IN THE HIGH COURT OF JUSTICE **Claim No: FL-2020-000018**

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

COMMERCIAL COURT (QBD)

FINANCIAL LIST

FINANCIAL MARKETS TEST 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

Defendant

(1) MURRAY & EMILY PULMAN T/A THE POSH PARTRIDGE

(2) BLUEBERRY ENTERPRISES LIMITED

(3) OTHERS INSURED BY QBE UK LIMITED OR AVIVA INSURANCE LIMITED

The 'HIGA' Interveners

(1) COMFOMATIC LIMITED

(2) 368 OTHERS INSURED BY HISCOX INSURANCE COMPANY LIMITED

The 'Hiscox' Interveners

SKELETON ARGUMENT
OF THE EIGHTH DEFENDANT

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A. INTRODUCTION & EXECUTIVE SUMMARY

1. This Skeleton Argument is served on behalf of the Eighth Defendant ("**Zurich**") for the trial of the test case proceedings brought by the Financial Conduct Authority ("**FCA**") to determine certain points of construction and principle concerning non-damage extensions to business interruption policies written by the Defendant insurers (the "**Insurers**").

2. Except as stated below, this Skeleton adopts the abbreviations and definitions used in the Amended Particulars of Claim ("**AmPoC**") and/or the FCA's Skeleton Argument (the "**FCA Skeleton**").

3. The FCA alleges that two forms of wording written by Zurich (the "**Zurich Wordings**") respond to the COVID-19 pandemic and the Governmental response to that pandemic, namely the action of competent authorities extensions (the "**AOCA Extension(s)**") in (i) Combined All Risks Policy ZCYP36 ("**Zurich 1**") and (ii) certain Commercial Combined policies ("**Zurich 2**"; together with Zurich 1, the "**Zurich Policies**") which provide cover for loss resulting from interruption of or interference with the insured's business in consequence of action by a competent civil authority following a danger or disturbance in the vicinity of the premises whereby access to such premises is prevented.

4. Zurich has considerable sympathy for policyholders whose businesses have been affected by the COVD-19 pandemic. It has not taken a position that none of its policies (including those outside of this test case) are capable of responding to the pandemic. It has instead considered each claim made on its individual facts against the relevant individual policy wording. However, it is clear that the AOCA Extensions are not triggered by the pandemic or the UK Government's response to the pandemic.

Executive Summary

5. The AOCA Extension is directed at disturbances or dangerous incidents local to the insured's premises, in response to which action is taken at a local level, and by which

access to the insured's premises is prevented. The paradigm case for application of the clause is a bomb scare, a violent attack or brawl, a structure at risk of collapse (such as a building or crane), a serious road traffic accident, or an approaching fire; in response, the relevant authority takes action by preventing access to the premises; and no one (except the emergency services or other relevant authority personnel dealing with the danger or disturbance) is allowed to enter the premises or their immediate vicinity, either because of the danger in doing so, or because (for example) police investigations are ongoing.

6. The COVID-19 pandemic,[1] and the nationwide Government Measures[2] responding to it, are very far from the kind of local situation contemplated by the AOCA Extension. As the FCA itself asserts, the Government Measures were introduced on a nationwide basis by the UK national Government to meet a national crisis, namely the emergence of COVID-19 as an infectious disease in the country. On any natural construction of the AOCA Extension, such national measures by the UK national Government responding to a nationwide pandemic of an infectious disease are not within the scope of the clause.

7. Cover under the Zurich Policies for notifiable diseases is provided by the bespoke Notifiable Diseases Extensions in each of the Zurich Policies. However, the FCA does not rely on the Notifiable Diseases Extension in either Zurich 1 or Zurich 2 because neither such extension provides cover in the present case. It would be surprising if, on its true construction, the AOCA Extension enabled policyholders to circumvent the restrictions on cover imposed by the Notifiable Diseases Extensions in relation to (i) the closed list of Notifiable Diseases (in Zurich 1), (ii) the geographical location of the occurrence of the disease in respect which cover is provided (both Zurich Policies), and (iii) the express exclusion in respect of pandemics (in Zurich 2).[3] The parties cannot have intended policyholders to obtain via the back door of the AOCA Extension cover

[1] Meaning the pandemic both nationally and internationally.
[2] Defined at paragraph 26 below.
[3] Zurich 1 at {**B/21/52} {L/21/30}**; Zurich 2 at {**B/22/35} {L/22/16}**.

which they expressly agreed was not available by the front door of the Notifiable Diseases Extensions.

8. By attempting to squeeze a national Government response to a nationwide infectious disease pandemic into the narrow parameters of the AOCA Extension (notwithstanding the existence, and clear effect, of the Notifiable Diseases Extensions), the FCA is trying to hammer a square peg into a round hole. This does not work.

9. First and foremost, the FCA's argument fails to give any meaningful effect to the requirement in the AOCA Extension that the "*action*" by the relevant "*authority*" which triggers cover must be taken "***following***" a "*danger or disturbance in the vicinity of the Premises*".

   (1) The FCA accepts (as it must) that the word "*following*" "*requires a causal connection*".[4] In context, "*following*" means '***in response to'***. This construction recognises that the actions in question are the result of human agency and a deliberate decision to act in response to the danger or disturbance in question (as opposed to being an inanimate consequence or result of an event in the natural world).

   (2) Zurich submits that the term "*following*" connotes a proximate causal connection in the same manner as "*resulting from*". However, whatever the precise strength of the causal connection required, there was no meaningful causal connection of any kind between the Government Measures and any "*danger or disturbance*" that might be said to have occurred "*in the vicinity of the Premises*". This is fatal to the FCA's case against Zurich.

   (3) The FCA does not allege, and could not allege, that the Government Measures "*followed*" any particular outbreak of disease in any specific locality that might be said to have been in the vicinity of the insured's premises. That is not what happened. Rather, the UK national Government (and not any public body acting

[4] See the FCA Skeleton Argument ("**FCA Skeleton**") [385] {**I/1/143}**; and Hiscox Interveners' Skeleton Argument ("**HI Skeleton**") [21] {**I/3/8}**.

at local level) responded - on a nationwide basis - to a national crisis. That national response, however, did not 'follow', i.e. respond to, any specific presence or outbreak of COVID-19 in the vicinity of an insured's premises. The UK Government would have acted in precisely the same way, and implemented the same measures, irrespective of any such COVID-19 as might have existed in the vicinity of an insured's premises.

(4) The FCA attempts to rebut this straightforward construction of the AOCA Extension by arguing that there was "*a danger*" in the vicinity of an insured's premises, within the meaning of the clause, because COVID-19 was "*everywhere*".[5] However, this does not rebut Zurich's construction of the clause. Even if it could be said that there was COVID-19, and hence "*a danger*", in the vicinity of the premises by reason of the nationwide pandemic, the Government Measures did not "*follow*" any such local presence of COVID-19. The Government Measures followed, and were in response to, the nationwide pandemic, and not anything specifically occurring in the vicinity of the premises. This is the short (and complete) answer to the FCA's case against Zurich.

10. The FCA's case against Zurich also fails to give proper meaning and effect to other elements of the AOCA Extension. The words used in the AOCA Extension are deliberately drawn in narrow terms. Specifically:

(1) The clause refers only to "*action*" by a relevant authority, and not 'action or advice' (as in other policies in the present case) or 'order or advice' (as in the Notifiable Diseases Extensions);

(2) The clause refers to action by the "*Police or other competent Local, Civil or Military Authority*" (or, in the case of Zurich 2, "*civil authority*"), and not action by "*government*", "*government authority*" or "*governmental authority*" as elsewhere in each of the Zurich Policies;

[5] FCA Skeleton [692.2]-[692.3] {**I/1/231}**.

(3) The clause refers only to 'prevention' of access to premises, and not 'prevention or hindrance' of 'access to or use of' premises (by contrast to other extensions in each of the Zurich Policies and/or other policies in issue in the present proceedings);

(4) The clause requires "*a danger or disturbance in the vicinity of the premises*", which clearly connotes a local incident (rather than a continuing state of affairs) specific to the locality of the insured's premises (by contrast to an infectious disease pandemic occurring throughout the country).

11. Properly construed, each of the phrases used in the AOCA Extension has a narrow meaning consistent with the local focus of the clause. In particular:

(1) The term "*action*" does not include "*advice*". Even if it does, none of the Government advice on which the FCA relies prevented access to premises. The advice could be disregarded if individuals chose to do so. It was also not directed at preventing access to premises; it was directed at limiting contact with others.

(2) The term "*Civil Authority*" does not extend to central government, i.e. the executive of the UK national Government. Given the local focus of the AOCA Extension, there was no need to encompass the executive of the national Government within the scope of the clause. The civil authorities contemplated by the clause are fire, rescue and other public authorities operating at a local level.

(3) Prevention of access requires the approach and/or entry to the premises to be physically obstructed or otherwise impossible. Such access must be prevented altogether. It is not enough that access is reduced, impaired or hindered. The FCA adopts an overly expansive notion of 'prevention' of access which fails to take account of the deliberate, and narrow, choice of words in the AOCA Extension.

(4) Properly construed, none of the Government Measures prevented access to premises within the meaning of the AOCA Extension. In particular:

(a) Before the 21 March Regulations came into force, there was nothing which prevented access to any premises.

(b) The 21 March and 26 March Regulations (together, the "**Regulations**") did not on their face prevent access to premises and did not have the effect of preventing such access. Their aim was not to prevent access to particular premises; it was to reduce the degree to which people gathered and mixed. They sought to strike a balance between limiting the number of people mixing, and providing necessary (or desirable) services. For that purpose, certain people were permitted (expressly or impliedly) to access premises across all the Categories of business identified by the FCA. None of the Regulations had the effect of physically obstructing access to premises or otherwise making such access impossible.

(c) The FCA's reliance on regulation 6 of the 26 March Regulations restricting movement of people is misplaced. This regulation did not prevent access to any premises. It did not seek to prevent access to any particular premises; and it permitted people to leave the place where they were living for specific purposes, including purposes which would involve accessing the premises of businesses that were the subject of the 26 March Regulations.

(5) Although the presence of COVID-19 is in principle capable of amounting to "*danger*", if that term is viewed in isolation, the COVID-19 pandemic is not "*a danger*" within the meaning or contemplation of the AOCA Extension. As used in the AOCA Extension, the term "*a danger*" connotes a transient incident posing a risk of danger (such as a bomb threat or fire) rather than an ongoing public health issue, especially one arising from an outbreak of infectious disease (which is a risk covered, if at all, by the Notifiable Diseases Extension and not the AOCA Extension).

(6) The requirement for the danger or disturbance to be "*in the vicinity*" of the premises underlines the localised nature of the danger or disturbance contemplated by the clause, rather than a national or international outbreak of an infectious disease. The phrase "*in the vicinity of*" the premises clearly requires "*a danger or disturbance*" within the meaning of the clause to be in the immediate locality of the premises.

12. If (contrary to Zurich's submissions) the Court finds that the AOCA Extension responds to some at least of the Government Measures imposed in response to the COVID-19 pandemic, Zurich's position on causation of loss and application of the trends clauses in the Zurich Policies (the "**Trends Clauses**") may be summarised as follows:

    (1) On any common-sense view, most (if not all) of any business interruption loss suffered by Zurich policyholders was not caused by any such civil authority "*action*" as might be found by the Court to have prevented access to an insured's premises, but rather by other and wider circumstances arising out of the COVID-19 pandemic (the "**Wider Circumstances**"),[6] including (i) the nationwide COVID-19 pandemic, (ii) the response of the public at large to COVID-19, (iii) the adverse impact of the above matters on economic activity, including deterrence of people who would have otherwise visited the UK from overseas, and (iv) Government Measures responding to the COVID-19 pandemic other than those the Court might find prevented access to premises (including the stay-at-home guidance and advice issued by the UK Government and regulation 6 of the 26 March Regulations).

    (2) Each of the above matters was and is an independent cause of policyholders' losses falling outside the scope of the cover provided by the AOCA Extension. Loss attributable to such matters is not therefore recoverable by way of an indemnity under the Zurich Policies.

    (3) Contrary to the FCA's case, policyholders' losses have not been caused by concurrent *inter*dependent causes and they are not indivisible. Policyholders' losses have been caused by concurrent and/or successive *independent* causes and are divisible.

    (4) Viewed through the perspective of the Trends Clauses, the amount of an insured's indemnity must be adjusted by reason of the Wider Circumstances, so that "*the*

[6] Described more particularly at paragraph 165 below.

figures thus adjusted shall represent as nearly as may be reasonably practicable the results which but for [the civil authority action preventing access to the insured's premises] would have been obtained during the relevant period".[7] The same result would be achieved by application of ordinary principles of causation, compensatory damages and indemnity insurance.

(5) The FCA's argument that the 'but for' test of causation should be disapplied in the present case is unsustainable. It is contrary to fundamental principles of causation, compensatory damages and indemnity insurance and ignores the Trends Clauses, which enshrine, and require application of, the 'but for' test to assessment of an insured's indemnity under the Zurich Policies.

(6) This is not a case of multiple triggers of cover. In each of the Zurich Wordings, there is a single trigger of cover, albeit comprised of multiple essential elements. In order to apply the 'but for' test, the Court must reverse or subtract the single peril (in the case of the Zurich Wordings, 'action by a civil authority', which, to qualify as an action within the meaning of the AOCA Extension, must be an action 'following a danger or disturbance in the vicinity whereby access to the premises was prevented').

(7) This requires the Court to reverse the "*action*" which the Court finds has prevented access, but everything else which actually happened remains (including the presence of COVID-19 and the Regulations which restricted movement of people rather than access to premises). Alternatively, the Court is required also to reverse the "*danger … in the vicinity of the premises*" which led to the "*action*", i.e. the presence or danger of COVID-19 in the vicinity of the premises. On no view does the Court reverse the entirety of the COVID-19 pandemic, on a nationwide (or presumably, worldwide) basis, as the FCA contends. The occurrence of COVID-19 outside the vicinity of the premises was not (on any view) part of the peril insured against under the Zurich Policies.

[7] **{B/22/30} {L/22/11}**

B. AGREED FACTS

13. The essential facts from Zurich's perspective (taken from the Agreed Facts Documents)[8] are as follows.

14. On 31 December 2019, the World Health Organisation (the "**WHO**") was informed of cases of pneumonia of unknown cause. On 31 January 2020, the UK confirmed its first COVID-19 cases and on 2 March 2020, the first COVID-19 confirmed death in the UK occurred.[9]

15. By no later than the end of 11 March 2020, and prior to the UK Government issuing any material guidance or imposing restrictions of national application as a result of COVID-19,[10] there was already more than a *de minimis* economic impact from COVID-19 on many of the businesses in each Category of business identified in paragraph 19/Annex 2 of the AmPoC.[11] Whilst not all businesses in all Categories would necessarily have suffered a negative economic impact by 11 March 2020, the parties agree that there would have been some impact on each Category as a whole. The economic impact would have continued at least as long as COVID-19 remained a significant threat in the UK (and potentially overseas), and may have increased, even if the UK Government had not issued such guidance or restrictions.[12]

16. On 11 March 2020, the WHO declared COVID-19 to be a pandemic.[13] Further guidance and advice was thereafter issued by the UK Government, including as follows:[14]

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[8] The Agreed Facts are set out in the 10 separate Agreed Facts Documents (each an "**AFD**") at **{C/1-16}**.
[9] AFD 1 **{C/1/3} {C/1/6}**.
[10] The guidance that had been issued before 11 March 2020 was not material. AFD 8 at [1] **{C/14/2}** mentions, matters such as the quarantining of those believed to have the disease and issuing the COVID-19 Action Plan and explanatory guidance entitled "*What is Social Distancing?*". These matters were not material guidance, nor did they amount to the imposition of restrictions of national application.
[11] **{A/2/13-15}** and **{A/2/158}**.
[12] AFD 8 **{C/14}**.
[13] AFD 1 **{C/1/10}**.
[14] See section 2 of AFD 4 **{C/7/4-11}** and AFD 1 **{C/1/10}**.

(1) On 12 March 2020, the UK Government advised those with symptoms to self-isolate for 7 days;[15]

(2) On 16 March 2020, the Prime Minister advised that:[16]

(a) whole households should self-isolate for 14 days if any one member has symptoms;

(b) "*now is the time for everyone to stop non-essential contact with others and to stop all unnecessary travel*"; in particular, everyone should start working from home where possible, and avoid pubs, clubs, theatres and other social venues;

(3) On 22 March 2020, the Prime Minister advised that the public should stay 2 metres apart and follow social distancing advice;[17]

(4) On 23 March 2020, the Prime Minister advised that the British people "*must stay at home*" and that they could only leave their homes for "*very limited purposes*";[18]

(5) On 10 May 2020, the UK Government began to promote a new "*stay alert*" message rather than "*stay at home*".[19]

17. Concurrently with this advice and guidance, the UK Government announced "*a full package of support, including the Coronavirus Business Interruption Loan Scheme and business rates holiday*". This was provided because (as the Government expressly acknowledged) "*most businesses have not purchased insurance that covers pandemic related losses*".[20]

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[15] AFD 1 **{C/1/10}**.
[16] AFD 1 **{C/1/12-14}**.
[17] AFD 1 **{C/1/25}**.
[18] AFD 1 **{C/1/26}**.
[19] AFD 1 **{C/1/38}**.
[20] AFD 1 **{C/1/19}**.

18. On 18 March 2020, the Prime Minister announced the closure of schools from 20 March 2020, except that schools were required to make provision for vulnerable children and children of key workers.[21]

19. On 21 March 2020, the 21 March Regulations came into force, which required:

    (1) Pursuant to regulation 2(1), that a person responsible for carrying on a business listed in Part 1 of the Schedule (restaurants, cafes, bars and public houses, referred to by the FCA at paragraph 19 of the AmPoC as "Category 1") must "*close any premises, or part of the premises, in which food or drink are sold for consumption on those premises, and … cease selling food or drink for consumption on its premises"*, or, *"if the business sells food or drink for consumption off the premises, cease selling food or drink for consumption on its premises…*". These businesses were therefore free to sell food and drink for consumption off the premises (in which case they were not required to "*close*" their premises and could still use the premises for the purposes of preparing and selling food and drink for consumption off the premises).

    (2) Pursuant to regulation 2(4), that a person responsible for carrying on a business listed in Part 2 of the Schedule (12 business types including theatres, cinemas, nightclubs and gyms, referred to by the FCA at paragraph 19 of the AmPoC as "Category 2") must "*cease to carry on that business…*".

20. The 21 March Regulations were revoked on 26 March 2020 by the 26 March Regulations,[22] which imposed different restrictions on various different types of businesses. In particular:

    (1) Pursuant to regulation 4(1), a person responsible for carrying on a business listed in Part 1 of Schedule 2 (restaurants, cafes, bars and public houses, referred to by the FCA at paragraph 19 of the AmPoC as "Category 1") was required to "*close*

[21] AFD 1 **{C/1/20}**.

[22] The 21 March Regulations **{J/15}** and the 26 March Regulations **{J/16}** are together referred to as the "**Regulations**".

any premises, or part of the premises, in which food or drink are sold for consumption on those premises, and … cease selling food or drink for consumption on its premises", or, "*if the business sells food or drink for consumption off the premises, cease selling food or drink for consumption on its premises…*". As under the 21 March Regulations, these business were free to sell food and drink for consumption off the premises, for which purpose they could still use (and hence were not required to "close") the premises.

