstrate those counterfactuals.

58.6. That is not to say that insurers could not have drafted wording to have the effect they contend for. See further paragraph 43 above, for example.

59. The allegation in paragraph 13 of QBE's Defence that the Government action in response to COVID-19 would have been the same, and would have had the same effect on an insured's business, whether the disease had occurred or manifested within any relevant area around the insured location or not, and similar allegations in QBE's Defence including at paragraphs 51.3, 73 and 75.4 and in RSA's Amended Defence at paragraph 62, provide a wholly unrealistic counterfactual. The Government action was caused by the widespread nature of the outbreak. It is admitted that if the outbreak had been clearly confined to a particular part of the country, any action would probably have been confined to that part of the country. It is also admitted that if there was no incidence of a disease in a particular part of the country at the time of any Government action, that Government action could not be causally attributed to any subsequent incidence of the disease in that part of the country. However, the counterfactual case advanced by QBE and RSA as above would mean that no insured could recover against any insurers because insurers could refuse indemnity to an insured in locality A by relying on the existence of an outbreak in other localities, even though exactly the same argument was being used against insured in those other localities by reference to locality A and other localities. The result would be that all the concurrent causes of the Government action (namely the outbreaks of the disease in numerous localities across the country) would fail to qualify as a 'but for' cause and there would be no such cause of the Government action.

60. Further, as to RSA's Amended Defence paragraph 56, 'assumed losses' is intended to denote losses that satisfy the causation tests as formulated by the FCA in the Particulars of Claim, in particular losses that would not have been suffered had the COVID-19 pandemic and associated public authority actions not occurred (see declaration (16)).

61. In relation to the application of any 'but for' test, the FCA's position is as set out in the Particulars of Claim. Further, and if and to the extent that a 'but for' test is applicable in relation to cover, or quantification, or under a trends clause, *and* contrary to the FCA's case the correct counterfactual is what would have occurred but for the insured peril when drawn narrowly as alleged by the Defendants:

61.1. The burden of showing that any other additional cause (other than the insured peril) caused any or all of the interruption, interference, loss, or anything else, such that the loss etc would have been suffered or occurred in any event, falls on the Defendants.

61.2. For the purposes of cover (rather than quantum), the Defendants would have to show that the relevant interruption, interference, prevention etc would have occurred in exactly the same way and to the same extent but for the insured peril. Otherwise, it could not be said that the peril was not a 'but for' cause of the interruption, interference, prevention etc.

Quantification machinery and trends clauses

62. Arch:

62.1. Paragraph 13 of Arch's Defence is admitted. As to paragraph 14, the quotation from OGI Retailers and Offices & Surgeries (Powerplace) is admitted. That trends clause wording only applies to the "*Item on Book Debts*" heading, not the "*Item on Gross Income and Increased Expenses*" (Powerplace) or "*Item on Income*" (Retailers) heading. However, cover for Gross Income (Powerplace) or Income (Retailers) is for "*the amount by which the Income falls short of the Income which would have been received during the Indemnity Period due to the Damage*". This is not a trends clause, although it may have similar effect to part of the typical trends clause

wording. The effect of those differences will be addressed in submissions to the extent relevant.

62.2. It is admitted that, as set out in paragraph 58 of Arch's Defence and contrary to paragraph 75.4 of the Particulars of Claim, the trends clauses in Arch1 (Retailers and Powerplace) are not 'upwards only', although as set out in the previous sub-paragraph they do not apply to Gross Income/Income, with the wording set out in the previous sub-paragraph applying instead. The third sentence of paragraph 58 is admitted as regards indemnifying for losses caused (as properly construed) by the insured event (as properly construed) but otherwise is denied.

63. Paragraph 135.1 of Ecclesiastical/MS Amlin's Defence, that 'damage' in the trends clauses must be read as 'peril insured against' in relation to Ecclesiastical 1.2 only (but not Ecclesiastical 1.1), is broadly accepted, but only in the sense of a broad insured event not a narrow sense of 'peril'.

64. QBE:

64.1. QBE's Defence paragraph 70.7.1 is denied. The term 'sub-limits', pursuant to its definition, refers to the sub-limits included in some of the clauses in the relevant extensions.

64.2. Paragraph 70.7.2 is denied. The appearance in the 'limitations and exclusions' section does not dictate to which cover clauses this machinery applies, whereas its reference to 'damage' (which does not include the non-damage extensions) does.

64.3. Paragraph 70.7.3 is also denied. Disapplying the quantification machinery to the QBE extensions is not "*inconsistent within each of the QBE Wordings*"—it is

consistent with the express and defined terms ('damage') of those Wordings—nor is it "*contrary to commercial common sense*".

64.4. The first sentence of paragraph 71.2 is admitted. The second sentence is denied. QBE omitted to include a definition of the bold term 'trends adjusted' and there is no basis for importing the definition from other QBE1 wordings (which form no part of the factual matrix for this Wording). Paragraph 71.3 is also denied. The term must have a fixed meaning for all insureds (not need to be interpreted in each individual case as QBE alleges) and QBE's suggestion that it might in some other case have a rectification case is highly doubtful but irrelevant to this claim, given that QBE is not advancing a rectification case in general applicable to all insureds.

64.5. For the avoidance of doubt, paragraph 49 of the Particulars of Claim is intended to apply mutatis mutandis to all Wordings that cover Category 6 businesses.

65. RSA's Amended Defence paragraph 71(b)(i) is admitted and paragraph 71(b)(ii) is denied. In particular, the express words 'solely as a result of Damage to Buildings' and the basis of settlement clause cannot be made to apply to the relevant non-damage extension without major unjustified rewriting of its own Wording that RSA has not begun to set out in its Defence. Similarly, paragraphs 63, 77 and 85 are denied, although the process of 'construction' (rewriting) alleged is so far unexplained.

O. <u>Cover</u>

66. The Defence pleas in relation to Cover are denied for the reasons set out in the Particulars of Claim.

P. Declarations

67. Save where the Defendants admit the Declarations sought in the Particulars of Claim, the Defences to the Declarations are denied.

DEFENCE TO COUNTERCLAIMS

68. The Particulars of Claim and paragraphs 1 to 67 of the Reply, above, are repeated. The Declarations sought by those Defendants who advance a Counterclaim (Arch, Argenta, QBE) are denied for the reasons set out in the Particulars of Claim and above in this Reply, save that the first sentence of declaration (1) in Arch's Defence is admitted.

COLIN EDELMAN QC, Devereux Chambers

LEIGH-ANN MULCAHY QC, Fountain Court Chambers

RICHARD HARRISON, Devereux Chambers

ADAM KRAMER, 3 Verulam Buildings

DEBORAH HOROWITZ, Fountain Court Chambers

MAX EVANS, Fountain Court Chambers

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

I am duly authorised by the Claimant to sign this Reply and Defence to Counterclaims.

Signed: _____

Full name: Greig Anderson

Position or office held: Partner, Herbert Smith Freehills LLP

DATED this 3rd day of July 2020