(2) Pursuant to regulation 4(4), that a person responsible for carrying on a business listed in Part 2 of Schedule 2 (containing an expanded list of 19 business types, including not only cinemas, theatres, nightclubs and gyms, but also, for example, hair salons, referred to by the FCA at paragraph 19 of the AmPoC as "Category 2") were required to "*cease … carry[ing] on that business or … provid[ing] that service …*". However, pursuant to regulation 4(5), regulation 4(4) did not prevent the use of:

(a) "*premises used for the businesses or services for [certain businesses and services listed, e.g. theatres] … to broadcast a performance to people outside the premises …*"

(b) "*any suitable premises ... to host blood donation sessions.*"

(3) Those businesses set out in Part 3 of Schedule 2 (a list of 19 separate business types including food retailers and pharmacies referred to by the FCA at paragraph 19 of the AmPoC as "Category 3") were permitted to remain open: see regulation 5(1).

(4) Pursuant to regulation 5(1), a person responsible for carrying on a business, not listed in Part 3 of Schedule 2, of offering goods for sale or hire in a shop (referred to by the FCA at paragraph 19 of the AmPoC as "Category 4"), or providing library services, was required to:

(a) "*cease … carry[ing] on that business or provid[ing] that service except by making deliveries or otherwise providing services in response to orders received … through a website ... by telephone ... or … by post.*"

(b) "*close any premises which are not required to carry out its business or provide its services as permitted [above]*"

(c) "*cease admit[ting] any person to its premises who is not required to carry on its business or provide its service as permitted [above]…*".

(5) Businesses falling into Category 4 were therefore free to continue supplying customers with goods and services in response to online, telephone or postal orders and for that purpose could still use (and to that extent were not required to close) their premises.

(6) Pursuant to regulation 5(3), a person responsible for carrying on a business consisting of the provision of holiday accommodation (referred to by the FCA at paragraph 19 of the AmPoC as "Category 6") was required to "*cease … carry[ing] on that business…*". However, pursuant to regulation 5(4), a person carrying on such a business was permitted to "*continue … carry[ing] on their business and keep[ing] any premises used in that business open*" for various identified purposes, including the provision of accommodation for any person who was "*unable to return to their main residence*" or "*uses that accommodation as their main residence*".

(7) Pursuant to regulation 5(5) and 5(6), a person responsible for a place of worship was required to ensure that "*the place of worship is closed*" except for a number of expressly permitted uses such as funerals. Together with certain educational establishments (which were not covered by the Regulations), these establishments are referred to by the FCA at paragraph 19 of the AmPoC as "Category 7".

21. As for the educational establishments, the FCA relies on the Prime Minister's announcement on 18 March 2020 as being a mandatory direction to close schools: Reply [15]. That announcement stated that schools were to remain closed after they

closed on 20 March 2020 "*except for children of key workers and vulnerable children*" and also stated that "*[r]egistered early years providers, including childminders, private schools and sixth forms should also follow this guidance*".[23] Accordingly, the announcement, at least insofar as it applied to referred to educational establishments other than state schools, was guidance, as opposed to legislation.[24]

22. Certain businesses were not mentioned in the Regulations, such as law firms. These are referred to by the FCA at paragraph 19 of the AmPoC as "Category 5".

23. The 26 March Regulations also contained restrictions on individuals' movements; pursuant to regulation 6(1), "*no person may leave the place where they are living without reasonable excuse.*" Thirteen potential reasonable excuses were set out at regulation 6(2), including taking exercise, obtaining basic necessities and travelling for the purposes of work where it was not reasonably possible to work from home.

24. Regulation 8 empowered "*relevant persons*" (defined as including police constables and community support officers) to "*take such action as is necessary to enforce any requirement imposed by regulation 4, 5 or 7*".

25. The Regulations applied throughout England.[25] They even applied to the Isles of Scilly, where, as of 30 April 2020, there had been no confirmed cases of COVID-19 and as of 5 June 2020, there had been no deaths related to COVID-19.[26]

26. All of the above Governmental advice, instructions and Regulations are referred to below as the "**Government Measures**".

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[23] AFD1 **{C/1/20}**.

[24] This was recognised by Lewis J in *Dolan & Others v Secretary of State for Health and Social Care* [2020] EWHC 1786 **{K/183/22}** at [110], "*The legal position is that there is currently no legal measure .. requiring those responsible for running schools to close those schools. … No order has been made under the Coronavirus Act 2020 to close any school in England. No other power has been identified as having been exercised so as to impose any legal requirement on any school in England to close.*"

[25] Substantially equivalent legislation was introduced in the devolved jurisdictions of Scotland, Wales and Northern Ireland.

[26] AFD 10 **{C/16}**.

27. Whilst the UK Government responded to the pandemic as set out above, other approaches were possible and shed light on what the likely situation in the UK would have been in the absence of the Government Measures.

28. First, the experience in Sweden is relevant:[27]

    (1) As at 14 June 2020 there had been 50,931 confirmed cases and 4,874 deaths. In response to the pandemic, the Swedish Government banned public gatherings with more than 50 people, and from 24 March 2020 required businesses serving food and drink to comply with binding regulations such as only allowing visitors to eat and drink whilst sitting at a table.

    (2) However, the Swedish Government did not impose either (a) mandatory closure of businesses, or (b) general mandatory restrictions confining Swedes to their homes or otherwise restricting their movements.

    (3) Notwithstanding the absence of any measures comparable to those imposed in the UK, many businesses in Sweden may have experienced business or trading losses.

29. Second, the experience of previous pandemics in the UK.[28] There were three influenza pandemics in the Twentieth Century: in 1918-1919 ('Spanish flu'), 1957-1958 ('Asian flu') and 1968 ('Hong Kong flu'). In respect of the two most recent of those pandemics, whilst estimated mortality rates in the UK were high, the UK Government did not impose general closures on businesses, confine citizens to their homes, impose other mandatory restrictions on freedom of movement or require the general closure of schools or universities. Instead, measures were taken on a local level (such as some school closures).

[27] AFD 6 **{C/10}**.
[28] AFD 7 **{C/12}**.

30. Third, the response of other national governments to various pandemics.[29] In short, various other national governments have historically on occasion imposed limited closures in particular cities on cultural/entertainment venues, and in the case of Mexico City in response to Swine Flu, closed schools, government offices and non-essential businesses and ordered people to stay indoors for five days.

The Effect of the Regulations

31. As is clear from the Regulations themselves, they did not prevent, and were not aimed at preventing, access to any particular premises (or particular geographical area). Their purpose was to limit the number of people unnecessarily coming into contact with each other (thereby promoting social distancing), rather than preventing access to any particular premises (or particular geographical area) to address a danger or disturbance at the premises or in their vicinity, as would be the case with a response (for example) of emergency services to a bomb scare, fire or riot. The Regulations were not evacuation orders, or the equivalent of police cordons. Nor were they orders which prevented everyone from entering premises (or particular geographical areas) because it was unsafe to do so. Rather, they struck a balance between limiting the number of people coming into contact with each other, and providing necessary (or even merely desirable, in the case of non-food shops) services.

The Chancellor's Statements

32. In its Statements of Case and Skeleton,[30] the FCA relies upon certain statements made on 17-18 March 2020 by the UK Government and/or Chancellor of the Exchequer, Mr Rishi Sunak, apparently for the purpose of demonstrating that the FCA's view that the stay-at-home advice and/or guidance and/or instructions given by the UK Government

[29] AFD 7 **{C/12}**.
[30] AmPoC [18.11] to [18.12] **{A/2/8};** Reply [12.3] to [12.4] **{A/14/8}**; and FCA Skeleton [49] to [52] **{I/1/23-24}**.

prior to issuing the 21 March Regulations amounted to "*closure of businesses*", is "*credible*".

33. This argument is misconceived and should be rejected.

(1) Neither the statements made by the UK Government/Chancellor, nor any discussions between the UK Government and the insurance industry preceding those statements, are admissible or relevant to construction of the Zurich Wordings.

(2) The FCA admits, as it must, that the statements made by the UK Government/Chancellor are not admissible factual matrix in the construction of the Wordings. Notwithstanding this, the FCA nevertheless persists in arguing that the statements support its characterisation of the Government's advice / guidance / instructions in the period preceding 21 March 2020 as amounting to 'closure' orders. This argument is simply another way of alleging that the statements are factual matrix evidence, the non-admissibility of which the FCA has already conceded. The views of the Government/Chancellor as to the effect of the UK Government's advice upon the operation of business interruption policies are inadmissible, irrelevant and of no assistance to the Court.

(3) If this point is to be pursued by the FCA, it would, at the very least, require evidence of fact as to (i) what transpired at the meetings on 17-18 March 2020 between the Chancellor and various insurers and/or representatives of the insurance industry;[31] (ii) the circumstances surrounding the ABI's statements on 17 and 18 March 2020; and (iii) whether, as the FCA alleges in its Reply and Skeleton, the UK Government could (and/or would) have legislated earlier than the 21 and 26 March 2020 had it known that insurers disputed what the Chancellor said. No such evidence has been – or could be - adduced at this trial. Even if the evidence had been, or could be adduced, it would not advance the FCA's case against Zurich.

[31] Zurich does not accept the accuracy of the description of what happened at those meetings.

(4) The statements appear to have been directed to policies that cover "*pandemics and unspecified notifiable diseases, as well as government-ordered closure*".[32] Regardless of whether the Government's stay-at-home advice and/or guidance and/or instructions might be "*equivalent*" to a closure order, the Zurich Wordings do not provide notifiable disease cover and are not policies in respect of which "*closure orders*" trigger cover. They are therefore irrelevant to construction of Zurich's Wordings.

C. RELEVANT PRINCIPLES OF CONSTRUCTION

34. The general principles of contractual construction are well-established and will be familiar to the Court. In this regard, Zurich adopts the exposition of those principles in the Defendants' Joint Skeleton Argument on Contractual Construction ("**Joint Construction Skeleton**").

35. Zurich draws brief attention to the following specific points which are of particular relevance to interpretation of the Zurich Wordings:

(1) It is essential to construe contractual words in their applicable context. Their meaning must be assessed in the context of the specific phrase, sentence and paragraph in which they appear, as well as in the "*the landscape of the document as a whole*".[33] As noted by the editors of Mance on *Insurance Disputes* ("***Mance***"), contextual interpretation "*is perhaps the most important of the approaches to construction*".[34]

(2) Words inevitably take colour from their surrounding context (a point sometimes described by the maxim *noscitur a sociis*, which "*stresses the importance of context*").[35] General words may therefore have a limited meaning when read in the context of surrounding words and phrases, especially when the surrounding

[32] Answer provided by John Glen, Economic Secretary to the Treasury, on 19 March 2020: AFD1 **{C/1/20}**.
[33] *Charter Reinsurance v Fagan* [1997] AC 313 **{K/83/72}** at 384H, Lord Mustill.
[34] Mance, *Insurance Disputes* ("***Mance***") **{K/204/2}**, at [6.36]. See also *Clarke* at [15-3] and [15-3A].
[35] Lewison, *The Interpretation of Contracts*, 6th edn. ("***Lewison***") **{K202/57}**, at [7.14].

words and phrases deal with a particular subject matter or share a common characteristic.[36] For example:

(a) In *Lewis Emanuel & Son v Hepburn*,[37] Pearson J construed the word "*damage*" in a policy providing cover "*for physical loss or damage or deterioration*" as meaning physical (and not financial) damage because the surrounding words "*physical loss*" and "*deterioration*" both connoted physical misfortune;

(b) In *Outokumpu Stainless Ltd v AXA Global Risks*,[38] Tomlinson J gave a restricted meaning to the term "*loss*" in an exclusion clause in a business interruption policy on the ground that the word took "*its colour from its context*";

(c) In *Tektrol Ltd v International Insurance Co of Hanover*,[39] the Court of Appeal relied on the "*context envisaged by the draftsman*", as derived from the surrounding words of the relevant clause, to construe the term "*malicious person*" in a business interruption policy as meaning only malicious persons whose actions were specifically directed at the computer systems used by the insured at its premises, and not other persons (including a remote computer hacker) who might also be described as 'malicious'.

(3) It is therefore not possible (as the FCA seeks to do) to ascribe generic meanings to words (such as "*action*", "*danger*" and "*vicinity*" in a prevention of access clause) without having regard to the sensitivity of the meaning of those words when used in a particular insurance clause, often alongside other different words. The distinction between the meaning of words and the question of what the parties would be understood to have meant by using words in a particular context

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[36] *Lewison*, ibid; and *McGillivray on Insurance Law* ("***McGillivray***") **{K/203/1}**, 14th edn, at [11-019].
[37] [1960] 1 Lloyd's Rep 304 **{K/57/5}** at 308.
[38] [2008] Lloyd's Rep IR 147 **{K/133/9}** at [23].
[39] [2005] 2 Lloyd's Rep 701 **{K/124/6}** at [11]-[12], Buxton LJ; [21], Carnwarth LJ and [28], Sir Martin Nourse.

in a contract is fundamental, but ignored by the FCA. As Lord Hoffmann said in *Kirin Amgen Inc v Hoechst Marion Roussel Ltd*:[40]

> "*The meaning of words is a matter of convention, governed by rules, which can be found in dictionaries and grammars. What the author would have been understood to mean by using those words is not simply a matter of rules. It is highly sensitive to the context and background to the particular utterance.*"

Accordingly, as the editors of *Mance* note: "*To apply the meaning of a word or phrase derived from judicial precedent or by use of a dictionary alone may well lead to error*".[41]

(4) Further, when reconciling different provisions within a single contract, common sense often indicates that a more specific provision should prevail over general wording.[42] Thus, "*when you find a particular situation dealt with in special terms, and later in the same document you find general words used which could be said to encompass and deal differently with that particular situation, the general words will not, in the absence of an indication of a definite intention to do so, be held to undermine or abrogate the effect of the special words which were used to deal with the particular situation*".[43]

Contra Proferentem

36. The FCA's reliance on the so-called '*contra proferentem* rule' is misplaced. There is no basis for adopting a *contra proferentem* approach to construction of the Zurich Wordings.

37. As set out in the Joint Construction Skeleton, a *contra proferentem* approach should only be adopted as a last resort ("*almost an admission of defeat*") where there is

[40] [2005] RPC 169 **{K/122/17}** at [32]; see also *Mannai Investment Co v Eagle Star Life Assurance Co* [1997] AC 749 **{K/84/27}** at 775.
[41] *Mance* **{K/204/3}** at [6.69].
[42] *Lewison* **{K/202/48}** at [7.05]
[43] *Welch v Bowmaker (Ir) Ltd* [1980] 1 I.R. 251 **{K/66/5}** (quoted in *Lewison* at [7.05] **{K/202/48}**).

genuine ambiguity in the meaning of a contractual provision that cannot otherwise be resolved.[44] That is not the position here.

38. Applying the principles set out in the Joint Construction Skeleton, there is no justification for adopting a *contra proferentem* approach to interpretation of the Zurich Wordings:

    (1) As set out at paragraphs 39 to 41 below, all of Zurich's insureds under the Zurich Policies purchased their policies through insurance brokers who were responsible for (among other things) advising insureds about the suitability and scope of the Zurich Policies for their particular needs.[45]

    (2) There is no ambiguity in the Zurich Wordings, let alone ambiguity that cannot be resolved by application of generally applicable construction principles. No "*admission of defeat*" is required such as to justify resort to *contra proferentem*.

    (3) Furthermore, Zurich is not seeking to rely upon an exemption clause. Insofar as it refers to the exclusion in Zurich 2 for loss resulting from infectious diseases which have been declared a pandemic by the WHO, it does so for the purposes of delineating the scope of cover afforded by the Notifiable Disease Extension, and not to escape liability which has otherwise arisen. A *contra proferentem* approach is therefore also inapplicable on this ground.[46]

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[44] *BNY Mellon Corporate Trustee Services v LBG Capital No 1* [2016] 2 Lloyd's Rep 119 **{K/164/9}** at [53], Lord Neuberger. See also *Clarke* **{K/194/3}** at [15-5C]; Colinvaux and Merkin's *Insurance Contract Law* **{K/195/1}** at [B-0281]; and *Lewison* **{K/202/52}** at [708(h)].

[45] AFD 9 at [8] **{C/15/2}**. The relevance of an insured's vulnerability to the court's adoption of a *contra proferentem* approach to construction is recognised by *Clarke* **{K/194/3}** at [15-5C]

[46] *Impact Funding Solutions* **{J/122}**; at [6]-[7], Lord Hodge and [35], Lord Toulson; and *Crowden v QBE Insurance (Europe) Ltd* [2018] 1 Lloyd's Rep IR 83 **{J/135/13}** at [65], McDonald Eggers QC (sitting as a High Court Judge).

D. THE ZURICH POLICIES & THE AOCA EXTENSIONS

The Placing of the Zurich Policies

39. As set out in AFD9, it is common ground that the Zurich Policies were all placed by authorised independent insurance intermediaries acting on behalf of their respective policyholder clients. The majority of the policies were placed through online portals which could be accessed only by authorised insurance intermediaries. None of the Zurich Policies was purchased direct by a policyholder.[47]

40. The FCA concedes policyholders would have received "*potentially limited broker advice and discussion*" (see Reply at [40]). All authorised insurance intermediaries are required to comply with the applicable rules in the FCA Handbook, including identifying their clients' needs and advising them on suitability.[48] It is reasonable to assume that they did so in the present case and that Zurich's policyholders accordingly had the benefit of such advice before purchasing their policies.[49]

41. The FCA's contentions in its Reply (at [4]) that the insureds in the present case are generally "*very small businesses or SMEs*" and "*unsophisticated purchasers of insurance*" go beyond the Agreed Facts, are highly selective and are not accepted by Zurich.[50] In fact, Zurich 1 Policies are sold mainly (via authorised insurance intermediaries) to mid-market companies with a turn-over of £5m or more. These matters are in any event irrelevant to the questions of construction and causation arising in the present case. The meaning and effect of the Zurich Policies cannot and does not change depending on the size or sophistication of the policyholders' business.

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[47] See AFD 9 at [8] **{C/15/2}.**

[48] *Jackson & Powell on Profession Liability* 8th edition **{K/200/1}** [16-007].

[49] See the equivalent assumption made by Lord Neuberger in *BNY Mellon Corporate Trustee Services* (at [33]) as to advice obtained by investors before purchasing the Enhanced Capital Notes considered in that case {**K/164/7}**.

[50] In a similar way, at [81] FCA Skeleton **{I/1/36}**, the FCA suggests that policyholders had "*limited knowledge of insurance matters*."

Relevant Provisions of the Zurich Policies

42. Zurich 1 comprises a Combined "All Risks" Policy Document (ZCYP36) and a sample Schedule (the "**Sample Schedule**"), key extracts from which are at **{L/21}**, and the full texts at **{B/21}**.

43. The lead Zurich 2 wording is the Commercial combined – Manufacturing (Acturis) SME557 policy, extracts of which are at **{L/22}** and the full text at **{B/22}**.

44. Each of the Zurich Policies provides a range of insurance cover, including (among other things) material damage "All Risks" cover, goods in transit cover and public and products liability cover.

Section B1

45. Section B1 of each Zurich Policy provides "Business Interruption 'All Risks'" cover.[51] The main form of such cover provided by each policy is material damage cover, providing insurance for loss resulting from interruption of or interference with the business carried on by the insured at its premises in consequence of any building or other property used by the insured at the premises being accidentally lost, destroyed or damaged during the period of the insurance.

46. Section B1 of each Zurich Policy also contains a series of extensions, set out at p. 10-16 of the Sample Schedule (for Zurich 1) and p. 34-37 of the policy document (for Zurich 2). These include the AOCA Extensions: see Zurich 1 at **{B/21/50-56} {L/21/24-30}**and Zurich 2 at **{B/22/34-37} {L/22/15-18}**.

47. There is no material difference between the wording of the AOCA Extension in each of Zurich 1 and Zurich 2. The AOCA Extension is one of four specific extensions in Zurich 1 and one of fifteen extensions in Zurich 2. The words used, and the ambit of

[51] Zurich 1 policy document at p. 14 **{B/21/14} {L/21/5}** and Zurich 2 policy document at p. 30 **{B/22/30} {L/22/11}**.

these other extensions is relevant (and in some respects, critical) to interpretation of the AOCA Extension. The relevant provisions are set out below.

48. After stating the Gross Profit relevant to the business interruption cover and the situation of the Premises which are the subject of that cover, Section B1 of the Zurich 1 Sample Schedule provides as follows:[52]

> "***EXTENSIONS***
>
> *Section B1*
>
> *The Business Interruption cover is subject to the extensions shown below:*
>
> *Any loss as insured by this Section resulting from interruption of or interference with the Business in consequence of accidental loss destruction or damage at the under-noted situations or to property as under-noted shall be deemed to be an Incident …."*

49. The relevant part of the Zurich 2 policy document is to the same effect (albeit using slightly different wording):[53]

> *"Any loss as insured under this section resulting from interruption of or interference with the **business** in consequence of:*
>
> *a) damage at any situation or to any property shown below; or*
>
> *b) any of the under-noted contingencies will be deemed to be an **incident.**"*

50. "*Business*" is defined in Zurich 2 as the business "*stated in the schedule*"; and "*Premises*" is defined as the "*premises stated in the schedule*".[54]

<u>The AOCA Extensions</u>

51. The first extension contained in each of the Zurich 1 and Zurich 2 policies is the AOCA Extension, which is in the following terms:[55]

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[52] {**B/21/50} {L/21/24}**

[53] {**B/22/34} {L/22/15}**

[54] Pages 12 and 15 of the policy document at {**B/22/12} {L/22/4}** and **{B/22/15} {L/22/7}**.

"***Action of Competent Authorities***

Action by the Police or other competent Local, Civil or Military Authority following a danger or disturbance in the vicinity of the Premises whereby access thereto shall be prevented provided there shall be no liability under this Section of this Extension for loss resulting from interruption of the Business during the first 6 hours of the Indemnity Period…"

The POA / Public Utilities Extensions

52. Each of Zurich 1 and Zurich 2 also contains a prevention of access extension ("**POA Extension**") in the following terms:[56]

*"**POA4 – Prevention of Access***

Property in the vicinity of the Premises, loss or destruction of or damage to which shall prevent or hinder the use of the Premises or access thereto, whether the Premises or property of the Insured therein shall be damaged or not but excluding loss or destruction of or damage to property of any supply undertaking from which the Insured obtains electricity, gas or water, or telecommunications services which prevents or hinders the supply of such services to the Premises."

53. Allied with the POA Extension, each of the Zurich Policies contains a "*Public Utilities – Electricity, Gas, Water and Telecommunications*" extension which covers "*loss as insured by this Section due to failure of the public supply of*" electricity, gas, water or telecommunications. This extension appears in both Zurich 1 and Zurich 2 in materially similar terms.[57]

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[55] The quoted wording is from Zurich 1, but there is no material difference in the wording of the corresponding clause in Zurich 2. In the Zurich 2 AOCA Extension, none of the terms are capitalised, but "*premises*" and "*indemnity period*" are in bold, and there is stated to be no liability for the first 3 (rather than 6) hours of the indemnity period. In Zurich 1: {**B/21/51} {L/21/25}.** In Zurich 2: {**B/22/34} {L/22/15}.**

[56] The quoted wording is from Zurich 1, but there is no material difference in the wording of the corresponding clause in Zurich 2. In the Zurich 2 POA Extension, none of the terms are capitalised, but "*premises*" and "*danger*" are in bold. In Zurich 2 "*damage*" is referred to rather than "*loss or destruction of or damage*", "*will prevent*" rather than "*shall prevent*" and further minor differences. In Zurich 1: {**B/21/51} {L/21/25}.** In Zurich 2: {**B/22/36} {L/22/17}.**

[57] See p. 11 of the Zurich 1 Sample Schedule {**B/21/51} {L/21/25}** and p. 36 of the Zurich 2 policy document **{B/22/36} {L/22/17}**.

The Notifiable Diseases Extensions

54. Both Zurich Policies contain a notifiable diseases extension (the "**Notifiable Diseases Extension(s)**"), but the terms of this extension in each of Zurich 1 and Zurich 2 are materially different.

55. The Notifiable Diseases Extension in Zurich 1 provides as follows:[58]

> "***Notifiable Diseases, Vermin, Defective Sanitary Arrangements, Murder and Suicide, Food Processors and Distributors–(Premises)-Contingency/All Risks***
>
> *The insurance by this Section shall … extend to include loss resulting from interruption of or interference with the Business carried on by the Insured at the Premises in consequence of:*
>
> *1* *a) Any occurrence of a Notifiable Disease (as defined below) at the Premises or attributable to food or drink supplied from the premises*
>
> *b) any discovery of an organism at the Premises likely to result in the occurrence of a Notifiable Disease*
>
> *2* *the discovery of vermin or pests at the Premises*
>
> *3* *any accident causing defects in the drains or other sanitary arrangements at the Premises*
>
> *which causes restrictions on the use of the Premises on the order or advice of the competent local authority*
>
> *4* *any occurrence of murder or suicide at the Premises."*

56. "*Notifiable disease*" is defined as illness sustained by any person resulting from food or drink poisoning or one of a closed list of specified human infectious or contagious diseases (which does not include COVID-19) "*an outbreak of which the competent local authority has stipulated shall be notified to them*".

57. In Zurich 2, the Notifiable Diseases Extension provides as follows:[59]

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[58] {**B/21/52} {L/21/26}**.

[59] {**B/22/35} {L/22/16}**.

"*Notifiable diseases, vermin, defective sanitary arrangements, murder and suicide*

*Loss resulting from interruption of or interference with the **business** at the **premises** resulting from:*

a) *i) Any occurrence of a **notifiable disease** at the **premises** or attributable to food or drink supplied from the **premises***

*ii) any discovery of an organism at the **premises** likely to result in the occurrence of a **notifiable disease***

b) *the discovery of vermin or pests at the **premises***

c) *any accident causing defects in the drains or other sanitary arrangements at the **premises***

d) *any occurrence of murder or suicide at the **premises**.*

*which causes restrictions on the use of the **premises** on the order or advice of the competent local authority. …*

Excluding:

i) *any infectious diseases which have been declared as a pandemic by the World Health Organisation."*

Loss of Attraction Extension

58. Zurich 2 (but not Zurich 1) contains a "*Loss of attraction*" extension (the "**Loss of Attraction Extension**"), which provides as follows:[60]

"*Loss of attraction*

*Property within the vicinity of the **premises**, such **damage** directly resulting in a diminished attraction to customers and solely in consequence thereof, an identifiable reduction in **your business**. ...*

Excluding any loss:

i) *during the first 24 hours of the **indemnity period***

[60] {**B/22/35} {L/22/16}**.

ii) as a result of obstruction by storm, flood or snow."

59. Zurich 1 (when written on a Loss of Profit or Loss of Revenue basis)[61] and Zurich 2 contain Trends Clauses which apply to both material damage and non-damage business interruption cover. These clauses are addressed in Section F below.

Initial Points on Construction of the AOCA Extension

60. A number of points fall to be made at the outset about the interpretation of the AOCA Extension when read alongside the other business interruption extensions and/or in the context of the policies as a whole:

(1) The Zurich Policies draw a clear distinction between:

(a) "*access to*" the premises (in the AOCA Extension) and "*use of*" the Premises (in the POA and Notifiable Diseases Extensions); and

(b) Access to the premises being "*prevented*" (in the AOCA Extension) and use of the premises being "*hinder[ed]"* or becoming subject to "*restrictions*" (in the POA and Notifiable Diseases Extensions).

(2) The Notifiable Diseases Extension in each of the Zurich Policies requires an occurrence "*at the Premises*", whereas the AOCA Extension and POA Extension contemplate an occurrence in an area which is wider but still in the immediate locality, i.e. "*in the vicinity of the Premises*".

(3) The AOCA Extension requires "*action*" preventing access to the premises, whereas the Notifiable Diseases Extension requires (in respect of Zurich 1 only, save in the case of murder or suicide at the Premises) restrictions on the use of the premises "*on the order or advice*" of the competent local authority.

[61] This is common ground, see [695] FCA Skeleton **{I/1/232}**.

(4) Whilst the Notifiable Diseases Extension requires restrictions to have been imposed by "*the competent local authority*", the AOCA Extension requires action by "*the Police or other competent Local, Civil or Military Authority*".

(5) As to the last point, the Zurich Policies contain a number of references to "*government*", "*government authority*" and "*governmental authority*", indicating that where the parties intended to refer to central government, they did so in express terms (see further section E(2) below).

61. In an attempt to avoid the clear import of language used elsewhere in the Zurich Policies, the FCA appears to argue that other extensions in the Zurich Policies were optional and should not therefore be treated as forming "*part of the factual matrix*" for interpretation of the AOCA Extensions.[62] That is not the correct approach. The AOCA Extension in each of the Zurich Policies must be construed in the context of the applicable policy as a whole. In the present case, that means the Zurich 1 and Zurich 2 policies at **{B/21}** and **{B/22}**. Those are the contracts which are the subject matter of the FCA's claim and on the basis of which the FCA asks the Court to make the declarations sought in the AmPoC.

62. The FCA could have brought its claim by reference to particular policies sold to specific policyholders which did or did not contain some of the extensions or other provisions in the Zurich Policies before the Court. It did not do so. The Court should proceed on the basis of the policies before it, i.e. those specifically selected by the FCA for the purposes of testing the Zurich Wordings. It is difficult to see how the Court (or the parties) could proceed on any other basis.

63. Moreover, the FCA relies, both in its statements of case and in its Skeleton, on the wording of the Notifiable Diseases Extension in Zurich 2, being one of the extensions which it now argues was optional and should therefore be disregarded.[63] The FCA cannot have it both ways. As explained, the correct (and in the present case, only

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[62] FCA Skeleton [657] **{I/1/221}**, footnote 507 **{I/1/189}** and [669.3] **{I/1/224-225}**.
[63] See AmPOC [33] **{A/2/23}**; Reply [43] **{A/14/22}**; FCA Skeleton [75, 184] **{I/1/33-34}**, **{I/1/70}**.

practicable) course is for the Court to construe the Zurich Wordings in the context of the Zurich Policies, i.e. those policies at **{B/21}** and **{B/22}**.

E. CONSTRUCTION OF THE AOCA EXTENSION

Overview

64. The AOCA Extension provides cover which is additional to the more conventional business interruption insurance that is otherwise available under Section B1, but which is contingent on material damage. The extensions to the business interruption cover are 'pockets' of cover, each one limited by its own specific requirements. There is no blanket coverage in respect of, for example, danger or notifiable diseases which caused business interruption losses.

65. While the AOCA Extension does not require material damage to the premises or property of the insured, the language of the clause places clear limits on what is, and is not, covered. All of the words used in the AOCA Extension are material to, and go towards achieving, that overall purpose.

66. The AOCA Extension is directed at disturbances or dangerous incidents local to the insured's premises, in response to which action is taken at a local level, and by which access to the insured's premises is prevented entirely, i.e. no-one (except the emergency services or other relevant authority personnel tasked with dealing with the danger or disturbance) is allowed in to the premises because of the local disturbance or danger. Consistent with the genesis of these extensions, the paradigm case for their application is a bomb scare, a violent attack or brawl, a structure at risk of collapse (such as a building or crane), a serious road traffic accident, or an approaching fire; in response, the relevant authority takes action by preventing access to the premises; and no one is allowed to enter the premises or their immediate vicinity, either because of the danger

in doing so, or because (for example) police investigation of a road traffic accident is ongoing.[64]

67. The COVID-19 pandemic, and the nationwide Government Measures responding to it, are very far from the kind of local situation contemplated by the AOCA Extension. As the FCA itself asserts, the Government Measures were introduced on a nationwide basis by the UK national Government to meet a national crisis, namely the emergence of COVID-19 as an infectious disease in the country. Thus, the FCA Skeleton emphasises that:[65]

    (1) COVID-19 was made a notifiable disease in England on 5 March 2020;

    (2) Statements made by the UK Prime Minister about the need for social distancing were made nationally, to the country as a whole;

    (3) The guidance issued by the UK Government comprised "*national guidance*";

    (4) The effect of the 21 March and/or 26 March Regulations was to introduce a "*national regime*" of restrictions on businesses and individuals;

    (5) The steps taken by the UK Government included enactment of the Coronavirus Act 2020, described in the Explanatory Note to the Act as "*part of a concerted effort across the whole of the UK to tackle the COVID-19 outbreak*";

    (6) The UK Government's response was taken in "*in a nation-wide way*".

68. On any natural construction of the AOCA Extension, such national measures by the UK national Government responding to a nationwide pandemic of an infectious disease are not within the scope of the clause. This conclusion is dictated by consideration of:

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[64] As explained by Riley on *Business Interruption Insurance* 10th edn ("***Riley***") **{K/206/29}** at [10.34]: "*Terrorist activity in the United Kingdom in the 1980s-90s involved not only devices which did explode, but also bomb hoaxes to which the authorities were bound to react. In the absence of damage, the normal business interruption cover, even with denial of access and loss of attraction extensions, would not be triggered. Cover is, however, available for such circumstances [pursuant to act of competent authority extensions]…*".

[65] See FCA Skeleton at [44] **{I/1/21}**, [56] **{I/1/25}**, [58] **{I/1/26}**, [63] **{I/1/27}** and [66] **{I/1/31}**.

(1) The clause as a whole, when read in the context of the Zurich Policies, including in particular the other extensions contained in each policy; and

(2) The meaning of the individual words used in the clause, whether considered individually or in the context of the language of the clause as a whole.

69. Cover under the Zurich Policies for a notifiable disease is provided by the bespoke Notifiable Diseases Extensions in the Zurich Policies. However, the FCA does not rely on the Notifiable Diseases Extension in either Zurich 1 or Zurich 2 because neither such extension provides cover in the present case.[66] In Zurich 1 there is a closed list of Notifiable Diseases (which does not include COVID-19), occurrences of which must have taken place at the premises, and in Zurich 2 not only must there have been an occurrence of the notifiable disease at the premises, but there is also an express exclusion in respect of any infectious disease which has been declared a pandemic by the WHO.

70. It would be surprising if, on its true construction, the AOCA Extension enabled policyholders to circumvent the restrictions on cover imposed by the Notifiable Diseases Extensions in relation to (i) the closed list of Notifiable Diseases (Zurich 1), (ii) the geographical location of the occurrence of the disease in respect which cover is provided (both Zurich Policies), and (iii) the express exclusion in respect of pandemics (Zurich 2). The parties cannot have intended policyholders to obtain via the back door of the AOCA Extension cover which they expressly agreed was not available by the front door of the Notifiable Diseases Extensions.[67]

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[66] The FCA pleads in its Reply at [7] **{A/14/3}** that the "*non-selection of policies of cover for inclusion in the test case does not amount to an acknowledgement that those policies or cover clauses are of no application to COVID-19*". It is inconceivable that the Notifiable Diseases Extensions in the Zurich Policies would not have been included in the current test case if the FCA considered that it had any prospect of successfully showing that they covered COVID-19.

[67] At FCA Skeleton [669.3] **{I/1/224-225}**, the FCA contends that the "Increased Cost of Working" Sample Schedule in Zurich 1 includes an AOCA Extension, without a Notifiable Diseases Extension. To the extent that the FCA argues that a policyholder not purchasing a Notifiable Diseases Extension would or should put him in a better position that a policyholder who did so, this is rejected. A fortiori, a policyholder who did not purchase bespoke cover in respect of notifiable diseases (in the form of the Notifiable Diseases Extension) cannot successfully argue that a notifiable disease falls within the AOCA Extension.

71. The FCA attempts to rebut this analysis by relying on the absence of an exclusion in respect of pandemics from the cover afforded by the AOCA Extension.[68] This argument, however, is circular. There is no need for the AOCA Extension to exclude what is not covered. Where (as in the case of the AOCA Extension) an insuring clause sets out the scope of cover in positive terms that are narrowly and carefully drawn, it would be otiose (or even impossible) for the policy to spell out by way of (on this hypothesis, multiple) exclusions what is not within the scope of cover. The absence of an exclusion in respect of pandemics from the AOCA Extension does not therefore assist the FCA.[69]

72. By way of Reply at [43], the FCA suggests that "*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*", and accordingly, had loss resulting from pandemics been intended to be excluded, then it ought to have been excluded by clear words.[70] However, the Zurich Wordings plainly do not provide cover for pandemics on their face, nor are the individual requirements of the Zurich Wordings met (for the reasons elucidated below).

73. Zurich's construction does not require the Court to assume that the various extensions in the Zurich Policies are mutually exclusive and that there is accordingly only one "*door*" for any event (as the FCA argues at [669] of its Skeleton). That mischaracterises the nature of Zurich's case. The extensions are not mutually exclusive in a strict sense (save for where they specify otherwise). However, where a particular extension is directed to a particular kind of event (e.g. notifiable diseases in the Notifiable Diseases Extension), it is unlikely that it was intended that the restrictions set

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[68] FCA Skeleton [669]-[671] **{I/1/224-225}**; AmPoC [4.2] **{A/2/4}** and [33]-[34] **{A/2/23-24}**; and Reply [43] {**A/14/22-23}**.

[69] See e.g. *Burger v Indemnity Mutual Marine Assurance Co* [1900] 2 QB 348 **{K/38/1}**, where the Court of Appeal declined to construe a marine collision policy as extending to the costs of wreck removal notwithstanding that such costs were not expressly excluded but other consequential losses (namely sums payable in respect of loss of life or personal injury) were excluded. Since the positive words defining the scope of cover were clear, the absence of an exclusion for wreck removal costs was irrelevant (as also was the presence of the exclusion for sums payable in respect of loss of life or personal injury, which was "*merely added by way of superabundant caution*": Romer LJ at 352).

[70] And see [668] of FCA's Skeleton **{I/1/224}**.

out in that extension could be side stepped by a policyholder's reliance on general wording in another extension.

74. The FCA's attempt to squeeze a national Government response to a nationwide infectious disease pandemic into the narrow parameters of the AOCA Extension (notwithstanding the existence, and clear effect, of the Notifiable Diseases Extensions) does not work. Whether the elements of the AOCA Extension are considered individually or as a whole, the Government Measures are not within the scope of cover afforded by the AOCA Extension.

75. Most fundamentally, the FCA's argument fails to give any meaningful effect to the requirement in the AOCA Extension that the "*action*" by the relevant "*authority*" which triggers cover must be taken "***following***" a "*danger or disturbance in the vicinity of the Premises*". The FCA accepts (as it must) that the word "*following*" "*requires a causal connection*".[71] Whatever the requisite strength of this causal connection, there was no meaningful causal connection of any kind between the Government Measures and any "*danger or disturbance*" that might be said to have occurred "*in the vicinity of the Premises*".

76. By implementing the Government Measures in response to the nationwide COVID-19 pandemic, the UK national Government was not responding to any particular local occurrence of COVID-19. The FCA's argument that there was "*a danger*" in the vicinity of an insured's premises because COVID-19 was "*everywhere*",[72] does not meet this point. Even if COVID-19 could be said to have been everywhere, and hence to be "*a danger*" in the vicinity of the premises, the Government Measures did not "*follow*" any such local presence of COVID-19. They followed, and were in response to, the nationwide pandemic (which is not a peril insured against by the AOCA Extension). This is the short and complete answer to the FCA's case.

[71] FCA Skeleton [385] **{I/1/143-144}**; and see Hiscox Interveners' Skeleton [21] **{I/3/8}**.
[72] FCA Skeleton [692.2]-[692.3] **{I/1/231}**.

77. The FCA's argument also fails to give proper meaning and effect to other elements of the AOCA Extension (as summarised at paragraphs 10 to 11 above). Each of the individual elements of the AOCA Extension is considered further below.

(1) Requirement for "*action*"

78. The AOCA Extension requires (among other things) "*action*" by the Police or other competent Local, Civil or Military Authority whereby access to the Premises is prevented.

79. It is notable that the clause does not, unlike other AOCA wordings in issue in these proceedings, refer to "*actions **or advice***" of the relevant authority.[73] The use of the word "*action*" also contrasts with the phrase "*order or advice of the competent local authority*" in the Notifiable Diseases Extension (in both of the Zurich Policies). Zurich submits that the draftsman's choice of words should be taken to be deliberate.

80. Read naturally, the word 'action' connotes something more affirmative than 'advice'.[74] It refers (in context) to mandatory actions taken (or orders issued) by the relevant authority that prevent access to the premises. Such actions will invariably have the force of law. Merely issuing guidance or advice about entry to premises does not prevent, and does not have the effect of preventing, access to the premises (see further Section E(3) below).

81. If the parties had intended cover to attach to non-mandatory guidance and advice, they could readily have said so. But they did not. There is no warrant for re-writing the AOCA Extension so as to include that which the parties did not.

82. At [118] and [641] FCA Skeleton, the FCA asserts that "*action*" is to be given the broadest possible meaning, as "*an act or thing done*" or "*anything someone does*",

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[73] See Arch 1, RSA 2 and RSA 4, all of which refer to "*actions or advice*" preventing or (in the case of RSA 1 and RSA 4) hindering access to the premises.

[74] Cf. T. Carlyle, French Revolution, "*An Action, the product and expression of exerted force*", cited in the OED definition of 'action'**{K/222.1/2}**.

which would encompass the giving of advice, whether by way of recommendation or suggestion. This is an unnecessarily strained construction of "*action*", and is not consistent with the words which the parties have chosen; in particular drawing a distinction between action and advice.[75] Further, this construction is not consistent with the purpose of the AOCA Extension, which requires "*prevention of access*"; a mere suggestion by an authority would not be capable of preventing access.

83. The latter point is the key point. Whatever the precise meaning of "*action*", it is common ground that the "*action*" in question must be action whereby access to premises is "*prevented*". That is the true battleground between the parties (see Section E(3) below**).**

84. As to [642] FCA Skeleton, the formal powers to prevent access to premises by relevant authorities such as the police, are set out at Section E(2) below. As is clear, their powers to prevent such access are backed by law and when exercised amount to the taking of "*action*", and not merely the proffering of "*advice*" or "*suggestion*".

85. In the present case, none of the Government Measures comprised "*action*" within the meaning of the AOCA Extension other than the 21 March and 26 March Regulations. However, as set out at Section E(3) below, none of those regulations prevented access to premises.

(2) Requirement for action by "*the Police or other competent Local, Civil or Military Authority*"

86. The Government Measures were clearly not actions by the Police or a Local or Military Authority. The FCA contends that the Government Measures were actions of, by or imposed by a competent civil authority.[76] Insofar as those measures comprised

[75]The FCA also relies on the same distinction between "action" and "advice", but asserts that "action" is broader: see FCA Skeleton [643] **{I/1/217}**. This argument is wrong as it relies on construing "action" to include "giving advice" which is an unnecessarily strained interpretation.

[76] AmPoC [44.3] **{A/2/29}**.

'actions' (see above), Zurich submits that they were not actions of, by or imposed by a "*Civil Authority*" within the meaning of the AOCA Extension.

87. Whilst the term "*Civil Authority*" may on its face arguably encompass central Government, Zurich submits that in the context of the AOCA Extension, the meaning of the term "*Civil Authority*" is informed by, and takes colour from, the other bodies mentioned in the clause whose actions qualify as actions for the purposes of triggering cover under the clause, namely the Police, Local Authorities and Military Authorities. Each of these operates, or (in the case of Military Authorities) has the ability to operate, at a level below the UK national Government. They each have (and at the time of inception of the Zurich Policies, had) powers to address and respond to <u>local</u> emergencies of the kind contemplated by the AOCA Extension.

88. By way of example:

(1) The Police (who are a paradigm authority for this clause) have (and at the time of inception, had) powers:

(a) Under ss. 33-36 of the Terrorism Act 2000[77] to designate, and prohibit or restrict access to, an area to be cordoned off for the purposes of a terrorist investigation. The powers accorded to the Police for this purpose include powers to order persons immediately to leave premises wholly or partly in or adjacent to the cordoned area;

(b) Under various enactments to close roads or divert or prohibit traffic, including to address emergencies, including terrorism or the prospect of terrorism (s. 67 of the Road Traffic Regulation Act 1984);[78]

(c) Under s. 160 of the Licensing Act 2003[79] to apply to the magistrates' court for an order closing licensed premises where there is, or expected to be, disorder in or near the premises.

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[77] {**K/11/48**}.
[78] {**K/9/5**}.

(2) A Local Authority has (and at the time of inception, had) powers:

(a) Under the Road Traffic Regulation Act 1984 to prohibit or restrict traffic because of (among other things) the likelihood of danger to the public (s. 14);[80]

(b) Under the Regulatory Reform (Fire Safety) Order 2005 (the "**Fire Safety Order**") to prohibit or restrict the use of regulated or designated sports grounds where the authority considers that use of such a ground is or would be unsafe (Art. 25 and 31);[81]

(c) Under the Health Protection (Local Authority Powers) Regulations 2010[82] to disinfect objects or premises (paragraphs 4-7) and restrict contact with, and access to, a dead body, including by service of a notice prohibiting entry to the room in which the body is located (paragraph 10).

(3) As for Military Authorities, the Joint Doctrine Publication 02, *UK Operations: the Defence Contribution to Resilience and Security* (3rd edn) (the "**Joint Doctrine Publication**") promulgated by the Chiefs of Staff sets out the basis on which the UK's armed forces provide military aid to civil authorities ("**MACA**"). Not only does the document show that military aid is provided to civil authorities,[83] the Joint Doctrine Publication recognises the distinction drawn in the AOCA Extension between central Government and civil authorities operating at a level below national Government. Thus MACA is defined (at p. 3) as meaning: "*Military operations conducted in the UK … involving the employment of Defence resources as requested by a* ***government department or civil***

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[79] {**K/12/1}**.

[80] Under s. 121A(2), London borough councils are the traffic authority for all roads in their respective borough; and under s. 121A(3), the council of a county or metropolitan district are the traffic authority for roads in the respective county or district **{K/9/7}**.

[81] {**K/14/1}**.

[82] {**K/17/3}**.

[83] MACA refers, by way of example, to support provided by the armed forces during flooding events and other local incidents such as the collapse of Didcot Power Station in 2016 (at p. 4-5) **{K/211/16}**.

authority"; and paragraph 3.17 provides that MACA requests will follow "*two broad channels*", namely 'top down' requests "*driven from central government*" or 'bottom up' requests "*made by* ***civil authorities at the sub-national or local level***" (emphasis added).

89. "*Civil Authorities*" that have powers to address local dangers and disturbances suggests bodies such as the fire and rescue authorities and the Health & Safety Executive (the "**HSE**"). As to these:

(1) Fire and rescue authorities have (and at the time of inception of the Zurich Policies, had) powers to do anything they consider appropriate for the purposes of carrying out their functions, which include taking measures to extinguish fires, and protect life and property in the event of fires, in their respective areas.[84] Further:

(a) Section 44(2) of the Fire and Rescue Services Act[85] expressly empowers an employee of a fire and rescue authority to (among other things) close a highway, stop and regulate traffic and restrict the access of persons to premises or a place; and

(b) Under the Fire Safety Order,[86] a fire and rescue authority is empowered to prohibit or restrict the use of any premises (other than those specified in Art. 25(b) to (e) of the Fire Safety Order) on the grounds that the use of such premises is or would be unsafe (Art. 25 and 31);

(2) The HSE (which has offices throughout the country and whose purposes include securing the health, safety and welfare of persons at work and protecting persons other than persons at work against risks to health or safety arising out of the activities of persons at work) has power:

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[84] Fire and Rescue Services Act 2004, ss. 5A and 7 **{K/13/1-3}**.
[85] {**K/13/4**}.
[86] {**K/14/1**}.

(a) Under the Health and Safety at Work Act 1974 to direct the cessation of any activities that it considers involve or may involve risk of serious personal injury;[87]

(b) Under the Fire Safety Order to prohibit or restrict the use of any workplace which is, or is on, a construction site.[88]

90. Zurich submits that the term "*Civil Authority*" is directed to bodies of the above kind, namely public bodies that operate at a local level below the executive (i.e. central Government) and have specific competencies to address local dangers and/or emergencies.[89] As noted above, the meaning of a word "*may take its character from those surrounding it if they have a recognisable characteristic*".[90] Where, as here, the words surrounding a term share a common characteristic, that term ought to be accorded the same characteristics. In the present case, this requires the term "*Civil Authority*" to be construed as meaning public authorities operating at a level below that of central Government. The term does <u>not</u> extend to the executive, i.e. the Prime Minister and government ministers (who, together with the Civil Service, comprise Her Majesty's Government).[91]

91. This construction is strongly supported by the use elsewhere in the Zurich Policies of the terms "*government*", "*government authority*" and "*governmental authority*". Specifically:

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[87] S. 22 of the 1974 Act **{K/6/1}**.

[88] Art. 25 and 31 of the Fire Safety Order **{K/14/1-4}**.

[89] Case law on the interpretation and application of prevention of access clauses in the United States shows that the term 'civil authority' has been applied to bodies of this kind: see e.g. *Princess Garment Co v Fireman's Fund* 115 F.2d 380 **{K/50/1}** (policemen and firemen); and *Syufy Enterprises v The Home Insurance Company of Indiana* (21.3.1995) 1995 WL 129229 **{K/81/1}** (San Francisco, Los Angeles and Las Vegas municipal authorities).

[90] MacGillivray at [11-019] **{K/203/1}**; see paragraph 35(2) above.

[91] Halsbury's *Laws of England*, Vol 20 at [17] and [150]-[151] **{K/197/1-4}**. See also Halsbury's *Laws of England*, Vol 29 at [3] **{K/197/5}**: "*the United Kingdom executive is formally referred to as Her Majesty's government*".

(1) The special exclusions to Goods in Transit cover in the Zurich Policies exclude cover for (among other things) "*confiscation, nationalisation … by any government or local authority*";[92]

(2) The cover for Clean Up Costs (in the public and products liability section in each of the Zurich Policies) encompasses the costs of remediation required by "*any government or statutory authority or body implementing or enforcing environmental protection legislation*";[93]

(3) The general exclusions in the Zurich Policies exclude cover for "*nationalisation, confiscation, requisition, seizure or destruction by any government or local authority*";[94]

(4) The special exclusions to the Cyber cover in Zurich 2 exclude cover for "*seizure, confiscation, expropriation, nationalisation or destruction of a computer system by order of any governmental authority*".[95]

92. The terms "*government*", "*government authority*" and "*governmental authority*" necessarily include the executive. Had actions of the executive been intended to be covered by the AOCA Extension, the parties would have used one of these terms in the clause (as do a number of other prevention of access / action of competent authority clauses in issue in these proceedings).[96] However, they did not do so. The AOCA Extension should not be construed as including that which the parties did not.

93. The above construction is commercially reasonable and accords with business common

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[92] Zurich 1 policy document at p. 21 **{B/21/21} {L/21/10}**; Zurich 2 policy document at p. 59 **{B/22/59} {L/22/25}**.

[93] Zurich 1 policy document at p. 31 **{B/21/31} {L/21/11}**; Zurich 2 policy document at p. 65 **{B/22/65} {L/22/26}**.

[94] Zurich 1 policy document at p. 36 **{B/21/36}{L/21/14}**; Zurich 2 policy document at p. 127 **{B/22/127} {L/22/33}**.

[95] Zurich 2 policy document at p. 94 **{B/22/94} {L/22/31}.**

[96] See Arch 1 ("*actions or advice of a government or local authority*"); Ecclesiastical 1 ("*any action of Government Police or Local Authority*"); Hiscox 1 ("*imposed by any civil or statutory authority or by order of the government or any public authority*"); MS Amlin 2 ("*imposed by any civil or statutory authority or by order of the government or any public authority*"); and RSA 4 ("*actions or advice of the police, other law enforcement agency, military authority, governmental authority or agency*").

sense. The Police, armed forces, local authorities and other civil authorities operating at a level below central Government (such as fire and rescue services) have extensive powers to address the local kind of danger and disturbance contemplated by the AOCA Extension. There is no reason why the parties should be taken to have contemplated dangers or disturbances requiring action by central Government on a nationwide basis to fall within the scope of the AOCA Extension.

94. The FCA recognises the consistency of Zurich's construction. In its Skeleton at [353], the FCA argues that Hiscox's concession that "*public authority*" includes the Government is inconsistent with Hiscox's case that restrictions must follow "*a small-scale event which must be local and/or specific to the insured, its business, activities or premises*" because it is "*very difficult to see why or when the Government [as opposed to other public authorities] would place restrictions on a premises following [such an event]*". By parity of reasoning, there is no reason why the AOCA Extension should be taken to have contemplated action by the UK national Government (as opposed to civil and other authorities operating at a local level).

(3) "*Access*" to the premises must be "*prevented*"

Meaning of "Prevention"

95. The AOCA Extension requires that "*access*" to the premises "*shall be prevented*". This requires the approach and/or entry to the premises to be physically obstructed or otherwise impossible. It is not enough that access is reduced, impaired or hindered. It is also not enough that use of the premises is restricted in some way. It is access to the premises that must be prevented; and such access must be prevented altogether.

96. As mentioned at paragraph 60 above, the use of the narrow terms "*access*" to the premises, and "*shall be prevented*", in the AOCA Extension contrasts with wider wording used in other business interruption extensions in the Zurich Policies:

    (1) The AOCA Extension requires "*access*" to the Premises to be "*prevented*", in contrast to:

(a) The POA Extension, which requires damage to property in the vicinity of the premises which "*prevent[s] or hinder[s] the use of the Premises or access thereto*";

(b) The Notifiable Diseases Extension, which requires "*restrictions on the use of the Premises*"; and

(c) The Loss of Attraction Extension [only in Zurich 2], which requires "*diminished attraction to customers*" resulting directly from damage to property in the vicinity of the premises.

(2) The Zurich Policies therefore draw a clear distinction between:

(a) "*access to*" the premises (in the AOCA Extension) and "*use of*" the Premises (in the POA and Notifiable Diseases Extensions); and

(b) Access to the premises being "*prevented*" (in the AOCA Extension) and use of the premises being "*hinder[ed]*" or subject to "*restrictions*" (in the POA and Notifiable Diseases Extensions).

97. This contrast is also apparent from a comparison between the AOCA Extension in the Zurich Policies and other action of competent authority / public authority extension wordings, including those in issue in these proceedings. See, for example, Amlin 2 and the Hiscox policies which refer to "*hindrance in access*"; and Amlin 3, Ecclesiastical 1 and RSA 2 which refer to "*prevent or hinder use of the premises or access to [the premises]*" (or similar wording).

98. The meaning of the words the parties have chosen in the Zurich Policies is plain. The AOCA Extension is <u>not</u> triggered by restrictions on the use of the premises (as in the Notifiable Diseases Extension) or hindering the use of or access to the premises (as in the POA Extension). It is triggered, and triggered only, by access to the premises being prevented.

99. The narrow words used in the AOCA Extension signal the sort of paradigm situation the clause is intended to cover: namely where access to the premises is perceived to be

dangerous (such as a bomb scare, a nearby fire or a violent disturbance in the vicinity) or where access is prohibited for some other reason (such as police investigations following a road traffic accident). For this reason, the AOCA Extension specifies that access must be prevented.

100. In contrast, the aim of the Government Measures, and in particular, the Regulations, was to reduce the number of people mixing and to promote social distancing. The rationale underlying the Regulations has been described by the Secretary of State for Health and Social Care, as cited in *Dolan & Others v Secretary of State for Health and Social Care*,[97] as follows:

> "*The Covid-19 pandemic represents truly exceptional circumstances, the like of which has not been experienced in United Kingdom for more than half a century … The Secretary of State describes the "basic principle" underlying the restrictions as being* ***to reduce the degree to which people gather and mix*** *with others not of the same household and, in particular, reducing and preventing such mixing in indoor spaces. I accept that this is the premise of the restrictions in the 2020 Regulations ….*" [Emphasis added]

101. It is therefore unsurprising that the Regulations do not prevent access to premises, in contrast to the paradigm cases covered by the AOCA Extension where such prevention of access is necessary. Rather, the Regulations reduce the degree to which people gather and mix.

102. The FCA contends that Zurich's case is "*wholly unrealistic*" because there will never be a total prevention of access to a premises for all people, and refers to emergency services and others (FCA Skeleton [678]). This misunderstands Zurich's case. It is not Zurich's case that in the paradigm case no one whatsoever is entitled to enter. Of course the emergency services may enter to assist as necessary. The point which Zurich makes is that in the paradigm case, the nature of the danger or disturbance, and indeed

[97] [2020] EWHC 1786 at [4] **{K/183/2}**, Lewis J (citing *R (Hussain) v Secretary of State for Health and Social Care* [2020] EWHC 1392 (Admin) at [19], Swift J) **{K/187/6}**.

the police or other local authority action, is such that, generally speaking, everyone is prevented from accessing the premises. This is in contrast to the Regulations.[98]

103. Zurich's construction is consistent with the interpretation of similar clauses in another common law jurisdiction, that is American business interruption policies providing cover where access to premises is "*prohibited*" or "*denied*". The US courts have consistently held that such policies require access to be "*totally and completely prevented – i.e. made impossible*",[99] rather than merely restricted or made more difficult or less convenient.

104. Thus, such clauses have been triggered where:

(1) Access to an insured's premises was prohibited by the New York civil authorities from 11 September to 14 September 2001 (in response to the 9/11 terror attacks), but not thereafter when vehicular access was restricted, but pedestrian access and public transport was permitted;[100]

(2) A governor ordered evacuation of a town in response to an approaching wildfire, but not after the order was lifted even though some roads into the town remained closed.[101]

105. On the other hand, access was not prohibited or denied where:

(1) Access was less convenient following a tornado;[102]

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[98] The FCA even goes so far as to suggest that insurers' arguments are wrong because, say, a police cordon might be ignored, FCA Skeleton [139-140] **{I/1/55}**. For the avoidance of doubt, Zurich's case is that a police cordon would prevent access to premises, even if it might be ignored.

[99] *Commstop Inc v Travelers Indemnity Co of Connecticut* (17.5.2012) 2012 WL 1883461 (US District Court (N.D. California)) **{K/146/1}**.

[100] *Abner, Herrman & Brock, Inc. v Great Northern Ins. Co* 308 F Supp 2d 331 (2004) at p. 4 and 10 (US District Court (New York)) **{K/113/1}**.

[101] *By Development Inc v United Fire and Cas Co*, 206 Fed Appx 609 (2006) at p. 1-2 (US Court of Appeals, Eighth Circuit) **{K/127/1}**. This finding was not challenged on appeal.

[102] *Dixson Produce LLC v National Fire Insurance Company of Hartford* 99 P.3d 725 (2004) at p, 3 to 5 (Court of Civil Appeals of Oklahoma, Division 2) **{K/114/3-5}**.

(2) A bridge was closed for repairs and an insured casino-hotel claimed to have lost 80% of its business, but the casino-hotel was still accessible and was still accessed during the period of closure;[103] and

(3) Municipal authorities imposed general curfews following the verdict in the Rodney King case, but did not specifically prohibit anyone from entering the insured's (or any other) premises.[104]

106. Zurich's construction is also consistent with the distinction drawn in *force majeure* cases between events which "*prevent*" and events which merely "*hinder*". In *Tennants (Lancashire) Ltd v CS Wilson & Co Ltd,*[105] Lord Atkinson said: "*Preventing delivery means, in my view, rendering delivery impossible and hindering delivery means something less than this, namely, rendering delivery more or less difficult, but not impossible.*"

107. On the Agreed Facts, access to insureds' premises was not prevented at any time; entry to premises was not physically obstructed or otherwise rendered impossible. Zurich does not understand the FCA to allege that access to any premises was physically prevented or otherwise rendered impossible.

108. The FCA nevertheless contends that the UK Government's advice, instructions and announcements as to social distancing, self-isolation, lockdown and restricted travel and activities, stay at home and home working amounted "*for all businesses .. in all cases for which access to or use of the premises by owners/employees/customers was material to the trading of the business to … prevention of access to the premises … given that owners, employers and/or customers could not access the premises.*"[106] This is wrong.

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[103] *St Paul Mercury Ins. Co. v Magnolia Lady, Inc* (4.11.1999) 1999 WL 33537191 **(**US District Court, ND Mississippi, Delta) **{K/91/1}**.

[104] *Syufy Enterprises v Home Insurance Co of Indiana* (21.3.1995) 1995 WL 129229 (US District Court, ND California) **{K/81/1}**.

[105] [1917] AC 495, at 518 **{J/41/24}** (quoted in *Lewison* at [13.07] **{K/202/59}**)

[106] [46.1] AmPoC **{A/2/30}**.

109. Consistent with its overall broad brush case on construction across all Wordings, the FCA asserts, somewhat surprisingly, that the term "*prevention*" is a "*broad term*" (FCA Skeleton [677]).[107] The consequence of this assertion is that, on the FCA's case, it does not matter that "*prevent*" rather than "*hinder*" (whether alone or in conjunction with "*prevent*") is used; the FCA suggests that "*prevent*" means any action which "*stops either completely or partially the otherwise free access to .. Premises*"; and that hinder "*also encompasses any action which makes more difficult the otherwise free access to .. the Premises*." There does not appear to be any distinction between "*partially*" stopping free access (which the FCA says means to "*prevent*"), or making free access more difficult (which the FCA says means "*hinder*").[108]

110. The FCA variously contends:[109]

    (1) that there could be prevention to a defined extent. For example, "*a road closure save for access by residents would still be a prevention of access for non-residents*";

    (2) that "*partial closure*" is sufficient to amount to prevention of access;

    (3) that access has been prevented in the sense intended by the insuring clause where there is "*a degree of prevention which results in loss*"; and

    (4) that "*prevention of access*" means preventing access to the premises for the "*ordinary business … for which premises operate, for at least some people*".

111. These points should all be rejected:

    (1) As to (1) and (2), "*prevention of access*" means what it says; if access to premises was still possible (although it might have been more difficult), access has not been prevented. Whilst a road closure save for access by residents might amount

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[107] Having suggested that the term "action" might be given a broad meaning because it would be limited by "*prevention of access*" ([642] of its Skeleton **{I/1/217}**), the FCA then argues that the latter phrase is broad too.
[108] FCA Skeleton [129] **{I/1/51}**.
[109] FCA Skeleton [137] **{I/1/54}**, [144] **{I/1/56}**, [149] **{I/1/57}**, [151] **{I/1/58-60}**, [677] and [678] **{I/1/226-227}**.

to a prevention of access for non-residents, prevention of access for certain individuals is not what is required by the AOCA Extension (which simply requires that access to the premises is prevented);

(2) As to (3), this assertion begs the question. The AOCA Extension does not provide cover for "*a degree of prevention*" causing loss; it provides cover where access to the premises has been prevented; and

(3) As to (4), there is no justification for reading extra words into the AOCA Extension which are not there. As set out at paragraph 99 above, the paradigm cases to which the AOCA Extension is directed are ones where the danger or disturbance is the reason why access to the premises must be prevented altogether.

112. The FCA's point (3) above in particular seems to be the driving force for much of the FCA's submissions on "*prevention of access*"; namely that where loss is caused, it should be recoverable, as long as there is a degree of prevention. That is plainly not what the AOCA Extension says.

113. The FCA also appears to equate "*closure*" with "*prevention of access*"[110] but these are not equivalent terms. A business may be "*closed*" to the public, but still allow access to employees (for example, other goods shops in Category 4).[111]

The Government Measures

114. Before the Regulations came into force, there was nothing which prevented access to any premises. As to the guidance and advice summarised at Section B above, none of it had the effect of physically obstructing access to premises or otherwise making such

[110] The FCA pleads that "*the prohibition on all but off-site or remote provision on businesses in categories 1 and 4 amounted to closure requirements*" but does not explain how this would amount to prevention of access: Reply [13.2] **{A/14/9}**.

[111] The FCA's reliance on the French case of *SAS Maison Rostang* at [152] of its Skeleton, is similarly misplaced. The issue in that case was whether a "*prohibition on receiving from the public is indeed a total or partial government ordered closure .. of the restaurant*", which the Court concluded it was **{J/143/6}**. The decision says nothing about the meaning of "*prevention of access*".

access impossible. First, this was only advice or guidance, which individuals could disregard. Second, none of the advice or guidance was directed at preventing access to any premises: rather it was directed at limiting contact with others, and promoting hygiene.

115. The FCA argues that on 24 March 2020 (i.e. prior to the 26 March Regulations) a potential customer of a clothing shop (which was then still allowed to stay open) would have been prevented from accessing the clothing shop because "*he or she ha[d] been told in terms, by the Government, not to attend the shop*".[112] This example betrays the extreme nature of the FCA's case. As at 24 March 2020 (or anytime in March for that matter) a person may have decided not to visit the clothing shop (because of the general fear of COVID-19 or the Government advice) but they were not "*prevented*" from doing so. The Government advises generally on a host of topics, for example not to smoke and to drink no more than 14 units of alcohol per week, but the Government does not "*prevent*" people from acting except where it prohibits them from so acting by restrictions having the force of law.

116. As to the 21 March and 26 March Regulations:

(1) They do not on their face prevent access to premises; and

(2) They do not have the effect of preventing access to premises.

Both of these points are unsurprising because the Regulations were not aimed at preventing access; rather they were designed to reduce the degree to which people gathered and mixed, particularly indoors.

[112] FCA Skeleton [146] **{I/1/56}**.

117. Zurich contends that it does not matter whether any particular individual premises was not in fact accessed during the currency of the Regulations; access was not prevented by the Regulations.[113]

118. To the extent that the FCA relies on the restrictions on individuals' movements as set out at regulation 6(1) of the 26 March Regulations (see paragraph 23 above), these restrictions did not prevent access to any premises:

    (1) First, the restrictions on movement were not directed at preventing access to any particular premises.

    (2) Second, on the face of regulation 6(1), people were permitted to leave the place where they were living when they had a reasonable excuse, which would include, for example, to obtain basic necessities or travel for the purposes of work where it was not reasonably possible to work from home, either of which might have involved accessing premises in one of the Categories of business identified at paragraph 20 above, and at paragraph 120 below.

119. In US caselaw, restrictions on individuals' movements have not counted as prohibitions or denials of access to premises: for example where curfew orders were imposed by civil authorities to quell potential violence following the verdict in the Rodney King case, an insured movie theatre could not recover under a business interruption policy which required "*access to .. premises [to be] specifically prohibited by order of civil authority*", because "*no civil authority ever specifically prohibited any individual from entering a theatre; rather, the cities imposed dawn-to-dusk*[114] *curfews to reduce the possibility of rioting and looting. Because access to [the insured's] theatre was never specifically denied, coverage for a business interruption loss was never triggered.*"[115]

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[113] The FCA misunderstands Zurich's case at [681] of its Skeleton **{I/1/227}**: cover is not lost by any particular business which seeks to mitigate its losses by operating its business to some degree from the premises.

[114] This is how it appears in the report, although it may be a mistake and ought to refer to "*dusk-to-dawn*".

[115] *United States District Court, ND California in Syufy Enterprises v Home Ins. Co of Indiana*, Not Reported in F. Supp. (1995), Westlaw citation 1995 WL 129229 (pages 1 to 2) **{K/81/1-2}**. See also, *United States District Court in 730 Bienville Partners Ltd v Assurance Company of America*, Not Reported in F. Supp 2d Westlaw

120. As to the provisions in the 21 March and/or 26 March Regulations concerning the Categories of business summarised at paragraphs 19 to 21 above, consistent with the aim of the Regulations, no part of them had the effect of physically obstructing access to premises or otherwise making such access impossible. Owners and/or employees were not prevented from accessing the premises. Indeed, in respect of each Category of business, it was made clear in the Regulations that access to premises was permitted for certain purposes and/or certain groups of individuals:[116]

(1) As to Category 1 (restaurants, cafes, bars and public houses), those responsible for carrying on these businesses were only required to "*close any premises, or part of the premises, in which food or drink are sold for consumption on those premises…*" These businesses could still sell food or drink for consumption off the premises, for which purpose employees preparing food and drink for takeaway/delivery, and those collecting food for takeaway/delivery (delivery drivers or customers) were permitted to access the premises;

(2) As to Category 2 (theatres, etc), those responsible for carrying on these businesses were required to "*cease to carry on that business or to provide that service*", but some of businesses could use the premises, for example, to broadcast performances to people outside the premises. Employees broadcasting performances were permitted to access the premises;

(3) As to Category 4 (other goods shops), those responsible for carrying on these businesses were required to "*cease to carry on that business*" except for the purposes of responding to orders received remotely, "*close any premises which are not required to carry out its business*" responding to orders remotely and to "*cease to admit any person to its premises who is not required to carry on its*

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citation 2022 WL 31996014 **{K/100/1-2}** in the aftermath of 9/11, the Federal Aviation Administration closed all US airports. The insured hotel in New Orleans claimed cover for business losses "*caused by action of civil authority that prohibits access to your premises*". The claim failed. Whilst the FAA's closure of airports may have prevented guests from getting to the hotel, the FAA hardly prohibited access to the hotel (page 1-2).

[116] In its Reply at [13.2] **{A/14/9}**, the FCA misunderstands [26(2)] of Zurich's Defence **{A/13/8}**. Zurich's point is that most kinds of businesses were permitted to remain open and/or carry on business (at least to some degree), rather than an assertion that more than 50% of businesses in the UK were permitted to remain open.

business" remotely. Employees preparing orders for delivery and those collecting those orders, were permitted to access the premises;

(4) As to Category 6 (holiday accommodation), those responsible for carrying on these businesses were required to "*cease to carry on that business*", although they could continue to do so and "*keep any premises used in that business open*" to provide accommodation, for example, to those who were unable to return to their main residence. Customers who were permitted to use the accommodation, and those employees needed to provide services to those customers, were permitted to access the premises;

(5) As to Category 7 (places of worship and certain educational establishments), those responsible for a place of worship were required to ensure that "*the place of worship is closed*" except for a number of expressly permitted uses such as funerals.[117] Employees and religious ministers were permitted to access the premises.

121. None of the above provisions prevented access to premises. Their aim was to limit mixing of people with one another, not preventing access to premises or localities. In respect of each Category of business, the Regulations sought to strike a balance between limiting the numbers of people mixing with each other, and the necessity/desirability of providing the particular goods or services. By contrast, if there had been a bomb threat, or violent disturbance, at the premises or in their vicinity, access to the premises and/or locality would have been denied to everyone. That is the kind of situation to which the AOCA Extension is directed. The Regulations, however, were not directed to such a situation.

[117] As to educational establishments, not covered by the Regulations but within the FCA's Category 7, they were subject to the guidance in the 18 March 2020 announcement as noted at paragraphs 20(7) and 21 above; and were advised to close save for certain exceptions such as children of key workers. Access to those premises was not prevented; first, at least in respect of non-state schools, the instruction was only guidance, and second, certain staff and children were expressly permitted access.

122. Further, the fact that regulation 8 gave relevant persons the power to enforce certain requirements imposed by the Regulations (see paragraph 24 above), does not mean that access to premises was prevented. Indeed, those powers could only be exercised to enforce compliance with the Regulations, which in themselves did not prevent access; rather, as set out above, they made it clear that access was permitted.

123. The FCA pleads that where a business in Categories 1, 2, 4, 6 and 7 was ordered to close the premises, or cease the business, or only provide take-away/mail order/online business and/or provided a limited range of permitted services, there was prevention of access to the premises "*given that owners, employees and/or customers were ordered not to access the premises for its business*".[118] This is simply not what the Regulations say. As set out above, no owners or employees were ordered "*not to access the premises for its business*"; and no customers were ordered not to access the premises.[119]

124. In its Skeleton, the FCA does not appear to maintain the argument that owners or employees were prevented from accessing the premises. Rather, its focus has shifted to customers.[120] In respect of Categories 1, 2, 4, 6 and 7, there was no prevention of access for the reasons set out above.

125. The FCA's position in respect of Categories 3 and 5 demonstrates the extreme nature of its case:

    (1) Even in the case of supermarkets or pharmacists (Category 3), the FCA contends that members of the public were <u>prevented</u> from accessing the premises because of social distancing requirements at the premises, and because of the general "*stay at home*" guidance.[121] This simply cannot be the correct interpretation of "*prevention of access*".

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[118] [47.1] AmPoC **{A/2/32}**.

[119] Save for the possible, immaterial, exception, at regulation 5(1) that a person responsible for carrying on a business in Category 4 must "*cease to admit any person to its premises who is not required to carry on its business*" remotely **{J/16/3}**.

[120] [149 to 151] **{I/1/57-60}**.

[121] FCA Skeleton [151.3] **{I/1/58-59}**.

(2) As to Category 5, the FCA contends that access to premises was prevented even for those businesses that were not subject to any specific restrictions in the Regulations, because of social distancing requirements at the premises and the restrictions on individuals' movements set out at regulation 6(1) of the 26 March Regulations.[122] This is wrong. There was nothing to prevent employees/owners/suppliers from accessing the premises "*for the purposes of work*" (a recognised "*reasonable excuse*" within regulation 6). To the extent that businesses closed because they could not comply with the social distancing requirements, those requirements did not prevent access to the premises of those businesses; even if the premises closed, employees/owners could still access them.

Zurich's Alternative Case

126. Alternatively, if (contrary to the above submissions) any aspect of the Regulations was capable of preventing access to premises, Zurich submits that only the regulatory restrictions applied to Category 2 businesses were so capable. Compared to other categories of business, the interference with access to the premises in Category 2 was most extreme (although, as set out above, access thereto was not prevented), and amounted, for the most part, to complete cessation of all businesses activity at the relevant premises of the businesses within this category.

(4) There must have been a "*danger or disturbance in the vicinity of the Premises*"

127. As noted at paragraph 35(2) above, words inevitably take colour from their surrounding context. Words, however general, may therefore be limited when read in the context of surrounding words and phrases, especially when they deal with a particular subject matter.

128. This applies to the meaning of "*danger*" in the AOCA Extension.

[122] FCA Skeleton [148] **{I/1/57}**, [151.5] **{I/1/59}**.

129. Although the presence of COVID-19 is in principle capable of amounting to "*danger*", if that term is viewed in isolation, the COVID-19 pandemic is not a danger within the meaning or contemplation of the AOCA Extension.

130. In *Tektrol Ltd v International Insurance Co of Hanover*,[123] the Court of Appeal found that, although it was common ground between the parties that a "*malicious person*" included a computer hacker, an exclusion referring to damage caused by "*erasure loss distortion or corruption of information on computer systems or other records programmes or software caused deliberately by rioters strikers locked-out workers persons taking part in labour disturbances or civil commotion or malicious persons*" did not include a computer hacker. As Burton LJ explained, by reference to counsel's argument:

> *"The concept of rioters, etc, causing damage to information on the computers at the insured's premises suggests strongly that the context envisaged by the draftsman is of interferences directed specifically at those computers and committed on or near the insured's premises … But suddenly to tag on at the end of the excepting clause a reference to remote hackers, a completely different category of person making a completely different kind of attack, significantly changes the thrust of the exception, in a way that one would expect to be done only by much more specific wording …*
>
> *… although, as agreed between the parties, the author of the virus was a "malicious person", the clause does not extend to interferences by such persons that are not directed at the computer systems, etc, used by the insured at the premises. If the insurer wished to exclude all damage caused however indirectly by a computer hacker he needed to place that exclusion in a separate clause, and not refer to malicious persons in the same terms as rioters or locked-out workers.*"

131. The COVID-19 pandemic is not a danger within the meaning of the AOCA Extension, in much the same way that computer hackers were not malicious persons within the meaning of the relevant clause in *Tektrol*.

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[123] [2005] 2 Lloyd's Rep 701 at [11]-[12] **{K/124/6}**. Carnwarth LJ dissented on a different point.

132. **First**, in circumstances where each of the Zurich Policies contains a Notifiable Diseases Extension, it is unlikely, as a matter of common sense, that the reference to "*danger*" in the AOCA Extensions is intended to encompass an outbreak of disease, let alone an outbreak of a notifiable disease. As stated in *Welch v Bowmaker*: "*when you find a particular situation dealt with in special terms, and later in the same document you find general words used which could be said to encompass and deal differently with that particular situation, the general words will not, in the absence of an indication of a definitive intention to do so, be held to undermine or abrogate the effect of the special words which were used to deal with the particular situation.*"[124]

133. Where the parties have turned their minds to the risk posed by an outbreak of disease, in particular a notifiable disease, and agreed cover specifically (i) where an occurrence of a notifiable disease is found at the premises and (ii) in the case of Zurich 1, only in respect of a closed list of notifiable diseases (which does not include COVID-19), or in the case of Zurich 2, on the basis that pandemics are expressly excluded, it is unlikely that the parties intended the term "*danger*" to apply to any disease, let alone a notifiable disease, let alone a pandemic.

134. **Second**, the AOCA Extension refers not to "*danger*" in a general sense but rather to "*a danger*". This connotes a transient incident posing a risk of danger (such as a bomb threat or a fire) rather than an ongoing public health issue, such as might be caused by the presence of a disease, or a pandemic.

135. **Third**, the words "*or disturbance*" give further colour to what is meant by "*a danger*" in the AOCA Extension. These words reinforce the notion that the clause contemplates an (isolated) incident, rather than a continuing state of affairs. The natural meaning of "*disturbance*" would encompass a traffic accident, a brawl, or commission of a criminal offence, such as a knife attack or a burglary. The term "*disturbance*" also re-affirms that the danger or disturbance contemplated by the AOCA Extension is a danger or disturbance which is specific to the immediate locality of the premises. The risk which

[124] *Welch v Bowmaker (Ir) Ltd* [1980] 1 IR 251 **{K/66/5}** (quoted in *Lewison* at [7.05] **{K202/48}**); see paragraph 35(4) above.

a disturbance poses to a business is a specific local risk – for example, a disturbance in Barnet is unlikely to require action preventing access to a business in Morden.

136. **Fourth**, the requirement that the "*danger or disturbance*" must be "*in the vicinity of the Premises*" suggests that it is a localised "*danger or disturbance*" that is contemplated, rather than a national or international "*danger or disturbance*", or, more particularly, the COVID-19 pandemic.

137. The FCA argues that the COVID-19 pandemic is a nationwide emergency arising out of a highly contagious disease, and, accordingly, from 3 March 2020 alternatively 12 March 2020, there was a danger everywhere in the UK which necessarily included in the vicinity of the premises.[125] This argument does not engage with the words used in the AOCA Extension.

138. Linguistically, and as a matter of logic, danger might exist both in the vicinity, and nationally. However, within the meaning of the AOCA Extension, the danger must be limited to the vicinity, or thereabouts. This is apparent from:

    (1) The reference to a danger or disturbance. As above, this suggests a specific incident must have occurred somewhere, rather than that a general state of affairs has arisen, signalling that the incident must have occurred in the vicinity of the premises;[126]

    (2) The AOCA Extension is triggered by action "*following*", i.e. "*in response to*", the danger in the vicinity. This suggests that the "*danger*" is confined to the vicinity (or thereabouts); otherwise, in the case of more widespread danger, there would not be action in response to danger in the vicinity, but action in response to a more widespread danger. See further Section E(5) below.

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[125] AmPoC [43] **{A/2/28-29}**.

[126] The FCA argues that Zurich's argument lacks common sense because one can look at a particular locality and determine whether there was a danger in that area, but to show that that danger did not exist anywhere outside of the locality is "*a different challenge altogether*", see FCA Skeleton [666] **{I/1/223}**. This betrays the FCA's premise that "*a danger*" within the meaning of the AOCA Extension encompasses widespread danger with a wide geographical reach. That is not what the AOCA Extension is intended to cover; rather, it is intended to cover a local danger or disturbance.

139. As to "*vicinity*", the term is not defined in the Zurich Policies. On its plain and ordinary meaning, "*vicinity*" means "*immediate locality*" and requires a close spatial proximity with the insured's premises (see **{K/222.1/7}**). The OED defines 'vicinity' as meaning "*the state, character, or quality of being near in space; propinquity, proximity*"; and 'in the vicinity of' as meaning "*near or close (to)*" (see **{K/222.1/7}**). Equivalent meanings have been ascribed to the term in case law and legislation. By way of example:

(1) In *Adler v George* [1964] 2 QB 7, Lord Parker CJ took the natural meaning of 'vicinity' to be "*the state of being near in space*";

(2) The term 'vicinity' has been defined in secondary legislation as meaning "*the area immediately surrounding*" a dwelling (Rent Officers (Housing Benefit Functions) (Scotland) Order 1997/1995, paragraph 1(4) of Schedule 1, Part I); and

(3) In *R v The Licensing Committee for Blackpool Council* [2007] EWHC 2213 (Admin), Sullivan J referred to statutory guidance advising that whether a person's residence or business was 'in the vicinity of' premises that were the subject of a licensing application depending on (among other things) whether "*the individual's residence or business is likely to be directly affected by disorder or disturbance occurring or potentially occurring on those premises or immediately outside the premises*" (at [14]).[127]

140. As recognised by the statutory guidance referred to in *R v The Licensing Committee for Blackpool Council*, the precise ambit of the vicinity of any particular premises must have regard to the nature of the business conducted on the premises and the

[127] On any particular facts, there may not be any material difference between the meaning for which Zurich contends, and the meaning contended for by the FCA, "*an area surrounding or adjacent to an Insured Location in which events that occur within such area would be reasonably expected to have an impact on an Insured or the Insured's Business*." [41.5] **{A/2/27}** and [43] AmPoC **{A/2/28}**.

geographical area in which the premises are located (including any features peculiar to that area).[128]

141. The term "*vicinity*" appears also in the POA Extension. In this clause, the term plainly refers to the immediate locality of the premises; the POA Extension provides cover in the event of "*loss or destruction of or damage to*" property "*in the vicinity of the premises*" which prevents or hinders the use of, or access to, the premises. The property in question must be property within the immediate locality of the premises because otherwise damage to such property would not, or would be unlikely to, prevent or hinder access to the premises. Finally, the word "*disturbance*" gives colour to the term "*vicinity*", and reinforces the local focus of the AOCA Extension.

142. The FCA argues that "*vicinity*" cannot mean "*immediate vicinity*" because the term "*immediate vicinity*" is used in the context of a condition precedent to the liability of the Insurer in respect of Public and Product Liability cover.[129] This is a weak point. The term is used in the following context:[130]

> *"It is a condition precedent to the liability of the Insurer under this Section that the following precautions are complied with on each occasion of the use or application of heat .. by or on behalf of the Insured taking place elsewhere than on the Insured's own premises.*
>
> *Application of heat by means of electric oxyacetylene or other welding or cutting equipment …*
>
> *The area in the immediate vicinity of the work (including in the case of work carried out on one side of a wall or partition, the opposite side of the wall or partition) must be cleared of all loose combustible material …"*

143. As is plain from the quotation, "*immediate vicinity*" means the area around the work where the presence of loose combustible material would present a fire risk, and is necessarily a smaller area than the building where the work is being carried out. This is

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[128] In practice, much depends on the locality in which the insured business is located. In the centre of London, vicinity may be only a matter of a few hundred metres, yet in more remote, rural areas a road closed 10 miles away due to damage to a building could require a significant detour: *Riley* at [10.32] **{K/206/27-28}**.

[129] FCA Skeleton [658] **{I/1/222}**.

[130] **{B/21/31} {L/21/11}**.

plainly not the same meaning to be given to "*vicinity*" in the AOCA Extension, where that area will extend beyond the premises. It does not assist in the interpretation of "*vicinity*" in the AOCA Extension.

144. **Fifth**, the AOCA Extension requires that the action responding to "*a danger or disturbance*" in the vicinity must be such as to prevent access to the premises, i.e. physically to obstruct such access or otherwise make access impossible (see further Section E(3) above). This indicates that the relevant "*danger or disturbance*" is one which poses a danger to anyone trying to access the premises (such as a fire, bomb scare or a brawl) such that the authorities' response is to prevent everyone from physically doing so. In contrast, in the case of COVID-19, the danger posed is caused by people mixing with each other. Such a danger does not require access to premises to be prevented. Accordingly, for this additional reason, the term "*a danger*" in the AOCA Extension does not include the COVID-19 pandemic.

145. Alternatively, if (contrary to the above submissions), the COVID-19 pandemic does constitute "*a danger*" within the meaning of the AOCA Extension, Zurich adopts (so far as necessary) the submissions of MS Amlin and RSA as to the extent of prevalence of COVID-19 required to constitute a danger in the vicinity of the premises.[131]

(5) The action by the competent civil authority must have been taken "*following*" a danger or disturbance in the vicinity of the Premises "*whereby*" access is prevented

146. The Zurich Policies only respond to an action of a competent civil authority which is taken "*following*" a danger or disturbance in the vicinity of the premises and "*whereby*" access to those premises is prevented.

147. The FCA accepts (as it must) that the word "*following*" "*requires a causal connection*".[132] Zurich submits that the term "*following*" in fact imports a requirement

[131] As to the date on which such a danger arose, the earliest appropriate date is 21 March 2020, when the Regulations which (on Zurich's alternative case) prevented access to Category 2 businesses came into force.
[132] FCA Skeleton [385] **{I/1/143}**; and see Hiscox Interveners' Skeleton [21] **{I/3/8}**.

of proximate causation, i.e. that the danger or disturbance in the vicinity must be the effective or operative cause of the relevant civil or other authority action. This is consistent with (a) the limited scope of the peril insured by the AOCA Extensions and (b) the overarching requirement of the Zurich Policies that the only recoverable losses are those which were proximately caused by the insured peril (as to which, see Section F below).[133]

148. Even if this were not be accepted, it is clear that "*following*" requires at least a meaningful causal connection between the "*action*" by which access to the premises was prevented and any such "*danger or disturbance*" that might be said to have occurred "*in the vicinity of the Premises*".

149. Clearly, not every "*action*" by a relevant authority will engage the Policy. At a minimum, the "*action*" must be referable to a "*danger or disturbance*" in the vicinity of the insured premises. This requires the "*action*" to be '***in response to***' a danger or disturbance in the vicinity of the premises.[134]

150. The FCA pleads that the word "*following*" connotes an event "*which is part of the factual background*", by which it is assumed that the FCA means that the term should bear only a temporal meaning.[135] However, if that were right (which it is not):

    (1) The words "*danger or disturbance in the vicinity*" would be nugatory; and

    (2) Instead, <u>any</u> action of a competent authority which came later in time to the "*danger*" would be sufficient to fall within cover; and

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[133] As noted in *Mance* (at [7.14]) **{K/204/8}**;and *MacGillivray* (at [21-001]) **{K/191/1}**, proximate causation is the default standard for causation in an insuring clause.

[134] One of the available definitions of 'following' in the OED is: "*Ensuing as an effect or consequence, resulting*" **{K/222.1/6}**. This encapsulates the intended meaning of the term in the AOCA Extension. See, also, the OED's definition of the verb 'follow' as: "*To come after or succeed as a consequence or effect; to result from.*" **{K/222.1/4}**.

[135] AmPoC [60] **{A/2/40}**; see also FCA Skeleton [325.3] **{I/1/126-127}**.

(3) That would be the case even if the action occurred a very considerable time afterwards, or had nothing to do with the "*danger*" or "*disturbance*" in the "*vicinity*" at all.

151. Accordingly, the FCA's construction is inconsistent with the wording of the AOCA Extension as a whole, is inconsistent with business common sense, and cannot be (and is not) what the parties intended.

152. The only construction which does give effect to all of the words in the AOCA extension is one in which "*following*" means '***in response to***'. Such a construction recognises the fact that the actions in question are the result of human agency and a deliberate decision to act in response to the danger or disturbance in question (as opposed to being an inanimate consequence or result of an event in the natural world); and it reflects the FCA's own language at AmPoC [4.1] and [18], where the FCA refers to the actions of the UK Government and various authorities as a "*response*" to the COVID-19 pandemic.

153. If that is correct, the flaw at the heart of the FCA's case becomes obvious.

154. The "*action*" on which the FCA relies takes the form of regulations, advice and information which were introduced by the Government on a national basis. By definition, none of these Government Measures was introduced in response to a "*danger*" in the "*vicinity*" of any particular "*premises*". On the contrary, they represented measures which were applied indifferently in all parts of the country in response to a nationwide (and worldwide) emergency, irrespective of the position in any given vicinity.

155. The FCA does not allege, and could not allege, that the Government Measures "*followed*" any particular outbreak of disease in any specific locality that might be said to have been in the vicinity of the Insured's premises. That is not what happened. By introducing the Government Measures, the UK national Government was not responding to any particular local occurrence of COVID-19, as the FCA accepts in its Reply (at [52]): "*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 an particular local occurrence of COVID-19".

156. There was therefore no meaningful causal connection between any "*danger or disturbance*" in the "*vicinity*" of the insured's premises and the national, and nationwide, action on which the FCA relies. The UK Government would have acted in precisely the same way, and implemented the same measures, irrespective of any such COVID-19 as might have existed in the vicinity of an insured's premises. Even if there was no danger in a given vicinity, the Government Measures would have applied regardless.[136] Neither a test of proximate causation nor any lesser causal test (including but for causation) is satisfied.

157. The FCA attempts to rebut this straightforward construction of the AOCA Extension by arguing that there was "*a danger*" in the vicinity of an insured's premises, within the meaning of the clause, because COVID-19 was "*everywhere*".[137] However, this does not answer Zurich's argument. Even if it could be said that there was COVID-19, and hence "*a danger*", in the vicinity of the premises by reason of the nationwide pandemic, the Government Measures did not "*follow*" any such local presence of COVID-19. The Government Measures followed, and were in response to, the nationwide pandemic (and not anything specifically occurring in the vicinity of the premises).

158. The FCA's further argument that the meaning of the term "*following*" only falls to be addressed once the Court has decided against Zurich on the meaning of "*danger*", "*in the vicinity of*" the premises and "*civil authority*", is misplaced.[138] The meaning of each of these terms must be considered together, in the context of the AOCA Extension as a whole. The FCA's argument is a further manifestation of its atomised approach to interpretation, which has repeatedly been eschewed by appellate courts at the highest level. As Lord Hodge said in *Wood v Capita Insurance Services*,[139] construction is a

[136] See the example of the Isles of Scilly, see paragraph 25 above.
[137] FCA Skeleton [692.2]-[692.3] **{I/1/231}**.
[138] FCA Skeleton [690-691] **{I/1/230}**.
[139] [2017] AC 73 at [12] **{J/134/7}**.

"*unitary exercise [which] involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated*". That unitary exercise must take account of the rival possible meanings of each of the words of the AOCA Extension.

159. The Court should not therefore accept the FCA's invitation to construe "*following*" on the assumption that the AOCA Extension contemplates being triggered by (i) perils that can be wide in their effect, including infectious diseases or pandemics, and (ii) action by a relevant authority in response to a wide area danger on a national or regional scale. As explained, that is not what the AOCA Extension, read as a whole in the context of the Zurich Policies, contemplates.

160. Finally, action must not only be in response to a danger in the vicinity, but must also be action "*whereby*" access to the premises is prevented. Whilst the FCA contends that "*whereby*" merely requires some causal link between the relevant elements in the causal chain (AmPoC [59]), this is wrong. Self-evidently, in order to trigger cover in the AOCA Extension, the action must be at least a 'but for' cause of the prevention of access.

F. CAUSATION OF LOSS AND TRENDS CLAUSES

Introduction

161. The questions of causation and quantification of loss raised by the FCA's claim fall to be addressed on the assumption (contrary to the submissions advanced above) that the AOCA Extension responds to some at least of the Government Measures imposed in response to the COVID-19 pandemic.[140]

162. Specifically, it must be assumed (contrary to Zurich's submissions) that one or more of the Government Measures comprised (a) "*action*" (b) by a "*civil authority*" (c)

[140] In the Zurich Policies, an anterior causation issue arises as to whether any such civil authority action as may be found to have prevented access to an insured's premises was taken "*following*" a danger in the vicinity of the premises. This anterior causation issue is addressed in Section E(5) above.

"*following a danger … in the vicinity*" of the insured's premises (e) "*whereby access*" to the premises was "*prevented*". In this event, an insured would be entitled to be indemnified, subject to the terms of Zurich Policies, for loss "*resulting from*" interruption or interference to its business "*in consequence of*" such civil authority action as prevented access to the premises.

163. Under the Zurich Policies, the amount of indemnity to which an insured is entitled is limited to its loss of "*Gross Profit*" calculated in accordance with the Trends Clauses, which require (as explained further below) that the computation of the insured's loss be adjusted "*to provide for the **trend** of the business and for variations in or other circumstances affecting the business either **before or after** the Incident or which would have affected the business **had the Incident not occurred**, so that the figures thus adjusted shall represent as nearly as may be reasonably practicable the results which but for the Incident would have been obtained during the relative period after the Incident*" [Emphasis added].[141]

164. The Trends Clauses are designed to ensure that the indemnity payable to an insured represents the true amount of loss suffered by the insured by reason of the specific peril insured under the Zurich Policies (i.e. the "*Incident*"). As explained by Riley (at [3.25]), without such a provision:

> "*the policy cannot be regarded as fulfilling the basic principle of an insurance that is to indemnify, because the turnover, charges and profits which would have been realised during a period of interruption are hypothetical and never capable of absolute proof. By the use of this clause it is possible to make adjustments in a loss settlement to produce as near as is reasonably possible a true indemnity for an insured's loss*".

165. In the circumstances which have arisen, it is clear on any common-sense view that most, if not all, of any business interruption loss suffered by policyholders was not caused by any such civil authority "*action*" as might be found by the Court to have

[141] See Specification to Section B1 in the Zurich 1 sample Schedule **{B/21/54} {L/21/28}**; and Basis of claim settlement provisions in Zurich 2 **{B/22/30-34**} **{L/22/11-15}**.

prevented access to an insured's premises, but rather by the Wider Circumstances arising out of the COVID-19 pandemic, namely:

(1) The nationwide COVID-19 pandemic, which resulted in individuals contracting COVID-19 and/or self-isolating and/or shielding themselves from contracting the disease; and/or

(2) The response of the public at large to COVID-19, including general public fear, which increased over time as the pandemic developed and resulted in individuals altering their behaviour so as to avoid contracting the disease; and/or

(3) The adverse impact of the above matters on economic activity, including deterrence of people who would have otherwise visited the UK from overseas; and/or

(4) Government Measures responding to the COVID-19 pandemic other than those which the Court might find prevented access to premises (including, Zurich submits, the Government's stay-at-home guidance and advice and Regulation 6 of the 26 March Regulations).

166. Each of the above matters was and is an independent cause of policyholders' losses falling outside the scope of the cover provided by the AOCA Extension. Loss caused by those matters would have been suffered by policyholders irrespective of the occurrence of the peril insured against by the AOCA Extension (i.e. action by a civil authority whereby access to the premises was prevented). To that extent, the loss suffered by policyholders was not caused by the peril insured against by the AOCA Extension and is not recoverable by way of an indemnity under the Zurich Policies.

167. Viewed through the perspective of the Trends Clauses, the Wider Circumstances comprise *"circumstances affecting the business either before or after the Incident … which would have affected the business had the Incident not occurred"*; the amount of the insured's indemnity must therefore be adjusted, by reason of those Wider Circumstances, so that *"the figures thus adjusted shall represent as nearly as may be reasonably practicable the results which but for [the civil authority action preventing*

access to the insured's premises] would have been obtained during the relevant period". The same result would be achieved by application of ordinary principles of causation, compensatory damages and indemnity insurance.

The FCA's Case and Insurers' Response

168. In an attempt to avoid the clear and obvious effect of the Trends Clauses and/or established principles of causation, compensatory damages and indemnity insurance, the FCA argues (among other things) that:

(1) Despite the multitude of factors which will, on any view, have impacted policyholders by reason of the COVID-19 pandemic, their losses are to be treated as indivisible and having been caused by a single proximate cause, namely *"the (nationwide) COVID-19 disease including its local presence of manifestation, and the restrictions due to an emergency, danger or threat to life due to harm potentially caused by the disease"*;[142]

(2) The cover afforded by the Wordings in issue in the present case, including the Zurich Wordings, contained *"multiple triggers"*, all of which comprise part of the relevant insured peril under each Wording and which should therefore be excluded when positing the counterfactual on the basis of which an insured's indemnity is to be computed;

(3) As a result, the correct counterfactual for the purposes of computing the amount of an insured's indemnity is that *"there was no COVID-19 in the UK and no Government advice, orders, laws or other measures in relation to COVID-19"*;[143]

(4) The amount of an insured's indemnity does not therefore fall to be reduced under the Trends Clauses or otherwise *"by reason that but for the business closure or particular Government measures all or the majority of the losses would have*

[142] AmPoC [53.1] **{A/2/35}**; Declaration (15) **{A/2/53}**. See FCA Skeleton [215.2(b) and 225] **{I/1/87}** and **{I/1/91}.**
[143] AmPoC [77] **{A/2/45}**. See also FCA Skeleton [215.3] **{I/1/87}**.

been suffered anyway as a result of the broader COVID-19 pandemic, the lockdown, self-isolation, social distancing or other national measures imposed by the Government";[144]

(5) Neither the Trends Clauses nor general principles of causation and/or indemnity insurance require a different result.[145]

169. These arguments are misconceived and should be rejected. In this regard, Zurich adopts the Defendants' Joint Skeleton Argument on Causation (the **"Joint Skeleton on Causation"**) produced by Ecclesiastical and MS Amlin on behalf of all Insurers. By way of brief summary of the points of particular significance to Zurich:[146]

(1) An insurance policy is a contract of indemnity by which the insurer agrees to hold the insured harmless against specified loss. If the specified form of loss occurs, the insurer is in breach of its promise to hold the insured harmless from such loss and is liable to compensate the insured in damages for such breach.[147]

(2) As to damages:

(a) Damages for breach of contract are intended to place the claimant in the same position as he would have been in if the contract had been performed.

(b) The burden is on the claimant to prove that the defendant's breach of contract caused the claimant to suffer loss, in the sense that the claimant is in a less favourable financial position than it would have been in if the contract had been performed. If the claimant cannot establish that its position is any worse than the position it would have been in had the

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[144] AmPoC [78] **{A/2/46}**; Declaration (18) {**A/2/54}**.
[145] AmPoC [74] **{A/2/44}** and [76] **{A/2/45}**.
[146] Citation of authority supporting each of the propositions identified below is provided in the Joint Skeleton.
[147] It follows that the assertion at FCA Skeleton [221] **{I/1/90}** that payment under an indemnity policy is a primary obligation is wrong. It is a secondary obligation to pay damages.

contract been performed, it will have suffered no loss and normally be entitled to no damages.

(c) In determining whether the defendant's breach of contract caused the claimant loss, the court applies the 'but for' test of causation, i.e. whether the claimant would have suffered the loss without (but for) the defendant's breach of contract.

(d) The above principles apply to contracts of insurance as they do to other commercial contracts.

(3) In addition, in the case of an insurance contract, the insured must establish not only that its loss was caused (in a 'but for' sense) by the insurer's breach of contract, i.e. by the occurrence of the peril insured against, but also that the peril insured against was the (or at least a) proximate cause of the loss. Before issues as to proximate cause arise, there must be more than one cause which satisfies the but for test, one of which is insured. The proximate cause is the dominant, effective or operative cause. An insurer is not liable for any loss which is not proximately caused by a peril insured against. These principles are founded upon the intention of the parties to a contract of insurance and must be applied in order to give effect to, and not defeat, the parties' intention.

(4) In determining whether (and the extent to which) an insured's loss was caused (in a 'but for' sense) by the peril insured against, the court ascertains whether (and the extent to which) the insured would have suffered the loss without (i.e. but for) the insured peril. If the insured would have suffered the loss regardless, the insured peril is not to be regarded as a cause of the insured's loss in any relevant sense, let alone as the proximate cause.

(5) The 'but for' test requires the court to posit a counterfactual which reverses the insured peril but assumes that everything else remained the same. The precise nature of the counterfactual will depend upon the ambit of the insured peril.

(6) There is nothing artificial or otherwise objectionable about reversing the insured peril - and nothing else - for the purposes of determining causation in the present case. That is precisely what the Trends Clauses, and basic principles of causation and compensatory damages, require.

(7) Whilst there are exceptional situations in which the courts have disapplied the 'but for' test, they are narrow, rare and exceptional. None of them apply in contract and none is relevant to the present case.

(8) There can, moreover, be no conceivable basis for disapplying the but for test where (as in the case of the Zurich Policies) the contract expressly requires application of that test in quantifying the amount of loss recoverable by the insured under the contract. Disapplying the but for test in such circumstances would subvert the basic purpose of the law of contract, namely to give effect to the parties' consensual agreement.

(9) The above principles cannot be circumvented (as the FCA seeks to argue) by reliance on rules concerning concurrent interdependent causes and/or the alleged indivisibility of the loss suffered by policyholders. Policyholders' losses are not indivisible. They have moreover been caused by concurrent and/or successive independent causes and not concurrent and/or successive interdependent causes.[148]

(10) This is not a case where the Wordings contain multiple triggers of cover. In each Wording, there is a single trigger, albeit comprised of multiple essential elements. In order to apply the but for test to such a composite peril, the court must reverse or subtract the peril (in the case of the Zurich Wordings, "action by a civil authority", which, to qualify as an action within the meaning of the AOCA

[148] Concurrent interdependent causes combine to produce the loss, i.e. the loss could not have occurred without both causes operating in concert. Independent causes operate separately to produce a single loss or different portions of a divisible loss.

Extension, must be an action "following a danger or disturbance in the vicinity whereby access to the premises was prevented").

Application of General Principles of Causation / Compensatory Damages / Indemnity Insurance to the Zurich Policies

Summary

170. As to application of the general principles to the Zurich Policies, Zurich submits in summary as follows:

(1) The Zurich Policies require application of the "but for" test, both by reason of the Trends Clauses and the inherent nature of the indemnity insurance provided by the policies.

(2) The court is therefore required to determine whether but for the insured peril, the insured would have suffered any (and if so, what) loss. That is a necessary (but not sufficient) prerequisite to an insured recovering an indemnity under the Zurich Policies. In addition to but for causation, the insured must also establish that the insured peril was the proximate (i.e. dominant, effective or operative) cause of its loss.

(3) In the case of the Zurich Policies, the relevant peril is that insured by the AOCA Extension, namely action by a civil authority following a danger in the vicinity of the premises whereby access to the premises was prevented.

(4) For the purposes of determining 'but for' causation in respect of claims by policyholders under the Zurich Policies:

(a) The Court is required to posit, by way of counterfactual, what would have happened if such civil authority action as the court finds prevented access to the insured's premises had not occurred. The Court is not required to posit (and should not posit) what would have happened had there been "*no*

COVID-19 in the UK and no Government advice, orders, laws or other measures [at all] in relation to COVID-19", as the FCA contends.

(b) The only matter to be reversed out for the purposes of the counterfactual is such Government Measure(s) as the court finds constituted action by a civil authority whereby access to the insured's premises was prevented. That is because it is the relevant action by the civil authority which is the trigger for the operation of the AOCA Extension (see below).[149]

(c) Alternatively, if and insofar as the peril insured against encompasses the presence of *"a danger … in the vicinity of the premises"*, such danger in the vicinity of the premises must also be reversed out for the purposes of the counterfactual. However, there is no basis for reversing out the entirety of the COVID-19 pandemic, as the FCA contends. On no view was the occurrence of COVID-19 outside the vicinity of the premises any part of the peril insured against under the Zurich Policies. Reversing out the entirety of the COVID-19 pandemic would redefine (and vastly extend) the scope of cover afforded by the AOCA Extension.

(5) In broad terms, the answer to the question '*what would have happened but for the Government action preventing access to the insured's premises*?' is that COVID-19 and the Wider Circumstances would still have occurred, and had the same impact on the insured and its business.

(6) It follows that (contrary to the FCA's argument) the amount of an insured's indemnity must fall to be reduced by reason that *"but for the business closure or particular Government measures [comprising the insured peril] all or the*

[149] FCA Skeleton [703] **{I/1/233}** and [704] **{I/1/244}** appear to proceed on the basis of a misapprehension that Zurich's case is that it is only the local application of nationwide Regulations which falls to be removed in the counterfactual. That is not Zurich's case. On Zurich's case, it is the nationwide application of the Regulations which prevent access which falls to be removed. However, it is only danger in the vicinity which, on Zurich's alternative case, falls to be removed from the counterfactual, not danger outside the vicinity.

majority of the losses would have been suffered anyway as a result of the broader COVID-19 pandemic, the lockdown, self-isolation, social distancing, or other national measured imposed by the Government".[150] This result is dictated by the Trends Clauses as well as the general principles of causation, compensatory damages and indemnity insurance summarised above and addressed in the Joint Skeleton on Causation.

The Trends Clauses in the Zurich Policies

171. Zurich 1 (when written on a Loss of Profit or Loss of Revenue basis)[151] and Zurich 2 contain Trends Clauses which apply to non-damage cover.

172. The Trends Clauses expressly provide for the insured's indemnity under the Zurich Policies to be calculated by applying the but for test, and asking what would have happened but for the insured peril. They therefore provide a complete answer to the FCA's argument that the but for test should be disapplied in the present case. As a matter of contract, there is no scope for the application of any other test of causation when computing the amount of an indemnity under the Zurich Policies.

173. The Trends Clauses contained in the Zurich Policies provide (so far as material) that:[152]

    (1) "*The Insurance under this item [i.e. the Business Interruption section of the policy] is limited to loss of Gross Profit due to a) Reduction in Turnover and b) Increase in Cost of Working and the amount payable as indemnity thereunder shall be:*

        a) *in respect of Reduction in Turnover: the sum produced by applying the Rate of Gross Profit to the amount by which the Turnover during the Indemnity Period shall fall short of the Standard Turnover* ***in consequence of the Incident***

        b) *in respect of Increased Cost of Working: the additional expenditure…necessarily and reasonably incurred for the sole purpose*

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[150] AmPoC, Declaration (18) **{A/2/54}**.

[151] This is common ground, see FCA Skeleton [695] **{I/1/232}**.

[152] Emphasis added. The wording quoted is taken from the Zurich 1 sample Schedule **{B/21/54} {L/21/28}**. The relevant wording in Zurich 2 is to substantially the same effect **{B/22/30} {L/22/11}**.

*of avoiding or diminishing the reduction in Turnover which **but for** that expenditure would have taken place during the Indemnity Period **in consequence of the Incident**…*

*less any sum saved during the Indemnity Period in respect of such of the charges and expenses of the Business payable out of Gross Profit as may cease or be reduced **in consequence of the Incident**.*"

(2) The Rate of Gross Profit and the Standard Turnover, by reference to which the Reduction in Turnover is to be calculated, are to be adjusted:

"*as may be necessary to provide for the trend of the Business and for variations in or other circumstances affecting the business either before or after the Incident or which would have affected the business **had the Incident not occurred**, so that the figures thus adjusted shall represent as nearly as may be reasonably practicable the results which **but for the Incident** would have been obtained during the relative period after the Incident*" (emphasis added)

174. The term "*Incident*" (or "*incident*" in Zurich 2) is defined in the Zurich Policies as being the applicable peril insured under the Business Interruption section of each policy, as follows:[153]

(1) Zurich 1:

"*Any loss … resulting from interruption of or interruption of or interference with the Business in consequence of accidental loss destruction or damage **at the under-noted situations** … shall be deemed to be an **Incident** …*"

(2) Zurich 2:

"*Any loss as insured under this section resulting from interruption of or interference with the **business** in consequence of: ..*

*b) **any of the under-noted contingencies***

*will be deemed to be an **incident**.*"

[153] Zurich 1 is **{B/21/50} {L/21/24}**. Zurich 2 is **{B/22/34} {L/22/15}**.

175. Thus, as is common ground: "*the extensions [in the Zurich Policies] operate by deeming the AOCA to be an 'Incident' within the meaning of the BI section … by reference to which the quantum machinery operates*".[154]

176. The requirement for 'but for' causation is reflected in a number of places in the Trends Clauses:

(1) Most prominently, in the adjustments to the Rate of Gross Profit and the Standard Turnover, to arrive at figures which represent the results which but for the Incident would have been obtained;

(2) But also, in the fact that:

(a) The Reduction in Turnover, the primary component of the indemnity calculation, is the amount by which the (actual) Turnover during the Indemnity Period falls short of the Standard Turnover "*in consequence of the Incident*";

(b) Any Increased Cost of Working must have been necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the reduction in Turnover which but for that expenditure would have taken place during the Indemnity Period "*in consequence* of the *Incident*"; and

(c) Any such sum as was saved during the Indemnity Period in respect of charges and expenses of the Business that ceased or were reduced "*in consequence of the Incident*" are to be deducted from the amount of the indemnity. [155]

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[154] FCA Skeleton [634] **{I/1/215}**. The FCA's suggestion, later in its Skeleton at [701]-[702] **{I/1/233}**, that the 'Incident' is not the action of the competent civil authority following a danger in the vicinity of the premises whereby access thereto was prevented is contrary to its acceptance at [634] of the obvious meaning and intent of the deeming provisions and is clearly wrong. The deeming provisions do not, and are plainly not intended to, deem the loss, or interruption or interference, to be the 'Incident'. The 'Incident' is the peril insured against by the respective extension.

[155] The FCA's argument that there is "*no need for a 'but for' test*" in application of the Increased Cost of Working Trends Clause (FCA Skeleton [696-7] **{I/1/232}**) is not understood. Not only is the agreed 'but for"

177. On their true and proper construction, the Trends Clauses thus require the calculation of an indemnity under the Zurich Policies:

(1) To take account of "*variations in or other circumstances*" affecting the insured business which would have affected the business but for the "*Incident*";

(2) So that the amount of indemnity represents as nearly as is reasonably practicable the results which but for the "*Incident*" would have been obtained by the business after the "*Incident*".

178. The adjustments mandated by the Trends Clauses necessarily require assessment of what would have happened but for the "*Incident*" (i.e. the insured peril). That in turn requires assessment of what would have happened but for the relevant action by a civil authority following a danger in the vicinity of the premises whereby access to the premises was prevented.

179. In short, the 'but for' test is enshrined in the agreement of the parties contained in the Trends Clauses as the basis for ascertaining the amount of indemnity payable under the Zurich Policies. It cannot be disapplied.

Case Law on Trends Clauses

180. The above approach to application of the Trends Clauses is consistent with, and endorsed by, the case law in this area.

Orient Express Hotels v Assicurazioni Generali SA

181. The leading decision is *Orient Express Hotels v Assicurazioni Generali SA* [2010] Lloyd's Rep IR 531,[156] arising out of damage to an hotel owned by Orient Express Hotels ("**OEH**") in New Orleans by hurricanes Katrina and Rita in 2005. Hamblen J

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test set out in the Trends Clause, but even on the FCA's argument, the "*but for*" test would arise when considering the words "*in consequence of*".

[156] **{J/106}**.

upheld an award by an eminent arbitral tribunal[157] deciding that by reason of the application of the trends clause in OEH's policy, as well as general principles of but for causation, OEH was only entitled to be indemnified in respect of losses caused by the damage to its hotel and not losses caused by damage to and devastation of the city by the hurricanes. The effect of this decision was severely to limit OEH's recovery under its insurance policy because the wide area damage to the city meant that the hotel would have had little or no business had the insured peril (i.e. damage to the hotel) not occurred.

182. This decision is addressed in the Joint Skeleton on Causation. Zurich relies on the following particular points in respect of the Trends Clauses:

(1) Hamblen J's decision makes clear, if authority were needed, that where the parties agree to apply a but for test of causation in a trends clause, there is no scope for the application of any other test in assessment of the insured's indemnity. As Hamblen J said at [34]:

> *"this is a Policy under which it has been agreed that a "but for" approach to causation should be adopted to the assessment of loss of revenue. This is made clear in the Trends Clause which is predicated on calculating the recoverable losses on the basis of what would have happened "had the Damage not occurred" or "but for the Damage". As such, it is difficult to see how it could ever be appropriate to disregard the causal test, or how the Policy would work if one did.*"

(2) Hamblen J rejected OEH's contention that the trends clause in that case (which was in similar terms to the Trends Clauses in the Zurich Policies) should be construed as not permitting adjustment for the consequences of the peril which caused the damage which gave rise to the business interruption and relevant business interruption loss. In particular:

(a) Hamblen J rejected OEH's argument that one could not ignore the damage to the hotel without also ignoring the event which caused the damage to

[157] Sir Gordon Langley (Chairman), Mr George Leggatt QC and Mr John O'Neill FCII.

occur. In his view, the only assumption required to be made by the trends clause was that the damage (i.e. the insured peril) had not occurred. The clause did not require any assumption to be made as to the causes of that damage (at [46]);

(b) Hamblen J rejected OEH's argument that the trends clause was dealing only with the implications of actual events, and not imaginary or hypothetical ones. In his view, the clause required a single assumption to be made, namely that there was no damage, and for the actual facts to be considered on the basis of that assumption (at [47]);

(c) Hamblen J rejected OEH's argument that the trends clause only contemplated adjustment for trends, variations or circumstances independent of the insured damage and therefore required the impact of the hurricanes also to be excluded in the but for assessment of loss. In his view, the wider area damage caused by the hurricanes was "*independent of the insured Damage, albeit not independent of the cause of that Damage*" (at [48]);

(d) Hamblen J rejected OEH's argument that the possibility of the insured earning a 'windfall' profit if only damage to the hotel was excluded in the counterfactual (by reason of the hotel then being assumed to be an undamaged hotel in a damaged city) counted against that being the appropriate counterfactual, not least because the possibility of such a 'windfall' argument had been rejected in the United States in *Prudential Lmi Commercial Insurance v Colleton Enterprises* 976 F.2d 727 (1992). Hamblen J preferred the view of the dissenting judge in *Colleton Enterprises*, who saw no "*intuitively-sensed logical flaw*" in the notion of a windfall where that possibility was admitted by the words of the Policy (at [49]-[50]);

(e) Hamblen J rejected OEH's argument that excluding only damage to the hotel, and not the wider area damage, produced the "*remarkable*" result

that the more widespread the impact of a natural peril, the less cover is afforded by the policy. In his view, this was the inevitable consequence of the main insuring clause, which only permitted recovery of business interruption losses caused by damage, i.e. damage to the hotel. The insuring clause had "*nothing to do with whatever other devastation the hurricanes might have caused elsewhere than at the insured property*" (at [51]).

(3) Hamblen J concluded at [57] that the trends clause was "*concerned only with the Damage [i.e. the insured peril], not with the causes of the Damage. What is covered are business interruption losses caused by the Damage, not business interruption losses caused by Damage or "other damage which resulted from the same cause." … The assumption required to be made under the Trends Clause is "had the Damage not occurred"; not "had the Damage and whatever event caused the Damage not occurred*."

(4) Contrary to the FCA's submissions at [299 to 306] of its Skeleton, Hamblen J was right to reject the arguments advanced by OEH for the reasons which he gave; and his conclusion at [57] not only accords with the principles relating to the interpretation of insurance contracts set out above, but properly reflects the scope of the indemnity which they provide.

<u>The 'windfall' argument</u>

183. As regards the 'windfall' argument, Hamblen J was (Zurich submits) right to agree with the dissenting judge in *Colleton Enterprises*. The majority in that case, which was concerned with damage to a motel caused by hurricane Hugo, considered that the appropriate counterfactual should assume that the hurricane did not occur at all, even though the relevant clause in the contract of insurance required consideration to be given to pre-damage earnings and probable earnings "*had the loss not occurred*".[158] This was on the basis of an "*intuitively sensed logical flaw*" in any analysis which

[158] *Colleton Enterprises* [16], [17], [22] **{J/69}**.

permitted the insured (whose business had been doing badly prior to the hurricane) to recover against its insurers on the basis it would have made a substantial profit from the occurrence of the hurricane but for the fact that the motel suffered damage.

184. The dissenting Judge, Hall CJ, considered that the reference to "*the loss*" was a reference to loss incurred by the insured rather than "*the overall loss in the surrounding area…*" He pointed out that the majority acknowledged that proof of a lost profit opportunity thwarted by the loss causing event could justify recovery under the lost-earnings provision. On this basis, if gold had been discovered the day after Hugo and the entire region was filled with gold seekers, the majority would have ruled that the insured's lost profits would have been covered. Although Hugo caused property loss, it also created a profit opportunity, and accordingly it did not strike Hall CJ as being problematic to permit recovery for any such profit as was lost.[159]

185. Although 'windfall profits' might be available in principle, the circumstances in which such profits will be recoverable are likely to be limited:

(1) In every case, it is necessary to consider the application of the policy formula.[160]

(2) The insured would need to prove the extent of the profits which it alleges would have been made but for the occurrence for the insured peril.

(3) In cases where an event causes widespread damage or harm, the insured might not be able to prove that, for example, increased numbers of customers would have visited its business. In *Orient Express Hotels* itself, there was no scope for the recovery of any '*windfall*' damages, because the city of New Orleans had been depopulated.

(4) In practice, insurers in the UK have acceded to claims for windfall profits where businesses specifically look to provide emergency services, for example, a "*business that stocks humidifiers for rental purposes would be justified in*

[159] *Colleton Enterprises* [27]-[28] **{J/69}**.
[160] *Riley* [15.18] **{K/206/51}**.

claiming an upward trend or windfall profit if they suffered damage that prevented them from trading."[161]

New World Harbourview Hotel v Ace Insurance

186. *New World Harbourview Hotel v Ace Insurance* [2011] Lloyd's Rep IR 230 provides further illustration of the court's straightforward approach to application of a trends clause. The case arose out of the outbreak of SARS in Hong Kong in 2003. The trends clause required adjustments to be made to Standard Revenue (defined as meaning the revenue realised during the 12 months immediately preceding the date of the Damage) to "*determine the trend of the Insured Business, in consideration of variations of the relative economy or other circumstances affecting the Insured Business either prior to, or after the date of Damage … so that the figures as adjusted shall represent as nearly as may be reasonably practicable the results which, but for such Damage, would have been realized during the relative period after the occurrence of Damage*".

187. SARS did not become a notifiable disease (and hence an insured peril) until 27 March 2003. By then, SARS was "*unquestionably present in Hong Kong*" and had already impacted upon the insured's revenue by deterring people from travelling to Hong Kong and/or otherwise visiting the hotel. The insured argued that its Standard Revenue should not be adjusted to reflect the downward trend in revenue by reason of SARS prior to the date on which SARS became notifiable (and thereby became Damage for the purposes of the policy). Reyes J of the Hong Kong Court of First Instance held that this adjustment was required.[162] That was neither absurd nor unreasonable; it was merely "*what the parties bargained for and agreed*" (at [79]).[163]

188. As noted in *Riley* at [15.23], this decision:

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[161] *Riley* [15.18] **{K/206/51}**.

[162] At [72] to[80] **{J/110}**. This finding was upheld on appeal [2010] 5 HKLRD 133 at [21]-[23] **{J/114/4}**.

[163] The FCA's focus on the definition of Standard Revenue at [307] **{I/1/121}** to [315] **{I/1/123}** of its Skeleton is a distinction without a difference.

"confirms not only that the other circumstances clause should be applied in a case of wide area damage, it also illustrates that the applicable trend may well be capable of measurement, in this case by virtue of the downward trend that was already evident".

Synergy Health v CGU Insurance

189. In *Synergy Health v CGU Insurance* [2011] Lloyd's Rep IR 500, Flaux J construed a trends clause as requiring adjustments to be made to the computation of the insured's loss so as to ensure that the insured was not over-compensated. The claim arose out of business interruption suffered by a provider of laundry services to the NHS by reason of a fire at its premises in Dunstable.

190. In interpreting the trends clause (which was in similar terms to the Trends Clauses in the Zurich Policies), Flaux J held that, in calculating the loss which the insured had suffered "*in consequence of*" the fire, the insured had to give credit for the fact that, as a result of the fire, it had ceased making a deduction in its accounts for depreciation of the plant and machinery at Dunstable.

191. At [253], Flaux J described as "*unanswerable*" a submission by the insurer (at [252]) that, if the insured did not give such credit, it would recover "*an indemnity for more than its actual loss in respect of business interruption*" because "***had the fire not occurred**, Synergy could not have earned its gross profit (by reference to which any indemnity under the business interruption section of the policy is calculated) without having the use of the machines, in respect of which a sum for depreciation would be deducted from the gross profit in each accounting period*" (emphasis added).

192. At [258], Flaux J added that "*as a matter of principle, a policy should be interpreted as providing an indemnity for the loss suffered* ***not for more than such indemnity***" (emphasis added). This re-affirms the importance of the indemnity principle underlying trends clauses.

The Effect of the Trends Clauses in the Zurich Policies

193. As noted above:

(1) On the true and proper construction of the Trends Clauses, an assessment is required of what would have happened 'but for' the "*Incident"* (or "*incident*");

(2) That in turn requires assessment of what would have happened but for the *"action"* of the competent local or civil authority following a danger in the vicinity of the premises whereby access thereto was prevented.

194. In the counterfactual required by the Trends Clauses, it should be assumed that the "*action*" which prevented access had not occurred, but everything else which actually happened should be assumed still to have happened.

195. For this purpose, the meaning of "*action*" is the action (if any) which the Court finds triggered the AOCA Extension. If (contrary to Zurich's submissions) the Regulations, or other Government Measures, constituted action by a civil authority preventing access to premises within the AOCA Extension, the same such action should be assumed not to have occurred, but everything else (including the presence of COVID-19 and the Regulations which restricted movement of people rather than access to premises) must be assumed to remain the same.[164]

196. This interpretation of "*Incident*" as the relevant action by a civil authority, and the consequent counterfactual, gives effect to the requirement implicit in the Trends Clauses, and inherent in the nature of indemnity insurance, that the insured be indemnified in respect of loss caused by the insured peril, not more and not less. The AOCA Extension does not provide cover for a danger or disturbance (whether or not in the vicinity of the premises) *per se*. If that was the intention, the Zurich Policies could have easily said so in terms.

197. Rather, the business interruption extensions are a series of pockets of cover; as set out at paragraphs 51 to 58 above, there is cover where, for example (i) a notifiable disease

[164] Contrary to FCA Skeleton [700] **{I/1/233}**, the Incident does not include the danger to which the action in question responds – see *Orient-Express*, in which, as set out above, Hamblen J drew a sharp distinction between the insured peril (the damage in *Orient Express*, the "*action*" in this case) and the cause of the damage (the hurricane in *Orient Express*, the "*danger*" in this case). Only the insured peril is removed from the counterfactual, not the underlying cause to which it responds..

occurs at the premises and this causes restrictions on the use of the premises on the order or advice of the competent local authority, or (ii) property is damaged in the vicinity of the premises and this prevents or hinders the use of the premises or access thereto. There is no blanket coverage in respect of, say, notifiable diseases or a danger or disturbance. Moreover, and by the same token, contrary to FCA Skeleton [701], the Incident is not the loss or the interruption/interference. Rather, it is the *action*, which causes (a) access to be prevented and, in consequence, (b) interruption/interference resulting in (c) loss. It is this action that constitutes the insured peril.

198. The AOCA Extension only provides cover for loss resulting from such action. In the relevant counterfactual, the relevant action must be assumed not to have happened, but not also the danger or disturbance giving rise to the action. If the latter was also assumed not to have happened, cover would extend to losses caused by the danger or disturbance, rather than by the action, which is the only insured peril under the AOCA Extension.

199. This interpretation of "*Incident*", as the relevant action by a civil authority, is consistent with *Orient Express Hotels*,[165] in which (as explained above) the cause of the damage, i.e. the hurricanes, was not excluded from the hypothetical counterfactual. Likewise, on the present facts, the cause of the Government Measures restricting access, i.e. the COVID-19 pandemic, should not be excluded. Otherwise, the cover would extend to losses caused by the COVID-19 pandemic (which is not an insured peril), rather than the narrow insured peril which comprises action by a civil authority in response to a danger or disturbance in the vicinity.

200. If one reverses such Regulations as might be found to prevent access to premises, the Wider Circumstances set out at paragraph 165 above would remain. Those are, or are likely to have been, factual causes of the losses claimed by policyholders.[166] In the context of the current test case procedure, which does not of course examine individual

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[165] See also *New World Harbourview Hotel* **{J/114/1-7}** (paragraph 186 above), where the effect of SARS was not excluded for the purposes of the loss calculation before it had become an insured peril (that is when it was notified).

[166] See Zurich's Defence [52(3)] **{A/13/20}**. The FCA did not respond to this paragraph by way of Reply.

policyholder facts, the Court is invited to take judicial notice of the likely effect of those particular causes.

201. Moreover, it has been agreed, as set out at paragraphs 15 and 28 above, that (i) prior to the UK Government issuing any material guidance or restrictions, there was already an economic impact on many the businesses in categories identified by the FCA, (ii) that impact would have continued and may have increased even if the UK Government had not issued such guidance or restrictions, and (iii) notwithstanding the absence of any measures comparable to those imposed in the UK, many businesses in Sweden may have experienced business or trading losses.

202. Indeed, whilst some Regulations have since been lifted (e.g. those concerning restaurants with effect from 4 July 2020), the reluctance of the public actually to visit businesses is evident from the fact that the government has recently announced an "*Eat Out to Help Out Scheme*": effectively subsidising restaurant meals so as to encourage customers to dine out.[167] A BBC survey published on 10 July 2020 indicated that 60% of those surveyed would be "*uncomfortable or very uncomfortable eating indoors during the pandemic…*"[168]

203. Each of the further causes identified at paragraphs 165 and 196 above was an independent cause of any relevant loss which any individual business might suffer concurrent with such Regulations as the Court finds to have prevented access. Policyholders would have suffered or would be likely to have suffered the same or substantially the same loss in any event as a result of the above facts and matters, regardless of the Regulations preventing access, and accordingly, they are not entitled to recover such loss.

204. Insofar as such Regulations as the Court finds to have prevented access can be said to have caused loss which is recoverable under the Policy (i.e. on the applicable 'but for' basis), such loss is limited to the additional amount of loss (on a 'but for' basis) which

[167] https://www.gov.uk/guidance/register-your-establishment-for-the-eat-out-to-help-out-scheme.
[168] https://www.bbc.co.uk/news/uk-53363032.

policyholders can demonstrate that the relevant Regulations caused, over and above the loss which would have been caused in any event as a result of the other causes.

205. The counterfactual for which the FCA contends (no COVID-19 in the UK and no Government advice, orders, laws or other measures)[169] is (an imprecise) equivalent of the "*undamaged Hotel in an undamaged City*" counterfactual which Hamblen J (rightly) rejected in *Orient Express Hotels*. The FCA's argument fails (as did OEH's argument in *Orient Express Hotels)* to distinguish between the insured peril and the causes of the insured peril (which are not insured). Contrary to FCA Skeleton [244], COVID-19 cannot be excluded from the counterfactual simply because it led to such Regulations as the Court finds prevented access, in the same way that the hurricanes could not be excluded because they caused the damage to the hotel in *Orient Express Hotels.*

206. At [58.3] of its Reply, the FCA asserts that where a policy contemplates 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, then losses concurrently caused by both the insured effect (the relevant action of the civil authority) and the underlying cause (the danger in the vicinity) ought in principle to be recoverable because otherwise the cover which is provided is "*largely illusory*". This argument should be rejected.

    (1) First, the argument is circular as it assumes what it needs to prove, namely that the underlying cause is an insured peril.

    (2) Second, the FCA's contention that cover is, on such an analysis, illusory, is without foundation. By way of a straightforward example of a danger or disturbance in the vicinity with no wider ramifications beyond, take the case of a violent attack or a road traffic accident which occurs in the street outside a restaurant. Assume next that, in response to such attack or accident, the police shut off access to the entire street, and, as a result, access is prevented to the

[169] AmPoC [77] **{A/2/45}**.

businesses in that area, with the result that they lose custom and revenue. In the ordinary course of events, and absent the intervention of the police, the effect on the restaurant of the attack or the accident might be minimal, and in any event, short-lived. However, a police investigation into the attack or accident might well result in the street being shut and access to the restaurant prevented for a much longer period of time. In these circumstances, the insured owner of the restaurant would not recover for losses which are attributable to the occurrence of the attack or accident, but he would recover for (additional) losses which are attributable to the prevention of access resulting from the prolonged investigation into the incident in question. There is no injustice in this result. If there was a danger or disturbance without action, there would be no cover at all.

(3) Third, and in any event, if, in fact, the cover which is provided is largely illusory in the circumstances of a pandemic such as COVID-19, this does nothing more than confirm that wordings such as the Zurich Wordings are not intended to cover pandemics in the first place. Losses will be recoverable in an appropriate case, but not in this case, because these Wordings are not intended to apply to these circumstances.

207. Similarly, at [59] of its Reply, the FCA alleges that the counterfactual advanced by QBE and RSA would mean that no insured could recover against any insurers because insurers could refuse indemnity to an insured in one locality by relying on the existence of an outbreak in other localities, even though (mutatis mutandis) the same argument was being used against the insured in the other locality. However, insofar as a variant of this argument might be advanced against Zurich, it would (again) be wrong. The complaint at [59] of the Reply amounts to a complaint (and underlines the fact) that the Wordings in issue in the present proceedings are not intended to and do not cover pandemics, and that the bargain which the parties struck was to limit cover to loss proximately caused by a relevant action of a civil authority but not losses which would have occurred regardless of any such action. There is nothing surprising about this, and it is the logical and necessary consequence of the parties' agreement.

208. Finally, the FCA alleges that for the purposes of considering any appropriate counterfactual to any applicable 'but for' test, there is only one proximate cause of all assumed losses: in summary the COVID-19 pandemic, and all of the Government Measures, AmPoC [53]. This is wrong.

209. As set out above, the application of the Trends Clauses results in only the relevant action by a civil authority being assumed not to have occurred (not, for example, the COVID-19 pandemic or the advice or guidance issued by the Government); and this is because of the cover provided by, and the distinctions made in, the AOCA Extension itself.

210. If, however, the FCA's contention is correct, the AOCA Extension would not respond because (on the FCA's own case) the interruption or interference said to give rise to the loss in question was not the consequence of action by a civil authority in response to a danger or disturbance in the vicinity of the premises, but rather the existence of a (national and international) pandemic and the response of the UK Government to it (on a nationwide basis) irrespective of the position in any particular vicinity.

Zurich's Alternative Case on the Counterfactual

211. In the alternative, if and insofar as the ambit of the peril insured against by the AOCA Extension requires the presence of *"a danger … in the vicinity of the premises"* also to be reversed out for the purposes of the causation counterfactual, there remains no basis for reversing out the entirety of the COVID-19 pandemic, as the FCA contends. On no view was the occurrence of COVID-19 outside the vicinity of the premises any part of the peril insured against under the Zurich Policies.

212. On this alternative hypothetical, i.e. assuming no Regulations preventing access and no COVID-19 in the vicinity of the premises, there would remain the following causes of relevant loss, that is the Wider Circumstances:

    (1) The COVID-19 pandemic, nationally and internationally (excluding in the relevant vicinity), resulting in individuals contracting COVID-19 and/or self-isolating and/or shielding; and/or

(2) The response of individuals and the public at large to COVID-19 including general public fear, and the adverse impact of such response on economic activity and public confidence arising out of knowledge and experience of COVID-19 generally, irrespective of any governmental advice or action (including, for the avoidance of doubt, deterrence of people who would have visited the UK from overseas); and/or

(3) The advice and/or guidance issued by the UK Government and/or the devolved legislatures, applying to England and/or the whole of the UK, responding to the pandemic (including, among other things, about social distancing);

(4) Regulations other than those preventing access to premises, comprising in particular the Regulations restricting movement or gatherings of people (but not access to premises).

213. The effect of this counterfactual on the present facts would not be materially different to the counterfactual posited on Zurich's primary case (as set out above). Policyholders would have suffered or would be likely to have suffered the same or substantially the same loss in any event as a result of the effect of the facts and matters set out above, regardless of such Regulations as might be found to have prevented access or the presence of COVID-19 in the vicinity, and accordingly, they are not entitled to recover such loss.

214. The FCA contends that on this alternative counterfactual, there would remain cover for losses that would not have been suffered by policyholders had the vicinity been disease and action-free, even if in some cases that may increase the indemnifiable amount (by reason of the insured's business being in "*an 'island' of normal disease free trade in a 'sea' of disease/public action*": AmPoC [79]). In principle, there may be scope for recovery of such 'windfall' profits (as accepted by Hamblen J in *Orient Express Hotels*). However, in the present case, such profits are unlikely to arise.

215. In the relevant counterfactual scenario, customers would probably not have visited the business, even if it was located in a disease free local vicinity, and no Regulations

preventing access to premises were in existence, because all of the other matters set out at paragraph 212 above would still exist: notably the existence of the COVID-19 pandemic and the fear of it, as well as the Regulations restricting movement and/or gatherings of people.

Other Possible Counterfactuals

216. Other counterfactuals may potentially arise for consideration depending upon the precise basis on which the Court might find (contrary to Zurich's submission) that the AOCA Extension is triggered by one or more of the Government Measures responding to the COVID-19 pandemic. However, in any potential counterfactual, the pandemic itself and the public response to the pandemic will remain (as they were not, on any view, insured perils under the Zurich Policies). Whatever the precise counterfactual, it will therefore always be the case that policyholders' losses will fall to be reduced by reason of such matters. The FCA's case to the contrary is unsustainable.

G. CONCLUSIONS

217. The narrowly worded, locally focussed, pocket of insurance cover which is the AOCA Extension does not respond to the Government Measures taken on a nationwide basis in response to the COVID-19 pandemic. Further, even if it did respond, most if not all losses suffered were caused by the COVID-19 pandemic, which is not an insured peril, and so are not recoverable.

218. It follows that the declarations sought by the FCA in the AmPoC, insofar as they relate to Zurich,[170] should not be made.

219. As to coverage:

[170] Declarations (1), (2), (3), (4), (5), (6), (10), (13), (14) and (17) do not relate to Zurich **{A/2/47-54}**. As to Declaration (7) and Declaration (2) in Schedule 8 of the AmPoC, paragraph 145 above is repeated **{A/2/143}, {A/2/147}, {A/2/148}**.

(1) As to Declaration (9), the Government is not a "*Civil Authority*", and, in any event, only the Regulations are capable of constituting "*action*", see sections E(1) and (2) above;

(2) As to Declarations (11) and (12), the advice, instructions and Regulations did not prevent access to the premises; alternatively, only the Regulations in respect of Category 2 prevented access to the premises, see section E(3) above;

(3) As to Declaration (8), although the presence of COVID-19 is in principle capable of amounting to "*danger*", if that term is viewed in isolation, the COVID-19 pandemic is not a danger within the meaning or contemplation of the AOCA Extension, see section E(4) above;

(4) As to Declaration (3) at Schedule 8 of the AmPoC, the action was not "*following*" a danger, see section E(5) above. As to the causation aspects, see paragraph 220(1) below.

(5) As to Declaration (1) at Schedule 8 of the AmPoC, the earliest action which could arguably prevent access (on Zurich's alternative case) are the 21 March Regulations (see Section E(3) above). As to danger, paragraph 219(3) above is repeated.

220. As to causation of loss (if, contrary to Zurich's submissions, cover under the AOCA Extension is triggered by the Government Measures):

(1) As to Declarations (15), (16) and (18), and Declaration 3 at Schedule 8 of the AmPoC, see Section F above:

(a) Most (if not all) of any business interruption loss suffered by Zurich policyholders was not caused by any such civil authority "*action*" as might be found by the Court to have prevented access to an insured's premises, but rather by the Wider Circumstances;

(b) The amount of an insured's indemnity must be adjusted by reason of the Wider Circumstances pursuant to the Trends Clauses and/or ordinary principles of causation, compensatory damages and indemnity insurance;

(c) For this purpose, the Court must reverse the "*action*" which the Court finds has prevented access to the insured's premises, but everything else which actually happened remains. The Court does not reverse the entirety of the COVID-19 pandemic, on a nationwide basis;

(d) Alternatively, if and insofar as the ambit of the peril insured against by the AOCA Extension requires the presence of *"a danger … in the vicinity of the premises"* also to be reversed for the purposes of the causation counterfactual, there remains no basis for reversing the entirety of the COVID-19 pandemic; on this alternative basis, in principle, there may be scope (depending upon the precise facts of an insured's claim) for upwards adjustment of the amount of an insured's indemnity. However, in the present case, such upwards adjustment is unlikely to arise.

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14 July 2020